

08-31-2001

Form PTO-1595
(Rev. 03/01)

RI

U.S. DEPARTMENT OF COMMERCE
U.S. Patent and Trademark Office

OMB No. 0651-0027 (exp. 5/31/2002)

Tab settings ⇌ ⇌ ⇌ ▼

101830880

To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

Diablo Research Corporation

08/27/01

2. Name and address of receiving party(ies)

Name: **Whisper Communications, Inc.**

Internal Address: _____

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

3. Nature of conveyance:



Assignment



Merger



Security Agreement



Change of Name



Other _____

Street Address: **825 Stewart Drive**City: **Sunnyvale** State: **CA** Zip: **94086**Execution Date: **November 8, 1996**Additional name(s) & address(es) attached? ☐ Yes ☐ No

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)

B. Patent No.(s) **5,734,966**Additional numbers attached? ☐ Yes ☒ No

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

Name: **Menlo Patent Agency LLC**Internal Address: **David R. Gildea**Street Address: **435 Hermosa Way**City: **Menlo Park** State: **CA** Zip: **94025**6. Total number of applications and patents involved: **1**7. Total fee (37 CFR 3.41).....\$**40**☒ Enclosed☒ Authorized to be charged to deposit account8. Deposit account number: **071248**

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

DO NOT USE THIS SPACE

9. Statement and signature.

*To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.***David R. Gildea**

Name of Person Signing

Signature

08/22/01
DateTotal number of pages including cover sheet, attachments, and documents: **19**Mail documents to be recorded with required cover sheet information to:
Commissioner of Patents & Trademarks, Box Assignments
Washington, D.C. 20231

08/30/2001 DBYRNE

00000167 5734966

40.00 OP

01 FC:581

PATENT
REEL: 012110 FRAME: 0234

ASSIGNMENT OF PATENT APPLICATION

WHEREAS, Leland M. Farrer of 19252 Donna Court, Morgan Hill, California 95037, Joseph S. Chan of 71 Smithwood Avenue, Milpitas, California 95035, Robert F. Garry of 1355 Donohue Drive, San Jose, California 95131, Charles A. Glorioso of 4350 Lawrence Drive, Castro Valley, California 94546, and Norman F. Krasner of 117 Coventry Court, San Carlos, California 94070, hereafter referred to as "Assignors", have invented certain new and useful improvements as described and set forth in the below identified application for the United States Letter Patent:

Title of the invention: WIRELESS COMMUNICATION SYSTEM;

execution date: _____; filing date: _____; Serial No. _____; and

WHEREAS, Diablo Research Corporation of 130 Kifer Court, Sunnyvale, California, 94086, hereinafter referred to as "Assignee", is desirous of acquiring an interest in the invention and application and in any Letters Patent which may be granted on the same;

FOR good and valuable consideration, receipt of which is hereby acknowledged by Assignors, Assignors have assigned, and by these presents do assign all right, title and interest in and to the invention and application, all foreign counterparts (including patent, utility model and industrial designs), and all future improvements thereon, and in and to any Letters Patent and Registrations which may hereafter be granted on the same in the United States and all countries throughout the world. The right, title and interest is to be held and enjoyed by Assignee and Assignee's successors and assigns as fully and exclusively as it would have been and enjoyed by Assignors had this assignment not been made, for the full term of any Letters Patent and Registrations which may be granted thereon, or any division, renewal, continuation, in whole or in part, substitution, conversion, reissue, prolongation or extension thereof.

Assignors further agree that they will, without charge to the Assignee, but at the Assignee's expense, (a) cooperate with Assignee in the prosecution of the U. S. patent application and foreign counterparts on the invention and any improvements, (b) execute, verify, acknowledge and deliver all such further papers, including patent applications and instruments of transfer, and (c) perform such acts as Assignee lawfully may request to obtain or maintain Letters Patent and Registrations for the invention and improvements in any and all countries, and to vest title thereto in Assignee, or Assignee's successors and assigns.

IN TESTIMONY WHEREOF, Assignors have hereunto signed their name(s) this 20th day of January, 1995.

Leland M. Farrer
signature of Leland M. Farrer

Joseph S. Chan
signature of Joseph S. Chan

Robert F. Garry
signature of Robert F. Garry

Charles A. Glorioso
signature of Charles A. Glorioso

Norman F. Krasner
signature of Norman F. Krasner

State of California

County of Santa Clara

Before me Henry Shepherd, a Notary Public duly commissioned and sworn, personally appeared

Leland M. Farrer AND Joseph S. Chan AND

Charles A. Glorioso AND Robert F. Garry, Jr. AND NORMAN F. KRASNER
personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/they has/have executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the Santa Clara County of Santa Clara on the date set forth in this certificate.

Henry Shepherd
Notary Public

My commission expires:

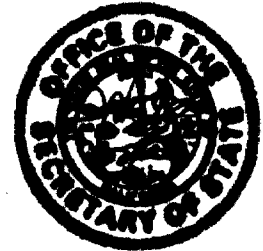
RECORDED
PATENT & TRADEMARK OFFICE

JAN 20 95





SECRETARY OF STATE

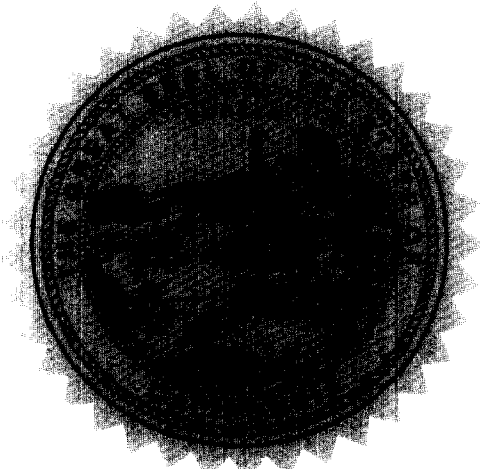


I, *BILL JONES*, Secretary of State of the State of California, hereby certify:

That the attached transcript of 16 page(s) was prepared by and in this office from the record on file, 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

FEB 09 1998



Bill Jones

Secretary of State

A483886

FILED *Bgm*
In the office of the Secretary of State
of the State of California

NOV 08 1996

Bill Jones
BILL JONES, Secretary of State

1112746
RESTATED ARTICLES OF INCORPORATION
OF
DIABLO RESEARCH CORPORATION

DONALD E. PEZZOLO and LAWRENCE A. KLEIN certify that:

1. They are the President and Secretary, respectively, of DIABLO RESEARCH CORPORATION, a California corporation.
2. The Articles of Incorporation of this corporation are amended and restated to read as follows:

ONE: The name of this corporation is Whisper Communications, Inc.

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

THREE: The Corporation shall be authorized to issue 50,000,000 shares of Common Stock, no par value (the "Common Stock"), and 30,000,000 shares of Preferred Stock, no par value (the "Preferred Stock"). Of the Preferred Stock, 1,915,558 shares shall be designated as "Series A Preferred Stock" and 3,357,804 shares shall be designated as "Series B Preferred Stock."

Ninety-nine percent (99%) of the shares of Common Stock outstanding immediately prior to the date this amendment becomes effective shall be, and hereby are, automatically reclassified as shares of Series B Preferred Stock on a one-for-one basis. Such reclassification shall be allocated among the holders of shares of Common Stock or of securities convertible or exercisable into Common Stock pro rata in accordance with the number of shares of Common Stock held or subject to such securities.

The following is a statement of the designations, preferences, voting powers, qualifications, special or relative rights and privileges in respect of the authorized capital stock of the Corporation.

I. PREFERRED STOCK

Section 1. Description Of Undesignated Preferred Stock

The undesignated Preferred Stock may be issued from time to time in one or more series. The Board of Directors of the Corporation shall have authority to the fullest extent permitted under the General Corporation Law of California to adopt by resolution from time to time one or more Certificates of Determination providing for the designation of one or more series of Preferred Stock and the voting powers, whether full or limited or no voting powers, and

such designations, preferences and relative, participating, optional, or other special rights and qualifications, limitations or restrictions thereof, and to fix or alter the number of shares comprising any such series, subject to any requirements of the California Corporations Code and these Articles of Incorporation, as amended from time to time.

The authority of the Board of Directors with respect to each such series shall include, without limitation of the foregoing, the right to determine and fix the following preferences and powers, which may vary as between different series of Preferred Stock:

- (a) the distinctive designation of such series and the number of shares to constitute such series;
- (b) the rate at which dividends on the shares of such series shall be declared and paid, or set aside for payment, whether dividends at the rate so determined shall be cumulative or accruing, and whether the shares of such series shall be entitled to any participating or other dividends in addition to dividends at the rate so determined, and if so, on what terms;
- (c) the right or obligation, if any, of the Corporation to redeem shares of the particular series of Preferred Stock and, if redeemable, the price, terms and manner of such redemption;
- (d) the special and relative rights and preferences, if any, and the amount or amounts per share, which the shares of such series of Preferred Stock shall be entitled to receive upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation;
- (e) the terms and conditions, if any, upon which shares of such series shall be convertible into, or exchangeable for, shares of capital stock of any other series, including the price or prices or the rate or rates of conversion or exchange and the terms of adjustment, if any;
- (f) the obligation, if any, of the Corporation to retire, redeem or purchase shares of such series pursuant to a sinking fund or fund of a similar nature or otherwise, and the terms and conditions of such obligation;
- (g) voting rights, if any, including special voting rights with respect to the election of directors and matters adversely affecting any series of Preferred Stock;
- (h) limitations, if any, on the issuance of additional shares of such series or any shares of any other series of Preferred Stock; and
- (i) such other preferences, powers, qualifications, special or relative rights and privileges thereof as the Board of Directors of the Corporation, by the vote of the members of the Board of Directors then in office acting in accordance with this Restated Articles of Incorporation, or any Preferred Stock, may deem advisable and are not inconsistent with law, the provisions of this Restated Articles of Incorporation or the provisions of any such Certificate of Determination.

Section 2. Description And Designation Of Series A Preferred Stock And Series B Preferred Stock

(a) Designation.

The Series B Preferred Stock shall rank senior to the Series A Preferred Stock upon liquidation and shall have the rights, powers, privileges and preferences set forth herein. As used herein, the term "Preferred Stock" used without reference to the Series A Preferred Stock or the Series B Preferred Stock means the shares of Series A Preferred Stock, Series B Preferred Stock and all other shares of Preferred Stock, without distinction as to series, except as otherwise expressly provided for herein, or as the context otherwise requires.

(b) Dividends.

In the event that the Board of Directors of the Corporation shall declare a dividend payable upon the then outstanding shares of Common Stock (other than a stock dividend on the Common Stock distributed solely in the form of additional shares of Common Stock), the holders of Series A Preferred Stock and Series B Preferred Stock shall be entitled to the amount of dividends per share of Series A Preferred Stock or Series B Preferred Stock, as the case may be, as would be declared payable on the largest number of whole and fractional shares of Common Stock into which each share of Series A Preferred Stock or Series B Preferred Stock held by each holder thereof could be converted pursuant to the provisions of Section 5 hereof, such number determined as of the record date for the determination of holders of Common Stock entitled to receive such dividend and without regard to any restrictions on the issuance of or payment of dividends on fractional shares. The Series A Preferred Stock and Series B Preferred Stock shall have no other special dividend rights.

(c) Restrictions on Distributions.

Except to the extent in any instance approval is provided in writing by the holders of two-thirds of the outstanding shares of Series A Preferred Stock (voting as a single class), the Corporation shall not declare or pay any dividends, or purchase, redeem, retire, or otherwise acquire for value any shares of its capital stock (or rights, options or warrants to purchase such shares) now or hereafter outstanding, return any capital to its stockholders as such, or make any distribution of assets to its stockholders as such, or permit any Subsidiary to do any of the foregoing. "Subsidiary" or "Subsidiaries" means any corporation, partnership or joint venture of which the Company or any of its other Subsidiaries (as herein defined) directly or indirectly owns at the time at least fifty percent (50%) of the outstanding voting shares or similar interests other than directors' qualifying shares.

Notwithstanding the foregoing, Subsidiaries may declare and make payment of cash and stock dividends, return capital and make distributions of assets to the Corporation, and nothing contained in the foregoing shall prevent the Corporation from: (i) declaring or paying any dividend consisting solely of cash; (ii) effecting a stock split or declaring or paying any dividend consisting of shares of any class of capital stock paid to the holders of shares of such class of capital stock; (iii) complying with any specific provision of the terms of any subsequently designated series of Preferred Stock in accordance with its terms; (iv) redeeming or repurchasing any stock of a deceased stockholder out of proceeds of insurance held by the

Corporation on that stockholder's life; or (v) redeeming or repurchasing any stock of any director, officer, employee, consultant or other person or entity, pursuant to a stock repurchase agreement or stock restriction agreement approved by the Board of Directors under which the Corporation has the right or obligation to repurchase in the event of death, termination of employment or of the consulting arrangement, or other similar discontinuation of a business relationship, vested shares at no more than their fair market value and unvested shares at no more than their initial issuance price.

Section 3. Liquidation, Dissolution Or Winding Up.

(a) Treatment at Liquidation, Dissolution or Winding Up.

In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, or in the event of its insolvency, before any distribution or payment is made to any holders of any series of capital stock of the Corporation designated to be junior in liquidation preference and subject to the liquidation rights and preferences of any series of Preferred Stock designated in the future to be senior to in liquidation:

(i) first, the holders of each share of Series B Preferred Stock shall be entitled to be paid out of the assets of the Corporation available for distribution to holders of the Corporation's capital stock the greater of (A) the Series B Issuance Price (subject to equitable adjustment for any stock dividend, stock split, combination, reorganization, recapitalization, reclassification or other similar event involving a change in the capital structure of the Preferred Stock) plus all declared but unpaid dividends on each such share or (B) such amount per share of Series B Preferred Stock as would have been payable had each share of Preferred Stock which is convertible into Common Stock been converted immediately prior to such liquidation, dissolution or winding up; and

(ii) thereafter, the holders of each share of Series A Preferred Stock shall be entitled to be paid out of the remaining assets of the Corporation available for distribution to holders of the Corporation's capital stock the greater of (x) the Series A Issuance Price (subject to equitable adjustment for any stock dividend, stock split, combination, reorganization, recapitalization, reclassification or other similar event involving a change in the capital structure of the Preferred Stock) plus all declared but unpaid dividends on each such share or (y) such amount per share of Series A Preferred Stock as would have been payable had each share of Preferred Stock which is convertible into Common Stock been so converted immediately prior to such liquidation, dissolution or winding up. For purposes hereof, (i) "Series A Issuance Price" means the price at which the first share of the Series A Preferred Stock is issued and (ii) "Series B Issuance Price" means \$7.766 per share of the Series B Preferred Stock.

If, upon liquidation, dissolution or winding up of the Corporation, the remaining assets shall be insufficient to pay the holders of Series B Preferred Stock and of any other series of Preferred Stock on parity with the Series B Preferred Stock with respect to liquidation preference the full amounts to which they otherwise would be entitled, the holders of Series B Preferred Stock and such other series of Preferred Stock shall share ratably in any distribution of assets pro rata in proportion to the respective liquidation preference amounts which would

otherwise be payable upon liquidation with respect to the outstanding shares of the Series B Preferred Stock and such other series of Preferred Stock if all liquidation preference dollar amounts with respect to such shares were paid in full. If, upon liquidation, dissolution or winding up of the Corporation, the remaining assets shall be insufficient to pay the holders of Series A Preferred Stock and of any other series of Preferred Stock on parity with the Series A Preferred Stock with respect to liquidation preference the full amounts to which they otherwise would be entitled, the holders of Series A Preferred Stock and such other series of Preferred Stock shall share ratably in any distribution of assets pro rata in proportion to the respective liquidation preference amounts which would otherwise be payable upon liquidation with respect to the outstanding shares of the Series A Preferred Stock and such other series of Preferred Stock if all liquidation preference dollar amounts with respect to such shares were paid in full.

(b) Treatment of Reorganization, Consolidation, Merger, or Sale of

Assets.

Any merger, consolidation or other corporate reorganization or combination to which the Corporation is a non-surviving party, and any sale of all or substantially all of the assets of the Corporation, shall be regarded, at the option of the holders of a majority of the outstanding shares of a Series A Preferred Stock, as a liquidation, dissolution or winding up of the affairs of the Corporation for purposes of this Section 3; provided, however that, in the case of any such transaction to which the provisions of Section 5(f) also apply, the holders of at least two-thirds of the outstanding shares of Series A Preferred Stock (voting together as a single class) shall have the right to elect the benefits of the provisions of Section 5(f) hereof for all of the Series A Preferred Stock or Series B Preferred Stock, as the case may be, in lieu of receiving payment in liquidation, dissolution or winding up of the Corporation pursuant to this Section 3.

The provisions of this Section 3(b) shall not apply to (i) any reorganization, merger or consolidation involving only a change in the state of incorporation of the Corporation, (ii) a merger of the Corporation with or into a wholly-owned Subsidiary of the Corporation that is incorporated in the United States of America, or (iii) a merger, reorganization, consolidation or other combination, of which the Corporation is substantively the surviving corporation and operates as a going concern, with another corporation incorporated in the United States of America and which does not involve a recapitalization, reorganization, reclassification or other similar change in the capital structure of the Corporation.

(c) Distributions.

The holders of a majority of outstanding shares of Series A Preferred Stock shall determine whether distributions provided for in this Section 3 shall be payable in cash or other property of the Corporation. Whenever the distribution provided for in this Section 3 shall be payable in whole or in part in property other than cash, the value of any property distributed shall be the fair market value of such property as reasonably determined in good faith by the Board of Directors of the Corporation. All distributions of property other than cash made hereunder shall be made, to the maximum extent possible, pro rata with respect to each series and class of Preferred Stock and Common Stock in accordance with the liquidation amounts payable with respect to each such series and class.

Section 4. Voting Power.

(a) General.

Except as otherwise expressly provided in this Section 4 or Section 3(b), 5, or 6 hereof or as provided elsewhere herein, or in any Certificate of Determination heretofore or hereafter filed with respect to any other series of Preferred Stock, or as otherwise required by law, (i) each holder of Preferred Stock shall be entitled to vote on all matters submitted to a vote of the stockholders of the Corporation (including election of directors to the extent not otherwise expressly provided for) and shall be entitled to that number of votes equal to the largest number of whole shares of Common Stock into which such holder's shares of Preferred Stock could be converted, pursuant to the provisions of Section 5 hereof, at the record date for the determination of stockholders entitled to vote on such matters or, if no such record date is established, at the date such vote is taken or any written consent of stockholders is solicited, and (ii) the holders of shares of Preferred Stock and Common Stock shall vote together (or render written consents in lieu of a vote) as a single class on all matters submitted to the stockholders of the Corporation (including election of directors to the extent not otherwise expressly provided for).

(b) Director Election Rights.

The holders of the outstanding shares of the Series A Preferred Stock, voting as a separate class, shall have the right, (i) so long as at least 80% of the shares of Series A Preferred Stock originally issued remain outstanding, to elect two directors of the Corporation, and (ii) so long as at least 50% of the shares of Series A Preferred Stock originally issued remain outstanding, to elect one director of the Corporation (the "Series A Directors"). At any annual or special meeting of the Corporation held for the purpose of electing directors, the presence in person or by proxy (or by written consent) of the holders of a majority of the outstanding shares of Series A Preferred Stock shall constitute a quorum for the election of the Series A Directors. The holders of the shares of Series A Preferred Stock present in person or by proxy at any meeting relating to the election of directors (calculated after the determination of a quorum) shall then be entitled to elect the Series A Directors.

Section 5. Conversion Rights.

The holders of the Preferred Stock shall have the following rights and be subject to the following obligations with respect to the conversion of such shares into shares of Common Stock:

(a) Voluntary Conversion.

Subject to and in compliance with the provisions of this Section 5, each holder of shares of Preferred Stock may, at its option, convert all or any portion of its shares of Preferred Stock into fully-paid and non-assessable shares of Common Stock. The number of shares of Common Stock which a holder of Series A Preferred Stock shall be entitled to receive upon conversion shall be the product obtained by multiplying (i) the number of shares of Series A Preferred Stock being converted at any time, by (ii) the rate (the "Series A Conversion Rate") equal to the quotient obtained by dividing the Series A Issuance Price by the "Series A

Conversion Value." The Series A Conversion Value in effect from time to time, except as adjusted in accordance with this Section 5, shall be the Series A Issuance Price. The number of shares of Common Stock which a holder of Series B Preferred Stock shall be entitled to receive upon conversion shall be the product obtained by multiplying (i) the number of shares of Series B Preferred Stock being converted at any time, by (ii) the rate (the "Series B Conversion Rate") equal to the quotient obtained by dividing the Series B Issuance Price (subject to equitable adjustment for any stock dividend, stock split, combination, recapitalization, reclassification or other similar event involving a change in the capital structure of the Series B Preferred Stock) by the "Series B Conversion Value". The Series B Conversion Value in effect from time to time, except as adjusted in accordance with this Section 5, shall be the Series B Issuance Price.

(b) Automatic Conversion.

(i) Events Causing Conversion of Preferred Stock.

Immediately (A) prior to the closing of an underwritten public offering on a firm commitment basis pursuant to an effective registration statement filed pursuant to the Securities Act of 1933, as amended, (other than on Form S-4 or S-8 on any successor forms thereto) covering the offer and sale of Common Stock for the account of the Corporation in which the Corporation actually receives gross proceeds equal to or greater than \$10,000,000 (calculated before deducting underwriters' discounts and commissions and other offering expenses), but subject to the closing of such public offering, or (B) prior to the closing of a rights offering to the stockholders of Safeguard Scientifics, Inc., but subject to the closing of such rights offering, (each offering described in clauses (A) and (B) being hereafter referred to as a "Qualified Public Offering"), or (C) upon the approval, set forth in a written notice to the Corporation, of the holders of at least two-thirds of the outstanding shares of Series A Preferred Stock and Series B Preferred Stock, voting as a single class, of an election to convert all outstanding shares of Series A Preferred Stock and Series B Preferred Stock to Common Stock, all outstanding shares of Series A Preferred Stock and Series B Preferred Stock shall be converted automatically into the number of fully paid, non-assessable shares of Common Stock into which such shares of Series A Preferred Stock or Series B Preferred Stock, as the case may be, are convertible pursuant to this Section 5 as of the closing and consummation of such underwritten public offering or the date of such approval, without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent.

(ii) Surrender of Certificates Upon Mandatory Conversion.

Upon the occurrence of the conversion event specified in the preceding paragraph (i); the holders of Preferred Stock shall, upon notice from the Corporation, surrender the certificates representing such shares at the office of the Corporation or its transfer agent for the Common Stock. Thereupon, there shall be issued and delivered to such holder a certificate or certificates for the number of shares of Common Stock into which the shares of Preferred Stock so surrendered were convertible on the date on which the conversion occurred. The Corporation shall not be obligated to issue such certificates unless certificates evidencing such shares of Preferred Stock being converted are either delivered to the Corporation or any such transfer agent, or the holder notifies the Corporation that such certificates have been lost, stolen or destroyed and executes an

agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith.

(c) Anti-Dilution Adjustments.

(i) Upon Dilutive Issuances. If the Corporation shall, while there are any shares of Series A Preferred Stock outstanding, issue or sell shares of its Common Stock or "Common Stock Equivalents" (as defined in Section 5(c)(ii)(A) below) without consideration or at a price per share or "Net Consideration Per Share" (as defined in Section 5(c)(iii) below) less than the Series A Conversion Value in effect immediately prior to such issuance or sale, then in each such case the Series A Conversion Value, except as hereinafter provided, shall be lowered so as to be equal to an amount determined by multiplying such Series A Conversion Value by the following fraction:

$$\frac{N_0 + N_1}{N_0 + N_2}$$

Where:

N0 = the number of shares of Common Stock and Common Stock Equivalents outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully-diluted basis assuming the exercise or conversion of all then exercisable or convertible options, warrants, purchase rights and convertible securities).

N1 = the number of shares of Common Stock which the aggregate consideration, if any, (including the Net Consideration Per Share with respect to the issuance of Common Stock Equivalents) received or receivable by the Corporation for the total number of such additional shares of Common Stock so issued or deemed to be issued would purchase at the Series A Conversion Value in effect immediately prior to such issuance.

N2 = the number of such additional shares of Common Stock so issued or deemed to be issued.

The provisions of this Section 5(c)(i) may be waived as to all shares of Series A Preferred Stock in any instance (without the necessity of convening any meeting of stockholders of the Corporation) upon the written agreement of the holders of two-thirds of the outstanding shares of Series A Preferred Stock.

(ii) Common Stock Equivalents.

(A) General. For the purposes of this Section 5(c), the issuance of any warrants, options, subscription or purchase rights with respect to shares of Common Stock and the issuance of any securities convertible into or exchangeable for shares of Common Stock and the issuance of any warrants, options, subscription or purchase rights with

respect to such convertible or exchangeable securities (collectively, "Common Stock Equivalents"), shall be deemed an issuance of Common Stock. Any obligation, agreement or undertaking to issue Common Stock Equivalents at any time in the future shall be deemed to be an issuance at the time such obligation, agreement or undertaking is made or arises. No adjustment of the Series A Conversion Value shall be made under this Section 5(c) upon the issuance of any shares of Common Stock which are issued pursuant to the exercise, conversion or exchange of any Common Stock Equivalents.

(B) Adjustments for Adjustment, Cancellation or Expiration of Common Stock Equivalents. Should the Net Consideration Per Share of any such Common Stock Equivalents be decreased from time to time other than as a result of the application of anti-dilution provisions substantially similar to the provisions of this Section 5(c), then, upon the effectiveness of each such change, the Series A Conversion Value will be that which would have been obtained (1) had the adjustments made pursuant to Section 5(c)(ii)(A) upon the issuance of such Common Stock Equivalents been made upon the basis of the new Net Consideration Per Share of such securities, and (2) had the adjustments made to the Series A Conversion Value since the date of issuance of such Common Stock Equivalents been made to such Series A Conversion Value as adjusted pursuant to clause (1) above. Any adjustment of the Series A Conversion Value which relates to any Common Stock Equivalent shall be disregarded if, as, and when such Common Stock Equivalent expires or is canceled without being exercised, or is repurchased by the Company at a price per share at or less than the original purchase price, so that the Series A Conversion Value effective immediately upon such cancellation or expiration shall be equal to the Series A Conversion Value that would have been in effect (1) had the expired or canceled Common Stock Equivalent not been issued, and (2) had the adjustments made to the Series A Conversion Value since the date of issuance of such Common Stock Equivalents been made to the Series A Conversion Value which would have been in effect had the expired or canceled Common Stock Equivalent not been issued.

(iii) Net Consideration Per Share. For purposes of this Section 5(c), the "Net Consideration Per Share" which shall be receivable by the Corporation for any Common Stock issued upon the exercise or conversion of any Common Stock Equivalents shall be determined as follows:

(A) The "Net Consideration Per Share" shall mean the amount equal to the total amount of consideration, if any, received by the Corporation for the issuance of such Common Stock Equivalents, plus the minimum amount of consideration, if any, payable to the Corporation upon exercise, or conversion or exchange thereof, divided by the aggregate

number of shares of Common Stock that would be issued if all such Common Stock Equivalents were exercised, exchanged or converted.

(B) The "Net Consideration Per Share" which shall be receivable by the Corporation shall be determined in each instance as of the date of issuance of Common Stock Equivalents without giving effect to any possible future upward price adjustments or rate adjustments which may be applicable with respect to such Common Stock Equivalents.

(iv) Stock Dividends for Holders of Capital Stock Other Than Common Stock. In the event that the Corporation shall make or issue (otherwise than to holders of Common Stock), or shall fix a record date for the determination of holders of any capital stock of the Corporation other than holders of Common Stock entitled to receive, a dividend or other distribution payable in Common Stock or securities of the Corporation convertible into or otherwise exchangeable for shares of Common Stock of the Corporation, then such Common Stock or other securities issued in payment of such dividend shall be deemed to have been issued for a consideration of \$.01, except for dividends payable to the holders of Series A Preferred Stock.

(v) Consideration Other than Cash. For purposes of this Section 5(c), if a part or all of the consideration received by the Corporation in connection with the issuance of shares of the Common Stock or the issuance of any of the securities described in this Section 5(c) consists of property other than cash, such consideration shall be deemed to have a fair market value as is reasonably determined in good faith by the Board of Directors of the Corporation.

(vi) Exceptions to Anti-dilution Adjustments; Basket for Reserved Employee Shares. This Section 5(c) shall not apply under any of the circumstances which would constitute an Extraordinary Common Stock Event (as described below). Further, this Section 5(c) shall not apply with respect to the issuance or sale of (i) up to 104,000 shares of Series B Preferred Stock or Common Stock issued or issuable upon exercise of three warrants, (ii) up to 569,000 shares of Series B Preferred Stock or Common Stock issued or issuable upon stock options granted in connection with the termination of the Phantom Stock Plan of the Corporation, and (iii) up to 800,000 shares of Common Stock, or the grant or options exercisable therefor, issued or issuable after the original issue date of the Series A Preferred Stock to directors, officers, employees and consultants of the Corporation or any subsidiary pursuant to any qualified or non-qualified stock option plan or agreement, stock purchase plan or agreement, stock restriction agreement, employee stock ownership plan (ESOP), consulting agreement, or such other options, issuances, arrangements, agreements or plans intended principally as a means of providing compensation for employment or services and approved by the Board of Directors; provided, however, that the number set forth above may be increased from time to time by the vote or consent of two-thirds of the Board of Directors or by the written consent of the holders of a majority of the outstanding shares of Series A Preferred Stock. The foregoing numbers shall be subject to equitable adjustment in the event of any stock dividend, stock split, combination, reorganization, recapitalization,

reclassification or other similar event involving a change in the Common Stock of the Corporation.

(d) Adjustment Upon Extraordinary Common Stock Event.

Upon the occurrence of an Extraordinary Common Stock Event (as hereinafter defined), the Series A Conversion Value and the Series B Conversion Value shall, simultaneously with the occurrence of such Extraordinary Common Stock Event, be adjusted by multiplying the Series A Conversion Value or the Series B Conversion Value, as the case may be, by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such Extraordinary Common Stock Event and the denominator of which shall be the number of shares of Common Stock outstanding immediately after such Extraordinary Common Stock Event, and the product so obtained shall thereafter be the Series A Conversion Value, which, as so adjusted, shall be readjusted in the same manner upon the occurrence of any successive Extraordinary Common Stock Event or Events.

An "Extraordinary Common Stock Event" shall mean (i) the issue of additional shares of Common Stock as a dividend or other distribution on outstanding shares of Common Stock, (ii) a subdivision of outstanding shares of Common Stock into a greater number of shares of Common Stock, or (iii) a combination or reverse stock split of outstanding shares of Common Stock into a smaller number of shares of the Common Stock.

(e) Adjustment Upon Certain Dividends.

In the event the Corporation shall make or issue, or shall fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution (other than a distribution in liquidation or other distribution otherwise provided for herein) with respect to the Common Stock payable in (i) securities of the Corporation other than shares of Common Stock, or (ii) other assets (excluding cash dividends or distributions), then and in each such event provision shall be made so that the holders of Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the number of securities or such other assets of the Corporation which they would have received had their Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the Conversion Date, retained such securities or such other assets receivable by them, giving application to all other adjustments called for during such period under this Section 5.

(f) Adjustment Upon Capital Reorganization or Reclassification.

If the Common Stock shall be changed into the same or different number of shares of any other classes of capital stock, whether by capital reorganization, recapitalization, reclassification or otherwise (other than an Extraordinary Common Stock Event), then and in each such event the holder of each share of Preferred Stock shall have the right thereafter to convert such share into, in lieu of the number of shares of Common Stock which the holder would otherwise have been entitled to receive, the kind and amount of shares of capital stock and other securities and property receivable upon such reorganization, recapitalization, reclassification or other change by the holders of the number of shares of Common Stock into which such shares of Preferred Stock could have been converted immediately prior to such

reorganization, recapitalization, reclassification or change, all subject to further adjustment as provided herein. The provision for such conversion right shall be a condition precedent to the consummation by the Corporation of any such transaction unless the election described below is made.

In the case of a transaction to which both this Section 5(f) and Section 3(b) apply, the holders of at least two-thirds of the outstanding shares of Series A Preferred Stock (voting together as a single class) shall have the option of electing treatment for the Series A Preferred Stock, under either this Section 5(f), notice of which election shall be submitted in writing to the Corporation at its principal office no later than five (5) business days before the effective date of such event or if no such election shall be made, the provisions of Section 3(b), and not this Section 5(f), shall apply.

(g) Certificate as to Adjustments: Notice by Corporation.

In each case of an adjustment or readjustment of the Series A Conversion Rate or Series B Conversion Rate, the Corporation at its expense will furnish each holder of Series A Preferred Stock or Series B Preferred Stock so affected with a certificate prepared by the Treasurer or Chief Financial Officer of the Corporation, showing such adjustment or readjustment, and stating in detail the facts upon which such adjustment or readjustment is based.

(h) Exercise of Conversion Privilege.

To exercise its conversion privilege, a holder of Preferred Stock shall surrender the certificate or certificates representing the shares being converted to the Corporation at its principal office, and shall give written notice to the Corporation at that office that such holder elects to convert such shares. Such notice shall also state the name or names (with address or addresses) in which the certificate or certificates for shares of Common Stock issuable upon such conversion shall be issued. The certificate or certificates for shares of Preferred Stock surrendered for conversion shall be accompanied by proper assignment thereof to the Corporation or in blank. The date when such written notice is received by the Corporation, together with the certificate or certificates representing the shares of Preferred Stock being converted, shall be the "Conversion Date". As promptly as practicable after the Conversion Date, the Corporation shall issue and deliver to the holder of the shares of Preferred Stock being converted, or on its written order, such certificate or certificates as it may request for the number of shares of Common Stock issuable upon the conversion of such shares of Preferred Stock in accordance with the provisions of this Section 5. Such conversion shall be deemed to have been effected immediately prior to the close of business on the Conversion Date, and at such time the rights of the holder as holder of the converted shares of Preferred Stock shall cease and the person(s) in whose name(s) any certificate(s) for shares of Common Stock shall be issuable upon such conversion shall be deemed to have become the holder or holders of record of the shares of Common Stock represented thereby.

(i) Reservation of Common Stock.

The 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 Preferred Stock (including any shares of Preferred Stock represented by any warrants, options, subscription or purchase rights for 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 (including any shares of Preferred Stock represented by any warrants, options, subscriptions or purchase rights for such Preferred Stock), the Corporation shall take such action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

Section 6. Restrictions And Limitations On Corporate Action.

The Corporation shall not take any corporate action or amend its Restated Articles of Incorporation without the approval by vote or written consent of the holders of at least two-thirds of the then outstanding shares of Series A Preferred Stock, voting as a single class, each share of Series A Preferred Stock to be entitled to one vote in each instance, if such corporate action or amendment would change any of the rights, preferences, privileges or limitations provided for herein for the benefit of any shares of Series A Preferred Stock. Without limiting the generality of the preceding sentence, the Corporation will not amend its Restated Articles of Incorporation or take any other corporate action without the approval by the holders of at least two-thirds of the then outstanding shares of Series A Preferred Stock, voting as a single class, if such amendment or corporate action would:

- (a) amend the Restated Articles of Incorporation of the Corporation; or
- (b) make the size of the Board of Directors of the Corporation larger than 9 or smaller than 5 members; or
- (c) increase the authorized number of shares of Preferred Stock; or
- (d) authorize, create or issue (including the issuance of any undesignated Preferred Stock), or obligate the Corporation to authorize, create or issue, additional shares of Series A Preferred Stock or of any class of stock ranking senior to or on a parity with the Series A Preferred Stock with respect to liquidation preferences, dividend rights or containing redemption rights; or
- (e) authorize, approve or cause any merger, consolidation, sale of all or substantially all of the assets of the Corporation, corporate reorganization, recapitalization or other business combinations with another entity for an aggregate valuation (based on such transaction) of less than \$100,000,000; or
- (f) authorize or commence a public offering of the Corporation's capital stock unless such offering is a Qualified Public Offering.

Section 7. No Dilution Or Impairment.

The Corporation will not, by amendment of its Restated Articles of Incorporation or through any reorganization, transfer of capital stock or 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 of the Preferred Stock set forth herein, but will at all times in good faith assist in the carrying out of all such terms. Without limiting the generality of the foregoing, the Corporation (a) will not increase the par value of any shares of stock receivable on the conversion of the Preferred Stock above the amount payable therefor on such conversion, and (b) will take such action as may be necessary or appropriate in order that the Corporation may validly and legally issue fully paid and nonassessable shares of stock on the conversion of all Preferred Stock from time to time outstanding.

Section 8. Notices Of Record Date.

In the event of

(a) any taking by the 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 dividends or other distribution, or any right to subscribe for, purchase or otherwise acquire any shares of capital stock of any other securities or property, or to receive any other right, or

(b) any capital reorganization of the Corporation, any reclassification or recapitalization of the capital stock of the Corporation, any merger or consolidation of the Corporation, or any transfer of all or substantially all of the assets of the Corporation to any other corporation, or any other entity or person, or

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

then and in each such event the Corporation shall mail or cause to be mailed to each holder of Preferred Stock a notice specifying (i) the date on which any such record is to be taken for the purpose of such dividend, distribution or right and a description of such dividend, distribution or right, (ii) the date on which any such reorganization, reclassification, recapitalization, transfer, consolidation, merger, dissolution, liquidation or winding up is expected to become effective, and (iii) the time, 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 reorganization, reclassification, recapitalization, transfer, consolidation, merger, dissolution, liquidation or winding up. Such notice shall be mailed by first class mail, postage prepaid, at least ten (10) days prior to the date specified in such notice on which action is being taken.

Section 9. Status Of Converted Or Repurchased Preferred Stock.

Any share or shares of Preferred Stock acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be returned to the status of authorized but unissued shares of undesignated Preferred Stock. Upon the cancellation of all outstanding shares of Series A Preferred Stock and Series B Preferred Stock, these Restated Articles of Incorporation shall be amended to delete this Division I of Article THREE.

II. COMMON STOCK

Section 1. Priority.

All preferences, voting powers, relative, participating, optional or other special rights and privileges, and qualifications, limitations or restrictions of the Common Stock are expressly made subject to and subordinate to those that may be fixed with respect to the Preferred Stock.

Section 2. Voting Right.

Each holder of record of Common Stock shall be entitled to one vote for each share of Common Stock standing in his name on the books of the Corporation. Except as otherwise required by law, or as otherwise expressly provided in this Restated Articles of Incorporation and any Certificate of Determination heretofore or hereafter filed with respect to any Preferred Stock, the holders of Common Stock shall vote together as a single class on all matters submitted to stockholders for a vote.

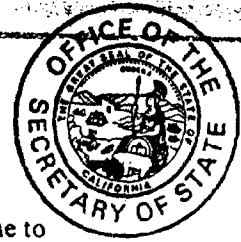
Section 3. Dividends.

Subject to provisions of law, this Restated Articles of Incorporation and any Certificate of Determination with respect to any Preferred Stock, the holders of Common Stock shall be entitled to receive dividends out of funds legally available therefor at such times and in such amounts as the Board of Directors may determine in their sole discretion.

Section 4. Liquidation.

Upon any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, after the payment or provision for payment of all debts and liabilities of the Corporation and all preferential amounts to which the holders of the Preferred Stock are entitled with respect to the distribution of assets in liquidation, the holders of Common Stock shall be entitled to share ratably in the remaining assets of the Corporation available for distribution.

FOUR: The Board of Directors of the Corporation is expressly authorized to adopt, amend or repeal by-laws of the Corporation with the vote at a duly held meeting of two-thirds of the members of the Board of Directors or with the written consent of all of the members of the Board of Directors in lieu of a meeting, subject to any rights of holders of Preferred Stock.



FIVE: The number of directors of the Corporation shall be fixed from time to time by the Board of Directors, provided that such number shall not be less than five nor more than nine. Elections of directors need not be by written ballot except and to the extent provided in the California Corporations Code Section 708(e).

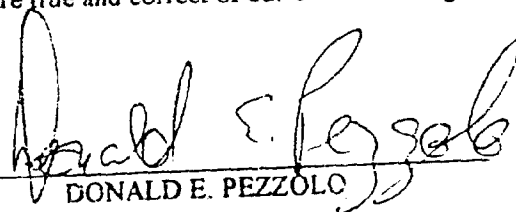
SIX: The liability of directors of the Corporation (for actions or inactions taken by them as directors) for monetary damages shall be eliminated to the fullest extent permissible under California law. Neither any amendment nor repeal of this Article Six, nor the adoption of any provision of the Articles of Incorporation inconsistent with this Article Six, shall eliminate or reduce the effect of this Article Six in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article Six would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

SEVEN: The Corporation shall be authorized, whether by law, agreement or otherwise, to provide indemnification of agents (as defined in Section 317 of the California Corporations Code), for breach of duty to the Corporation and its shareholders in excess of indemnification expressly permitted by Section 317 of the California Corporations Code, subject to the limits on such excess indemnification set forth in Section 204 of the California Corporations Code.

3. The foregoing amendment and restatement of Articles of Incorporation has been duly approved by the Board of Directors.
4. The foregoing amendment and restatement of Articles of Incorporation has been duly approved by the required vote of shareholders in accordance with Section 902 of the Corporations Code. The total number of outstanding shares of the corporation was 2,728,822 Common Shares; and the number of shares voting in favor of the amendment equaled or exceeded the vote required, such required vote being a majority of the outstanding shares of Common Stock.

We further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

Dated: November 8, 1996


DONALD E. PEZZOLO


LAWRENCE A. KLEIN