

PATENT ASSIGNMENT

Electronic Version v1.1

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SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	MERGER
EFFECTIVE DATE:	12/17/2002
CONVEYING PARTY DATA	
Name	Execution Date
Odyssey Pharmaceuticals, Inc.	12/10/2002
RECEIVING PARTY DATA	
Name:	Odyssey Thera, Inc.
Street Address:	4550 Norris Canyon Road
Internal Address:	Suite 140
City:	San Ramon
State/Country:	CALIFORNIA
Postal Code:	94583
PROPERTY NUMBERS Total: 4	
Property Type	Number
Patent Number:	6270964
Patent Number:	6294330
Patent Number:	6428951
Patent Number:	6897017
CORRESPONDENCE DATA	
Fax Number:	(703)418-4777
<i>Correspondence will be sent via US Mail when the fax attempt is unsuccessful.</i>	
Phone:	703-418-2777
Email:	zackchem@aol.com
Correspondent Name:	Isaac A. Angres
Address Line 1:	2001 Jefferson Davis Highway
Address Line 2:	Suite 301
Address Line 4:	Arlington, VIRGINIA 22202
NAME OF SUBMITTER:	Isaac Angres

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**Total Attachments: 23**

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FILED # C673-98

DEC 17 2002

IN THE OFFICE OF  
*Dean Heller*  
DEAN HELLER, SECRETARY OF STATE

**CERTIFICATE OF MERGER  
MERGING  
ODYSSEY PHARMACEUTICALS, INC.  
WITH AND INTO  
ODYSSEY THERA, INC.**

Pursuant to Section 92A.120 of the Nevada Revised Statutes

Odyssey Pharmaceuticals, Inc., a Nevada corporation ("*Nevada Odyssey*") and Odyssey Thera, Inc., a Delaware corporation ("*Delaware Odyssey*"), DO HEREBY CERTIFY AS FOLLOWS:

FIRST: That Nevada Odyssey was incorporated on January 13, 1998 pursuant to the Nevada Revised Statutes (the "*Nevada Law*"), and that Delaware Odyssey was incorporated on November 22, 2002, pursuant to the Delaware General Corporation Law (the "*Delaware Law*").

SECOND: That an Agreement and Plan of Merger (the "*Merger Agreement*"), dated as of December 10, 2002, among Delaware Odyssey and Nevada Odyssey, setting forth the terms and conditions of the merger of Nevada Odyssey with and into Delaware Odyssey (the "*Merger*"), has been approved, adopted, certified, executed and acknowledged by each of the owner corporations in accordance with Section 92A.200 of the Nevada Law.

THIRD: That the name of the surviving corporation (the "*Surviving Corporation*") shall be "Odyssey Thera, Inc."

FOURTH: The Surviving Corporation's agent for service of process is:

Marnie MacDonald  
Odyssey Thera, Inc.  
4550 Norris Canyon Road, Suite 140  
San Ramon, CA 94583

FIFTH: That an executed copy of the Merger Agreement is on file at the principal place of business of the Surviving Corporation at the following address:

Odyssey Thera, Inc.  
4550 Norris Canyon Road, Suite 140  
San Ramon, CA 94583


SIXTH: That a copy of the Merger Agreement will be furnished by the Surviving Corporation, on request and without cost, to any stockholder of any constituent corporation.

SEVENTH: That the Merger shall become effective at 5:00 pm on the day of filing of this Certificate of Merger with the Secretary of State of the State of Delaware.

**PATENT  
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IN WITNESS WHEREOF, each of Nevada Odyssey and Delaware Odyssey has caused this Certificate of Merger to be executed in its corporate name this 10th day of November, 2002.

ODYSSEY PHARMACEUTICALS, INC.,  
a Nevada Corporation

  
By: Marnie MacDonald, President

ODYSSEY THERA, INC.,  
a Delaware Corporation

  
By: Marnie MacDonald, President

STATE OF NEVADA  
Secretary of State  
I hereby certify that this is a true and  
complete copy of the document as filed in  
this office.

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By  Dean Heller  
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# Delaware

PAGE 1

*The First State*

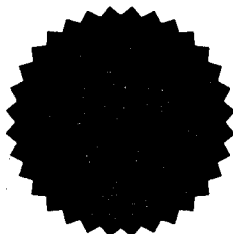
I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF MERGER, WHICH MERGES:

"ODYSSEY PHARMACEUTICALS, INC.", A NEVADA CORPORATION,  
WITH AND INTO "ODYSSEY THERA, INC." UNDER THE NAME OF  
"ODYSSEY THERA, INC.", A CORPORATION ORGANIZED AND EXISTING  
UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED  
IN THIS OFFICE THE TENTH DAY OF DECEMBER, A.D. 2002, AT 9  
O'CLOCK A.M.

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

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020758405



*Harriet Smith Windsor*

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 2203141

DATE: 01-14-03

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REEL: 016945 FRAME: 0171

**CERTIFICATE OF MERGER**

**OF**

**ODYSSEY PHARMACEUTICALS, INC.,  
a Nevada corporation**

**INTO**

**ODYSSEY THERA, INC.,  
a Delaware corporation**

**(UNDER SECTION 252 OF THE GENERAL  
CORPORATION LAW OF THE STATE OF DELAWARE)**

Odyssey Thera, Inc., a Delaware corporation, hereby certifies that:

(1) The name and state of incorporation of each of the constituent corporations are:

- (a) Odyssey Thera, Inc., a Delaware corporation ("Odyssey Delaware");  
and
- (b) Odyssey Pharmaceuticals, Inc., a Nevada corporation ("Odyssey Nevada").

(2) An Agreement of Merger has been approved, adopted, certified, executed and acknowledged by Odyssey Nevada and by Odyssey Delaware in accordance with the provisions of subsection (c) of Section 252 of the General Corporation Law of the State of Delaware.

(3) The name of the surviving corporation is Odyssey Thera, Inc., a Delaware corporation, which will continue its existence as the surviving corporation under its present name upon the effective date of the merger.

(4) The certificate of incorporation of Odyssey Delaware shall be the certificate of incorporation of the surviving corporation after the effectiveness of the merger.

(5) That pursuant to the Merger Agreement, the Certificate of Incorporation of the Surviving Corporation is amended to read in its entirety as set forth in Exhibit A hereto.

(6) The executed Agreement of Merger is on file at the principal place of business of the surviving corporation, Odyssey Delaware, located at: 4550 Norris Canyon Road, Suite 140, San Ramon, CA, 94583.

(7) A copy of the Agreement of Merger will be furnished by Odyssey Delaware, on request and without cost, to any stockholder of Odyssey Nevada or Odyssey Delaware.

(8) The authorized capital stock of Odyssey Nevada is 20,000,000 shares of Common Stock, with par value of \$0.001, and 10,000,000 shares of Preferred Stock, with par value of \$0.001.

(9) The effective date of this merger shall be December 10, 2002.

IN WITNESS WHEREOF, Odyssey Delaware has caused this Certificate of Merger to be signed by Marnie MacDonald, President, on the 10th day of December, 2002.

ODYSSEY THERA, INC.,  
a Delaware corporation

By: /s/ Marnie MacDonald  
Marnie MacDonald, President



**AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
ODYSSEY THERA, INC.**

Odyssey Thera, Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware (the "*Corporation*") does hereby certify that:

1. The original Certificate of Incorporation was filed with the Secretary of State of Delaware on November 22, 2002.
2. The Amended and Restated Certificate of Incorporation in the form attached hereto as Exhibit I has been duly adopted in accordance with the provisions of Sections 245 and 228 of the General Corporation Law of the State of Delaware by the directors and stockholders of the Corporation, and prompt written notice was duly given pursuant to Section 228 to those stockholders who did not approve the Amended and Restated Certificate of Incorporation by written consent.
3. The Amended and Restated Certificate of Incorporation so adopted reads in full as set forth in Exhibit I attached hereto and is hereby incorporated herein by this reference.

IN WITNESS WHEREOF, Odyssey Thera, Inc. has caused this Certificate to be signed by the President this 10th day of December, 2002.

ODYSSEY THERA, INC.

By: /s/ Marnie MacDonald  
Marnie MacDonald, Ph.D., President

EXHIBIT . I

**AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
ODYSSEY THERA, INC.**

**FIRST**

The name of the Corporation is Odyssey Thera, Inc.

**SECOND**

The address of the registered office of the Corporation in the State of Delaware is 615 S. Dupont Highway, Dover, DE. The name of its registered agent at such address is National Corporate Research, Ltd, in the County of Kent.

**THIRD**

The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, as amended from time to time.

**FOURTH**

The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is 30,000,000 shares, comprised of 20,000,000 shares of Common Stock with a par value of \$0.001 per share (the "*Common Stock*") and 10,000,000 shares of Preferred Stock with a par value of \$0.001 per share (the "*Preferred Stock*").

The Preferred Stock shall be divided into two series. 2,515,000 of the shares of Preferred Stock are designated "Series A Preferred Stock" (the "*Series A Preferred*") and 7,125,000 of the shares of Preferred Stock are designated "Series B Preferred Stock" (the "*Series B Preferred*"). The remaining shares of Preferred Stock shall remain undesignated.

**FIFTH**

The relative rights, preferences, privileges, and restrictions granted to or imposed upon the respective classes of the shares or the holders thereof are as set forth below. As used in this

Article Fifth, the term "Preferred Stock," without designation, shall refer collectively to shares of Series A Preferred and shares of Series B Preferred.

**1. Dividend Preference.**

The holders of Preferred Stock shall be entitled to receive, out of funds legally available therefor, dividends at an annual rate equal to (i) \$0.096 (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each outstanding share of Series A Preferred held by them, and (ii) \$0.178 (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each outstanding share of Series B Preferred held by them, payable when and if declared by the Board of Directors of the Corporation (the "**Board of Directors**"), in preference and priority to the payment of dividends on any shares of Common Stock (other than those payable solely in Common Stock or involving the repurchase of shares of Common Stock from terminated employees, officers, directors, or consultants pursuant to contractual arrangements). In the event dividends are paid to the holders of Preferred Stock that are less than the full amounts to which such holders are entitled pursuant to this Section 1, such holders shall share ratably (calculated on an as-if converted to Common Stock basis) in the total amount of dividends paid according to the respective amounts due each such holder if such dividends were paid in full. After payment of dividends to the holders of Preferred Stock, dividends may be declared and distributed among all holders of Common Stock; provided, however, that no dividend may be declared and distributed among holders of Common Stock at a rate greater than the rate at which dividends are paid to the holders of Preferred Stock based on the number of shares of Common Stock into which such shares of Preferred Stock are convertible (as adjusted for stock splits and the like) on the date such dividend is declared. The dividends payable to the holders of the Preferred Stock shall not be cumulative, and no right shall accrue to the holders of the Preferred Stock by reason of the fact that dividends on the Preferred Stock are not declared or paid in any previous fiscal year of the Corporation, whether or not the earnings of the Corporation in that previous fiscal year were sufficient to pay such dividends in whole or in part. In the event that the Corporation shall have declared but unpaid dividends outstanding immediately prior to, and in the event of, a conversion of Preferred Stock (as provided in Section 4 hereof), the Corporation shall, at the option of the Corporation, pay in cash to the holder(s) of Preferred Stock subject to conversion the full amount of any such dividends or allow such dividends to be converted into Common Stock in accordance with, and pursuant to the terms specified in, Section 4 hereof.

**2. Liquidation Preference.**

(a) In the event of any liquidation, dissolution, or winding up of the Corporation, whether voluntary or not, or the sale, lease, assignment, transfer, conveyance or disposal of all or substantially all of the assets of the Corporation, or the acquisition of this Corporation by another entity by means of consolidation, corporate reorganizations or merger, or other transaction or series of related transactions in which more than 50% of the outstanding voting power of this Corporation is disposed of (each a "**Liquidation Event**"), distributions to the stockholders of the Corporation shall be made in the following manner:

(i) Each holder of Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Common Stock, by reason of their ownership of such stock, the amount of (i) \$1.20 (the "*Original Series A Issue Price*") per share (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each share of Series A Preferred then held by such holder, plus an amount equal to all declared but unpaid dividends on such shares of Series A Preferred (collectively, the "*Series A Preference*") and (ii) \$2.23 (the "*Original Series B Issue Price*") per share (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each share of Series B Preferred then held by such holder, plus an amount equal to all unpaid dividends, whether or not declared, on such shares of Series B Preferred (collectively, the "*Series B Preference*"). If, upon the occurrence of a Liquidation Event, the assets and funds available to be distributed among the holders of the Preferred Stock shall be insufficient to permit the payment to such holders of the full preferential amount, then the entire assets and funds of the Corporation legally available for distribution to such holders shall be distributed ratably (calculated on an as-is converted to Common Stock basis) based on the total preferential amount due each such holder under this Section 2(a).

(ii) After payment has been made to the holders of Preferred Stock of the full amounts to which they are entitled pursuant to Section 2(a)(i) above, the remaining assets of the Corporation available for distribution to stockholders shall be distributed ratably among the holders of Common Stock and Preferred Stock (on an as-if converted to Common Stock basis) until such time as the holders of Preferred Stock shall have received, in addition to any amounts received by such holders pursuant to Section 2(a)(i) above, an amount equal to (i) two times the Original Series B Issue Price per share (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each share of Series B Preferred then held by such holder and (ii) two times the Original Series A Issue Price per share (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each share of Series A Preferred then held by such holder. Thereafter, the remaining assets of the Corporation available for distribution to stockholders shall be distributed ratably among the holders of Common Stock based on the number of shares of Common Stock held by each such holder.

(b) Each holder of Preferred Stock shall be deemed to have consented to distributions made by the Corporation in connection with the repurchase of shares of Common Stock issued to or held by officers, directors, or employees of, or consultants to, the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements (whether now existing or hereafter entered into) providing for the right of said repurchase between the Corporation and such persons.

(c) The value of securities and property paid or distributed pursuant to this Section 2 shall be computed at fair market value at the time of payment to the Corporation or at the time made available to stockholders, all as determined by the Board of Directors in the good faith exercise of its reasonable business judgment, provided that (i) if such securities are listed on any established stock exchange or a national market system, their fair market value shall be the

closing sales price for such securities as quoted on such system or exchange (or the largest such exchange) for the date the value is to be determined (or if there are no sales for such date, then for the last preceding business day on which there were sales), as reported in the Wall Street Journal or similar publication, and (ii) if such securities are regularly quoted by a recognized securities dealer but selling prices are not reported, their fair market value shall be the mean between the high bid and low asked prices for such securities on the date the value is to be determined (or if there are no quoted prices for such date, then for the last preceding business day on which there were quoted prices).

(d) Nothing hereinabove set forth shall affect in any way the right of each holder of Preferred Stock to convert such shares at any time and from time to time into Common Stock in accordance with Section 4 hereof.

### 3. *Voting Rights.*

(a) Except as otherwise required by law or hereunder, the holder of each share of Common Stock issued and outstanding shall have one vote and the holder of each share of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such share of Preferred Stock could be converted at the record date for determination of the 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, such votes to be counted together with all other shares of stock of the Corporation having general voting power and not separately as a class. Fractional votes by the holders of Preferred Stock shall not, however, be permitted and any fractional voting rights shall (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted) be rounded to the nearest whole number (with one-half being rounded upward). Holders of Common Stock and Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation.

(b) Notwithstanding the provisions of Section 3(a), at each annual or special meeting called for the purpose of electing directors, the holders of Preferred Stock, voting as a single class, shall be entitled to elect three members of the Board of Directors, and the holders of the Common Stock, voting as a single class, shall be entitled to elect two members of the Board of Directors. The provisions of this Section 3(b) shall expire and be of no further force or effect upon conversion of at least 90% of the shares of Preferred Stock originally issued by the Corporation into Common Stock pursuant to the provisions of Section 4 hereof. In the case of any vacancy in the office of a director elected by a specified group of stockholders, a successor shall be elected to hold office for the unexpired term of such director by the affirmative vote of a majority of the shares of such specified group given at a special meeting of such stockholders duly called or by an action by written consent for that purpose. Any director who shall have been elected by a specified group of stockholders may be removed during the aforesaid term of office, either for or without cause, by, and only by, the affirmative vote of the holders of a majority of the shares of such specified group, given at a special meeting of such stockholders duly called or by an action by written consent for that purpose, and any such vacancy thereby

created, may be filled by the vote of the holders of a majority of the shares of such specified group represented at such meeting or in such consent.

4. **Conversion Rights.**

The holders of Preferred Stock shall have conversion rights as follows:

(a) **Right to Convert.** Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for such Preferred Stock as follows:

(i) Each share of Series A Preferred shall be convertible into such number of fully-paid and non-assessable shares of Common Stock as is determined by dividing the Original Series A Issue Price (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) by the then applicable Conversion Price for such Series A Preferred, determined as hereinafter provided, in effect at the time of conversion. The price at which shares of Common Stock shall be deliverable upon conversion of the Series A Preferred (the "**Series A Conversion Price**") shall initially be the Original Series A Issue Price. The initial Series A Conversion Price shall be subject to adjustment as provided in accordance with Section 4(d) of this Article Fifth.

(ii) Each share of Series B Preferred shall be convertible into such number of fully-paid and non-assessable shares of Common Stock as is determined by dividing the Original Series B Issue Price (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) by the then applicable Conversion Price for such Series B Preferred, determined as hereinafter provided, in effect at the time of conversion. The price at which shares of Common Stock shall be deliverable upon conversion of the Series B Preferred (the "**Series B Conversion Price**") shall initially be the Original Series B Issue Price. The initial Series B Conversion Price shall be subject to adjustment as provided in accordance with Section 4(d) of this Article Fifth.

(b) **Automatic Conversion.** The Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Conversion Price for such series of Preferred Stock as follows: (i) with respect to the Series A Preferred and Series B Preferred, upon the closing of a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, the public offering price of which was not less than \$7.50 per share (adjusted to reflect subsequent stock dividends, stock splits, combinations or recapitalizations) and \$20,000,000 in the aggregate (prior to underwriter commissions and expenses); (ii) with respect to the Series A Preferred, upon receipt by the Corporation of the affirmative vote or written consent of at least two-thirds (66-2/3%) of the outstanding shares of the Series A Preferred; or (iii) with respect to the Series B Preferred, upon receipt by the Corporation of the affirmative vote or written consent of at least two thirds (66-2/3%) of the outstanding shares of the Series B Preferred (each such event is an "**Automatic Conversion**"). In the event of an Automatic Conversion of the Preferred Stock upon a public offering as aforesaid, the person(s) entitled to receive the Common Stock issuable upon such

conversion of such Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

(c) ***Mechanics of Conversion.*** No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the then effective Series A Conversion Price or Series B Conversion Price, as applicable. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock and to receive certificates therefor, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Preferred Stock, and shall give written notice to the Corporation at such office that he or she elects to convert the same; provided, however, that in the event of an Automatic Conversion pursuant to Section 4(b), the outstanding shares of Series A Preferred and/or Series B Preferred shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent, and provided further that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion unless the certificates evidencing such shares of Series A Preferred and/or Series B Preferred are either delivered to the Corporation or its transfer agent as provided above, or the holder notifies the Corporation or its transfer agent 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 with such certificates. The Corporation shall, as soon as practicable after such delivery, or such agreement and indemnification in the case of a lost certificate, issue and deliver at such office to such holder of Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock. 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 Preferred Stock to be converted, or in the case of Automatic Conversion, on the date of closing of the offering or the date of the affirmative vote or written consent of two thirds (66-2/3%) of the then outstanding shares of Series A Preferred or Series B Preferred, as applicable, 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.

(d) ***Adjustments to Conversion Price.***

(i) ***Adjustments for Dividends, Splits, Subdivisions, Combinations, or Consolidation of Common Stock.*** In the event the outstanding shares of Common Stock shall be increased by stock dividend payable in Common Stock, stock split, subdivision, or other similar transaction occurring after the filing of this Amended and Restated Certificate of Incorporation into a greater number of shares of Common Stock, the Conversion Prices then in effect shall, concurrently with the effectiveness of such event, be decreased in proportion to the percentage increase in the outstanding number of shares of Common Stock. In the event the outstanding shares of Common Stock shall be decreased by reverse stock split, combination,

consolidation, or other similar transaction occurring after the filing of this Amended and Restated Certificate of Incorporation into a lesser number of shares of Common Stock, the Conversion Prices then in effect shall, concurrently with the effectiveness of such event, be increased in proportion to the percentage decrease in the outstanding number of shares of Common Stock.

(ii) *Adjustments for Other Distributions.* In the event the Corporation at any time or from time to time makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, any distribution payable in securities of the Corporation other than shares of Common Stock and other than as otherwise adjusted in this Section 4, 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 amount of securities 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 date of conversion, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Section 4 with respect to the rights of the holders of the Preferred Stock.

(iii) *Adjustments for Reclassification, Exchange and Substitution.* If the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification, or otherwise (other than a subdivision or combination of shares provided for above), the Conversion Prices then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted such that the Preferred Stock shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of such Preferred Stock immediately before that change.

(iv) *Adjustments on Issuance of Additional Stock.* If the Corporation shall issue "Additional Stock" (as defined below) for a consideration per share less than the Series A Conversion Price and/or Series B Conversion Price in effect on the date and immediately prior to such issue, then and in such event, the Series A Conversion Price and/or Series B Conversion Price, as applicable, shall be reduced concurrently with such issue, to a price (calculated to three decimal places) determined by multiplying such Conversion Price by a fraction (i) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Stock so issued (or deemed to be issued) would purchase at such Conversion Price; and (ii) the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Additional Stock so issued; provided that for purposes of this Section 4(d)(iv), all shares of Common Stock issuable upon conversion of the outstanding Preferred Stock, all shares of Common Stock issuable upon exercise of outstanding stock options, and all shares of Common Stock issuable upon exercise or conversion of any other



outstanding security or debt instrument of the Corporation shall be deemed to be Common Stock outstanding. For purposes of this subsection (iv) "**Additional Stock**" shall mean all Common Stock issued by the Corporation after the date on which the first share of Series B Preferred was issued (the "Series B Original Issue Date") other than Common Stock issued or issuable at any time (a) upon conversion of the Preferred Stock or other convertible securities outstanding as of the Series B Original Issue Date; (b) up to 1,685,000 shares of Common Stock to officers, directors, and employees of, and consultants to, the Corporation after the Series B Original Issue Date pursuant to stock purchase or stock option plans or other arrangements as designated and approved by the Corporation's Board of Directors; (c) as a dividend or distribution with respect to the Preferred Stock; (d) in connection with equipment leasing, real estate, bank financing or similar transactions approved by the Corporation's Board of Directors; (e) pursuant to the acquisition by the Company of another corporation or entity by consolidation, corporate reorganization, or merger, or purchase of all or substantially all of the assets of such corporation or entity as approved by the Company's Board of Directors; (f) to vendors and customers as approved by the Company's Board of Directors; (g) as described in subsections (i), (ii), and (iii) of this Section 4(d); and (h) on terms unanimously approved by the Company's Board of Directors.

For the purpose of making any adjustment in the Conversion Price as provided above, the consideration received by the Corporation for any issue or sale of Common Stock will be computed:

(1) to the extent it consists of cash, as the amount of cash received by the Corporation before deduction of any offering expenses payable by the Corporation and any underwriting or similar commissions, compensation, or concessions paid or allowed by the Corporation in connection with such issue or sale;

(2) to the extent it consists of property other than cash, at the fair market value of that property as determined in good faith by the Corporation's Board of Directors; and

(3) if Common Stock is issued or sold together with other stock or securities or other assets of the Corporation for a consideration which covers both, as the portion of the consideration so received that may be reasonably determined in good faith by the Board of Directors to be allocable to such Common Stock.

If the Corporation (1) grants any rights or options to subscribe for, purchase, or otherwise acquire shares of Common Stock, or (2) issues or sells any security convertible into shares of Common Stock, then, in each case, the price per share of Common Stock issuable on the exercise of the rights or options or the conversion of the securities will be determined by dividing the total amount, if any, received or receivable by the Corporation as consideration for the granting of the rights or options or the issue or sale of the convertible securities, plus the minimum aggregate amount of additional consideration payable to the Corporation on exercise or conversion of the securities, by the maximum number of shares of Common Stock issuable on the exercise of conversion. Such granting or issue or sale will be

considered to be an issue or sale for cash of the maximum number of shares of Common Stock issuable on exercise or conversion at the price per share determined under this subsection, and the Series A Conversion Price and/or Series B Conversion Price will be adjusted as above provided to reflect (on the basis of that determination) the issue or sale. No further adjustment of such Conversion Prices will be made as a result of the actual issuance of shares of Common Stock on the exercise of any such rights or options or the conversion of any such convertible securities.

Upon the redemption or repurchase of any such securities or the expiration or termination of the right to convert into, exchange for, or exercise with respect to, Common Stock, the Series A Conversion Price and/or Series B Conversion Price will be readjusted to such price as would have been obtained had the adjustment made upon their issuance been made upon the basis of the issuance of only the number of such securities as were actually converted into, exchanged for, or exercised with respect to, Common Stock. If the purchase price or conversion or exchange rate provided for in any such security changes at any time, then, upon such change becoming effective, the Series A Conversion Price and/or Series B Conversion Price then in effect will be readjusted forthwith to such price as would have been obtained had the adjustment made upon the issuance of such securities been made upon the basis of (1) the issuance of only the number of shares of Common Stock theretofore actually delivered upon the conversion, exchange or exercise of such securities, and the total consideration received therefor, and (2) the granting or issuance, at the time of such change, of any such securities then still outstanding for the consideration, if any, received by the Corporation therefor and to be received on the basis of such changed price or rate.

(e) **No Impairment.** Except as provided in Section 6, the Corporation will not, by amendment of its Certificate of Incorporation 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 Preferred Stock against impairment.

(f) **Certificate as to Adjustments.** Upon the occurrence of each adjustment or readjustment of the Conversion Prices pursuant to this Section 4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the applicable Conversion Price for such series of Preferred Stock 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 such series of Preferred Stock.

(g) **Notices of Record Date.** In the event that this 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 or series of its stock any additional shares of stock of any class or series or other rights;

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

(iv) 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, this Corporation shall send to the holders of the Preferred Stock:

(1) at least 20 days' prior written notice of the date on which a record shall be taken for such dividend, distribution, or subscription rights (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 (iii) and (iv) above; and

(2) in the case of the matters referred to in (iii) and (iv) above, at least 20 days' prior written notice of the date when the same shall take place (and 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 or the record date for the determination of such holders if such record date is earlier).

Each such written notice shall be delivered personally or given by first class mail, postage prepaid, or by a nationally (or internationally) recognized overnight courier service, addressed to the holders of the Preferred Stock at the address for each such holder as shown on the books of this Corporation; provided, however, that first class mail shall not be used to effectuate delivery of any such notice to addresses outside of the United States.

(h) **Issue Taxes.** The Corporation shall pay any and all issue and other taxes (other than income taxes) that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of shares of Preferred Stock pursuant hereto; provided, however, that the Corporation shall not be obligated to pay any transfer taxes resulting from any transfer requested by any holder in connection with any such conversion.

(i) **Reservation of Stock Issuable Upon Conversion.** 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; 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 Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to its Certificate of Incorporation.

(j) *Status of Converted Stock.* In case any series of Preferred Stock shall be converted pursuant to this Section 4, the shares so converted shall resume the status of authorized but unissued shares of Preferred Stock undesignated as to series.

**5. *Redemption Rights.***

The Series A Preferred and the Series B Preferred shall be nonredeemable.

**6. *Covenants.***

In addition to any other rights provided by law, and as long as at least one-third (33-1/3%) of the Preferred Stock originally issued remain outstanding, this Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of two-thirds (66-2/3%) of the outstanding shares of Preferred Stock, voting together as a single class:

(a) amend or repeal any provision of, or add any provision to, the Corporation's Certificate of Incorporation or Bylaws if such action would alter or change the preferences, rights, privileges or powers of, or the restrictions provided for the benefit of, any series of Preferred Stock;

(b) authorize or issue shares of any class or series of stock having any preference or priority as to dividends or redemption rights, liquidation preferences, conversion rights, or voting rights, superior to or on a parity with any preference or priority of any series of Preferred Stock;

(c) authorize or issue any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having option rights to purchase, any shares of stock of this Corporation having any preference or priority as to dividends or redemption rights, liquidation preferences, conversion rights, or voting rights, superior to or on a parity with any preference or priority of any series of Preferred Stock;

(d) reclassify any shares of capital stock of this Corporation into shares having any preference or priority as to dividends or redemption rights, liquidation preferences, conversion rights, or voting rights, superior to or on a parity with any preference or priority of any series of Preferred Stock;

(e) apply any of its assets to the redemption, retirement, purchase or acquisition, directly or indirectly, through subsidiaries (as defined in Section 424(f) of the Internal Revenue Code of 1986 (the "Tax Code")) or otherwise, of any shares of any class or

series of Common Stock, except from employees, advisors, officers, directors and consultants of, and persons performing services for, this Corporation or its subsidiaries on terms approved by the Board of Directors upon termination of employment or association;

(f) engage in any transaction or series of related transactions constituting a Liquidation Event;

(g) declare or pay dividends on or make any distributions with respect to the Corporation's Common Stock or other junior securities; and

(h) increase or decrease the authorized number of shares of Common Stock or Preferred Stock;

**7. Residual Rights.**

All rights accruing to the outstanding shares of the Corporation not expressly provided for to the contrary herein shall be vested in the Common Stock. The Common Stock shall not be redeemable.

**SIXTH**

The Corporation is to have perpetual existence.

**SEVENTH**

In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware:

**1. Board Authority.**

The board of directors of the Corporation is expressly authorized:

(a) To make, alter or repeal the bylaws of the Corporation.

(b) To authorize and cause to be executed mortgages and liens upon the real and personal property of the Corporation.

(c) To set apart out of any of the funds of the Corporation available for dividends a reserve or reserves for any proper purpose and to abolish any such reserve in the manner in which it was created.

(d) By a majority of the whole board (including at least one director elected by the holders of Common Stock), to designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified

member of any committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the Corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the Certificate of Incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the board of directors as provided in Section 151(a) of the General Corporation Law of the State of Delaware, fix any of the preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the Corporation or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the Corporation), adopting an agreement of merger or consolidation under Sections 251 or 252 of the General Corporation Law of the State of Delaware, recommending to the stockholders the sale, lease or exchange, of all or substantially all of the corporation's property and assets, recommending to the stockholders a dissolution of the Corporation or a revocation of a dissolution, or amending the bylaws of the Corporation; and, unless the resolution or bylaws expressly so provide, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock, or to adopt a certificate of ownership and merger pursuant to Section 253 of the General Corporation Law of the State of Delaware.

(e) When and as authorized by the stockholders in accordance with statute, to sell, lease or exchange all or substantially all of the property and assets of the Corporation, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property including shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors shall deem expedient and for the best interests of the Corporation.

## **2. Election of Directors.**

The election of directors need not be by written ballot unless the bylaws of the Corporation shall so provide.

## **3. Corporate Records.**

The books of the Corporation may be kept at such place within or without the State of Delaware as the bylaws of the Corporation may provide or as may be designated from time to time by the board of directors of the Corporation.

## EIGHTH

Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this Corporation under the provisions of Section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 279 of Title 8 of the Delaware Code, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this Corporation, as the case may be, and also on this Corporation.

## NINTH

A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived any improper personal benefit. If the Delaware General Corporation Law is amended hereafter to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Any repeal or modification of the foregoing paragraph by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

## TENTH

### 1. *Right To Indemnification.*

Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or Proceeding, whether civil, criminal, administrative or investigative ("*Proceeding*"), by reason of the fact that he or she or a person of whom he or she is the legal

representative, is or was a director or officer, employee or agent of the Corporation or is or was serving at the request of the Corporation as a director or officer, employee or agent of another corporation, or of a partnership, joint venture, trust or other enterprise, including service with respect to employee benefit plans, whether the basis of such Proceeding is alleged action in an official capacity as a director, officer, employee or agent or in any other capacity while serving as a director, officer, employee or agent, shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended, (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than said Law permitted the Corporation to provide prior to such amendment) against all expenses, liability and loss (including attorneys' fees, judgments, fines, ERISA excise taxes or penalties and amounts paid or to be paid in settlement) reasonably incurred or suffered by such person in connection therewith and such indemnification shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of his or her heirs, executors and administrators; provided, however, that the Corporation shall indemnify any such person seeking indemnity in connection with an action, suit or Proceeding (or part thereof) initiated by such person only if such action, suit or Proceeding (or part thereof) was authorized by the board of directors of the Corporation. Such right shall be a contract right and shall include the right to be paid by the Corporation expenses incurred in defending any such Proceeding in advance of its final disposition; provided, however, that the payment of such expenses incurred by a director or officer of the Corporation in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such person while a director or officer, including, without limitation, service to an employee benefit plan) in advance of the final disposition of such Proceeding, shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such director or officer, to repay all amounts so advanced if it should be determined ultimately that such director or officer is not entitled to be indemnified under this Section or otherwise.

## **2. *Right of Claimant to Bring Suit.***

If a claim under Section 1 of Article Tenth is not paid in full by the Corporation within 90 days after a written claim has been received by the Corporation, the claimant may at any time thereafter bring suit against the Corporation to recover the unpaid amount of the claim and, if successful in whole or in part, the claimant shall be entitled to be paid also the expense of prosecuting such claim. It shall be a defense to any such action (other than an action brought to enforce a claim for expenses incurred in defending any Proceeding in advance of its final disposition where the required undertaking, if any, has been tendered to this Corporation) that the claimant has not met the standards of conduct which make it permissible under the Delaware General Corporation Law for the Corporation to indemnify the claimant for the amount claimed, but the burden of proving such defense shall be on the Corporation. Neither the failure of the Corporation (including its Board of Directors, independent legal counsel, or its stockholders) to have made a determination prior to the commencement of such action that indemnification of the claimant is proper in the circumstances because he or she has met the applicable standard of conduct set forth in the Delaware General Corporation Law, nor an actual determination by the Corporation (including its Board of Directors, independent legal counsel, or its stockholders) that



the claimant has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that claimant has not met the applicable standard of conduct.

**3.     *Non-Exclusivity of Rights.***

The rights conferred on any person by Sections 1 and 2 of Article Tenth shall not be exclusive of any other right which such persons may have or hereafter acquire under any statute, provision of the Certificate of Incorporation, bylaw, agreement, vote of stockholders or disinterested directors or otherwise.

**4.     *Insurance.***

The Corporation may maintain insurance, at its expense, to protect itself and any such director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust or other enterprise against any such expense, liability or loss, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law.

**ELEVENTH**

The Corporation reserves the right to amend or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon a stockholder herein are granted subject to this reservation.