

01-06-2003



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<b>PTO-1595</b> (Rev. 6-93) OMB No. 0651-0011 (exp. 4/94)		U.S. DEPARTMENT OF COMMERCE Patent and Trademark Office	
To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.			
1. Name of conveying party(ies): <u>NextMark.com, Inc.</u> Additional name(s) of conveying party(ies) attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		2. Name and address of receiving party(ies) Name: <u>NextMark, Inc.</u>	
3. Nature of conveyance <input type="checkbox"/> Assignment <input type="checkbox"/> Merger <input type="checkbox"/> Security Agreement <input checked="" type="checkbox"/> Change of Name <input type="checkbox"/> Other:		Internal Address: _____ Street Address: <u>2 Buck Road</u> City: <u>Hanover</u> State: <u>NH</u> ZIP: <u>03755</u> Additional name(s) & address(es) attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Execution Date: <u>July 29, 2002</u>			
4. Application number(s) or patent number(s): If this document is being filed together with a new application, the filing date of the application is: _____			
A. Patent Application No.(s) <u>See attached Schedule I</u>		B. Patent No.(s) <u>See attached Schedule I</u>	
Additional numbers attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
5. Name and address of party to whom correspondence concerning document should be mailed:		6. Total number of applications and patents involved: <u>6</u>	
Name: <u>Jason C. Gish</u> Telephone: <u>(617) 832-1000</u> Internal Address: <u>Foley Hoag LLP</u> Street Address: <u>155 Seaport Blvd.</u> City: <u>Boston</u> State: <u>MA</u> ZIP: <u>02210</u>		7. Total fee (37 CFR 3.41).....\$240.00 <input checked="" type="checkbox"/> Enclosed <input type="checkbox"/> Authorized to be charged to deposit account 8. Deposit account number: <u>06-1448</u> Attach duplicate copy of this page if paying by deposit account	
<b>DO NOT USE THIS SPACE</b>			
9. Statement and signature: <i>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.</i> <div style="display: flex; justify-content: space-between;"> <div> <u>Jason C. Gish</u>            Name of Person Signing         </div> <div>             Signature         </div> <div> <u>December 27, 2002</u>            Date         </div> </div> Total number of pages including cover sheet, attachments, and document:			

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

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**PATENT**  
**REEL: 013617 FRAME: 0307**

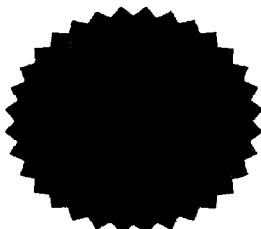
SCHEDULE 1

<u>Patent/ Application Number</u>	<u>Country</u>	<u>Title</u>	<u>Filing Date</u>
09/661010	United States	Method and System for Acquiring Prospect Lists Over a Computer Network	9/13/00
09/662364	United States	Method and System for Storing Prospect Lists in a Computer Database	9/13/00
09/662429	United States	Method and System for Distributing Prospect Lists Over a Computer Network	9/13/00
09/662362	United States	Method and Systems for Enabling Privacy Control in a Prospect Database	9/13/00
09/697233	United States	Systems and Methods for Generating Highly Responsive Prospect Lists	10/26/00
US00/41598	Patent Cooperation Treaty	Systems and Methods for Generating Highly Responsive Prospect Lists	10/26/00

## *The First State*

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "NEXTMARK.COM, INC.", CHANGING ITS NAME FROM "NEXTMARK.COM, INC." TO "NEXTMARK, INC.", FILED IN THIS OFFICE ON THE TWENTY-NINTH DAY OF JULY, A.D. 2002, AT 12:30 O'CLOCK P.M.

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



*Harriet Smith Windsor*

Harriet Smith Windsor, Secretary of State

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AUTHENTICATION: 1912167

020481128

DATE: 07-31-02

PATENT  
REEL: 013617 FRAME: 0309

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION  
OF NEXTMARK.COM, INC.,  
a Delaware Corporation

NEXTMARK.COM, INC. (the "Corporation"), a corporation organized and existing under the General Corporation Law of the State of Delaware, as amended (the "DGCL"), does hereby certify, pursuant to Sections 228, 242, and 245 of the DGCL, that:

(a) The name of the Corporation is NextMark.com, Inc. The original Certificate of Incorporation was filed by the Corporation with the Secretary of State of Delaware on December 10, 1999. Certificate of Amendments were filed by the Corporation with the Secretary of State of Delaware on June 20, 2000, December 18, 2000, March 8, 2001, and September 26, 2001 (collectively, the "Certificates of Amendment").

(b) This Amended and Restated Certificate of Incorporation, which restates, integrates and further amends the Certificate of Incorporation of the Corporation, as amended by the Certificates of Amendment, was duly adopted in accordance with the provisions of Section 242 and 245 of the DGCL, and was approved by the written consent of the stockholders of the Corporation given in accordance with the provisions of Section 228 of the DGCL.

The text of the Certificate of Incorporation, as amended by the Certificates of Amendment, is hereby amended and restated to read as hereinafter set forth in full:

**FIRST.** The name of the Corporation is NextMark, Inc.

**SECOND.** The address of its registered office in the State of Delaware is 1209 Orange Street, Wilmington, Delaware, County of New Castle, 19801. The name of its registered agent at such address is The Corporation Trust Company.

**THIRD.** The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the DGCL.

**FOURTH.** The Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares that the Corporation is authorized to issue is Eleven Million Five Hundred Sixteen Thousand Nine Hundred Sixty-Three (11,516,963) shares. Seven Million Two Hundred Thirty-Nine Thousand (7,239,000) shares shall be Common Stock, \$0.001 par value per share, and Four Million Two Hundred Seventy-Seven Thousand Nine Hundred and Sixty-Three (4,277,963) shares shall be Preferred Stock, \$0.001 par value per share, Two Million Nine Hundred Sixty-Nine Thousand Four Hundred Forty-Six (2,969,446) shares of which shall be designated Series B-1 Participating Convertible Preferred Stock (the "Series B-1 Preferred Stock") and One Million Three Hundred Eight Thousand Five Hundred Seventeen (1,308,517) shares of which shall be designated Series B-2 Participating Convertible Preferred Stock (the "Series B-2 Preferred Stock"). As used herein, the term "Series B Preferred Stock" shall mean both the Series B-1 Preferred Stock and the Series B-2 Preferred Stock, collectively.

Under the Corporation's Certificate of Incorporation, as amended, as in effect immediately prior to the filing of this Amended and Restated Certificate of Incorporation, of the Five Hundred Thirty Thousand (530,000) shares of authorized Preferred Stock, par value \$.001 per share, the Corporation had designated Five Hundred Thirty Thousand (530,000) shares as Series A Preferred Stock (the "Old Series A Preferred Stock"). Upon the filing of this Amended and Restated Certificate of Incorporation, each and every issued and outstanding share of Old Series A Preferred Stock shall automatically and immediately be converted into one share of Common Stock (the "Series A Conversion"). Upon the Series A Conversion, all rights with respect to issued and outstanding shares of Old Series A Preferred Stock and all rights of the holders thereof shall automatically and immediately terminate, except for the right of the holders to receive shares of Common Stock as provided in the preceding sentence upon surrender of their shares of Old Series A Preferred Stock. All aggregate share amounts shall be rounded to the nearest integer, such that no fractional shares of Common Stock shall be issued. Upon the Series A Conversion, the certificate or certificates with respect to Old Series A Preferred Stock held by any holder of such shares shall represent only the right of such holder to receive, as provided below, a certificate or certificates for the appropriate number of shares of Common Stock. Without derogating from the above, each holder of shares of Old Series A Preferred Stock shall promptly after the Series A Conversion surrender the certificate or certificates therefore, duly endorsed for transfer, at the office of the Corporation or of its designated agent. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office a certificate or certificates for the appropriate number of shares of Common Stock. In lieu of delivering any stock certificate representing shares of Old Series A Preferred Stock required to be delivered pursuant to this section, the holder may execute and deliver an affidavit that such certificate has been lost, stolen or destroyed and an agreement (in form and substance reasonably acceptable to counsel for the Corporation) to indemnify the Corporation for any loss incurred by it in connection therewith. All shares of Old Series A Preferred Stock converted in accordance with this paragraph shall be retired and cancelled, and shall not be reissued. No holder of certificates which, immediately prior to the filing of this Amended and Restated Certificate of Incorporation, represented shares of Old Series A Preferred Stock shall be permitted to sell, transfer or dispose of shares of Common Stock into which such shares of Old Series A Preferred Stock were converted, unless and until such certificates have been surrendered to the Corporation as set forth in the preceding paragraphs of this Article Fourth.

The classes of capital stock of the Corporation shall have the voting powers, preferences and relative participating, optional or other special rights, and qualifications, limitations or restrictions as set forth in this Article Fourth.

"Cause" shall mean the occurrence of any of the following events on the part of any employee of the Corporation:

- (i) any act of personal dishonesty or a breach of trust in connection with the employee's responsibilities to the Corporation and intended by the employee to result in substantial personal enrichment of the employee;
- (ii) the conviction of the employee of, or a guilty plea or a plea of nolo contendere by the employee to, any crime classified as a felony under any Federal, state or local law;
- (iii) the repeated or ongoing use by the employee of a controlled substance without a prescription or alcohol which has a materially detrimental effect on the employee's ability to carry out his duties and responsibilities to the Corporation; or
- (iv) any willful violation or refusal to obey the reasonable directives and/or instructions of the Board of Directors with respect to a material aspect of the operation or management of the Corporation after there has been delivered to the employee a written demand for performance by the Corporation which describes the basis for the Corporation's belief that the employee has not obeyed such directives and/or instructions of the Board of Directors and such violation or refusal has not been corrected by the employee within ten (10) days following such demand.

"Change of Control" shall mean: (a) the Corporation sells or otherwise disposes of all or substantially all of its assets to any "person" or group of affiliated "persons" (as such term is used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended); or (b) the Corporation is involved in a merger, consolidation or any other reorganization in which the stockholders of the Corporation immediately prior to the transaction hold less than 51% of the total voting securities of the resulting or surviving entity after such transaction.

"Convertible Securities" means any evidences of indebtedness, Options, stock, or other securities convertible into or exchangeable for Common Stock.

"Junior Shares" means all shares of Common Stock of this Corporation or any other stock ranking junior to the Series B Preferred Stock in dividends or liquidation rights.

"Options" means rights, options or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities.

"Original Issue Date" means the date on which a share of Series B Preferred Stock was first issued.

"Qualified Public Offering" means a fully underwritten firm commitment public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended,

covering the offer and sale by the Corporation of Common Stock in which the public offering price per share is not less than ten times (10X) the then effective Series B-1 Conversion Price and the aggregate gross proceeds to the Company equal or exceed \$20,000,000.

"Series B-1 Conversion Price" means the amount set forth in Section 4(a), as adjusted pursuant to Section 5.

"Series B-1 Per Share Purchase Price" has the same meaning as defined in that certain Series B Preferred Stock Purchase Agreement by and among the Corporation, the Founder (as defined therein) and the Investors (as defined therein) dated as of the Original Issue Date.

"Series B-2 Conversion Price" means the amount set forth in Section 4(a), as adjusted pursuant to Section 5.

"Series B-2 Per Share Purchase Price" has the same meaning as defined in that certain Series B Preferred Stock Purchase Agreement by and among the Corporation, the Founder (as defined therein) and the Investors (as defined therein) dated as of the Original Issue Date.

"Subsidiary" means any corporation at least 50% of whose outstanding voting shares shall at the time be owned directly or indirectly by this Corporation or by one or more subsidiaries, or by this Corporation and one or more subsidiaries.

## Section 2. Dividend Rights.

(a) Dividend Amount. The holders of the Series B-1 Preferred Stock shall be entitled to receive dividends, when and as they may be declared from time to time by the Board of Directors out of any funds legally available therefor, at the annual rate per share equal to 12% of the Series B-1 Per Share Purchase Price (as adjusted to reflect any stock split, stock dividend, combination, recapitalization, reorganization or adjustment of the Series B-1 Preferred Stock), in each fiscal year of the Corporation, in preference and priority to any payment of any dividend on the shares of the Junior Shares. The holders of the Series B-2 Preferred Stock shall be entitled to receive dividends, when and as they may be declared from time to time by the Board of Directors out of any funds legally available therefor, *pari passu* with the holders of the Series B-1 Preferred Stock, at the annual rate per share equal to 12% of the Series B-2 Per Share Purchase Price (as adjusted to reflect any stock split, stock dividend, combination, recapitalization, reorganization or adjustment of the Series B-2 Preferred Stock), in each fiscal year of the Corporation, in preference and priority to any payment of any dividend on the shares of the Junior Shares.

(b) Dividends Cumulative. Dividends on the Series B Preferred Stock shall be cumulative (i.e., such dividends shall be deemed to accrue from day to day whether or not earned or declared) and as long as any shares of the Series B Preferred Stock are outstanding and any dividends owed on the Series B Preferred Stock have not been paid, the Corporation shall not declare or pay any dividend or make any other distribution upon any Junior Shares (except dividends or distributions payable in stock of the Corporation ranking junior to the Series B Preferred Stock as to dividends and ranking junior to the Series B Preferred Stock in liquidation), and, except pursuant to a vote or consent of a majority of the Board of Directors, which majority

must include the vote or consent of the directors nominated by the holders of Series B Preferred Stock, the Corporation shall not directly or indirectly purchase or redeem or otherwise acquire for value, or set apart any amount for a sinking fund for the purchase or redemption of, any Junior Shares unless in each instance all dividends for a previous dividend period shall have been paid or (if payment is not required) reserved on all outstanding shares of the Series B Preferred Stock and the dividend for the then current annual dividend period on the Series B Preferred Stock shall have been declared and set aside. In the event that the Corporation shall declare and pay less than the aggregate dividends at any time required to be paid pursuant to Section 2(c) on shares of Series B Preferred Stock, dividends actually paid will be paid first on Series B Preferred Stock to each holder thereof in proportion to the total dividends at the time payable to each. Any accumulation of dividends on the Series B Preferred Stock shall not bear interest.

(c) Payment of Dividends. Notwithstanding anything to the contrary in this Section 2, dividends on the Series B Preferred Stock shall not be payable until the earliest of the date which is one day before: (i) the Corporation voluntarily elects to or a court of competent jurisdiction issues an order to liquidate, dissolve or wind-up the Corporation pursuant to applicable law; (ii) the Corporation redeems the Series B Preferred Stock pursuant to Section 7 hereof; or (iii) the Corporation effects a Change in Control.

### Section 3. Liquidation Preference.

#### (a) Preference.

- (i) In the event of any liquidation, dissolution or winding up of the affairs of the Corporation, voluntarily or involuntarily, the holders of each share of Series B-1 Preferred Stock, prior to any distribution to the holders of Junior Shares, but *pari passu* with the holders of the Series B-2 Preferred Stock, shall be entitled to receive pro rata a preferential amount per share equal to:
  - (A) three times the Series B-1 Per Share Purchase Price (adjusted to reflect any stock split, stock dividend, combination, recapitalization or reorganization of the Series B-1 Preferred Stock); plus
  - (B) all cumulative dividends and all declared but unpaid dividends (collectively, the "Series B-1 Preferred Stock Liquidation Preference").
- (ii) In the event of any liquidation, dissolution or winding up of the affairs of the Corporation, voluntarily or involuntarily, the holders of each share of Series B-2 Preferred Stock, prior to any distribution to the holders of Junior Shares, but *pari passu* with the holders of the Series B-1 Preferred Stock, shall be entitled to receive pro rata a preferential amount per share equal to:
  - (A) three times the Series B-2 Per Share Purchase Price (adjusted to reflect any stock split, stock dividend,



combination, recapitalization or reorganization of the Series B-2 Preferred Stock); plus

- (B) all cumulative dividends and all declared but unpaid dividends (collectively, the "Series B-2 Preferred Stock Liquidation Preference").

(b) Liquidation After Preference. After payment in full of the Series B-1 Preferred Stock Liquidation Preference to the holders of the Series B-1 Preferred Stock and the payment in full of the Series B-2 Preferred Stock Liquidation Preference to the holders of the Series B-2 Preferred Stock, the entire remaining assets and funds of the Corporation legally available for distribution, if any, shall be distributed among the holders of the Series B Preferred Stock and the Common Stock in proportion to the shares of Common Stock then held by them and the shares of Common Stock which they then have the right to acquire upon conversion of the shares of Series B Preferred Stock then held by them (the "Remaining Liquidation Preference").

(c) Change of Control Treated as Liquidation. A Change of Control shall be deemed to be a liquidation, dissolution or winding up within the meaning of this Section 3.

(d) Adjustment of Liquidation Provisions in Connection with Change of Control. If in connection with a Change of Control: (i) Pych, in his capacity as a stockholder of the Corporation, is to receive less than 10% of the aggregate proceeds received by all of the stockholders of the Corporation as a result of the Change of Control and the operation of this Section 3; and (ii) Pych is still an employee of the Corporation immediately prior to the time of the consummation of the Change of Control, then, notwithstanding anything to the contrary contained in this Section 3, upon the consummation of such Change of Control: (x) Pych shall receive (in addition to any proceeds he would otherwise receive as a result of the operation of Section 3(b)) additional proceeds from the Change of Control such that he receives a total of 10% of the aggregate proceeds received by all of the stockholders of the Corporation as a result of the Change of Control (the "Pych Liquidation Adjustment"); and (y) the holders of the Series B Preferred Stock shall have the amounts that they would have otherwise received as a result of the operation of this Section 3 reduced on a pro-rata basis so as to provide for the Pych Liquidation Adjustment. For purposes of this Section 3(d), in the event that Pych is not an employee of the Corporation immediately prior to the time of a consummation of the Change in Control, Pych will still be deemed to be an employee of the Corporation if the only reason his employment with the Corporation has been terminated is his involuntary dismissal from the Corporation without "Cause." The Corporation shall not by amendment of its Certificate of Incorporation (except with the written consent of Pych as provided below) or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Section 3(d) to be observed or performed hereunder by the Corporation or the holders of the Series B Preferred Stock but shall at all times in good faith assist in the carrying out of all the provisions of this Section 3(d) and in the taking of all such action as may be necessary or appropriate in order to protect the rights of Pych under this Section 3(d) against impairment. Notwithstanding any other provision of this Amended and Restated Certificate of Incorporation to the contrary, this Section 3(d) or any other provision of this Amended and Restated Certificate of Incorporation (to the extent such other provision affects or relates to the

rights of Psych contained in this Section 3(d) (including, without limitation, Section 3(c) and the definitions of "Cause" and "Change of Control" in Section 1)) shall not be amended so as to impair or adversely affect the rights of Psych contained in this Section 3(d) without the written consent of Psych, provided however, that such amendment shall not require the written consent of Psych if such amendment: (A) is executed and filed with the Secretary of State of the State of Delaware in connection with an equity financing of the Corporation; and (B) would reduce the Psych Liquidation Adjustment proportionately in comparison with any dilution, if any, incurred by the holders of the Series B Preferred Stock (viewed as a single class) in connection with such equity financing.

#### **Section 4. Conversion of Series B Preferred Stock.**

The holders of the Series B Preferred Stock shall have conversion rights in accordance with the following provisions:

(a) **Right to Convert and Conversion Price.**

(i) Each share of Series B-1 Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for the Series B-1 Preferred Stock, into such number of fully paid and non-assessable shares of Common Stock as is determined by dividing the Series B-1 Per Share Purchase Price by the Series B-1 Conversion Price, determined and adjusted as hereafter provided, in effect at the time of conversion. The initial Series B-1 Conversion Price shall be the Series B-1 Per Share Purchase Price, and it shall be subject to adjustment as provided in Section 5.

(ii) Each share of Series B-2 Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for the Series B-2 Preferred Stock, into such number of fully paid and non-assessable shares of Common Stock as is determined by dividing the Series B-2 Per Share Purchase Price by the Series B-2 Conversion Price, determined and adjusted as hereafter provided, in effect at the time of conversion. The initial Series B-2 Conversion Price shall be the Series B-2 Per Share Purchase Price, and it shall be subject to adjustment as provided in Section 5.

(b) **Mandatory Conversion.** Each share of Series B Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Series B-1 Conversion Price or Series B-2 Conversion Price, as applicable, upon: (i) the closing of a Qualified Public Offering; or (ii) the written election or vote of holders of at least 67% of the then issued and outstanding Series B Preferred Stock, electing or voting as a single class, in each case whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; provided, however, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion unless certificates evidencing such shares of the Series B Preferred Stock being converted are either delivered to the Corporation or its transfer agent, or the holder of such shares notifies the Corporation or any transfer agent that such certificates have been lost, stolen, or destroyed and

executes an agreement reasonably satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith. In the event of a conversion in connection with a Qualified Public Offering, all holders of record of shares of Series B Preferred Stock will be given at least 20 days' prior written notice of the date fixed and place designated for mandatory conversion of the Series B Preferred Stock and a description of the event which will result in the automatic conversion of the Series B Preferred Stock into Common Stock. In the event of a conversion in connection with a written election by holders of Series B Preferred Stock, all holders of record of shares of Series B Preferred Stock will be given written notice of the date fixed and place designated for surrender of his or its certificates or certificates for all such shares in connection with such mandatory conversion of the Series B Preferred Stock and a description of the election which resulted in the automatic conversion of the Series B Preferred Stock into Common Stock. Any notice sent pursuant to this Section 4(b) shall be sent by certified mail, postage prepaid, to each record holder of Series B Preferred Stock at such holder's address appearing on the stock register of the Corporation. On or before the date so fixed for conversion in connection with a Qualified Public Offering, each holder of shares of Series B Preferred Stock shall surrender his or its certificate or certificates for all such shares to the Corporation at the place designated in exchange for the number of shares of Common Stock to which such holder is entitled. On or before the date fixed for surrender of his or its certificates in connection with a written election by holders of Series B Preferred Stock, each holder of shares of Series B Preferred Stock shall surrender his or its certificate or certificates for all such shares to the Corporation at the place designated in exchange for the number of shares of Common Stock to which such holder is entitled. The mechanics for conversion and other provisions relating to conversion of Series B Preferred Stock into Common Stock and payments in lieu of fractions set forth elsewhere in this Section 4 shall apply to the mandatory conversion of the Series B Preferred Stock.

(c) Reserved.

(d) Mechanics of Conversion. No fractional shares of Common Stock shall be issued upon conversion of Series B Preferred Stock. In lieu of any fractional share to which a holder of Series B Preferred Stock would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the then effective Series B-1 Conversion Price or Series B-2 Conversion Price (as applicable). Before any holder of Series B Preferred Stock shall be entitled to convert the same into full shares of Common Stock, the holder shall surrender the certificate or certificates therefor, duly endorsed for transfer or with appropriate stock powers, at the office of the Corporation or of any transfer agent for the Series B-1 Preferred Stock or Series B-2 Preferred Stock (as applicable), and shall give written notice to the Corporation at such office that he elects to convert the same. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Series B Preferred Stock a certificate or certificates for the number of shares of Common Stock to which he shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable in order to avoid a conversion into fractional shares of Common Stock. Except as provided in paragraph (b), such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Series B Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

(e) No Impairment. The Corporation will not, by amendment of its Certificate of Incorporation, as amended and restated, or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of the Series B Preferred Stock against impairment.

(f) Notices of Record Date, etc. In the event that the Corporation shall propose at any time:

(i) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus;

(ii) to offer for subscription pro rata to the holders of any class of its stock any additional shares of stock of any class or other rights;

(iii) to subdivide or combine its outstanding Common Stock;

(iv) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or

(v) to merge or consolidate with or into any other corporation, or sell, lease or convey all or substantially all its property or business, or to liquidate, dissolve or wind up;

then, in connection with each such event, the Corporation shall send to the holders of the Series B Preferred Stock:

(1) at least 20 days' prior written notice of the date on which a record shall be taken for such dividend, distribution, subscription rights, subdivision or combination (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote in respect of the matters referred to in clauses (iv) and (v) above; and

(2) in the case of the matters referred to in clauses (iv) and (v) above, at least 20 days' prior written notice of the date when the same shall take place (specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event).

Each such written notice shall be given by certified mail, postage prepaid, addressed to the holders of Series B Preferred Stock at the address for each such holder as shown on the books of the Corporation.

(g) Reservation of Common Stock. The Corporation shall, at all times when the Series B Preferred Stock shall be outstanding, reserve and keep available out of its authorized but

unissued stock, for the purpose of effecting the conversion of the Series B Preferred Stock, such number of its duly authorized shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding Series B Preferred Stock. Before taking any action which would cause an adjustment reducing the Series B-1 Conversion Price or the Series B-2 Conversion Price below the then par value of the shares of Common Stock issuable upon conversion of the Series B-1 Preferred Stock or the Series B-2 Preferred Stock (as applicable), the Corporation will take any corporate action which may, in the opinion of its counsel, be necessary in order that the Corporation may validly and legally issue fully paid and nonassessable shares of such Common Stock at such adjusted Series B-1 Conversion Price or Series B-2 Conversion Price.

(h) Cancellation of Series B Preferred Stock. All shares of Series B Preferred Stock which shall have been surrendered for conversion as herein provided shall no longer be deemed to be outstanding and all rights with respect to such shares, including the rights, if any, to receive notices and to vote, shall forthwith cease and terminate except only the right of the holders thereof to receive shares of Common Stock in exchange therefor and payment of any accrued and unpaid dividends thereon. Any shares of Series B Preferred Stock so converted shall be retired and cancelled, and shall not be reissued, and the Corporation may from time to time take such appropriate action as may be necessary to reduce the authorized Series B Preferred Stock accordingly.

#### Section 5. Adjustment of Conversion Price on Series B Preferred Stock.

(a) Adjustment of Conversion Price. The Series B-1 Conversion Price and the Series B-2 Conversion Price on the Series B-1 Preferred Stock and the Series B-2 Preferred Stock, respectively, shall be adjusted as set forth in this Section 5 with the intent that the rights of holders of such Series B Preferred Stock to convert shall not be impaired.

(b) Situations Where No Adjustment Required. No adjustment in the Series B-1 Conversion Price of a particular share of Series B-1 Preferred Stock shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the Series B-1 Conversion Price in effect on the date of, and immediately prior to, such issue. No adjustment in the Series B-2 Conversion Price of a particular share of Series B-2 Preferred Stock shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the Series B-2 Conversion Price in effect on the date of, and immediately prior to, such issue.

(c) Adjustment for Combination or Consolidation of Common Stock. In the event the outstanding shares of Common Stock shall be combined or consolidated, by reclassification or otherwise, into a lesser number of shares of Common Stock, the Series B-1 Conversion Price and the Series B-2 Conversion Price in effect immediately prior to such combination or consolidation shall, concurrently with the effectiveness of such combination or consolidation, be proportionately increased.

(d) Adjustment for Stock Dividend or Subdivision. In the event the Corporation at any time or from time to time after the Original Issue Date shall declare or pay any dividend or on or distribution with respect to the Common Stock payable in Common Stock, or effect a subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock by reclassification or otherwise than by payment of a dividend in Common Stock, then and in any such event, the Series B-1 Conversion Price and the Series B-2 Conversion Price in effect immediately prior to such subdivision or stock dividend shall forthwith be proportionately reduced.

(c) Adjustment Upon Issuance of Additional Shares of Common Stock.

(i) In the event the Corporation shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to paragraph (f) hereof but excluding any issued as a combination or consolidation as provided in paragraph (c) or upon a dividend or distribution or subdivision as provided in paragraph (d)) without consideration or for a consideration per share less than the:

- (A) Series B-1 Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, the Series B-1 Conversion Price shall be reduced, concurrently with such issue to a price (calculated to the nearest cent) determined in accordance with the following formula:

$$\text{Series B-1 Conversion Price} = \frac{P1Q1 + P2Q2}{Q1 + Q2}$$

where

P1 = the Series B-1 Conversion Price in effect immediately prior to such issue;

Q1 = the total number of shares of Common Stock outstanding immediately prior to such issue (including shares described in clause (e)(ii) below);

P2 = Average price per share received by the Corporation upon such issue; and

Q2 = Number of Shares of Common Stock issued (plus Additional Shares of Common Stock deemed to have been issued) in the subject transaction.

- (B) Series B-2 Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, the Series B-2 Conversion Price shall be reduced, concurrently with such issue to a price (calculated to the nearest cent) determined in accordance with the following formula:

$$\text{Series B-2 Conversion Price} = \frac{P1Q1 + P2Q2}{Q1 + Q2}$$

where

P1 = the Series B-2 Conversion Price in effect immediately prior to such issue;

Q1 = the total number of shares of Common Stock outstanding immediately prior to such issue (including shares described in clause (e)(ii) below);

P2 = Average price per share received by the Corporation upon such issue; and

Q2 = Number of Shares of Common Stock issued (plus Additional Shares of Common Stock deemed to have been issued) in the subject transaction.

(ii) For the purposes of Sections 4(e)(i)(A) and (B), the number of shares of Common Stock outstanding immediately prior to such issue shall be calculated on a fully diluted basis, as if all shares of Series B Preferred Stock and all Convertible Securities had been fully converted into shares of Common Stock immediately prior to such issuance and any outstanding Options had been fully exercised immediately prior to such issuance (and any resulting Convertible Securities fully converted into Common Stock) as of such date, but not including in such calculation any shares of Common Stock issuable with respect to shares of Series B Preferred Stock, Convertible Securities or outstanding Options solely as the result of an adjustment in the respective conversion prices or ratios resulting from the issuance of Additional Shares of Common Stock causing the adjustment in question.

(f) Adjustment Upon Deemed Issue of Additional Shares of Common Stock. In the event the Corporation at any time or from time to time after the Original Issue Date shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options in accordance with clause (ii) below or, in the case of Convertible Securities, the maximum number of shares of Common Stock into which they are convertible in accordance with clause (ii) below, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that Additional Shares of Common Stock shall not be deemed to have been issued unless the consideration per share (determined pursuant to paragraph (g) hereof) of such Additional Shares of Common Stock would be less than the Series B-1 Conversion Price or the Series B-2 Conversion Price (as applicable) in effect on the date of and immediately prior to such issue, or such record date, as the case may be, and provided further that in any such case in which Additional Shares of Common Stock are deemed to be issued:

- (i) except as provided in clause (ii) below, no further adjustment in the Series B-1 Conversion Price or the Series B-2 Conversion Price (as applicable) shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;
- (ii) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase in the consideration payable to the Corporation, or for any decrease in the number of shares of Common Stock issuable upon the exercise, conversion or exchange thereof, or for the termination of the right to exercise or convert such Options or Convertible Securities, then the Series B-1 Conversion Price and/or the Series B-2 Conversion Price (as applicable) computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase, decrease or termination becoming effective, be recomputed to reflect such increase, decrease or termination insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities and upon termination such Options or Convertible Securities shall no longer be deemed to be outstanding; and
- (iii) no readjustment pursuant to clause (ii) above shall have the effect of increasing the Series B-1 Conversion Price or the Series B-2 Conversion Price to an amount which exceeds the lower of (A) the Series B-1 Conversion Price or the Series B-2 Conversion Price (as applicable) on the original adjustment date, or (B) the Series B-1 Conversion Price or the Series B-2 Conversion Price (as applicable) that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date.

(g) Determination of Consideration. For purposes of this Section 5, the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

- (i) Cash and Property. Such consideration shall:

(A) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation, excluding amounts paid or payable for accrued interest or accrued dividends;

(B) insofar as it consists of property other than cash, be computed at the fair value thereof at the time of such issue, as determined in good faith by the Board of Directors; and

(C) in the event Additional Shares of Common Stock are issued together with other shares of securities or other assets of the Corporation for consideration which



covers both, be the proportion of such consideration so received, computed as provided in sub-clauses (A) and (B) above, as determined in good faith by the Board of Directors.

(ii) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to paragraph (f), relating to Options and Convertible Securities, shall be determined by dividing

(A) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by

(B) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(iii) Stock Dividends and Stock Subdivisions. Any Additional Shares of Common Stock deemed to have been issued, relating to stock dividends and stock subdivisions, shall be deemed to have been issued for no consideration and the Series B-1 Conversion Price and Series B-2 Conversion Price shall be adjusted in accordance with paragraph (d) of this Section 5.

(h) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Series B-1 Conversion Price or the Series B-2 Conversion Price pursuant to this Section 5, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Series B-1 Preferred Stock and Series B-2 Preferred Stock (as applicable) a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Series B-1 Preferred Stock or Series B-2 Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Series B-1 Conversion Price or Series B-2 Conversion Price (as applicable) at the time in effect, and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of Series B-1 Preferred Stock or Series B-2 Preferred Stock (as applicable).

#### Section 6. Voting Rights of Series B Preferred Stock.

(a) General. Except: (i) as set forth in the Investor Rights Agreement by and among the Corporation, the Founder (as defined therein) and the Investors (as defined therein) dated as of the Original Issue Date; (ii) with respect to matters which alter or change the powers,

preferences or special rights of the Series B Preferred Stock so as to affect them adversely (in which case the Series B-1 Preferred Stock and the Series B-2 Preferred Stock shall vote as a single class); and (iii) as otherwise required by law, each share of Series B Preferred Stock issued and outstanding shall have the right to vote on all matters the number of votes equal at any time to the number of shares of Common Stock into which the Series B-1 Preferred Stock and Series B-2 Preferred Stock (as applicable) would be convertible at the then applicable Series B-1 Conversion Price or Series B-2 Conversion Price (as applicable), and the holders of the Series B Preferred Stock shall vote with the Common Stock as a single class.

#### **Section 7. Redemption at Option of Holder.**

(a) Option to Redeem. Upon written notice, made by registered or certified U.S. mail (return receipt requested), given to the Corporation at least 120 days prior to the third anniversary of the Original Issue Date by holders of not less than 67% of the then issued and outstanding Series B Preferred Stock (electing as a single class) (the "Redemption Notice"), the Corporation shall redeem the indicated percentage of all of the shares of Series B Preferred Stock then issued and outstanding, on each of those dates set forth in the table below (collectively, the "Redemption Dates"), or such lesser number of shares of Series B Preferred Stock as the holders may determine, at the Redemption Price (as hereafter defined):

<u>Date</u>	<u>Percentage</u>
Third Anniversary of the Original Issue Date (the "Third Anniversary")	25%
Three Months After the Third Anniversary	25%
Six Months After the Third Anniversary	25%
Nine Months After the Third Anniversary	25%

(b) Redemption Price. The Redemption Price under this Section shall be:

- (i) with regard to each share of Series B-1 Preferred Stock the greater of (x) the amount of the Series B-1 Preferred Stock Liquidation Preference, or (y) the fair market value of a share of Series B-1 Preferred Stock as determined in accordance with Section 7(j) hereof.
- (ii) with regard to each share of Series B-2 Preferred Stock the greater of (x) the amount of the Series B-2 Preferred Stock Liquidation Preference, or (y) the fair market value of a share of Series B-2 Preferred Stock as determined in accordance with Section 7(j) hereof.

(c) Notice and Option Exercise. Subject to receipt by the Corporation of the Redemption Notice in accordance with Section 7(a), between 30 and 15 days prior to each of the Redemption Dates, the Corporation shall provide each holder of Series B Preferred Stock with a written offer (addressed to the holder at its address as it appears on the stock transfer books of the Corporation) to redeem shares of Series B Preferred Stock as provided above, which notice shall specify the maximum number of shares eligible for redemption and the Redemption Price. Each holder of Series B Preferred Stock will have until 15 days prior to each Redemption Date to provide the Corporation with written notice of such holder's acceptance of the redemption offer,

which notice shall specify the number of shares to be redeemed. All notices or offers hereunder shall be sent by registered or certified mail, postage prepaid, and shall be deemed to have been provided when mailed. In the event that any holder of Series B Preferred Stock does not provide the Corporation with written notice of the holder's acceptance of the redemption offer on or before the date 15 days prior to the applicable Redemption Date, the Corporation shall have no obligation to redeem any shares of Series B Preferred Stock of such holder on the Redemption Date specified in its notice to such holder. Failure by any holder to accept an offer to redeem any shares of Series B Preferred Stock at a particular Redemption Date shall not constitute a waiver of such holder's right to require the Corporation to redeem shares of Series B Preferred Stock on any succeeding Redemption Date.

(d) Waiver. Notwithstanding the foregoing, the Corporation's obligation to redeem any shares of Series B Preferred Stock on any Redemption Date shall be waived if the holders of at least 67% of the then outstanding shares of Series B Preferred Stock (electing as a single class) shall request such waiver by written notice given to the Corporation at least ten days prior to such Redemption Date. The Corporation shall immediately notify all holders of Series B Preferred Stock of any such waiver and shall not be required to redeem any shares of Series B Preferred Stock of any holder of Series B Preferred Stock on such Redemption Date. The holders of Series B Preferred Stock shall have the right to waive the obligation of the Corporation to redeem shares of Series B Preferred Stock on any number of occasions.

(e) Payment. On any Redemption Date, the funds legally available therefor shall be used to redeem from the holders thereof at the Redemption Price that number of shares of Series B Preferred Stock which the holders have elected to redeem on such date. If the funds legally available to pay the aggregate Redemption Price for such shares on such Redemption Date are insufficient to discharge the Corporation's obligation in full, the funds available shall be used to redeem from among the holders of the Series B Preferred Stock the number of shares of Series B Preferred Stock having an aggregate Redemption Price as nearly equal as possible to the amount of the funds available therefor, and the Corporation's obligations to pay the balance of the Redemption Price payable on such Redemption Date shall continue. Thereafter, such continuing obligation shall be satisfied within 15 days after the end of each month of the Corporation, by action of the Board of Directors, until such obligation is fully discharged. For the purpose of determining whether funds are legally available for redemption of shares of Series B Preferred Stock as provided herein, the Corporation shall value its assets at the highest amount permissible under applicable law.

(f) Redemptions Pro Rata. All redemptions under this Section 7 (including redemptions in part or redemptions where there are not sufficient funds legally available to redeem that number of shares requested to be redeemed) shall be made ratably among the holders of Series B Preferred Stock, based upon the number of shares of Series B Preferred Stock which each holder requested to be redeemed on that Redemption Date.

(g) Redemption Procedures. On or after a Redemption Date, each holder of shares of Series B Preferred Stock who has elected to redeem on that date shall surrender the certificate evidencing the shares to be redeemed to the Corporation at its principal office and shall thereupon be entitled to receive payment of the Redemption Price therefor. If less than all the shares represented by any such surrendered certificate are redeemed, a new certificate shall be

issued representing the unredeemed shares. The Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificates or certificates as the owner thereof, and each surrendered certificate shall be cancelled.

(h) Termination of Rights. From and after the Redemption Date, unless default be made by the Corporation in payment of the Redemption Price, then, notwithstanding that the certificates evidencing any shares of Series B Preferred Stock so called for redemption shall not have been surrendered, all rights of the holders thereof with respect to the shares which they elected to redeem shall forthwith after such date cease and terminate, except only the right of the holders to receive the Redemption Price upon surrender of their certificates therefor.

(i) Retirement of Series B Preferred Stock. All Series B Preferred Stock redeemed pursuant to this Section shall be retired and cancelled and shall not be reissued, and the Corporation may from time to time take appropriate action as may be necessary to reduce the authorized Series B Preferred Stock accordingly.

(j) Appraisal. Sixty (60) days prior to the Third Anniversary, the Corporation and holders of at least 67% of the then outstanding shares of Series B Preferred Stock (acting as a single class), shall select an appraiser or, failing the selection of a mutually acceptable appraiser within such period, within an additional 10 day period, the holders of at least 67% of the then outstanding shares of Series B Preferred Stock (acting as a single class) shall appoint an appraiser, the Corporation shall appoint a second appraiser, and such two appraisers shall appoint a third appraiser, or failing action within such period by any party or the appraisers, any unappointed appraiser or appraisers shall be appointed by the American Arbitration Association, Boston, Massachusetts, upon application of any party or appraiser. Within 20 days from his (their) appointment, the appraiser(s) shall proceed by majority vote, if necessary, to determine the fair market value of a share of Series B-1 Preferred Stock and the fair market value of a share of Series B-2 Preferred Stock on the date closest to the Third Anniversary as practicable, and such determinations shall be final and binding upon all interested persons. The Corporation shall promptly furnish to the appraiser(s) such information concerning its financial condition, earnings, capitalization, business prospects and sales of its capital stock as he (they) may reasonably request. Within such 20 day period, the appraiser(s) shall promptly notify in writing the Corporation and any other interested person known to the appraiser(s) of the final determination of value. The parties shall each pay the fees and expenses of any appraiser appointed by or for each of them, and shall pay equally the fees and expenses of a single mutually acceptable appraiser or the third appraiser, if selection of a third appraiser is necessary.

**FIFTH.** In furtherance of and not in limitation of powers conferred by statute, it is further provided that:

(a) Subject to the limitations and exceptions, if any, contained in the By-laws of the Corporation, such By-laws may be adopted, amended or repealed by the Board of Directors of the Corporation; and

(b) Elections of directors need not be by written ballot unless, and only to the extent, otherwise provided in the By-laws of the Corporation; and

of the Corporation, but no stockholder shall have any preemptive rights except as specifically so granted.

**TENTH.** The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Amended and Restated Certificate of Incorporation in the manner prescribed by the DGCL and this Certificate of Incorporation, and all rights conferred upon stockholders herein are granted subject to this reservation; provided, however, that any amendment, alteration, change or repeal of Section 3(d) of Article Fourth or this Article Tenth shall require the written consent of Pych to the extent required by Section 3(d) of Article Fourth.

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No. 2439 P. 2/2

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been executed by the President of the corporation this 24 day of July, 2002.

NEXTMARK.COM, INC.

By: 

Joseph Pych, President