

FILED

MAY 25 12 11 PM '99

ARTICLES OF MERGER

eSOFT ACQUISITION CORPORATION,
an Idaho corporation,

WITH AND INTO

APEXX TECHNOLOGY, INC.,
an Idaho corporation

SECRETARY OF STATE
STATE OF IDAHO

*In accordance with Section 30-1-1105 of the
Idaho Business Corporation Act*

The undersigned, Tom Loutzenheiser, the President of **APEXX TECHNOLOGY, INC.**, an Idaho corporation, DOES HEREBY CERTIFY as follows:

1. The Constituent corporations (the "Constituent Corporations") in the merger (the "Merger") are eSoft Acquisition Corporation, an Idaho corporation ("eSoft"), and Apexx Technology, Inc., an Idaho corporation ("Apexx").
2. Apexx is the surviving corporation in the Merger (the "Surviving Corporation").
3. A Plan of Merger dated as of May 21, 1999 (the "Merger Plan") has been approved and executed by each of the Constituent Corporations in accordance with Section 30-1-1103 of the Idaho Business Corporation Act. The Merger Plan is attached hereto as Exhibit A and is incorporated herein by this reference.
4. The number of shares of eSoft outstanding and entitled to vote was 100 shares of Common Stock; no shares of eSoft were entitled to vote separately as a class; all of the shares voted for and none of the shares voted against the Merger.
5. The number of shares of Apexx outstanding and entitled to vote was 1,421,305 shares of Common Stock; no shares of Apexx were entitled to vote separately as a class; the total number of votes cast in favor and against the Merger were as follows

No. of Shares
Voted For

1,200,245

No. of Shares
Voted Against

50,000

IDAHO SECRETARY OF STATE

05/25/1999 09:00

CK: 52282 CT: 1177 BH: 219899

1 @ 30.00 = 30.00 MERGER # 2

1 @ 20.00 = 20.00 EXPEDITE C # 3

C99400

6. The number of shares of Common Stock voting for the Merger was sufficient for approval of the Merger.
7. Pursuant to the Merger Plan, the Articles of Incorporation of eSoft as in effect immediately prior to the Effective Time of the Merger shall constitute the Articles of Incorporation of the Surviving Corporation, without change or amendment until thereafter amended in accordance with the provisions thereof and applicable law, except that Article I of the Articles of Incorporation of eSoft is amended in its entirety to read as follows:

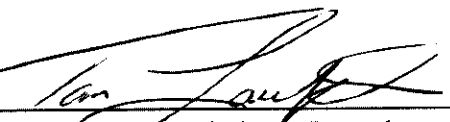
ARTICLE I

The name of the Corporation is Apexx Technology, Inc. (the "Corporation").

8. The Merger shall become effective at 12:01 a.m., Boise, Idaho time on the date these Articles of Merger are filed with the Secretary of State of the State of Idaho.

IN WITNESS WHEREOF, the undersigned has caused these Articles of Merger to be duly executed as of the 21st day of May, 1999.

APEXX TECHNOLOGY, INC.

By: 
Tom Loutzenheiser, President

PLAN OF MERGER

THIS PLAN OF MERGER (this "Merger Plan") is entered into this 21st day of May, 1999, by and between **eSOFT, INC.**, a Delaware corporation ("Parent"), **eSOFT ACQUISITION CORPORATION**, an Idaho corporation and a wholly-owned subsidiary of Parent ("Merger Sub"), and **APEXX TECHNOLOGY, INC.**, an Idaho corporation ("Apexx"). Merger Sub and Apexx are sometimes referred to jointly as the "Constituent Corporations."

R E C I T A L S

- A. The Boards of Directors of Parent and Apexx have determined that a business combination between Parent and Apexx is fair to and in the best interests of their respective companies and stockholders and, accordingly, have agreed to effect the merger provided for herein upon the terms and subject to the conditions set forth herein.
- B. In connection with the merger provided for herein, a total of 2,947,368 shares of Parent's common stock will be issued or reserved for issuance. Of such shares, 1,591,365 shares will be issued in exchange for all of the issued and outstanding shares of Apexx's common stock, and 1,356,003 shares will be held in reserve for issuance upon the exercise of options to purchase Parent's common stock.
- C. The parties have heretofore entered into that certain Amended and Restated Agreement and Plan of Merger dated as of January 25, 1999 (the "Merger Agreement"). This Merger Plan is being entered into by the parties to satisfy the requirements of Section 30-1-1101 of the Idaho Business Corporations Act (the "IBCA").

A G R E E M E N T S

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and subject to the terms and conditions of this Merger Plan, the parties hereby agree as follows:

ARTICLE 1 THE MERGER

1.1 The Merger. Subject to the terms and conditions of this Agreement, in accordance with Part 11 of the IBCA, at the Effective Time (as defined in *Section 1.2* hereof), Merger Sub shall be merged with and into Apexx in accordance with this Merger Plan and the Merger Agreement, and the separate corporate existence of Merger Sub shall thereupon cease (the "Merger"). Apexx shall be the surviving corporation in the Merger (sometimes hereinafter referred to as the "Surviving Corporation") and, as of the Effective Time, shall be a wholly-

owned subsidiary of Parent. The Merger shall have the effects specified in Section 30-1-1106 of the IBCA.

1.2 *Effective Time of the Merger.* Upon the execution of this Merger Plan, Articles of Merger, satisfying the requirements of Section 30-1-1105, shall be duly executed by the Surviving Corporation and filed with the Secretary of State of the State of Idaho in accordance with the IBCA. The "Effective Time" of the Merger shall be, and such term as used herein shall mean, 12:01 a.m., Boise, Idaho time, on date on which the Articles of Merger are filed with the Idaho Secretary of State.

1.3 *Articles of Incorporation.* The Articles of Incorporation of Merger Sub as in effect immediately prior to the Effective Time of the Merger shall constitute the Articles of Incorporation of the Surviving Corporation, without change or amendment until thereafter amended in accordance with the provisions thereof and applicable law, except that Article I of the Articles of Incorporation of Merger Sub shall be amended in its entirety to read as follows:

ARTICLE I

The name of the Corporation is
APEXX TECHNOLOGY, INC.

1.4 *Bylaws.* At the Effective Time, the Surviving Corporation shall take such action as is necessary to amend and restate the Bylaws of the Surviving Corporation to be the Bylaws of Merger Sub, until duly amended in accordance with applicable law.

1.5 *Directors.* The Surviving Corporation shall take such action as is necessary to elect as directors of the Surviving Corporation immediately following the Effective Time: Tom Loutzenheiser, Jeffrey Finn and Tom Tennesen, until their successors are duly appointed or elected in accordance with applicable law.

1.6 *Officers.* The Surviving Corporation shall take such action as is necessary to elect as the officers of the Surviving Corporation immediately following the Effective Time: Tom Loutzenheiser, President, and Jeffrey Finn, Secretary, until their successors are duly appointed or elected in accordance with applicable law.

1.7 *Further Assurances.* Each party hereto will, either prior to or after the Effective Time, execute such further documents, instruments, deeds, bills of sale, assignments and assurances and take such further actions as may reasonably be requested by one or more of the parties to consummate the Merger, to vest the Surviving Corporation with full title to all assets, properties, privileges, rights, approvals, immunities and franchises of either of the Constituent Corporations or to effect the other purposes of this Agreement.

ARTICLE 2 CONVERSION OF SHARES

2.1 *Merger Sub Stock.* At the Effective Time, each share of common stock, no par value per share, of Merger Sub outstanding immediately prior to the Effective Time shall, by virtue of the Merger and without any action on the part of Parent, be converted into and exchanged for one validly issued, fully paid and non-assessable share of common stock, no par value, of the Surviving Corporation.

2.2 *Apexx Securities.*

(a) At the Effective Time, and subject to the provisions of Article IX of the Merger Agreement, each share of common stock of Apexx, no par value per share ("Apexx Common Stock") issued and outstanding immediately prior to the Effective Time (other than any shares of Apexx Common Stock as to which any stockholder has exercised its dissenters rights under the IBCA (a "Dissenting Share") shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into the right to receive 1.119651 (the "Share Exchange Ratio") validly issued, fully paid and non-assessable shares of common stock of Parent, \$.01 par value per share ("Parent Common Stock").

(b) Each Dissenting Share shall not be converted as set forth in *Section 2.2(a)* above, but shall be converted into the right to receive such consideration from Parent as may be determined to be due with respect to such Dissenting Share pursuant to the IBCA; *provided, however,* that each Dissenting Share in respect of which a claim for appraisal is irrevocably withdrawn after the Effective Time shall be deemed to be converted, as of the Effective Time, into the right to receive 1.119651 shares of Parent Common Stock, subject to the provisions of Article IX of the Merger Agreement.

(c) As a result of the Merger and without any action on the part of the holder thereof, at the Effective Time all shares of the Apexx Common Stock shall cease to be outstanding and shall be canceled and retired, and each holder of shares of the Apexx Common Stock shall thereafter cease to have any rights with respect to such shares of the Apexx Common Stock, except the right to receive, without interest, the Parent Common Stock in accordance with this Merger Plan and the Merger Agreement (and cash in lieu of any fractional share that is equal to the product of such fractional interest times the last sales price of Parent Common Stock at the Effective Time as reported by the Nasdaq quotation system) upon the surrender of a certificate (a "Certificate") representing such shares of the Apexx Common Stock or, with respect to a Dissenting Share, the right to receive such consideration per Dissenting Share as such holders of Dissenting Shares may be determined to be entitled pursuant to the IBCA.

(d) Each share of the Apexx Common Stock issued and held in Apexx's treasury at the Effective Time shall, by virtue of the Merger, cease to be outstanding and shall be canceled and retired without payment of any consideration therefor.

(e) All options to purchase Apexx Common Stock (individually, an "Apexx Option" and collectively, the "Apexx Options") outstanding at the Effective Time under any Apexx stock option plan or agreement (the "Apexx Stock Option Plans") shall, at the Effective Time, automatically and without further action on the part of any holder thereof, be converted into an option to purchase Parent Common Stock (individually, a "Parent Stock Option" and collectively, the "Parent Options"). Each option granted by Parent hereunder shall be exercisable upon the same terms and conditions as under the applicable Apexx Stock Option Plan and the applicable option agreement issued thereunder, except that (i) each such Apexx Option shall be exercisable for that whole number of shares of Parent Common Stock (to the nearest whole share) determined by multiplying the number of shares of the Apexx Common Stock subject to such Apexx Option immediately prior to the Effective Time times 1.085879 (the "Option Exchange Ratio"), (ii) the total option price of the shares of Parent Common Stock issuable upon exercise of a Parent Stock Option shall be an amount equal to the total option price of the shares of Apexx Common Stock subject to such Apexx Option in effect immediately prior to the Effective Time, (iii) the exercise price per share shall be calculated by dividing the aggregate option value of the shares of Apexx Common Stock subject to such Apexx Options in effect immediately prior to the Effective Time by the number of shares of Parent Common Stock underlying such Parent Options, and (iv) all Parent Stock Options shall be immediately exercisable.

ARTICLE 3 MISCELLANEOUS

3.1 Abandonment. At any time before the Effective Time, this Merger Plan may be terminated and the Merger may be abandoned by the Board of Directors of Parent or the Constituent Corporations or each of them, notwithstanding approval of the Merger by the shareholders of Apexx or Parent.

3.2 Amendment. At any time prior to the Effective Time, this Merger Plan may be amended by the Boards of Directors of Parent and the Constituent Corporations to the fullest extent permitted by applicable law.

3.3 Counterparts. In order to facilitate the filing and recording of this Merger Plan, the same may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.


3.4 Applicable Law. This Merger Plan shall be construed and interpreted in accordance with the laws of the State of Idaho.

3.5 Merger Agreement. THIS MERGER PLAN DOES NOT, NOR SHALL IT BE DEEMED TO, SUPERSEDE, SUPPLANT, EXTINGUISH, MERGE OR EXPAND ANY OF THE REPRESENTATIONS, WARRANTIES, INDEMNITIES OR LIMITATIONS CONTAINED IN THE MERGER AGREEMENT.

IN WITNESS WHEREOF, Parent, Merger Sub and Apexx have caused this Plan of Merger to be executed by their duly authorized officers as of the day and year first above written.


PARENT:

eSOFT, INC.

By: 
Its: President


MERGER SUB:

eSOFT ACQUISITION CORPORATION

By: 
Its: Vice President

APEXX:

APEXX TECHNOLOGY, INC.

By: 
Its: President