

PATENT ASSIGNMENT

Electronic Version v1.1
 Stylesheet Version v1.1

SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	MERGER
EFFECTIVE DATE:	02/17/2000

CONVEYING PARTY DATA

Name	Execution Date
Micro Web Servers, Inc.	02/17/2000

RECEIVING PARTY DATA

Name:	NetBotz, Inc.
Street Address:	2800 Industrial Terrace
City:	Austin
State/Country:	TEXAS
Postal Code:	78758

PROPERTY NUMBERS Total: 1

Property Type	Number
Application Number:	10775898

CORRESPONDENCE DATA

Fax Number: (617)395-7070
Correspondence will be sent via US Mail when the fax attempt is unsuccessful.
 Phone: 617-395-7058
 Email: tjmpatents@lalaw.com
 Correspondent Name: Thomas J. McGinnis
 Address Line 1: One Main Street
 Address Line 2: Lando & Anastasi, LLP
 Address Line 4: Cambridge, MASSACHUSETTS 02142

ATTORNEY DOCKET NUMBER:	A2000-720120
NAME OF SUBMITTER:	Thomas J. McGinnis

Total Attachments: 20
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CERTIFICATE OF MERGER

OF

MICRO WEB SERVERS, INC.
(a Texas Corporation)

WITH AND INTO

NETBOTZ, INC.
(a Delaware Corporation)

NetBotz, Inc. ("NetBotz"), organized and existing under and by virtue of the General Corporation Law of the State of Delaware and Micro Web Servers, Inc. ("MWS"), organized and existing under and by virtue of the Business Corporation Act of the State of Texas,

EACH DO HEREBY CERTIFY:

FIRST: That the name and state of incorporation of each of the constituent corporations of the merger is as follows:

<u>Name</u>	<u>State of Incorporation</u>
NetBotz, Inc.	Delaware
Micro Web Servers, Inc.	Texas

SECOND: That an Agreement and Plan of Merger dated as of February 17, 2000 ("Agreement and Plan of Merger") by and between MWS and NetBotz has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with the requirements of Section 252 of the General Corporation Law of the State of Delaware and Articles 5.01-5.06 of the Business Corporation Act of the State of Texas.

THIRD: That the name of the surviving corporation of the merger is NetBotz, Inc.

FOURTH: That the Certificate of Incorporation of NetBotz shall be the Certificate of Incorporation of the surviving corporation.


FIFTH: That the executed Agreement and Plan of Merger is on file at the principal place of business of the surviving corporation. The address of the principal place of business of the surviving corporation is 2800 Industrial Terrace, Austin, Texas 78758.

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

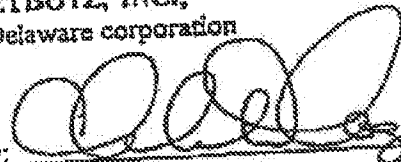
SEVENTH: That the surviving corporation will be responsible for payment of all taxes and franchise taxes required by law.

IN WITNESS WHEREOF, Micro Web Servers, Inc. and NetBotz, Inc. have caused this Certificate to be duly signed by its authorized officers, this 2nd day of February, 2000.

MICRO WEB SERVERS, INC.,
a Texas corporation

By: 
Gerard L. Cullen
President

NETBOTZ, INC.,
a Delaware corporation

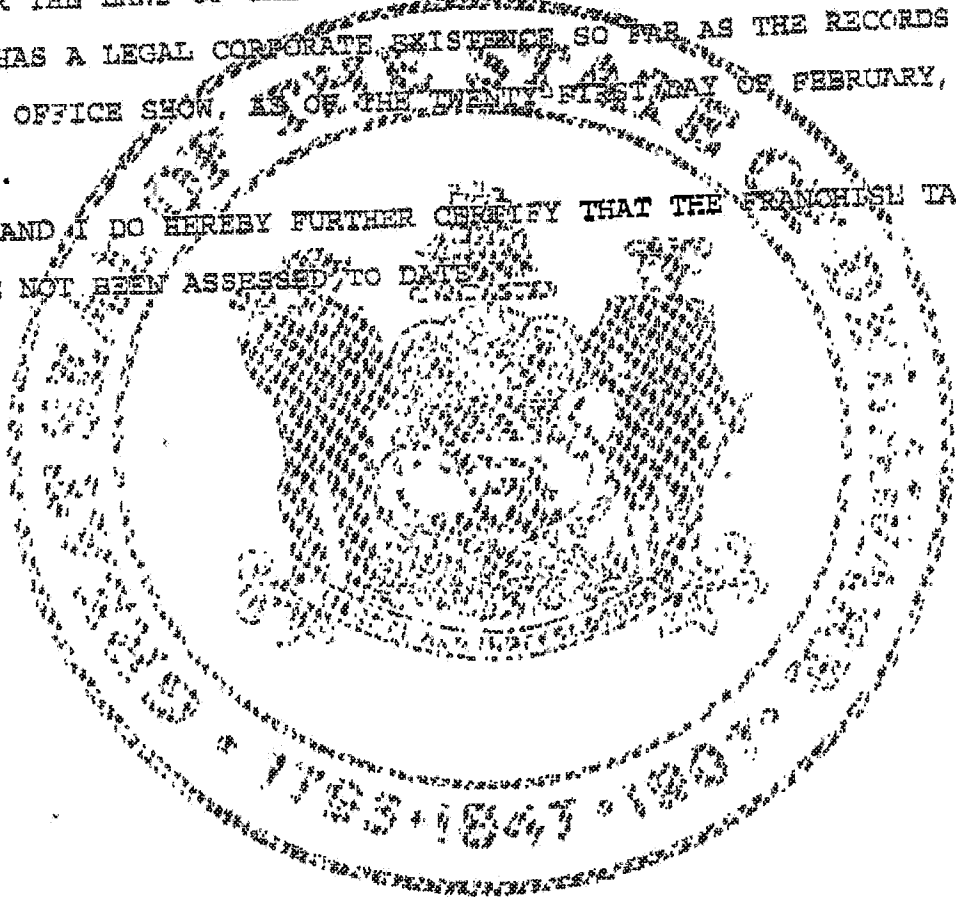
By: 
C. Donald Cooper
Chief Executive Officer

State of Delaware
Office of the Secretary of State

PAGE 1

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "NEIBOTZ, INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY FIRST DAY OF FEBRUARY, A.D. 2000.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.



Edward J. Freel

Edward J. Freel, Secretary of State

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001085053

AUTHENTICATION: 0268541
DATE: 02-21-00

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REEL: 026845 FRAME: 0680

State of Delaware
Office of the Secretary of State

PAGE 1

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "NETBOTZ, INC.", FILED IN THIS OFFICE ON THE TWENTY-FOURTH DAY OF FEBRUARY, A.D. 2000, AT 9 O'CLOCK A.M.

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



3171481 8100

001092649


Edward J. Freel, Secretary of State

AUTHENTICATION: 0277720

DATE: 02-24-00

PATENT

REEL: 026845 FRAME: 0681

NetBotz, Inc.

RESTATED CERTIFICATE OF INCORPORATION

NetBotz, Inc., a corporation organized and existing under the laws of the State of Delaware, hereby certifies as follows:

- A. The name of the corporation is NetBotz, Inc. The original Certificate of Incorporation of the corporation was filed with the Delaware Secretary of State on February 17, 2000.
- B. This Restated Certificate of Incorporation was duly adopted by written consent of the stockholders in accordance with the applicable provisions of Sections 228, 242 and 245 of the Delaware General Corporation Law (the "DGCL").
- C. This Restated Certificate of Incorporation restates, integrates and amends the provisions of the Certificate of Incorporation of this corporation.
- D. The text of the Certificate of Incorporation is hereby amended and restated in its entirety to read as follows:

ARTICLE I

The name of this corporation is NetBotz, Inc.

ARTICLE II

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

ARTICLE III

The corporation is to have perpetual existence.

ARTICLE IV

The address of the corporation's registered office in the State of Delaware is 1013 Centre Road, City of Wilmington, Delaware 19805, in the County of New Castle. The name of its registered agent at such office is Corporation Service Company.

ARTICLE V

This corporation is authorized to issue two classes of stock to be designated "Common Stock" and "Preferred Stock." The total number of shares which this corporation is authorized to issue is 30,000,000 shares, of which 20,000,000 shares shall be Common Stock with a par value of \$0.001 per

share and 10,000,000 shares shall be Preferred Stock with a par value of \$0.001 per share, 210,000 shares of which shall be designated Series A Preferred Stock and 1,600,000 shares of which shall be designated Series B Preferred Stock.

The Board of Directors of this corporation is hereby authorized within the limitations and restrictions stated in this Certificate of Incorporation, to determine or alter the rights, preferences, privileges and restrictions granted to or imposed upon any wholly unissued series of Preferred Stock, other than the Series A Preferred Stock and Series B Preferred Stock, the number of shares constituting any such series and the designation thereof, or any of them.

The relative rights, preferences, privileges, limitations and restrictions granted to or imposed on the respective classes of the shares of capital stock or the holders thereof are as follows:

5.1 Dividends.

(a) The holders of the Series A Preferred Stock and Series B Preferred Stock shall be entitled to receive dividends, on a pari passu basis, out of funds legally available therefor, at all times prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of this corporation) on the Common Stock of this corporation, at the rate of (i) in the case of the Series A Preferred Stock, \$0.08 per share (as adjusted for stock splits, stock dividends or similar events with respect to such shares) per annum, and (ii) in the case of the Series B Preferred Stock, \$0.36 per share (as adjusted for stock splits, stock dividends or similar events with respect to such shares) per annum. Such dividends shall be payable when, as and if declared by the board of directors of the corporation, and shall not be cumulative; provided, however, with respect to any shares of Series B Preferred Stock that have not been converted to Common Stock pursuant to subsection (a) or (b) of Section 5.4 by the fourth anniversary of the date on which the corporation issued its first share of Series B Preferred Stock (the "Series B Original Issue Date"), dividends upon such shares of Series B Preferred Stock shall begin to accumulate from that date. Upon conversion of any series of any shares of any series of Preferred Stock pursuant to subsection (a) or (b) or Section 5.4, all declared or accumulated and unpaid dividends shall be payable in cash or Common Stock at the then fair market value, as determined in good faith by a majority of the Board of Directors. No dividends shall be paid on any shares of Common Stock or any shares of any series of Preferred Stock unless a dividend (including the amount of any dividend paid pursuant to the above provision) is paid with respect to all outstanding shares of each series of Preferred Stock in an amount for each such share of Preferred Stock equal to or greater than the aggregate amount of such dividends for all shares of Common Stock into which each such share of Preferred Stock could then be converted.

(b) Consent to Repurchases. Solely for the purpose of this Section 5.1, each holder of shares of Series A Preferred Stock or Series B Preferred Stock shall be deemed to have consented to any repurchases by the corporation of shares of Common Stock issued to or held by employees, directors or consultants pursuant to agreements providing for such repurchase.

5.2 Liquidation Preference. In the event of any liquidation, dissolution or winding up of the corporation, either voluntary or involuntary, distributions to the stockholders of the corporation shall be made in the following manner:

(a) Preferred Stock Preference. The holders of the Series A Preferred Stock and Series B Preferred Stock shall be entitled to receive, on a pari passu basis, prior and in preference to any distribution of any of the assets or surplus funds of the corporation to the holders of Common Stock of the corporation, an amount equal to (i) in the case of the Series A Preferred Stock, \$1.00 per share (as adjusted for stock splits, stock dividends or similar events with respect to such shares) (the "Series A Original Issue Price"), plus an additional amount equal to any dividends declared but unpaid on each such share (the "Series A Liquidation Amount"), and (ii) in the case of the Series B Preferred Stock, \$3.59 per share (as adjusted for stock splits, stock dividends or similar events with respect to such shares) (the "Series B Original Issue Price"), plus an additional amount equal to any dividends declared or accumulated but unpaid on each such share (the "Series B Liquidation Amount"). If, upon such liquidation, dissolution or winding up of the corporation, the assets and funds distributed are insufficient to permit the payment to each holder of Series A Preferred Stock and Series B Preferred Stock the full aforesaid Liquidation Amounts, the entire assets and funds legally available for distribution shall be distributed ratably to such holders in proportion to the preferential amount each such holder is otherwise entitled to receive. The Series A Original Issue Price and the Series B Original Issue Price are collectively referred herein as the "Original Issue Price".

(b) Remaining Assets. Upon the completion of the distribution required by subsection (a) of this Section 5.2, the remaining assets of this corporation available for distribution to stockholders shall be distributed to the holders of Series A Preferred Stock, Series B Preferred Stock and Common Stock pro rata based on the number of shares of Common Stock held by each such holder (assuming full conversion of the Series A and Series B Preferred Stock) until, (i) with respect to the holders of Series A Preferred Stock, such holders shall have received an aggregate of \$5.00 per share (including amounts paid pursuant to subsection (a) of this Section 5.2) and (ii) with respect to the holders of Series B Preferred Stock, such holders have received an aggregate of \$10.77 per share (including amounts paid pursuant to subsection (a) of this Section 5.2); thereafter, if assets remain in this corporation, the holders of Common Stock shall receive all of such remaining assets pro rata based on the number of shares of Common Stock held by each such holder.

(c) Reorganization or Merger. Unless otherwise agreed by the holders of at least sixty percent (60%) of the then outstanding Series A and Series B Preferred Stock, voting together as a single class, for the purposes of this Section 5.2, a liquidation, dissolution or winding up of the corporation shall be deemed to include (X) the acquisition of the corporation by another entity by means of any transaction or series of related transactions (including, without limitation, any reorganization, merger or consolidation) that results in the transfer of fifty percent (50%) or more of the corporation's outstanding voting power or (Y) a sale of all or substantially all of the assets of the corporation. Any securities to be delivered to the holders of the Preferred Stock and Common Stock upon a merger, reorganization or sale of all or substantially all of the assets of the corporation shall be valued as follows:

(i) For securities not subject to investment letter or other similar restrictions on free marketability:

(1) if traded on a securities exchange or The Nasdaq Stock Market, the value shall be deemed to be the average of the closing prices of the securities on such exchange or market over the 30-day period ending three (3) days prior to the closing of such transaction;

(2) if actively traded over-the-counter, the value shall be deemed to be the average of the closing bid prices over the 30-day period ending three (3) days prior to the closing of such transaction; and

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

(ii) The method of valuation of securities subject to investment letter or other restrictions on free marketability shall take into account an appropriate discount (as determined in good faith by the Board of Directors of this corporation) from the market value determined as pursuant to clauses (1), (2) or (3) above so as to reflect the approximate fair market value thereof.

(d) In the event the requirements of this Section 5.2 are not complied with, the corporation shall forthwith either:

(i) cause such closing to be postponed until such time as the requirements of this Section 5.2 have been complied with, or

(ii) cancel such transaction, in which event the rights, preferences, privileges and restrictions of the holders of the Preferred Stock shall revert to and be the same as such rights, preferences, privileges and restrictions existing immediately prior to the date of the first notice referred to in subsection (c) below.

(e) The corporation shall give each holder of record of Preferred Stock written notice of the transaction described in subsection (c) above not later than twenty (20) days prior to the stockholders' meeting called to approve such transaction, or twenty (20) days prior to the closing of such transaction, whichever is earlier, and shall also notify such holders in writing of the final approval of such transaction. The first of such notices shall describe the material terms and conditions of the impending transaction and the provisions of subsection (c), and the corporation shall thereafter give such holders prompt notice of any material changes. The transaction shall in no event take place sooner than ten (10) days after the corporation has given notice of any material changes provided for herein; provided, however, that such periods may be shortened upon the written consent of the holders of at least two-thirds of the shares of Preferred Stock then outstanding.

5.3 Voting.

(a) General. Each 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, and, except as otherwise required by law, shall have voting rights and powers equal to the voting rights and powers of the Common Stock. Each holder of each share of Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the corporation's Bylaws and shall vote with holders of the Common Stock upon the election of directors (except as set forth in subsection (b) below) and upon any other matter submitted to a vote of stockholders (except those matters required by law to be submitted to a class vote and as set forth in Section 5.6). 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). Each holder of each share of Common Stock shall be entitled to one vote.

(b) Election of Directors.

(i) The holders of Common Stock, voting as a single class, shall be entitled to elect two (2) members of the corporation's board of directors at each meeting or pursuant to each consent of the corporation's stockholders for the election of directors. The holders of Series B Preferred Stock, voting as a single class, shall be entitled to elect three (3) members of the corporation's board of directors at each meeting or pursuant to each consent of the corporation's stockholders for the election of directors. The holders of Common Stock, Series A Preferred Stock and Series B Preferred Stock, voting together as a single class, shall be entitled to elect the remaining members of the corporation's board of directors at each meeting or pursuant to each consent of the corporation's stockholders for the election of directors.

(ii) Vacancies in the board of directors may be filled by a majority of the remaining directors originally elected by the same series, class or classes of shares that elected the member who created the vacancy (or the remaining director so elected if there is but one, or if there is no such director remaining, by the affirmative vote of the holders of a majority of the shares of that class or classes). The stockholders entitled to vote upon the election of directors may elect a director or directors at any time to fill any vacancy or vacancies not filled by the directors.

(iii) Any director who was elected by a specified class or classes of stock or series thereof may be removed during his or her term of office, either for or without cause, by, and only by, the affirmative vote of a majority of the holders of the shares of the class or classes of stock or series thereof that initially elected such director. Such vote may be given at a special meeting of such stockholders duly called or by an action by written consent for that purpose.

5.4 Conversion. The holders of the Preferred Stock have conversion rights as follows:

(a) Right to Convert. Each share of each series 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 the Preferred Stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Original Issue Price for such series of Preferred Stock by the Conversion Price for such series of Preferred Stock, determined as hereinafter provided, in effect at the time of the conversion (the "Conversion Rate"). The initial "Conversion Price" per share for the Series A Preferred Stock and Series B Preferred Stock shall be the Series A Original Issue Price and the Series B Original Issue Price, respectively. Such initial Conversion Price of each series of Preferred Stock shall be subject to adjustment as provided in subsection (c) of this Section 5.4.

(b) Automatic Conversion. Each share of Preferred Stock shall automatically be converted into shares of Common Stock at its then effective Conversion Rate (i) immediately prior to the closing of a firm commitment underwritten public offering pursuant to an effective registration

statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the corporation to the public in which the public offering price is at least (prior to underwriter's discounts or commissions and offering expenses) \$5.00 per share (subject to adjustment for stock splits, stock dividends, recapitalizations and similar events) and the aggregate gross proceeds raised is equal to or exceeds \$10,000,000 or (ii) on the date the holders of at least sixty percent (60%) of the then outstanding shares of Series A Preferred Stock and Series B Preferred Stock, taken together as a single class, so elect to convert.

(c) Mechanics of Conversion. Before any holder of Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of this corporation or of any transfer agent for the Preferred Stock, and shall give written notice to this corporation at its principal corporate office, of the election to convert the same and shall state therein the name or names in which the certificate or certificates for shares of Common Stock are to be issued; provided, however, that in the event of an automatic conversion in connection with an underwritten public offering as described in subsection (b) above, the outstanding shares of Preferred Stock 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 Preferred Stock 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. This corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Preferred Stock, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock as of such date. If the conversion is in connection with an underwritten public offering as described in subsection (b) above, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock upon conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

(d) Fractional Shares. In lieu of any fractional shares to which the holder of Preferred Stock would otherwise be entitled, the corporation shall pay cash equal to such fraction multiplied by the then effective Conversion Price. Whether or not fractional shares are issuable upon such conversion shall be determined on the basis of the total number of shares of Preferred Stock of each holder at the time converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion.

(e) Adjustment of Conversion Price. The Conversion Price of the Preferred Stock shall be subject to adjustment from time to time as follows:

(i) If the corporation shall issue (or, pursuant to subsection (e)(ii)(3) below, shall be deemed to have issued) any Common Stock other than "Excluded Stock" (as defined below in subsection (e)(iii)) for a consideration per share less than the Conversion Price for any series of Preferred Stock in effect immediately prior to the issuance of such Common Stock (excluding stock dividends, subdivisions, split-ups, combinations, dividends or recapitalizations, which are covered by subsections (e)(iv), (v) and (vii) below), the Conversion Price for such series in effect immediately after each such issuance shall forthwith (except as otherwise provided in this subsection (e)) be adjusted to a price equal to the product obtained by multiplying the Conversion Price for such series of Preferred Stock in effect immediately prior to such issuance of Common Stock by a fraction, the numerator of which is equal to the sum of (i) the total number of shares of Common Stock outstanding (including any shares of Common Stock deemed to be issued pursuant to subsection (e)(ii)(3) below) immediately prior to such issuance of Common Stock plus (ii) the number of shares of Common Stock that the aggregate consideration received by this corporation for such issuance of Common Stock would purchase at the Conversion Price for such series of Preferred Stock in effect immediately prior to such issuance of Common Stock, and the denominator of which is equal to the sum of (i) the total number of shares of Common Stock outstanding (including any shares of Common Stock deemed to be issued pursuant to subsection (e)(ii)(3) below) immediately prior to such issuance of Common Stock plus (ii) the number of shares of Common Stock issued.

(ii) For the purposes of any adjustment of the Conversion Price of the Preferred Stock pursuant to this subsection (e), the following provisions shall be applicable:

(1) In the case of the issuance of Common Stock for cash, the consideration shall be deemed to be the amount of cash paid therefor after deducting any discounts or commissions paid or incurred by the corporation in connection with the issuance and sale thereof.

(2) In the case of the issuance of Common Stock for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as reasonably determined in good faith by the Board of Directors.

(3) In the case of the issuance of (i) options to purchase or rights to subscribe for Common Stock, (ii) securities, by their terms, convertible into or exchangeable for Common Stock or (iii) options to purchase or rights to subscribe for securities, by their terms, convertible into or exchangeable for Common Stock:

(a) the aggregate maximum number of shares of Common Stock deliverable upon exercise (assuming the satisfaction of any conditions to exercisability, including without limitation, the passage of time) of such options to purchase or rights to subscribe for Common Stock shall be deemed to have been issued at the time such options or rights were issued and for a consideration equal to the consideration (determined in the manner provided in clauses (1) and (2) of subdivision (ii) above), if any, received by the corporation upon the issuance of such options or rights plus the minimum purchase price provided in such options or rights for the Common Stock covered thereby;

(b) the aggregate maximum number of shares of Common Stock deliverable upon conversion of or in exchange (assuming the satisfaction of any conditions to

convertibility or exchangeability, including, without limitation, the passage of time) for any such convertible or exchangeable securities, or upon the exercise of options to purchase or rights to subscribe for such convertible or exchangeable securities and subsequent conversion or exchange thereof, shall be deemed to have been issued at the time such securities were issued or such options or rights were issued and for a consideration equal to the consideration received by the corporation for any such securities and related options or rights (excluding any cash received on account of accrued interest or accrued dividends), plus the additional minimum consideration, if any, to be received by the corporation upon the conversion or exchange of such securities or the exercise of any related options or rights (the consideration in each case to be determined in the manner provided in clauses (1) and (2) of subdivision (ii) above);

(c) on any change in the number of shares of Common Stock deliverable upon exercise of any such options or rights or conversion of or exchange for such convertible or exchangeable securities, or on any change in the minimum purchase price of such options, rights or securities, including, but not limited to, a change resulting from the antidilution provisions of such options, rights or securities, the Conversion Price of any series of Preferred Stock that was in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Common Stock or any payment of such consideration upon the exercise of any such options or rights or the conversion or exchange of such securities; and

(d) on the expiration of any such options or rights, the termination of any such rights to convert or exchange or the expiration of any options or rights related to such convertible or exchangeable securities, the Conversion Price of any series of Preferred Stock that was in any way affected by or computed using such options, rights or securities related to such options or rights shall forthwith be readjusted to such Conversion Price as would have been obtained had the adjustment made upon the issuance of such options, rights, convertible or exchangeable securities or options or rights relate to such convertible or exchangeable securities, as the case may be, been made upon the basis of the issuance of only the number of shares of Common Stock (and convertible or exchangeable securities that remain in effect) actually issued upon the exercise of such options or rights, upon the conversion or exchange of such convertible or exchangeable securities or upon the exercise of the options or rights related to such convertible or exchangeable securities, as the case may be.

(ii) "Excluded Stock" shall mean:

(1) all shares of Series A and Series B Preferred Stock and the Common Stock into which the shares of Series A and Series B Preferred Stock are convertible;

(2) all shares of Common Stock or other securities issued as a dividend or distribution on the Series A and Series B Preferred Stock;

(3) all shares of Common Stock, warrants or options to purchase Common Stock or other securities issued, to the corporation's employees, officers, directors, scientific advisors, consultants and services providers pursuant to any plan or arrangement approved by the Board of Directors (including at least two directors elected by Series B Preferred Stock);

(4) all shares of Common Stock, warrants or options to purchase Common Stock or other securities issued to commercial banks or equipment lessors upon approval of the Board of Directors (including at least two directors elected by Series B Preferred Stock);

(5) all shares of Common Stock issued pursuant to a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended; or

(6) the issuance of shares of Common Stock in connection with business combinations or corporate partnering agreements approved by the Board of Directors (including at least two directors elected by Series B Preferred Stock).

(iv) If the number of shares of Common Stock outstanding at any time after the date hereof is increased by a stock dividend payable in shares of Common Stock or by a subdivision or split-up of shares of Common Stock, then, on the date such payment is made or such change is effective, the Conversion Price of Preferred Stock shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of any shares of Preferred Stock shall be increased in proportion to such increase of outstanding shares.

(v) If the number of shares of Common Stock outstanding at any time after the date hereof is decreased by a combination of the outstanding shares of Common Stock, then, on the effective date of such combination, the Conversion Price of Preferred Stock shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of any shares of Preferred Stock shall be decreased in proportion to such decrease in outstanding shares.

(vi) In the event the corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by this corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in subsection (e)(iv), then, in each such case for the purpose of this subsection (e)(vi), the holders of Preferred Stock shall be entitled to a proportionate share of any such distribution as though they were the holders of the number of shares of Common Stock of the corporation into which their respective shares of Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the corporation entitled to receive such distribution.

(vii) In case, at any time after the date hereof, of any capital reorganization, or any reclassification of the stock of the corporation (other than as a result of a stock dividend or subdivision, split-up or combination of shares), or the consolidation or merger of the corporation with or into another person (other than a consolidation or merger in which the corporation is the continuing entity and which does not result in any change in the Common Stock or a consolidation or merger where Section 5.2 applies), the shares of Preferred Stock shall, after such reorganization, reclassification, consolidation, merger, sale or other disposition, be convertible into the kind and number of shares of stock or other securities or property of the corporation or otherwise to which such holder would have been entitled if immediately prior to such reorganization, reclassification, consolidation, merger, sale or other disposition such holder had converted its shares of Preferred Stock into Common Stock. The provisions of this clause (vii) shall similarly apply to successive reorganizations, reclassifications, consolidations, mergers, sales or other dispositions.

(viii) All calculations under Section 5.4(e) shall be made to the nearest cent or to the nearest one hundredth (1/100) of a share, as the case may be.

(f) Minimal Adjustments. No adjustment in the Conversion Price for any series of Preferred Stock need be made if such adjustment would result in a change in the Conversion Price of less than \$0.01. Any adjustment of less than \$0.01 which is not made shall be carried forward and shall be made at the time of and together with any subsequent adjustment which, on a cumulative basis, amounts to an adjustment of \$0.01 or more in the Conversion Price.

(g) No Impairment. The corporation will not through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 5.4 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 Preferred Stock set forth in Section 5.4(e) against impairment. This provision shall not restrict the corporation's right to amend its Certificate of Incorporation with the requisite stockholder consent.

(h) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Conversion Rate for any series of Preferred Stock pursuant to Section 5.4(c), the corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of such series 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 written request at any time of any holder of any series of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) all such adjustments and readjustments, (ii) the Conversion Rate 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 holder's shares of Preferred Stock.

(i) Notices of Record Date and Proposed Liquidation Distribution. In the event of any taking by the corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property or to receive any other right, the corporation shall mail to each holder of Preferred Stock at least twenty (20) days prior to such record date, a notice specifying the date on which any such record is to be taken for the purpose of such dividend or distribution or right, and the amount and character of such dividend, distribution or right. In the event of a liquidation distribution pursuant to Section 5.1 hereof, the corporation shall mail to each holder of Preferred Stock not later than twenty (20) days prior to the stockholders' meeting called to approve such transaction or twenty (20) days prior to the closing of such transaction, whichever is earlier, a notice (i) certifying as to (x) the anticipated aggregate proceeds available for distribution to holders of Preferred Stock and Common Stock, (y) the amount expected to be distributed pursuant to Section 5.2 in respect of each share of each outstanding series of Preferred Stock and each share of Common Stock and (z) the amount expected to be distributed pursuant to Section 5.2 in respect of each share of each outstanding series of Preferred Stock if the holder of each such share of Preferred Stock converted such share of Preferred Stock into

Common Stock immediately prior to the liquidation distribution and (ii) stating that in connection with such liquidation distribution the holders of shares of each series of Preferred Stock may prior to such liquidation distribution convert their shares of such series of Preferred Stock into Common Stock at the applicable Conversion Rate for such series.

(j) Notices. Any notice required by the provisions of Sections 5.2 and 5.4 to be given to the holders of shares of the Preferred Stock shall be deemed given upon personal delivery, upon delivery by nationally recognized courier or three business days after deposit in the United States mail, postage prepaid, and addressed to each holder of record at such holder's address appearing on the corporation's books.

(k) 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 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.

(l) Reissuance of Converted Shares. No shares of Preferred Stock which have been converted into Common Stock after the original issuance thereof shall ever again be reissued and all such shares so converted shall upon such conversion cease to be a part of the authorized shares of the corporation.

5.5 Redemption.

(a) Redemption on Demand. In the event that holders of at least sixty percent (60%) of the then outstanding Series A Preferred Stock and Series B Preferred Stock, taken together as a single class, so request in writing, at any time on or after the seventh anniversary of the Series B Original Issue Date, this corporation shall, on the date sixty (60) days after such request is given (the "Redemption Date"), to the extent it may lawfully do so, redeem up to 50% of the number shares of the Series A Preferred Stock and Series B Preferred Stock then held by such holders, or if such demand is made at any time on or after the eighth anniversary of the Series B Original Issue Date, up to 100% of the shares of the Series A Preferred Stock and Series B Preferred Stock then held by such holders by the paying the Redemption Price (as defined below) thereof. Notwithstanding the foregoing, any holder of Series A Preferred Stock or Series B Preferred Stock who did not vote and request in writing that his shares be redeemed may elect not to participate in any redemption without prejudice to such holder's redemption rights under this Section 5.5.

(b) Redemption Price. The price per share to be paid to redeem the Series A Preferred Stock shall be an amount equal to the Series A Liquidation Amount and the price per share to be paid to redeem the Series B Preferred Stock shall be an amount equal to the greater of (i) the Series B Liquidation Amount or (ii) the fair market value per share as determined by agreement between the holders of sixty percent (60%) of the then outstanding shares of Series B Preferred Stock and the

corporation or, if such holders and the corporation cannot agree on the fair market value, by an independent appraiser mutually acceptable to the holders of a sixty percent (60%) of the then outstanding shares of Series B Preferred Stock and this corporation; provided, however, that if such holders and this corporation are unable to agree on a single appraiser, the holders of a sixty percent (60%) of the then outstanding shares of Series B Preferred Stock, on the one hand, and this corporation, on the other hand, shall each select a single independent appraiser reasonably qualified to conduct business valuations of such nature, and such appraisers shall agree on the Redemption Price or shall select a third appraiser who shall determine the Redemption Price.

(c) Partial Redemption. In the event of any redemption of only a part of the then outstanding Series A and Series B Preferred Stock, the corporation shall effect such redemption pro rata among the holders of Series A and Series B Preferred Stock according to the aggregate number of outstanding shares of Series A and Series B Preferred Stock held by each holder.

(d) Redemption Procedure. At least 30 days prior to the Redemption Date, written notice (the "Redemption Notice") shall be mailed, postage prepaid, to each holder of record (at the close of business on the business day next preceding the day on which notice is given) of the Series A and Series B Preferred Stock, at the address last shown on the records of the corporation for such holder or given by the holder to the corporation for the purpose of notice or if no such address appears or is given, at the place where the principal executive office of the corporation is located, notifying such holder of the redemption to be effected, specifying the number of shares to be redeemed, the Redemption Price, the place at which payment may be obtained and calling upon such holder to surrender to the corporation, in the manner and at the place designated, its certificate or certificates representing the shares to be redeemed. Except as provided in subsection (e) below, on or after the Redemption Date, each holder of Series A or Series B Preferred Stock to be redeemed shall surrender to the corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon, subject to the provisions of subsection (e) above, the aggregate Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be cancelled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

(e) Effect of Redemption. From and after the Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of such shares as holders of Series A and Series B Preferred Stock (except the right to receive their respective Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the corporation or be deemed to be outstanding for any purpose whatsoever. If the funds of the corporation legally available for redemption on any Redemption Date are insufficient to redeem the total number of shares requested to be redeemed on such date, those funds which are legally available will be used to redeem the maximum possible number of such shares pro rata as described in subsection (c) above. The shares not redeemed shall remain outstanding and be entitled to all the rights and preferences provided herein. At any time thereafter when additional funds of the corporation are legally available for the redemption of shares not redeemed, such funds will immediately be set aside for the redemption of the balance of the shares which the corporation has become obligated to redeem on any Redemption Date but which it has not

redeemed; provided that the holders of such Series A and Series B Preferred Stock shall receive at least 10 days notice of such redemption.

(f) Redemption Funding. On or prior to the Redemption Date, the corporation shall deposit the Redemption Price of all shares of Preferred Stock designated for redemption, with a bank or trust company having aggregate capital and surplus in excess of \$100,000,000 as a trust fund for the benefit of the respective holders of the shares designated for redemption and not yet redeemed. Simultaneously, the corporation shall deposit irrevocable instructions and authority to such bank or trust company to pay, on and after the date fixed for redemption or prior thereto, the Redemption Price of the Series A and Series B Preferred Stock to the holders thereof, respectively, upon surrender of their certificates. Any money or notes deposited by the corporation pursuant to this subsection (f) for the redemption of shares which are thereafter converted into shares of Common Stock no later than the close of business on the last business day prior to the Redemption Date shall be returned to the corporation forthwith upon such conversion. The balance of any money or notes deposited by the corporation pursuant to this subsection (f) remaining unclaimed at the expiration of six months following the Redemption Date shall thereafter be returned to the corporation, provided that the stockholder to which such money would be payable hereunder shall be entitled, upon proof of its ownership of the Series A and Series B Preferred Stock and payment of any bond requested by the corporation, to receive such monies but without interest from the Redemption Date.

5.6 Preferred Stock Protective Provisions.

(a) Series A Protective Provision. So long as at least 100,000 shares of Series A Preferred Stock are outstanding, the corporation shall not, without first obtaining the affirmative vote or written consent of the holders of at least fifty percent (50%) of the then outstanding Series A Preferred Stock take any action that would alter or change the rights, preferences or privileges of the Series A Preferred Stock materially or adversely.

(b) Series B Protective Provision. So long as at least 500,000 shares of Series B Preferred Stock are outstanding, the corporation shall not, without first obtaining the affirmative vote or written consent of the holders of at least sixty percent (60%) of the then outstanding Series B Preferred Stock take any action that would alter or change the rights, preferences or privileges of the Series B Preferred Stock materially or adversely.

(c) General. So long as at least 500,000 shares of Series B Preferred Stock are outstanding, the corporation shall not, without first obtaining the affirmative vote or written consent of the holders of at least sixty percent (60%) of the then outstanding Series A and Series B Preferred Stock, voting together as a single class:

(i) authorize any other equity security, including any other security convertible into or exercisable for any equity security, having a preference over, or on parity with, the Series A Preferred Stock or Series B Preferred Stock with respect to voting, dividends or upon liquidation;

(ii) sell, convey, or otherwise dispose of or encumber all or substantially all of its property or business or merge into or consolidate with any other corporation (other than a wholly

owned subsidiary corporation) or effect any transaction or series of related transactions in which more than fifty percent (50%) of the voting power of this corporation is disposed of,

(iii) declare or pay any dividends on the Common Stock, or repurchase any Preferred Stock or Common Stock (other than the redemption rights provided by Section 5.5 or the exercise of repurchase rights pursuant to any right of first refusal or restricted stock grant approved by a majority of the Board of Directors);

(iv) unless unanimously approved by the Board of Directors, make any loans or advances to, employees or consultants of this corporation, except (i) in the ordinary course of business as part of travel advances or other remuneration for services and (ii) pursuant to secured promissory notes for the purchase of stock;

(v) unless unanimously approved by the Board of Directors, make any guarantees, except in the ordinary course of business;

(vi) mortgage, pledge or create any security interest in, or permit any subsidiary corporation to mortgage, pledge or create any security interest in, all or substantially all of the real or personal property of this corporation or any subsidiary corporation, unless unanimously approved by the Board of Directors;

(vii) own or permit any subsidiary corporation to own any securities of any subsidiary corporation or other corporation, partnership or other entity unless it is wholly-owned by this corporation unless unanimously approved by the Board of Directors;

(viii) repurchase any shares of this corporation's capital stock from a stockholder of this corporation if the corporation and the holders of at least sixty percent (60%) of the then outstanding Series A and Series B Preferred Stock, taken together as a single class, reasonably determine that such repurchase would cause either the Series A Preferred Stock or Series B Preferred Stock to fail to qualify as "qualified small business stock" under Section 1202 of the Internal Revenue Code of 1986, as amended;

(ix) increase the size of the Board of Directors to more than seven (7) members, unless unanimously approved by the Board of Directors; or

(x) amend the corporation's Certificate of Incorporation.

The provisions of this Section 5.6 shall not be in limitation of any rights which any holder of Preferred Stock may have under the DGCL.

ARTICLE VI

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter, amend or repeal the Bylaws of the corporation.

ARTICLE VII

The number of directors which constitutes the whole Board of Directors of the corporation shall be as specified in the Bylaws of the corporation.

ARTICLE VIII

Election of directors need not be by written ballot unless the Bylaws of the corporation shall so provide.

ARTICLE IX

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the corporation may be kept (subject to any provision contained in the statutes) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the corporation.

ARTICLE X

Advance notice of new business and stockholder nominations for the election of directors shall be given in the manner and to the extent provided in the Bylaws of the corporation.

ARTICLE XI

To the fullest extent permitted by the DGCL, as the same may be amended from time to time, a director of this corporation shall not be personally liable to this corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. Any repeal or modification of the provisions of this ARTICLE XI, by amendment of this ARTICLE XI or by operation of law, shall not adversely affect any right or protection of a director of the corporation with respect to any acts or omissions of such director occurring prior to such repeal or modification.

ARTICLE XII

To the fullest extent permitted by applicable law, this corporation is authorized to provide indemnification of (and advancement of expenses to) directors, officers, employees and other agents of this corporation (and any other persons to which Delaware law permits this corporation to provide indemnification), through Bylaw provisions, agreements with any such director, officer, employee or other agent or other person, vote of stockholders or disinterested directors, or otherwise, in excess of the indemnification and advancement otherwise permitted by Section 143 of the DGCL, subject only to limits created by applicable Delaware law, statutory or nonstatutory, with respect to actions for breach of duty to a corporation, its stockholders and others. Any repeal or modification of any of the provisions of this ARTICLE XII, by amendment of this ARTICLE XII or by operation of law, shall not adversely affect any right or protection of a director, officer, employee or other agent or other person existing at the time of, or increase the liability of any director of this corporation with respect to any acts or omissions of such director, officer or agent occurring prior to such repeal or modification.

IN WITNESS WHEREOF, the corporation has caused this Certificate to be signed by its Chief Executive Officer, this 24th day of February, 2002.

Notary Jan



By: _____

C. Donald Cooper
Chief Executive Officer