

12-07-1999

Attorney Docket Nos. 16186-7, -8, -10, -14, -18, -22

FORM PTO-1594
1-31-92

U. S. DEPARTMENT OF COMMERCE
Patents and Trademark Office

*MIND
11/22/99*



To the Honorable Commissioner of Patents and Tra

ments or copy thereof.

Name of conveying party(ies):

101216116

receiving party(ies)

Persistence Software, Inc.

Name: Persistence Software, Inc.

- Individual(s)
- General Partnership
- Corporation-State: California
- Other

Internal Address:

Street Address: 1720 South Amphlett Blvd., Suite 300

City: San Mateo State: CA Z.P.: 94402

Additional name(s) of conveying parties attached? Yes No

- Individual(s) citizenship
- Association
- General Partnership
- Limited Partnership
- Corporation-State: Delaware
- Other

Nature of conveyance

- Assignment
- Merger
- Security Agreement
- Change of Name
- Other

If assignee is not domiciled in the United States, a domestic representative designation is attached: Yes No

Execution Date: June 14 1999

(Designation must be a separate document from Assignment)

Additional names and addresses attached? Yes No

Application Number(s) or Registration Number(s).

A. Trademark Application No(s): 75/417508

B. Trademark Registration No(s): 2128711

Additional numbers attached? Yes No

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

6. Total number of applications and registrations involved 6

Name: Mark A. Steiner
TOWNSEND AND TOWNSEND AND CREW LLP
Two Embarcadero Center, 8th Floor
San Francisco, California 94111-3834
(415) 576-0200

7. Total fee (37 CFR 3.41): \$190.00

- Enclosed
- Charge Fees to Deposit Account
- Charge any additional fees associated with this paper or during the pendency of this application, or credit any overpayment, to deposit account.

8. Deposit account number: 20-1430

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

DO NOT USE THIS SPACE

9. Statement and signature.

To the best of my knowledge and belief, the foregoing is true and correct and any attached copy is a true copy of the original document

Mark A. Steiner
Name of Person Signing

Mark A. Steiner
Signature

11-18-99
Date

Total number of pages including cover sheet, attachments and document: 12

10. Change Correspondence Address to that of Part 5? Yes No

OMB No. 0651-0011 (exp. 4/94)

Do not detach this portion

Mail documents to be recorded with required cover to:

Asst. Commissioner for Trademarks
Box: Assignments
Washington, D.C. 20231

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01 FC: 481 40.00 CH
02 FC: 482 125.00 CH

TRADEMARK
REEL: 001996 FRAME: 0318

Additional name(s) of conveying party(ies):
(Continued from Page 1)

Additional name(s) and address(es) of receiving party(ies):
(Continued from Page 1)

Additional application number(s) or registration number(s):
(Continued from Page 1)

A. Trademark Application No(s).

B. Trademark Registration No(s).

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75/564581

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STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 09:00 AM 06/14/1999
991237656 - 3035875

**AGREEMENT AND PLAN OF MERGER
OF PERSISTENCE SOFTWARE, INC.
A DELAWARE CORPORATION,
and
PERSISTENCE SOFTWARE, INC.
A CALIFORNIA CORPORATION**

This Agreement and Plan of Merger dated as of June 11, 1999 (the "Agreement") is between Persistence Software, Inc., a California corporation ("Persistence-California"), and Persistence Software, Inc., a Delaware corporation ("Persistence-Delaware"). Persistence-Delaware and Persistence-California are sometimes referred to in this Agreement as the "Constituent Corporations."

RECITALS

A. Persistence-Delaware is a corporation duly organized and existing under the laws of the State of Delaware and has an authorized capital of 49,000,000 shares, 41,100,000 of which are designated "Common Stock," \$0.001 par value per share, and 7,900,000 of which are designated "Preferred Stock," \$0.001 par value per share, of which 2,134,715 shares are designated as Series A Preferred Stock, none of which are issued and outstanding, 3,243,192 of which are designated Series B Preferred Stock, none of which are issued and outstanding, 1,544,277 of which are designated as Series C Preferred Stock, none of which are issued and outstanding, and 775,701 of which are designated as Series D Preferred Stock, none of which are issued and outstanding. As of June 11, 1999, 1,000 shares of Persistence-Delaware Common Stock were issued and outstanding, all of which are held by Persistence-California, and no shares of Preferred Stock were issued and outstanding.

B. Persistence-California is a corporation duly organized and existing under the laws of the State of California and has an authorized capital of 49,000,000 shares, 41,100,000 of which are designated "Common Stock," \$0.001 par value per share, and 7,900,000 of which are designated "Preferred Stock," \$0.001 par value per share, of which 2,134,715 shares are designated as Series A Preferred Stock, all of which are issued and outstanding, 3,243,192 of which are designated Series B Preferred Stock, all of which are issued and outstanding, 1,544,277 of which are designated as Series C Preferred Stock, all of which are issued and outstanding, and 775,701 of which are designated as Series D Preferred Stock, all of which are issued and outstanding. As of June 11, 1999, 7,750,222 shares of Common Stock were issued and outstanding and 7,697,885 shares of Preferred Stock were issued and outstanding.

C. The Board of Directors of Persistence-California has determined that, for the purpose of effecting the reincorporation of Persistence-California in the State of Delaware, it is advisable and in the best interests of Persistence-California that Persistence-California merge with and into Persistence-Delaware upon the terms and conditions provided in this Agreement.

D. The respective Boards of Directors of Persistence-Delaware and Persistence-California have approved this Agreement and have directed that this Agreement be submitted to a vote of their respective stockholders and executed by the undersigned officers.

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AGREEMENT

In consideration of the mutual agreements and covenants set forth herein, Persistence-Delaware and Persistence-California hereby agree, subject to the terms and conditions hereinafter set forth, as follows:

1. Merger.

1.1 Merger. In accordance with the provisions of this Agreement, the Delaware General Corporation Law and the California General Corporation Law, Persistence-California shall be merged with and into Persistence-Delaware (the "Merger"), the separate existence of Persistence-California shall cease and Persistence-Delaware shall be, and is sometimes referred to below as, the "Surviving Corporation," and the name of the Surviving Corporation shall be Persistence Software, Inc..

1.2 Filing and Effectiveness. The Merger shall become effective upon completion of the following actions:

(a) Adoption and approval of this Agreement and the Merger by the stockholders of each Constituent Corporation in accordance with the applicable requirements of the Delaware General Corporation Law and the California General Corporation Law;

(b) The satisfaction or waiver of all of the conditions precedent to the consummation of the Merger as specified in this Agreement; and

(c) The filing with the Secretary of State of Delaware of an executed Certificate of Merger or an executed counterpart of this Agreement meeting the requirements of the Delaware General Corporation Law.

The date and time when the Merger becomes effective is referred to in this Agreement as the "Effective Date of the Merger."

1.3 Effect of the Merger. Upon the Effective Date of the Merger, the separate existence of Persistence-California shall cease and Persistence-Delaware, as the Surviving Corporation, (a) shall continue to possess all of its assets, rights, powers and property as constituted immediately prior to the Effective Date of the Merger, (b) shall be subject to all actions previously taken by its and Persistence-California's Board of Directors, (c) shall succeed, without other transfer, to all of the assets, rights, powers and property of Persistence-California in the manner more fully set forth in Section 259 of the Delaware General Corporation Law, (d) shall continue to be subject to all of the debts, liabilities and obligations of Persistence-Delaware as constituted immediately prior to the Effective Date of the Merger, and (e) shall succeed, without other transfer, to all of the debts, liabilities and obligations of Persistence-California in the same manner as if Persistence-Delaware had itself incurred them, all as more fully provided under the applicable provisions of the Delaware General Corporation Law and the California General Corporation Law.

2. Charter Documents, Directors and Officers

2.1 Certificate of Incorporation. The Certificate of Incorporation of Persistence-Delaware as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Certificate of Incorporation of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.2 Bylaws. The Bylaws of Persistence-Delaware as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Bylaws of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.3 Directors and Officers. The directors and officers of Persistence-California immediately prior to the Effective Date of the Merger shall be the directors and officers of the Surviving Corporation until their successors shall have been duly elected and qualified or as otherwise provided by law, the Certificate of Incorporation of the Surviving Corporation or the Bylaws of the Surviving Corporation.

3. Manner of Conversion of Stock

3.1 Persistence-California Common Stock. Upon the Effective Date of the Merger, each one share of Persistence-California Common Stock issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such share or any other person, be converted into and exchanged for one fully paid and nonassessable share of Common Stock, \$0.001 per value, of the Surviving Corporation. No fractional share interests of the Surviving Corporation shall be issued. Any fractional share interests to which a holder would otherwise be entitled shall be aggregated so that no Persistence-California shareholders shall receive cash in an amount greater than the value of one (1) full share of Persistence-Delaware Common Stock.

3.2 Persistence-California Preferred Stock. Upon the Effective Date of the Merger, each share of Persistence-California Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, and Series D Preferred Stock issued and outstanding immediately prior thereto, which shares are convertible into such number of shares of Persistence-California Common Stock as set forth in the Persistence-California Articles of Incorporation, as amended, shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into and exchanged for one fully paid and non-assessable share of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, and Series D Preferred Stock of the Surviving Corporation, \$0.001 par value per share, respectively, having such rights, preferences and privileges as set forth in the Certification of Incorporation of the Surviving Corporation, which shares of Preferred Stock shall be convertible into the same number of shares of the Surviving Corporation's Common Stock, \$0.001 par value per share, as such share of Persistence-California Preferred Stock was convertible into shares of Persistence-California Common Stock immediately prior to the Effective Date of the Merger, subject to adjustment pursuant to the terms of the Certificate of Incorporation of the Surviving Corporation.

3.3 Persistence-California Options, Stock Purchase Rights and Convertible Securities.

(a) Upon the Effective Date of the Merger, the Surviving Corporation shall assume the obligations of Persistence-California under Persistence-California's 1994 Stock Purchase Plan, Amended and Restated 1997 Stock Plan, 1999 Employee Stock Purchase Plan and 1999 Directors' Stock Option Plan, and all other employee benefit plans of Persistence-California. Each outstanding and unexercised option, other right to purchase or security convertible into Persistence-California Common Stock or Preferred Stock (a "Right") shall become, subject to the provisions in paragraph (c) hereof, an option, right to purchase or a security convertible into the Surviving Corporation's Common Stock or Preferred Stock, respectively, on the basis of one share of the Surviving Corporation's Common Stock or Preferred Stock, as the case may be, for each one share of Persistence-California Common Stock or Preferred Stock issuable pursuant to any such Right, on the same terms and conditions and at an exercise price equal to the exercise price applicable to any such Persistence-California Right at the Effective Date of the Merger. This paragraph 3.3(a) shall not apply to Persistence-California Common Stock or Preferred Stock. Such Common Stock and Preferred Stock are subject to paragraphs 3.1 and 3.2 hereof, respectively.

(b) A number of shares of the Surviving Corporation's Common Stock and Preferred Stock shall be reserved for issuance upon the exercise or conversion of Rights equal to the number of shares of Persistence-California Common Stock and Preferred Stock so reserved immediately prior to the Effective Date of the Merger.

Notwithstanding the foregoing, with respect to options issued under the Persistence-California 1997 Stock Plan that are assumed in the Merger, the number of shares of Common Stock to which the holder would be otherwise entitled upon exercise of each such assumed option following the Merger shall be rounded down to the nearest whole number and the exercise price shall be rounded up to the nearest whole cent. In addition, no "additional benefits" (within the meaning of Section 424(a)(2) of the Internal Revenue Code of 1986, as amended) shall be accorded to the optionees pursuant to the assumption of their options.

3.4 Persistence-Delaware Common Stock. Upon the Effective Date of the Merger, each share of Common Stock, \$0.001 par value per share, of Persistence-Delaware issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by Persistence-Delaware, the holder of such shares or any other person, be canceled and returned to the status of authorized but unissued shares.

3.5 Exchange of Certificates. After the Effective Date of the Merger, each holder of an outstanding certificate representing shares of Persistence-California Common Stock or Preferred Stock may be asked to surrender the same for cancellation to an exchange agent, whose name will be delivered to holders prior to any requested exchange (the "Exchange Agent"), and each such holder shall be entitled to receive in exchange therefor a certificate or certificates representing the number of shares of the appropriate class and series of the Surviving Corporation's capital stock into which the surrendered shares were converted as herein provided.

Until so surrendered, each outstanding certificate theretofore representing shares of Persistence-California capital stock shall be deemed for all purposes to represent the number of whole shares of the appropriate class and series of the Surviving Corporation's capital stock into which such shares of Persistence-California capital stock were converted in the Merger.

The registered owner on the books and records of the Surviving Corporation or the Exchange Agent of any such outstanding certificate shall, until such certificate shall have been surrendered for transfer or conversion or otherwise accounted for to the Surviving Corporation or the Exchange Agent, have and be entitled to exercise any voting and other rights with respect to and to receive dividends and other distributions upon the shares of capital stock of the Surviving Corporation represented by such outstanding certificate as provided above.

Each certificate representing capital stock of the Surviving Corporation so issued in the Merger shall bear the same legends, if any, with respect to the restrictions on transferability as the certificates of Persistence-California so converted and given in exchange therefor, unless otherwise determined by the Board of Directors of the Surviving Corporation in compliance with applicable laws.

If any certificate for shares of Surviving Corporation's stock is to be issued in a name other than that in which the certificate surrendered in exchange therefor is registered, it shall be a condition of issuance thereof that the certificate so surrendered shall be properly endorsed and otherwise in proper form for transfer, that such transfer otherwise be proper and comply with applicable securities laws and that the person requesting such transfer pay to the Exchange Agent any transfer or other taxes payable by reason of the issuance of such new certificate in a name other than that of the registered holder of the certificate surrendered or establish to the satisfaction of the Surviving Corporation that such tax has been paid or is not payable.

4. General

4.1 Covenants of Persistence-Delaware. Persistence-Delaware covenants and agrees that it will, on or before the Effective Date of the Merger:

(a) Qualify to do business as a foreign corporation in the State of California and irrevocably appoint an agent for service of process as required under the provisions of Section 2105 of the California General Corporation Law.

(b) File any and all documents with the California Franchise Tax Board necessary for the assumption by Persistence-Delaware of all of the franchise tax liabilities of Persistence-California; and

(c) Take such other actions as may be required by the California General Corporation Law.

4.2 Further Assurances. From time to time, as and when required by Persistence-Delaware or by its successors or assigns, there shall be executed and delivered on behalf of Persistence-California such deeds and other instruments, and there shall be taken or caused to be

taken by it such further and other actions, as shall be appropriate or necessary in order to vest or perfect in, or conform of record or otherwise by, Persistence-Delaware the title to and possession of all the property, interests, assets, rights, privileges, immunities, powers, franchises and authority of Persistence-California and otherwise to carry out the purposes of this Agreement, and the officers and directors of Persistence-Delaware are fully authorized in the name and on behalf of Persistence-California or otherwise to take any and all such action and to execute and deliver any and all such deeds and other instruments.

4.3 Abandonment. At any time before the Effective Date of the Merger, this Agreement may be terminated and the Merger may be abandoned for any reason whatsoever by the Board of Directors of either Persistence-California or Persistence-Delaware, or both, notwithstanding the approval of this Agreement by the shareholders of Persistence-California or by the sole stockholder of Persistence-Delaware, or by both.

4.4 Amendment. The Boards of Directors of the Constituent Corporations may amend this Agreement at any time prior to the filing of this Agreement (or certificate in lieu thereof) with the Secretary of State of the State of Delaware, provided that an amendment made subsequent to the adoption of this Agreement by the stockholders of either Constituent Corporation shall not: (a) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such Constituent Corporation, (b) alter or change any term of the Certificate of Incorporation of the Surviving Corporation to be effected by the Merger, or (c) alter or change any of the terms and conditions of this Agreement if such alteration or change would adversely affect the holders of any class or series of capital stock of such Constituent Corporation.

4.5 Registered Office. The registered office of the Surviving Corporation in the State of Delaware is located at 1209 Orange Street, Wilmington, County of New Castle, Delaware 19801. Corporation Trust Company is the registered agent of the Surviving Corporation at such address.

4.6 FIRPTA Notification.

(a) On the Effective Date of the Merger, Persistence-California shall deliver to Persistence-Delaware, as agent for the shareholders of Persistence-California, a properly executed statement (the "Statement") in substantially the form attached hereto as Exhibit A. Persistence-Delaware shall retain the Statement for a period of not less than seven years and shall, upon request, provide a copy thereof to any person that was a shareholder of Persistence-California immediately prior to the Merger. In consequence of the approval of the Merger by the shareholders of Persistence-California, (i) such shareholders shall be considered to have requested that the Statement be delivered to Persistence-Delaware as their agent and (ii) Persistence-Delaware shall be considered to have received a copy of the Statement at the request of the Persistence-California shareholders for purposes of satisfying Persistence-Delaware's obligations under Treasury Regulation Section 1.1445-2(c)(3).

(b) Persistence-California shall deliver to the Internal Revenue Service a notice regarding the Statement in accordance with the requirements of Treasury Regulation Section 1.897-2(h)(2).

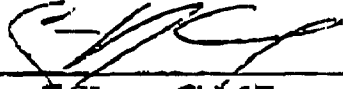
4.7 **Agreement.** Executed copies of this Agreement will be on file at the principal place of business of the Surviving Corporation at 1720 South Amphlett Blvd., Third Floor, San Mateo, California 94402, and copies thereof will be furnished to any stockholder of either Constituent Corporation, upon request and without cost.

4.8 **Governing Law.** This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of California, without giving effect to principles of conflicts of law.

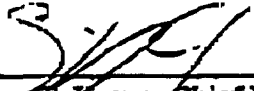
4.9 **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

The undersigned authorized representatives of the Constituent Corporation have executed and acknowledged this Agreement as of the date first set forth above.

PERSISTENCE SOFTWARE, INC.,
a Delaware corporation

By: 
Christopher T. Keene, Chief Executive Officer
and Chairman of the Board

PERSISTENCE SOFTWARE, INC.,
a California corporation

By: 
Christopher T. Keene, Chief Executive Officer
and Chairman of the Board

Persistence Software, Inc.

A Delaware Corporation


OFFICERS' CERTIFICATE OF APPROVAL OF MERGER

Christopher Keene and Christine Russell certify that:

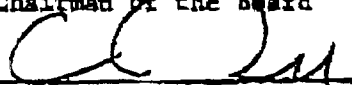
1. They are the ~~Chairman~~ and Chief Executive Officer and the Secretary, respectively, of Persistence Software, Inc., a corporation organized under the laws of the State of Delaware.
2. The corporation has authorized two classes of stock, designated "Common Stock" and "Preferred Stock," respectively.
3. There are 1,000 shares of Common Stock outstanding and entitled to vote on the Agreement and Plan of Merger attached hereto (the "Merger Agreement"). There are no shares of Preferred Stock outstanding.
4. The principal terms of the Merger Agreement were approved by the Board of Directors and by the vote of a number of shares of each class and series of stock which equaled or exceeded the vote required.
5. The percentage vote required was more than 50% of the votes entitled to be cast by holders of outstanding shares of Common Stock.

Christopher Keene and Christine Russell further declare under penalty of perjury under the laws of the States of Delaware and California that each has read the foregoing certificate and knows the contents thereof and that the same is true and correct of each's own knowledge.

Executed in San Mateo, California on June 11, 1999.



 Christopher Keene, Chief Executive Officer
 and Chairman of the Board



 Christine Russell, Secretary
 and Chief Financial 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 THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AGREEMENT OF MERGER, WHICH MERGES: "PERSISTENCE SOFTWARE, INC.", A CALIFORNIA CORPORATION, WITH AND INTO "PERSISTENCE SOFTWARE, INC." UNDER THE NAME OF "PERSISTENCE SOFTWARE, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE FOURTEENTH DAY OF JUNE, A. D. 1999, AT 9 O'CLOCK A.M.

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



Edward J. Freel

Edward J. Freel, Secretary of State

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AUTHENTICATION: 9802270

DATE: 06-14-99