

MRD 12/3/98



100918667

To the Honorable Commissioner of Patents and Trademarks, please return the attached original documents or copy thereof.

<p>1. Name of conveying party(ies): Harry H. Post Company.</p> <p><input type="checkbox"/> Individual(s) <input type="checkbox"/> Association <input type="checkbox"/> General Partnership <input type="checkbox"/> Limited Partnership <input checked="" type="checkbox"/> Corporation - State - the state of Colorado <input type="checkbox"/> Other _____</p> <p>Additional name(s) of conveying party(ies) attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>3. Nature of conveyance: <input type="checkbox"/> Assignment <input checked="" type="checkbox"/> Merger <input type="checkbox"/> Security Agreement <input type="checkbox"/> Change of Name <input type="checkbox"/> Other _____</p> <p>Execution Date: <u>December 23, 1997</u></p>	<p>2. Name and address of receiving party(ies): Name: <u>Ameriserv Food Company under the name of "Ameriserve Food Distribution, Inc."</u> Internal Address: _____ Street Address: <u>17975 West Sahara Lane</u> City: <u>Brookfield</u> State: <u>WI</u> ZIP: <u>53045</u></p> <p><input type="checkbox"/> Individual(s) citizenship _____ <input type="checkbox"/> Association _____ <input type="checkbox"/> General Partnership _____ <input type="checkbox"/> Limited Partnership _____ <input checked="" type="checkbox"/> Corporation-State <u>Delaware</u> <input type="checkbox"/> Other _____</p> <p>If assignee is not domiciled in the United States, a domestic representative designation is attached: <input type="checkbox"/> Yes <input type="checkbox"/> No (Designations must be a separate document from Assignment) Additional name(s) & address(es) attached? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
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<p>4. Application number(s) or registration number(s): A. Trademark Application No.(s) <u>75/115,491, 75/115,492</u></p>	<p>B. Trademark registration No.(s) <u>1,735,572, 2,035,845, 1,779,374, 1,981,302, 1,516,722</u></p> <p>Additional numbers attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
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<p>5. Name and address of party to whom correspondence concerning document should be mailed: Name: <u>Erich G. Rhyhart</u> Internal Address: _____ Street Address: <u>Mayer, Brown & Platt</u> <u>P.O. Box 2828</u> City: <u>Chicago</u> State: <u>IL</u> ZIP: <u>60690-2828</u></p>	<p>6. Total number of applications and registrations involved: <u>7</u></p> <p>7. Total fee (37 CFR 3.41) \$ <u>190.00</u> <input checked="" type="checkbox"/> Enclosed <input checked="" type="checkbox"/> Authorized to be charged to deposit account for any additional fees</p> <p>8. Deposit account number: <u>13-0019</u></p> <p>(Attach duplicate copy of this page if paying by deposit account)</p>
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9. Statement and signature.
To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Erich G. Rhyhart *Erich G. Rhyhart* 2 Dec 1998
Name of Person Signing Signature Date

Total number of pages comprising cover sheet: 16

Do not detach this portion

Mail documents to be recorded with required cover sheet information to:
12/07/1998 DNGUYEN 00000033 1735572

01 FC:481 40.00 DP
02 FC:482 150.00 DP

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Public burden reporting for this sample sheet is estimated to average about 30 minutes per document to be recorded, including time for reviewing the document and gathering the data needed, and completing and reviewing the sample cover sheet. Send comments regarding this burden estimate to the U.S. Patent and Trademark Office, Office of Information Systems, PK2-1000C, Washington, D.C. 20231, and to the Office of Management and Budget, Paperwork Reduction Project (0651-0011), Washington D.C. 20503.

State of Delaware

Office of the Secretary of State

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 MERGER, WHICH MERGES:

"THE HARRY H. POST COMPANY", A COLORADO CORPORATION,
WITH AND INTO "AMERISERV FOOD COMPANY" UNDER THE NAME OF
"AMERISERVE FOOD DISTRIBUTION, INC.", A CORPORATION ORGANIZED
AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS
RECEIVED AND FILED IN THIS OFFICE THE TWENTY-THIRD DAY OF
DECEMBER, A.D. 1997, AT 4:30 O'CLOCK P.M.



Edward J. Freel

Edward J. Freel, Secretary of State

AUTHENTICATION:

9118788

DATE:

06-04-98

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12-23-97

CERTIFICATE OF MERGER
OF
THE HARRY H. POST COMPANY
WITH AND INTO
AMERISERV FOOD COMPANY

The undersigned corporation, organized and existing under and by virtue of the General Corporation Law of the State of Delaware, DOES HEREBY CERTIFY THAT:

FIRST: The name and jurisdiction of incorporation of each of the constituent corporations in the merger (the "Constituent Corporations") are as follows:

<u>Name</u>	<u>State of Incorporation</u>
The Harry H. Post Company	Colorado
AmeriServ Food Company	Delaware

SECOND: An Agreement and Plan of Merger (the "Merger Agreement"), by and among AmeriServe Food Distribution, Inc. ("AmeriServe"), The Harry H. Post Company ("Post"), and AmeriServ Food Company ("Food"), dated as of December 23, 1997, has been approved, adopted, certified, executed, and acknowledged (1) by AmeriServe, in accordance with Section 21-20,130 of the Nebraska Business Corporation Act (the "NBCA"), and by the written consent of its sole shareholder, Nebco Evans Holding Company, a Delaware corporation, in accordance with the requirements of Section 21-2054 of the NBCA; (2) by Post, in accordance with Section 111-103 of the Colorado Business Corporation Act (the "CBCA") and by the written consent of its sole

shareholder, Food, in accordance with Section 107-104 of the CBCA; and (3) by Food, in accordance with the requirements of Section 252 of the General Law Corporation of the State of Delaware (the "DGCL") and by the written consent of its sole stockholder, AmeriServe, in accordance with Section 228 of the DGCL.

THIRD: Food shall be the surviving corporation of the merger (the "Surviving Corporation"), and at the time that the merger becomes effective, its name shall be "AmeriServe Food Distribution, Inc."

FOURTH: Pursuant to the Merger Agreement, at the time the merger becomes effective, the Certificate of Incorporation of the Surviving Corporation shall be amended and restated to read in its entirety as set forth in Exhibit A attached hereto.

FIFTH: The executed Merger Agreement is on file at the office of the Surviving Corporation located at 14841 Dallas Parkway, Dallas, Texas 75240-2100.

SIXTH: 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: Post has an authorized capital stock of 15,000,000 shares, consisting of 10,000,000 shares of Class A Common Stock, \$ 0.01 par value per share and 5,000,000 shares of Class B Common Stock, \$1.00 par value per share.

EIGHTH: The merger shall be effective at 12:02 AM, December 28, 1997.

IN WITNESS WHEREOF, this Certificate of Merger has been executed
on this 15 day of December, 1997.

AMERISERV FOOD COMPANY

By: Raymond E. Marshall
Name: Raymond E. Marshall
Title: President

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION

of

AMERISERVE FOOD DISTRIBUTION, INC.

ARTICLE I

The name of the Corporation is:

AMERISERVE FOOD DISTRIBUTION, INC.

ARTICLE II

The address of the Corporation's registered office in the State of Delaware is The Corporation Trust Center, 1209 Orange Street in the City of Wilmington, County of New Castle. The name of the Corporation's registered agent at such address is The Corporation Trust Company.

ARTICLE III

The purpose of the Corporation shall be to engage in any lawful act or activity for which corporations may be organized and incorporated under the General Corporation Law of the State of Delaware.

ARTICLE IV

Section 1. Authorized Stock. The Corporation shall be authorized to issue (a) 2,000 shares of common stock, \$10.00 par value per share ("Common Stock") and (b) 1315 shares of preferred stock (the "Preferred Stock") consisting of (1) 150 shares of Preferred Stock par value of \$50,000.00 per share (the "Series \$50,000 Preferred"); (2) 400 shares of Preferred Stock, \$25,000.00 par value per share (the "Series \$25,000 Preferred"); and (3) 765 shares of Senior Non-Convertible Preferred Stock, \$1.00 par value per share (the "Senior Non-Convertible Preferred").

Section 2. Preferred Stock. Shares of Preferred Stock may be issued from time to time in one or more series. The Board (as defined below) is hereby authorized to fix the voting rights, if any, designations, powers, preferences and the relative, participation, optional or other rights, if any, and the qualifications, limitations or restrictions thereof, of any unissued series of Preferred Stock; and to fix the number of shares constituting such series, and to increase or decrease the number of shares of any such series (but not below the number of shares thereof then outstanding).

Section 3. Senior Non-Convertible Preferred. Senior Non-Convertible Preferred shall consist of 765 shares, \$1.00 par value, each having the following rights and preferences:

(a) Dividends. (1) The holders of record of shares of Senior Non-Convertible Preferred shall be entitled to receive when and as declared by the Board out of funds legally available therefor, cash dividends at the rate of \$6,250.00 per share per annum payable semi-annually on such dates as may from time to time be determined by the Board, in preference to and in priority over dividends upon the Common Stock or any other Preferred Stock (collectively, the "Junior Shares"). Dividends on each share of Senior Non-Convertible Preferred shall accumulate, whether or not declared, from the date of its issuance. The holders of shares of Senior Non-Convertible Preferred shall not be entitled to any dividends other than the cash dividend provided for in this Section 3(a). During any period when the Corporation has failed to pay a semi-annual dividend on the Senior Non-Convertible Preferred for any preceding six-month period and until all unpaid dividends payable, whether or not declared, on the outstanding Senior Non-Convertible Preferred shall have been paid in full or declared and set apart for payment, the Corporation shall not: (i) declare or pay dividends, or make any other distributions, on any Junior Shares, other than dividends or distributions payable in Junior Shares, or (ii) redeem, purchase or otherwise acquire for consideration any Junior Shares, other than redemptions, purchases or other acquisitions of Junior Shares in exchange for any Junior Shares.

(2) Notwithstanding anything in Section 3(a) above to the contrary, from and after the first date on which any shares of the Senior Non-Convertible Preferred are issued until the second anniversary of such date, any dividend on the Senior Non-Convertible Preferred accrued and payable as provided in Section 1(a) above shall be payable by the Corporation, in lieu of cash, by the issuance of a number of additional shares (or fractional shares) of Senior Non-Convertible Preferred in respect of each such share (or fractional share) of Senior Non-Convertible Preferred then outstanding equal to the dividend then payable on each such share (or fractional share) of Senior Non-Convertible Preferred (expressed as a dollar amount) divided by the liquidation value of one share of Senior Non-Convertible Preferred (expressed as a dollar amount).

(b) Liquidation. In the event of a liquidation, dissolution or winding up of the Corporation, the holders of shares of Senior Non-Convertible Preferred shall be entitled to receive out of the assets of the Corporation an amount in cash equal to \$50,000.00 per share, plus any accumulated and unpaid dividends thereon to the date fixed for distribution, in preference to and in priority over any such distribution upon Junior Shares.

(c) Redemption. The Senior Non-Convertible Preferred may be redeemed, in whole or in part, at the option of the holder of the shares thereof, in connection with any repayment of Nebco Evans Holding Company's 12 1/2% Senior Notes due 2006 (the "Senior Notes") or in the event that the shares of the Senior Non-Convertible Preferred have been transferred to a trustee for the holders of the Senior Notes in satisfaction of or as a result of foreclosure upon the Senior Notes, at the redemption price per share of \$50,000.00 plus any accumulated and unpaid dividends thereon at the date fixed for redemption. The holders of shares of Senior Non-Convertible Preferred opting to have the

Corporation redeem their shares shall, not less than ten (10) nor more than sixty (60) days prior to the date that such holders desire to have their shares redeemed pursuant to this Section 3, provide the Corporation with written notice specifying the desired date of such redemption, such notice to be sent by first class mail, postage prepaid, to the Corporation at its registered office in the State of Delaware.

After the date fixed for the redemption of shares of Senior Non-Convertible Preferred, the holders of shares who have opted for redemption shall cease to be shareholders with respect to such shares and shall have no interest in or claims against the Corporation by virtue thereof except the right to receive the monies payable upon such redemption from the Corporation, without interest thereon, upon surrender (and endorsement, if required by the Corporation) of their certificates and the shares represented thereby shall no longer be deemed to be outstanding.

(d) Voting Rights. No holder of shares of Senior Non-Convertible Preferred shall be entitled to vote on any matters brought to a vote before the shareholders of the Corporation, except as otherwise provided by the DGCL.

(e) Consideration for Issuance of Shares. All shares of Senior Non-Convertible Preferred shall be deemed to be fully paid and nonassessable upon the issuance thereof.

(f) Notice of Holders of Certain Transactions. The Corporation shall cause a notice to be mailed to the holders of record of shares of Senior Non-Convertible Preferred at their respective addresses as the same shall appear on the books of the Corporation, in case:

(1) the Corporation shall declare a dividend (or any other distribution) on its Common Stock or other shares;

(2) of any reclassification of capital stock of the Corporation or of any consolidation or merger to which the Corporation is a party and for which approval of any shareholders of the Corporation is required, or of the sale or transfer of all or substantially all of the assets of the Corporation;

(3) of the voluntary or involuntary dissolution, liquidation or winding up of the Corporation.

Such notice shall be mailed at least twenty (20) days prior to the applicable record date or other date hereinafter referred to and shall specify (i) the date on which a record is to be taken for the purpose of such dividend, redemption, distribution of rights or, if a record is not to be taken, the date as of which the holders of Common Stock of record to be entitled to such dividend, distribution, redemption or rights are to be determined, or (ii) the date on which, in connection with such reclassification, consolidation, merger, sale, transfer, dissolution, liquidation or winding up, it is expected that holders of Common Stock of record shall be entitled to exchange their Common Stock for securities or other property

deliverable upon such reclassification, consolidation, merger, sale, transfer, dissolution, liquidation or winding up.

(g) Conversion. The holders of the shares of Senior Non-Convertible Preferred shall have no rights to convert their shares into Common Stock of the Corporation or into shares of any other capital shares of the Corporation.

(h) No Other Rights. The shares of Senior Non-Convertible Preferred shall not have any relative, participating, optional or other special rights or powers other than as set forth herein.

(i) Certain Restrictions. Notwithstanding anything to the contrary in this Section 3, the Senior Non-Convertible Preferred and the powers, designations, preferences and relative, participating, optional and other rights thereof, and the qualifications, limitations and restrictions thereon as set forth in this Section 3 are subject to certain restrictions set forth in a Credit Agreement, dated as of January 25, 1996, among the Corporation, Bank of America National Trust and Savings Association, Bank of America Illinois and The Other Financial Institutions Party Thereto, as arranged by BA Securities, Inc., in an Investors Agreement, dated as of January 25, 1996, by and among DLJ Merchant Banking Partners, L.P., DLJ International Partners, C.V., DLJ Offshore Partners, C.V., DLJ Merchant Banking Funding, Inc., Orkla a.s., Holberg Industries, Inc., NED Holdings, Inc. and Nebco Evans Holding Company, in the Indenture relating to the Senior Notes, dated as of January 25, 1996, by and between Nebco Evans Holding Company and IBJ Schroder Bank & Trust Company, as Trustee, and in a Pledge Agreement, dated as of January 25, 1996, between Nebco Evans Holding Company and IBJ Schroder Bank & Trust Company, as Agent.

Section 4. Series \$50,000 Preferred. Series \$50,000 Preferred shall consist of 150 shares, \$50,000.00 par value, each having the following rights and preferences:

(a) Dividends. The holders of record of shares of this Series \$50,000 Preferred shall be entitled to receive when and as declared by the Board out of funds legally available therefore, cash dividends at the rate of \$5,500.00 per share per annum payable monthly on such dates as may from time to time be determined by the Board, in preference to and in priority over dividends upon the Common Stock or upon the Series \$50,000 Preferred but not in priority over dividends upon the Senior Non-Convertible Preferred. Dividends on each share of this Series \$50,000 Preferred shall accumulate, whether or not declared, from the date of its issuance. The holders of shares of this Series \$50,000 Preferred shall not be entitled to any dividends other than the cash dividend provided for in this Section 4(a). No dividends shall be declared or paid on the Common Stock or any other shares of the Corporation except the Senior Non-Convertible Preferred during any period when the Corporation has failed to pay a monthly dividend on this Series \$50,000 Preferred for any preceding month.

(b) Liquidation. In the event of a liquidation, dissolution or winding up of the Corporation, the holders of shares of this Series \$50,000 Preferred shall be entitled to

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(f) Notice of Holders of Certain Transactions. The Corporation shall cause a notice to be mailed to the holders of record of shares of this Series \$50,000 Preferred at their respective addresses as the same shall appear on the books of the Corporation, in case:

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(1) the Corporation shall declare a dividend (or any other distribution) on its Common Stock or other shares;

(2) of any reclassification of capital shares of the Corporation or of any consolidation or merger to which the Corporation is a party and for which approval of any shareholders of the Corporation is required, or of the sale or transfer of all or substantially all of the assets of the Corporation;

(3) of the voluntary or involuntary dissolution, liquidation or winding up of the Corporation.

Such notice shall be mailed at least twenty (20) days prior to the applicable record date or other date hereinafter referred to and shall specify (i) the date on which a record is to be taken for the purpose of such dividend, redemption, distribution of rights or, if a record is not to be taken, the date as of which the holders of Common Stock of record to be entitled to such dividend, redemption, distribution or rights are to be determined, or (ii) the date on which, in connection with such reclassification, consolidation, merger, sale, transfer, dissolution, liquidation or winding up, it is expected that holders of Common Stock of record shall be entitled to exchange their Common Stock for securities or other property deliverable upon such reclassification, consolidation, merger, sale, transfer, dissolution, liquidation or winding up.

(g) Limitation on Cash Dividends and Distributions on Shares. So long as any shares of this Series \$50,000 Preferred are outstanding, the Corporation may not pay any cash dividend or make any other distribution in cash on its Common Stock or any other shares except its Senior Non-Convertible Preferred.

(h) Limitation on Certain Actions. So long as any shares of this Series \$50,000 Preferred are outstanding, the Corporation shall not: (a) authorize, create or issue any other class or classes of Preferred Stock or any other shares having rights, powers or preferences equal to or senior to the shares of this Series \$50,000 Preferred except for the Senior Non-Convertible Preferred, (b) redeem, purchase or otherwise acquire any shares of its Common Stock or other shares except the Senior Non-Convertible Preferred, or (c) merge, consolidate, sell or otherwise dispose of substantially all of its assets.

(i) Conversion. The holders of the shares of this Series \$50,000 Preferred shall have no rights to convert their shares into Common Stock or any other shares of the Corporation.

(j) No Other Rights. The shares of this Series \$50,000 Preferred shall not have any relative, participating, optional or other special rights or powers other than as set forth herein.

Section 5. Series \$25,000 Preferred. Series \$25,000 Preferred Stock shall consist of 400 shares, \$25,000.00 par value, each having the following rights and preferences:

(a) Dividends. The holders of record of shares of this Series \$25,000 Preferred shall be entitled to receive when and as declared by the Board out of funds legally available therefor, cash dividends at the rate of \$2,375.00 per share per annum payable semi-annually on such dates as may from time to time be determined by the Board, in preference to and in priority over dividends upon the Common Stock but not in priority over dividends upon the Series \$50,000 Preferred or upon the Senior Non-Convertible Preferred. Dividends on each share of this Series \$25,000 Preferred shall accumulate, whether or not declared, from the date of its issuance. The holders of shares of this Series \$25,000 Preferred shall not be entitled to any dividends other than the cash dividend provided for in this Section 5(a). No dividends shall be declared or paid on the Common Stock during any period when the Corporation has failed to pay a semi-annual dividend on this Series \$25,000 Preferred for any preceding six-month period.

(b) Liquidation. In the event of a liquidation, dissolution or winding up of the Corporation, the holders of shares of this Series \$25,000 Preferred shall be entitled to receive out of the assets of the Corporation an amount equal to \$25,000.00 per share, plus any accumulated and unpaid dividends thereon to the date fixed for distribution, in preference to and in priority over any such distribution upon the Common Stock but not in priority over any such distribution upon the Series \$50,000 Preferred Stock or upon the Senior Non-Convertible Preferred.

(c) Redemption. This Series \$25,000 Preferred may be redeemed, in whole or in part, at the option of the Corporation by resolution of the Board, at any time and from time to time, at the redemption price per share of \$25,000.00 plus any accumulated and unpaid dividends thereon at the date fixed for redemption. In the event that less than the entire number of shares of this Series \$25,000 Preferred outstanding is at any time redeemed by the Corporation, the shares to be redeemed shall be selected by lot in a manner determined by the Board unless they shall have been advised by the unanimous agreement of the holders of all shares of this Series \$25,000 Preferred to effect the redemption in some other manner.

Not less than sixty (60) nor more than seventy-five (75) days prior to the date fixed for any redemption of this Series \$25,000 Preferred or any part thereof, a notice specifying the time and place of such redemption shall be given by first class mail, postage prepaid, to the holders of record of the shares of this Series \$25,000 Preferred selected for redemption at their respective addresses as the same shall appear on the books of the Corporation, but no failure to mail such notice or any defect therein or in the mailing thereof shall affect the validity of the proceedings for redemption. Any notice which was mailed in the manner herein provided shall be conclusively presumed to have been duly given whether or not the holders receive the notice.

After the date fixed for the redemption of shares of this Series \$25,000 Preferred by the Corporation, the holders of shares selected for redemption shall cease to be shareholders with respect to such shares and shall have no interest in or claims against the Corporation by virtue thereof except the right to receive the monies payable upon

such redemption from the Corporation, without interest thereon, upon surrender (and endorsement, if required by the Corporation) of their certificates and the shares represented thereby shall no longer be deemed to be outstanding.

(d) Voting Rights. No holder of this Series \$25,000 Preferred shall be entitled to vote on any matters brought to a vote before the shareholders of the Corporation, except as otherwise provided by the DGCL.

(e) Consideration for Issuance of Shares. All shares of this Series \$25,000 Preferred shall be deemed to be fully paid and nonassessable upon the issuance thereof.

(f) Notice of Holders of Certain Transactions. The Corporation shall cause a notice to be mailed to the holders of record of shares of this Series \$25,000 Preferred at their respective addresses as the same shall appear on the books of the Corporation, in case:

(1) the Corporation shall declare a dividend (or any other distribution) on its Common Stock or other shares;

(2) of any reclassification of capital stock of the Corporation or of any consolidation or merger to which the Corporation is a party and for which approval of any shareholders of the Corporation is required, or of the sale or transfer of all or substantially all of the assets of the Corporation;

(3) of the voluntary or involuntary dissolution, liquidation or winding up of the Corporation.

Such notice shall be mailed at least twenty (20) days prior to the applicable record date or other date hereinafter referred to and shall specify (i) the date on which a record is to be taken for the purpose of such dividend, redemption, distribution of rights or, if a record is not to be taken, the date as of which the holders of Common Stock of record to be entitled to such dividend, redemption, distribution or rights are to be determined, or (ii) the date on which, in connection with such reclassification, consolidation, merger, sale, transfer, dissolution, liquidation or winding up, it is expected that holders of Common Stock of record shall be entitled to exchange their Common Stock for securities or other property deliverable upon such reclassification, consolidation, merger, sale, transfer, dissolution, liquidation or winding up.

(g) Limitation on Cash Dividends and Distributions on Shares. So long as any shares of this Series \$25,000 Preferred are outstanding, the Corporation may not pay any cash dividend or make any other distribution in cash on its Common Stock.

(h) Limitation on Certain Actions. So long as any shares of this Series \$25,000 Preferred are outstanding, the Corporation shall not: (a) authorize, create or issue any other class or classes of Preferred Stock or any other shares having rights, powers or preferences equal to or senior to the shares of this Series \$25,000 Preferred except for the

Senior Non-Convertible Preferred and the Series \$50,000.00 Preferred, (b) redeem, purchase or otherwise acquire any of its Common Stock, or (c) merge, consolidate, sell or otherwise dispose of substantially all of its assets.

(i) Conversion. The holders of the shares of this Series \$25,000 Preferred shall have no rights to convert their shares into Common Stock or any other shares of the Corporation.

(j) No Other Rights. The shares of this Series \$25,000 Preferred shall not have any relative, participating, optional or other special rights or powers other than as set forth herein.

Section 6. Voting Rights. Except as otherwise provided herein, by law or by the resolution or resolutions adopted by the Board designating the rights, powers and preferences of any series of Preferred Stock, the Common Stock shall have the exclusive right to vote for the election of directors and for all other purposes. Each share of Common Stock shall have one vote, and the Common Stock shall vote together as a single class.

ARTICLE V

Unless and except to the extent that the Bylaws of the Corporation shall so require, the election of directors of the Corporation need not be by written ballot.

ARTICLE VI

In furtherance and not in limitation of the powers conferred by law, the Board of Directors of the Corporation (the "Board") is expressly authorized and empowered to make, alter and repeal the Bylaws of the Corporation by a majority vote at any regular or special meeting of the Board or by written consent, subject to the power of the stockholders of the Corporation to alter or repeal any Bylaws made by the Board.

ARTICLE VII

The Corporation reserves the right at any time and from time to time to amend, alter, change or repeal any provision contained in this Amended and Restated Certificate of Incorporation, and any other provisions authorized by the laws of the State of Delaware at the time in force may be added or inserted, in the manner now or hereafter prescribed by law; and all rights, preferences and privileges of whatsoever nature conferred upon stockholders, directors or any other persons whomsoever by and pursuant to this Amended and Restated Certificate of Incorporation in its present form or as hereafter amended are granted subject to the right reserved in this Article.

ARTICLE VIII

Section 1. Elimination of Certain Liability of Directors. 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 DGCL, or (iv) for any transaction from which the director derived an improper personal benefit.

Section 2. Indemnification and Insurance.

(a) 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 (hereinafter a "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 of the Corporation or is or was serving at the request of the Corporation as a director, 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 DGCL, 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 expense, liability and loss (including attorneys' fees, judgments, fines, amounts paid or to be paid in settlement, and excise taxes or penalties arising under the Employee Retirement Income Security Act of 1974) 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, except as provided in paragraph (2) hereof, the Corporation shall indemnify any such person seeking indemnification in connection with a proceeding (or part thereof) initiated by such person only if such proceeding (or part thereof) was authorized by the Board. The right to indemnification conferred in this Section shall be a contract right and shall include the right to be paid by the Corporation the expenses incurred in defending any such proceeding in advance of its final disposition; provided, however, that, if the DGCL requires, the payment of such expenses incurred by a director or officer 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 a 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 shall ultimately be determined that such director or officer is not entitled to be indemnified under this Section or otherwise. The Corporation may, by action of the Board, provide indemnification to employees and agents of the Corporation with the same scope and effect as the foregoing indemnification of directors and officers.

(b) Right of Claimant to Bring Suit. If a claim under paragraph (1) of this Section is not paid in full by the Corporation within thirty 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 is required, has been tendered to the Corporation) that the claimant has not met the standards of conduct which make it permissible under the General Corporation Law of the State of Delaware 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, 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 General Corporation Law of the State of Delaware, nor an actual determination by the Corporation (including its Board, 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 the claimant has not met the applicable standard of conduct.

(c) Non-Exclusivity of Rights. The right to indemnification and the payment of expenses incurred in defending a proceeding in advance of its final disposition conferred in this Section shall not be exclusive of any other right which any person may have or hereafter acquire under any statute, provision of the Certificate of Incorporation, By-law, agreement, vote of stockholders or disinterested directors or otherwise.

(d) Insurance. The Corporation may maintain insurance, at its expense, to protect itself and any 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 DGCL.