

State of Delaware  
Secretary of State  
Division of Corporations  
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**AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
ADVANCED ICU CARE, INC.**

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(Incorporated on January 10, 2006)

Advanced ICU Care, Inc. (the "Corporation"), a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware (the "Delaware Law"), does hereby certify:

I. That the Board of Directors of the Corporation, by a written consent executed in accordance with Section 141(f) of the Delaware Law on January 10, 2006, adopted a resolution setting forth the Amended and Restated Certificate of Incorporation set forth below, declaring it advisable and submitting it to the stockholders of the Corporation entitled to vote in respect thereof for their consideration of such Amended and Restated Certificate of Incorporation.

II. That by written consent executed in accordance with Section 228(a) of the Delaware Law on January 11, 2006, the stockholders of the Corporation voted in favor of the adoption of the Amended and Restated Certificate of Incorporation set forth below.

III. That the Amended and Restated Certificate of Incorporation of the Corporation set forth below has been duly adopted in accordance with Sections 242 and 245 of the Delaware Law and shall read in its entirety as follows:

**FIRST:** The name of the corporation is Advanced ICU Care, Inc. (the "Corporation").

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

**THIRD:** The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware (the "Delaware Law").

**FOURTH:** The total number of shares of all classes of stock which the Corporation shall have authority to issue, is 13,610,000, which are divided into two classes as follows:

(a) 3,610,000 shares of Preferred Stock, par value \$0.01 per share (the "Preferred Stock" and shares of Preferred Stock are herein sometimes referred to as the "Preferred Shares"), with the rights and preferences designated in Part A below, all of which shall be designated Series A Convertible Preferred Stock, par value \$0.01 per

share (the "Series A Preferred" and shares of Series A Preferred are herein sometimes referred to as the "Series A Preferred Shares"); and

(b) 10,000,000 shares of Common Stock, par value \$0.01 per share (the "Common Stock" and shares of Common Stock are sometimes referred to herein as the "Common Shares"), with the rights and preferences designated in **Part B** below.

In addition to the capitalized terms defined elsewhere herein, certain capitalized terms used herein are defined in **Part D** hereof.

**PART A. Terms Applicable to the Preferred Stock**

**Section 1. Liquidation.**

(a) Upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, before any payment or distribution shall be made on any Junior Securities, each holder of the Series A Preferred shall be entitled to receive for each share of Series A Preferred, an amount in cash or, to the extent that cash is not available, property, out of the assets of the Corporation available for distribution to the stockholders, equal to the Series A Liquidation Value, plus all accrued and unpaid dividends (whether or not declared) to which such holders shall be entitled pursuant to Section 2 hereof. For purposes of this Section 1, unless waived by the holders of at least two-thirds of the Series A Preferred Stock then outstanding, the occurrence of a Fundamental Change shall be deemed to be a liquidation, dissolution or winding up of the Corporation.

(b) After the payment to the holders of the Series A Preferred of the full preferential amounts provided for in Section 1(a), upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, the entire remaining assets and funds of the Corporation legally available for distribution, if any, shall be distributed ratably among the holders of the Series A Preferred Shares and the holders of Common Shares in proportion to the number of Common Shares held by such holders or issuable upon conversion of the Series A Preferred Shares held by such holders, and based upon the sum of the total number of Common Shares outstanding and the total number of Common Shares issuable upon conversion of the Series A Preferred Shares.

(c) If upon any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the assets of the Corporation available for distribution are insufficient to permit the payment to the holders of Series A Preferred of the full preferential amount payable to the holders of Series A Preferred Shares provided in Section 1(a), then all of the assets of the Corporation available for distribution shall be distributed ratably among the holders of the Series A Preferred in proportion to the number of shares of Series A Preferred held by each such holder on the date of liquidation, dissolution or winding up of the Corporation.

Section 2. Dividends.

(a) When and as declared by the Board and to the extent permitted under the Delaware Law, the Corporation shall pay preferential ~~cumulative~~ dividends to the holders of Series A Preferred Shares as provided in this Section 2. Except as otherwise provided herein, dividends on each outstanding share of Series A Preferred shall accrue on a daily basis at a rate of eight percent (8%) per annum on the Series A Liquidation Value, from and including the date of issuance of such share of Series A Preferred Stock to and including the earlier of the date on which the Series A Liquidation Value of such share of Series A Preferred Stock plus all accrued and unpaid dividends thereon is paid or the date on which such share may be converted. Such dividends shall be cumulative and accrue whether or not they have been declared and whether or not there are profits, surplus or other funds of the Corporation legally available for the payment of dividends. Any accrued but unpaid dividends shall be paid when, as and if, declared by the Board or as otherwise set forth in this Certificate of Incorporation. All accrued and unpaid dividends on the Series A Preferred Stock shall be fully paid or declared with funds irrevocably set apart for payment before any dividend, distribution or payment may be made with respect to any Preferred Shares (other than the Series A Preferred Shares) or Junior Securities. The date on which the Corporation initially issues any share of Preferred Stock shall be deemed to be its "date of issuance" regardless of the number of times transfer of such share is made on the stock records maintained by or for the Corporation and regardless of the number of certificates which may be issued to evidence such share.

(b) In addition to the preferential dividend right specified in Section 2(a) above, the holders of Series A Preferred Stock, participating equally on an as if-converted basis, shall be entitled to receive dividends together with the holders of Common Stock in the manner set forth in this paragraph. The holders of Series A Preferred Stock shall be entitled to receive when, as and if, declared by the Board, out of funds legally available therefor, a portion of any dividends declared on shares of Common Stock, whether payable in cash or property, equal to the amount of the dividend that would have been payable in respect of the shares of Common Stock into which all outstanding shares of the Series A Preferred Stock could have been converted on the date of the declaration of the dividend.

(c) No dividend shall be declared or paid and no sum shall be set apart therefore on any Junior Securities unless and until all dividends payable on the Series A Preferred shall have been declared and paid or a sum set apart for such payment. Except as otherwise provided herein, if at any time the Corporation pays less than the total amount of preferential dividends then accrued with respect to all outstanding shares of Series A Preferred, such payment shall be distributed ratably among the holders of such series in proportion to the number of shares of such series held by each such holder.

(d) Notwithstanding anything contained in this Section 2 to the contrary, the holders of Preferred Stock shall not be entitled to receive any dividends in connection with and following a Qualified Public Offering (as defined herein).

Section 3. Voting Rights. The Series A Preferred Stock shall have those voting rights set forth for the Series A Preferred Shares in Part C below.

Section 4. Conversion.

4.1 Conversion Procedure.

(a) At any time and from time to time, any holder of Series A Preferred Shares may convert all or any portion of the Series A Preferred Shares (including any fraction of a share) held by such holder into the number of shares of Common Stock obtained by adding (i) the number of shares determined by (A) multiplying the number of Series A Preferred Shares to be converted by the Series A Liquidation Value, and (B) dividing the resulting product by the Series A Conversion Price (as provided in Section 4.2(a) below) then in effect, plus (ii) the number of shares determined by dividing the total amount of any accrued and unpaid dividends with respect to such Series A Preferred Shares to be converted by the Series A Conversion Price then in effect.

(b) Each conversion of Preferred Shares will be deemed to have been effected as of the close of business on the date on which the stockholder delivers written notice to the Corporation at its principal office of its desire to convert shares of Preferred Stock and surrenders the certificate or certificates representing the Preferred Shares to be converted. At such time as such conversion has been effected, the rights of the holder of such Preferred Shares as such holder will cease and the Person or Persons in whose name or names any certificate or certificates for shares of Common Stock are to be issued upon such conversion will be deemed to have become the holder or holders of record of the shares of Common Stock represented thereby. All shares of Series A Preferred Stock tendered for conversion shall, from and after the date of conversion, be deemed to have been retired and cancelled and shall not be reissued as Series A Preferred Stock and the Corporation may thereafter take such appropriate action as may be necessary to reduce accordingly the authorized number of shares of Series A Preferred Stock.

(c) As soon as possible after a conversion has been effected (but in any event within five (5) business days in the case of Sections 4.1(c)(i) and 4.1(c)(iii) below), the Corporation will deliver to the converting holder:

(i) a certificate or certificates representing the number of shares of Common Stock issuable by reason of such conversion in such name or names and such denomination or denominations as the converting holder has specified;

(ii) payment of the amount payable under Section 4.1(f) below with respect to such conversion; and

(iii) a certificate representing any Series A Preferred Shares that were represented by the certificate or certificates delivered to the Corporation in connection with such conversion but which were not converted.

(d) The issuance of certificates for shares of Common Stock upon conversion of Series A Preferred Stock will be made without charge to the holders of such Series A Preferred Stock for any issuance tax in respect thereof or other cost incurred by the Corporation in connection with such conversion and the related issuance of shares of Common Stock. Upon conversion of each Series A Preferred Share, the Corporation will take all such actions as are necessary in order to insure that the Common Stock issuable with respect to such conversion will be validly issued, fully paid and nonassessable.

(e) The Corporation will not close its books against the transfer of shares of Series A Preferred Stock or Common Stock issued or issuable upon conversion of shares of Series A Preferred Stock in any manner that interferes with the timely conversion of Series A Preferred Stock.

(f) If any fractional interest in a share of Common Stock would, except for the provisions of this Section 4.1(f), be deliverable upon any conversion of the Series A Preferred Stock, the Corporation, in lieu of delivering the fractional share therefor, may pay an amount to the holder thereof equal to the fair market value (as reasonably determined in good faith by the Board) of such fractional interest as of the date of conversion.

(g) The Corporation shall at all times reserve and keep available, out of its authorized but unissued Common Stock, such number of Common Shares as would be issuable upon the conversion of all Series A Preferred Shares then outstanding.

#### 4.2 Conversion Prices.

(a) Initial Series A Conversion Price. The initial "Series A Conversion Price" will be \$0.6925. In order to prevent dilution of the conversion rights granted to holders of Series A Preferred Shares hereunder, the Series A Conversion Price will be subject to adjustment from time to time pursuant to this Section 4.2 and Sections 4.4 and 4.5 of this Part A. For purposes of this Section 4.2, the Corporation shall be deemed to have issued or sold Common Stock under the circumstances as set forth in Section 4.3 below.

(b) Adjustment for Dilutive Events. If and whenever on or after the original date of issuance of the Series A Preferred Stock, the Corporation issues or sells, or in accordance with Section 4.3 below is deemed to have issued or sold, any shares of Common Stock (or any Options or Convertible Securities, in each case, as defined below) for consideration per share less than the applicable Series A Conversion Price in effect immediately prior to the time of such issue or sale (a "Dilutive Event"), then forthwith upon the occurrence of any such Dilutive Event, the Series A Conversion Price will be reduced (in order to increase the

number of shares of Common Stock into which such Series A Preferred Share is convertible) to that price per share determined by dividing (i) the sum of (x) the product derived by multiplying the Series A Conversion Price in effect immediately prior to such Dilutive Event, times the number of shares of Common Stock Deemed Outstanding immediately prior to the Dilutive Event plus (y) the aggregate consideration (if any) received by the Corporation for the total number of such shares of Common Stock so issued or sold, or deemed issued or sold, in such Dilutive Event by (ii) the number of shares of Common Stock Deemed Outstanding immediately after such Dilutive Event. Additional shares of Common Stock issued or sold (or deemed issued or sold) without consideration shall be deemed to have been sold for \$0.01 per share. Notwithstanding anything herein to the contrary, the issuance by the Corporation of (i) options or other rights to acquire up to 366,480 shares of Common Stock (as adjusted for stock dividends, splits, combinations and the like with respect to the Common Stock), and the issuance of shares of Common Stock upon exercise thereof, issued pursuant to stock option plans, stock option grants or other similar arrangements to officers, directors, employees and consultants approved by the Board; (ii) shares of Common Stock issued pursuant to a transaction described in Section 4.4 below; (iii) the Series A Preferred Shares pursuant to the Series A Stock Purchase Agreement and shares of Common Stock issuable upon conversion of such Series A Preferred Shares; (iv) shares of Common Stock issuable upon exercise of the Nidus Warrant or the Advisory Fee Warrant; (v) securities issued pursuant to financing leases or similar arrangements approved by not less than two-thirds of the holders of the Series A Preferred Shares; (vi) securities issued other than for cash to strategic partners, lenders or lessors of the Corporation pursuant to strategic partnerships or other transactions approved by not less than two-thirds of the holders of the Series A Preferred Shares; (vii) Common Stock or securities convertible into or exercisable for Common Stock, approved by the holder or holders of not less than two-thirds of the Series A Preferred Stock then outstanding, as securities excluded from the Series A Conversion Price adjustment provisions provided for herein, shall not constitute a Dilutive Event.

**4.3 Common Stock Deemed Outstanding.** For purposes of determining an adjusted Series A Conversion Price pursuant to Section 4.2(b) above, the following shall be deemed to be an issuance and sale of Common Stock by the Corporation and the "Common Stock Deemed Outstanding" shall be the number of shares of Common Stock actually issued and outstanding plus (i) the number of shares of Common Stock that would be outstanding assuming the full exercise and conversion of all outstanding options, warrants, purchase rights, and convertible securities, exercisable or convertible for Common Stock (or any securities which are further exercisable for or convertible into Common Stock), including, but not limited to, the Common Stock that would be issuable upon conversion of the outstanding Series A Preferred Stock; and (ii) the number of shares of Common Stock deemed issued or sold pursuant to Sections 4.3(a) and 4.3(b) below regardless of whether such Options or Convertible Securities are actually exercisable at such time (without duplication for any options, warrants, purchase rights, and convertible securities included under clause (i) immediately preceding).

(a) Issuance of Rights or Options. If (i) the Corporation in any manner grants any rights or options to subscribe for or to purchase shares of Common Stock or any securities convertible into or exchangeable for shares of Common Stock (such rights or options referred to herein as "Options" and such convertible or exchangeable stock or securities referred to herein as "Convertible Securities") whether or not such Options or the right to convert or exchange any such Convertible Securities are immediately exercisable and (ii) the Price Per Share of shares of Common Stock issuable upon the exercise of such Options or upon conversion or exchange of such Convertible Securities is less than the Series A Conversion Price in effect immediately prior to the time of the granting of such Options, then (x) the total maximum number of shares of such Common Stock issuable upon the exercise of such Options or upon conversion or exchange of the total maximum number of Convertible Securities issuable upon the exercise of such Options will be deemed to be Common Stock issued and sold by the Corporation, (y) the consideration received pursuant to the Dilutive Event will equal the Price Per Share times the number of shares of Common Stock so deemed issued and sold by the Corporation and (z) the number of shares of Common Stock so deemed issued and sold by the Corporation shall be included in the Common Stock Deemed Outstanding immediately after such Dilutive Event. For purposes of this Section 4.3(a), the "Price Per Share" will be determined by dividing (i) the total amount, if any, received or receivable by the Corporation as consideration for the granting of such Options, plus the minimum aggregate amount of additional consideration payable to the Corporation upon exercise of all such Options, plus in the case of such Options which relate to Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable to the Corporation upon the issuance or sale of such Convertible Securities and the conversion or exchange thereof, by (ii) the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon the conversion or exchange of all such Convertible Securities issuable upon the exercise of such Options. No further adjustment of the Series A Conversion Price will be made when Convertible Securities are actually issued upon the exercise of such Options or when Common Stock is actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities; provided, that, if such Options expire or lapse without being exercised and/or converted into Common Stock, then the Series A Conversion Price will be readjusted to the Series A Conversion Price which would have been in effect had such expired or lapsed Options not been issued.

(b) Issuance of Convertible Securities. If (i) the Corporation in any manner issues or sells any Convertible Securities whether or not the right to convert or exchange any such Convertible Securities are immediately exercisable and (ii) the Price Per Share of shares of Common Stock issuable upon such conversion or exchange is less than the Series A Conversion Price in effect immediately prior to the time of such issue or sale, then (x) the maximum number of shares of Common Stock issuable upon conversion or exchange of such Convertible Securities will be deemed to be Common Stock issued and sold by the Corporation, (y) the consideration received pursuant to the Dilutive Event will equal the Price Per Share times the number of shares of Common Stock so deemed issued and sold by the Corporation and (z)

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The number of shares of Common Stock so deemed issued and sold by the Corporation shall be included in the Common Stock Deemed Outstanding immediately after such Dilutive Event. For the purposes of this Section 4.3(b), the "Price Per Share" will be determined by dividing (i) the total amount received or receivable by the Corporation as consideration for the issue or sale of such Convertible Securities, plus the minimum aggregate amount of additional consideration, if any, payable to the Corporation upon the conversion or exchange thereof, by (ii) the total maximum number of shares of Common Stock issuable upon the conversion or exchange of all such Convertible Securities. No further adjustment of the Series A Conversion Price will be made when Common Stock is actually issued upon the conversion or exchange of such Convertible Securities, and if any such issue or sale of such Convertible Securities is made upon exercise of any Options for which adjustments to the Series A Conversion Price had been or are to be made pursuant to Section 4.3(a) above, no further adjustment of the Series A Conversion Price will be made by reason of such issue or sale; provided, that, if such Convertible Securities expire or lapse without being exercised and/or converted into Common Stock, then the Series A Conversion Price will be readjusted to the Series A Conversion Price which would have been in effect had such expired or lapsed Convertible Securities not been issued.

(c) Change in Option Price or Conversion Rate. If at any time there is a change in (i) the purchase price provided for in any Options, (ii) the additional consideration, if any, payable upon the conversion or exchange of any Convertible Securities, or (iii) the rate at which any Convertible Securities are convertible or exchangeable for Common Stock, then the Series A Conversion Price in effect at the time of such change will be readjusted to the Series A Conversion Price which would have been in effect had those Options or Convertible Securities still outstanding at the time of such change provided for such changed purchase price, additional consideration or changed conversion rate, as the case may be, at the time such Options or Convertible Securities were initially granted, issued or sold but only if as a result of such adjustment the Series A Conversion Price then in effect hereunder would have been reduced; and on the termination of any such Option or any right to convert or exchange such Convertible Securities, the Series A Conversion Price then in effect hereunder shall forthwith be increased to the Series A Conversion Price which would have been in effect at the time of such termination had such Option or Convertible Securities, to the extent outstanding immediately prior to such termination, never been issued.

(d) Calculation of Consideration Received. If any shares of Common Stock, Options or Convertible Securities are issued or sold or deemed to have been issued or sold for cash, the consideration received therefor or the Price Per Share, as the case may be, will be deemed to be the net amount received or to be received by the Corporation therefor. In case any shares of Common Stock, Options or Convertible Securities are issued or sold for a consideration other than cash, the amount of the consideration other than cash received by the Corporation or the non-cash portion of the Price Per Share, as the case may be, will be the Fair Market Value of such consideration received or to be received, respectively, by the Corporation; except where such consideration consists of securities, in which case the amount of consideration received or



to be received, respectively, by the Corporation will be the Market Price thereof as of the date of receipt. If any shares of Common Stock, Options or Convertible Securities are issued in connection with any merger in which the Corporation is the surviving corporation, the amount of consideration therefor will be deemed to be the Fair Market Value of such portion of the net assets and business of the non-surviving corporation as is attributable to such shares of Common Stock, Options or Convertible Securities, as the case may be.

(e) Integrated Transactions. In case any Option is issued in connection with the issuance or sale of other securities of the Corporation, together comprising one integrated transaction in which no specific consideration is allocated to such Option by the parties thereto, the Option will be deemed to have been issued for a consideration of \$0.01.

(f) Treasury Shares. The number of shares of Common Stock Deemed Outstanding at any given time shall not include shares owned or held by or for the account of the Corporation, and the disposition of any shares so owned or held shall be considered an issuance or sale of Common Stock by the Corporation.

(g) Record Date. If the Corporation takes a record of the holders of Common Stock for the purpose of entitling them (i) to receive a dividend or other distribution payable in shares of Common Stock, Options or in Convertible Securities or (ii) to subscribe for or purchase shares of Common Stock, Options or Convertible Securities, then such record date will be deemed to be the date of the issuance or sale of the shares of Common Stock deemed to have been issued or sold upon the declaration of such dividend or upon the making of such other distribution or the date of the granting of such right of subscription or purchase, as the case may be.

4.4 Subdivision or Combination of Common Stock. If the Corporation at any time subdivides (by any stock split, stock dividend, recapitalization or otherwise) its outstanding shares of Common Stock into a greater number of shares, the Series A Conversion Price in effect immediately prior to such subdivision will be proportionately reduced so that the number of shares of Common Stock issuable upon conversion of each share of Series A Preferred Stock shall be increased in proportion to such increase of the aggregate number of shares of outstanding Common Stock. If the Corporation at any time combines (by reverse stock split or otherwise) its outstanding shares of Common Stock into a smaller number of shares, the Series A Conversion Price in effect immediately prior to such combination will be proportionately increased so that the number of shares of Common Stock issuable upon conversion of each share of Series A Preferred Stock shall be decreased in proportion to such decrease of the aggregate number of shares of outstanding Common Stock.

4.5 Organic Change. Upon the consummation of an Organic Change, the terms of the Preferred Stock shall be deemed modified, without payment of any additional consideration therefor, so as to provide that upon the conversion of the Preferred Shares following the consummation of such Organic Change, the holder of such Preferred Shares shall

have the right to acquire and receive (in lieu of or in addition to the shares of Common Stock acquirable and receivable prior to the Organic Change) such shares of stock, securities or assets as such holder would have received if such holder had converted its Preferred Shares into Common Stock immediately prior to such Organic Change, in each case giving effect to any adjustment of the Series A Conversion Price made after the date of consummation of the Organic Change. All other terms of the Preferred Stock shall remain in full force and effect following such an Organic Change. The provisions of this Section 4.5 shall similarly apply to successive Organic Changes.

#### 4.6 Notices.

(a) Immediately upon any adjustment of the Series A Conversion Price, the Corporation shall give written notice thereof to all holders of Series A Preferred Stock specifying the Series A Conversion Price in effect thereafter.

(b) The Corporation shall give written notice to all holders of Preferred Stock at least twenty (20) days prior to the date on which the Corporation closes its books or takes a record for determining rights to vote with respect to any Organic Change, dissolution or liquidation.

4.7 Mandatory Conversion. If the holder or holders of not less than two-thirds of the Series A Preferred Shares then outstanding shall so elect, by vote or written consent, all of the outstanding Series A Preferred Shares (and any accrued but unpaid dividends thereon) shall automatically convert into shares of Common Stock upon such election, vote or consent and without any further action by the holders of such Series A Preferred Shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent.

4.8 Mandatory Conversion Upon Qualified Public Offering. If a firm commitment underwritten Public Offering of shares of Common Stock (a "Qualified Public Offering") is effected in which (a) the aggregate price paid by the public for the shares is at least \$30,000,000 and (b) the price per share paid by the public for such shares is at least five hundred percent (500%) of the Series A Liquidation Value, then all of the outstanding shares of Preferred Stock (and any accrued but unpaid dividends thereon except as provided in Section 2(d)) shall be automatically converted into shares of Common Stock immediately prior to and conditioned upon the closing of the sale of shares pursuant to such Qualified Public Offering, all without any further action by the holders of such Preferred Shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent.

4.9 Certain Events. If any event similar to or of the type contemplated by the provisions of this Section 4, but not expressly provided for by such provisions, occurs, then the Board will make an appropriate and equitable adjustment in the Series A Conversion Price so as to protect the rights of the holders of Series A Preferred Stock; provided, that no such adjustment

will increase the Series A Conversion Price as otherwise determined pursuant to this Section 4 or decrease the number of shares of Common Stock issuable upon conversion of each Series A Preferred Share.

4.10 Computations. All computations under this Section 4 shall be made to the nearest one-tenth (1/10) of a cent or to the nearest one hundredth (1/100) of a share, as the case may be.

Section 5. Redemption.

5.1 Optional Redemptions.

(a) At any time or times on or during the 180-day period immediately following the fifth anniversary of the Initial Closing, the holder or holders of not less than two-thirds (2/3) of the Series A Preferred then outstanding may elect, at their option, to require the Corporation to redeem (to the extent that funds are legally available therefor) all or any portion of the outstanding shares of Series A Preferred Stock by delivering written notice of such request to the Corporation. Within five (5) days after receipt of any such notice, the Corporation shall give written notice of such request to all holders of Series A Preferred Shares and any such holder can request, within thirty (30) days of its receipt of such notice, that, subject to the priority provisions set forth herein, the Corporation redeem all or any of the shares of Series A Preferred Stock held by such holder. The Corporation shall be required either to redeem, or obtain or procure a third party to purchase, all Series A Preferred Shares with respect to which written redemption requests (including requests made by non-initiating holders pursuant to the immediately preceding sentence) have been made at a price per share equal to the Series A Redemption Price (provided in Section 5.1(b) below) within one hundred eighty (180) days after receipt of the initial redemption request. The date of the initial redemption, and the date of each redemption thereafter, shall be a "Redemption Date."

(b) For purposes hereof, the "Series A Redemption Price" of any Series A Preferred Share means an amount equal to the greater of (i) the amount that such Series A Preferred Share would receive upon the liquidation, dissolution and winding up of the Corporation pursuant to Section 1 of Part A of this Article Fourth, assuming a Fundamental Change with respect to the Corporation at Fair Market Value, and (ii) the Series A Liquidation Value plus all accrued but unpaid dividends on such Series A Preferred Shares through the Redemption Date to which holders of Series A Preferred are entitled pursuant to Section 2 of Part A of this Article Fourth.

(c) The rights of the holders of Series A Preferred to require the Corporation to redeem shares of Series A Preferred Stock shall terminate upon a Fundamental Change or Qualified Public Offering.

5.2 Redemption Payment. For each Series A Preferred Share that is to be redeemed, the Corporation shall be obligated to pay to the holder thereof (upon surrender by such holder at the Corporation's principal office of the certificate representing such Series A Preferred Share) an amount equal to the Series A Redemption Price. The Series A Redemption Price shall be paid, at the option of the Corporation, either by (i) payment of 100% of the Series A Redemption Price by wire transfer of immediately available funds to an account or accounts designated by such holder, or (ii) payment of one-third of the Series A Redemption Price by wire transfer of immediately available funds to an account or accounts designated by such holder and delivery of a promissory note in an original principal amount equal to the balance of the Series A Redemption Price, payable in two equal annual installments (with a maturity date of the second anniversary of the applicable Redemption Date) and bearing interest at an annual rate equal to eight percent (8%). If the funds of the Corporation legally available for redemption of Series A Preferred Stock on any Redemption Date are insufficient to redeem the total number of Series A Preferred Shares to be redeemed on such date, those funds which are legally available shall be used first, to pay any and all accrued and unpaid dividends on the Series A Preferred to be redeemed (ratably among the holders of such shares in proportion to the accrued and unpaid dividend amounts each holder is entitled to receive), and thereafter, to redeem the Series A Preferred Shares to be redeemed on such Redemption Date, paid to the holders of such Series A Preferred Shares ratably in proportion to the aggregate Series A Redemption Price each such holder is entitled to receive on such Redemption Date. At any time thereafter when additional funds of the Corporation are legally available for the redemption of Series A Preferred Shares, such funds shall immediately be used first, to pay any and all accrued and unpaid dividends on any balance of Series A Preferred Shares then outstanding to be redeemed (ratably among the holders of such shares in proportion to the accrued and unpaid dividend amounts each holder is entitled to receive), and thereafter, to redeem any balance of Series A Preferred Shares then outstanding to be redeemed on such Redemption Date, paid to the holders of such Series A Preferred Shares ratably in proportion to the aggregate Series A Redemption Price each such holder is entitled to receive on such Redemption Date. In case fewer than the total number of Series A Preferred Shares represented by any certificate are redeemed, a new certificate representing the number of unredeemed Series A Preferred Shares shall be issued to the holder thereof without cost to such holder within three (3) business days after surrender of the certificate representing the redeemed Series A Preferred Shares.

5.3 No Rights After Redemption. No Series A Preferred Share is entitled to any dividends declared after the date on which the Redemption Price of such Series A Preferred Share is paid to the holder thereof. On such date all rights of the holder of such Series A Preferred Share shall cease, and such Series A Preferred Share shall no longer be deemed to be outstanding.

5.4 Redeemed or Otherwise Acquired Shares. Any Series A Preferred Shares that are redeemed or otherwise acquired by the Corporation shall be considered authorized but unissued shares.

### 5.5 Events of Noncompliance.

(a) Subject to the last sentence of this Section 5.5(a), an Event of Noncompliance shall be deemed to have occurred:

(i) If the Corporation fails to make any redemption payment with respect to the Series A Preferred Stock that it is obligated to make hereunder and any such failure continues for a period of five (5) days after the Corporation receives notice of the occurrence thereof (whether or not funds of the Corporation are legally available for such payment); or

(ii) If the Corporation makes an assignment for the benefit of creditors or admits in writing its inability to pay its debts generally as they become due; or an order, judgment or decree is entered adjudicating the Corporation bankrupt or insolvent; or any order for relief with respect to the Corporation is entered under the United States Bankruptcy Code; or the Corporation petitions or applies to any tribunal for the appointment of a custodian, trustee, receiver or liquidator of the Corporation, or of all or any substantial part of the assets of the Corporation, or commences any proceeding (other than a proceeding for the voluntary liquidation and dissolution of any wholly-owned Subsidiary) relating to the Corporation under any bankruptcy reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction; or any such petition or application is filed, or any such proceeding is commenced, against the Corporation and either (x) the Corporation by any act indicates its approval thereof, consent thereto or acquiescence therein or (y) such petition, application or proceeding is not dismissed within ninety (90) days.

(b) If an Event of Noncompliance shall have occurred and is continuing and for so long as any shares of Series A Preferred Stock remain outstanding (adjusted appropriately in the event the shares of Series A Preferred Stock are subdivided into a greater number, whether by stock split, stock dividend or otherwise, or combined into a lesser number, whether by reverse stock split or otherwise), then the holders of Series A Preferred Stock, voting as a separate class, will have the special right (in addition to any other voting rights such holders may have) to elect an additional number of directors to the Board that, together with the number of directors that the holders of Series A Preferred Stock are entitled to nominate and have elected pursuant to the Stockholders Agreement, would constitute a majority of the Board at such time, and the Corporation shall, if necessary, cause the Board to adopt resolutions increasing the size of the Board in order to effect this right, but solely for as long as this right exists. Whenever such special right has vested, it may be exercised at any special meeting of the Corporation's stockholders as provided below or by written consent of the stockholders necessary to take such actions as contemplated by this paragraph (b). If exercised by written consent, then the entire Board shall consist of a majority of members (i) elected by the holders of Series A Preferred Shares voting separately as separate series with respect to such number of directors that such series may be entitled to nominate and have elected pursuant to the

Stockholders Agreement and (ii) elected by the holders of not less than two-thirds (2/3) of the shares of Common Stock that would be issuable upon conversion of the Series A Preferred Stock voting together as a separate class with respect to such additional number of directors to constitute such super-majority, pursuant to the written consent, and the remainder of the entire Board shall consist of the members previously nominated or designated by the holders of the Series A Preferred and Common Stock voting separately as a separate class pursuant to the Stockholders Agreement. If an Event of Noncompliance shall have occurred and is continuing, then upon the written request of the holders of not less than a two-thirds (2/3) of the shares of Common Stock that would be issuable upon conversion of the Series A Preferred Shares, a proper officer of the Corporation will call as promptly as possible a special meeting of Corporation's stockholders for the purpose of electing directors. If such meeting has not been called by a proper officer of the Corporation within three (3) days after personal service of said written request upon the secretary of the Corporation or within five (5) days after mailing the same by registered mail addressed to the secretary of the Corporation at its principal office, then the holders of record of not less than two-thirds (2/3) of the shares of Common Stock that would be issuable upon conversion of the Series A Preferred Shares at the time outstanding may designate in writing one of their number to call such meeting at the expense of the Corporation, and such meeting may be called by such person so designated upon the notice required for annual meetings of stockholders and will be held at such place designated by such holders. Any holder of Series A Preferred Stock so designated will be given access to the stock record books of the Corporation for the purpose of causing meetings of stockholders to be called pursuant to these provisions. Upon the convening of such meeting, the office of all persons who were theretofore directors of the Corporation shall terminate and the entire Board shall consist of those members elected at the meeting, the majority of which shall be elected by the holders of (i) Series A Preferred Shares, voting separately as separate series with respect to such number of directors that such series may be entitled to nominate and have elected pursuant to the Stockholders Agreement and (ii) two-thirds (2/3) of the shares of Common Stock that would be issuable upon conversion of the Series A Preferred Shares at the time outstanding, voting together as a separate class, with respect to such additional number of directors to constitute such super-majority, and the remainder of which shall be elected by the holders of a majority of the shares of Common Stock. The special right of the holders of the Series A Preferred Stock provided for in this Section 5.5(b) shall continue only until the date the Event of Noncompliance giving rise to such right ceases to exist, but may be invoked again if an additional Event of Noncompliance occurs. Any director elected pursuant to these special rights may be removed, and any vacancy in the Board existing at such time when this special voting power is vested can be filled, by written consent or at another special meeting in accordance with these provisions. Upon the date the Event of Noncompliance giving rise to the rights under this Section 5.5(b) ceases to exist, the office of all persons who were elected directors of the Corporation pursuant to this Section 5.5(b) shall terminate, the size of the Board shall be as it was immediately prior to such event, and the entire Board shall consist of those members (subject to any resignations or replacements) who were directors of the Corporation immediately prior to the exercise of the special right of the holders of the Series A Preferred Shares provided for in this Section 5.5(b).

(c) In addition, if an Event of Noncompliance shall have occurred under Section 5.5(a)(ii), then the holder or holders of at least two-thirds (2/3) of the Series A Preferred then outstanding may demand by written notice delivered to the Corporation immediate redemption (to the extent that funds are legally available therefor) of all or any portion of the Series A Preferred Shares then outstanding at a price per share equal to the Series A Redemption Price. The Corporation shall give prompt written notice of any such election to the other holders of the Series A Preferred Shares (but in any event within five (5) days after the receipt of the initial demand for redemption), and each such other holder may demand immediate redemption of all or any portion of such holder's Series A Preferred Shares by giving written notice thereof to the Corporation within seven (7) days after receipt of the Corporation's notice. If any holder or holders of the Series A Preferred Shares demands immediate redemption of all or any portion of such holder's Series A Preferred Shares pursuant to the terms of this Section 5.5(c), the Corporation shall pay to such holder or holders the aggregate applicable Redemption Price of such shares requested to be redeemed by such holder or holders within fourteen (14) days after receipt of the initial demand for redemption and otherwise in accordance with the payment preferences described in Section 5.2 hereof.

#### Section 6. Miscellaneous.

6.1 Registration of Transfer. The Corporation will keep at its principal office a register for the registration of Preferred Shares. Upon the surrender of any certificate representing Preferred Shares at such place, the Corporation will, at the request of the record holder of such certificate, execute and deliver (at the Corporation's expense) a new certificate or certificates in exchange therefor representing in the aggregate the number of Preferred Shares represented by the surrendered certificate. Each such new certificate will be registered in such name and will represent such number of Preferred Shares as is requested by the holder of the surrendered certificate and will be substantially identical in form to the surrendered certificate, and dividends will accrue on the Preferred Shares represented by such new certificate from the date to which dividends have been fully paid on such Preferred Shares represented by the surrendered certificate.

6.2 Replacement. Upon receipt of evidence reasonably satisfactory to the Corporation (an affidavit of the registered holder will be satisfactory) of the ownership and the loss, theft, destruction or mutilation of any certificate evidencing Preferred Shares, and in the case of any such loss, theft or destruction, upon receipt of indemnity reasonably satisfactory to the Corporation (provided that if the holder is an institutional investor its own agreement will be satisfactory), or, in the case of any such mutilation upon surrender of such certificate, the Corporation will (at its expense) execute and deliver in lieu of such certificate a new certificate of like kind representing the number of Preferred Shares of such class and series represented by such lost, stolen, destroyed or mutilated certificate and dated the date of such lost, stolen, destroyed or mutilated certificate, and dividends will accrue on the Preferred Shares represented

by such new certificate from the date to which dividends have been fully paid on such lost, stolen, destroyed or mutilated certificate.

6.3 Amendment and Waiver. No amendment, modification or waiver will be binding or effective with respect to any provision of this Part A without the prior affirmative vote or the written consent or waiver of the holder or holders of at least two-thirds of the Series A Preferred then outstanding at the time such action is taken.

6.4 Notices. Except as otherwise expressly provided, all notices referred to herein will be in writing and will be delivered personally or mailed, certified mail, return receipt requested, postage prepaid, or delivered by overnight courier service, and will be deemed to have been given upon delivery, if delivered personally, five days after mailing, if mailed, or one business day after delivery to the courier, if delivered by overnight courier service (a) to the Corporation, at its principal executive offices and (b) to any stockholder, at such holder's address as it appears in the stock records of the Corporation (unless otherwise indicated in writing by such holder).

## **PART B. Terms Applicable to Common Stock**

Section 1. Liquidation. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation and after the payment of any preferential amounts to be distributed to the holders of the Series A Preferred Shares, the remaining assets of the Corporation available for distribution to the stockholders shall be distributed to the holders of Common Shares in accordance with Section 1(b) of Part A of this Article Fourth.

Section 2. Dividends. Whenever all accrued and unpaid preferential dividends upon the Series A Preferred Stock shall have been paid or declared and set apart for payment, the Board may declare a dividend or distribution upon the Common Stock. Dividends or distributions so declared by the Board shall be paid to the holders of Common Shares ratably in proportion to the number of shares of Common Stock held by each such holder on the date as of which the holders of Common Stock of record entitled to receive such dividends or distribution were determined.

Section 3. Voting Rights. The Common Stock shall have those voting rights set forth for the Common Stock in Part C below.

## **PART C. Voting Rights.**

Section 1. In General. Except as otherwise provided by the Delaware Law, this Amended and Restated Certificate of Incorporation and the Related Agreements, on all matters submitted to a vote of the stockholders of the Corporation, the Common Stock and the Series A Preferred shall vote together as a single class. Each holder of Series A Preferred shall have the number of votes equal to the number of shares of Common Stock which such holder would have



been entitled to receive had such holder converted all of its Series A Preferred Shares into Common Shares on the date as of which the holders of Common Stock of record entitled to vote were determined (assuming for this purpose only that Preferred Shares are convertible into fractional shares) and each holder of Common Stock shall have one vote per share of Common Stock held by such holder on the date as of which the holders of Common Stock of record entitled to vote were determined.

Section 2. Protective Provisions. For so long as a majority of the Series A Preferred Shares (as adjusted for stock splits, stock dividends, combinations, recapitalizations and the like) issued at the Initial Closing and the Second Closing remain outstanding, the Corporation shall not undertake, without the prior written approval of the Holder or Holders of at least two-thirds (2/3) of the outstanding Series A Preferred Stock, any of the following actions:

(a) Dividends. Directly or indirectly declare or pay, or permit any of its Subsidiaries to declare or pay, any dividends, or make or permit any of its Subsidiaries to make, any distributions upon any of its equity securities other than in accordance with Section 2 of Part A hereof;

(b) Redemptions. Directly or indirectly redeem, purchase or otherwise acquire, or permit any of its Subsidiaries to directly or indirectly redeem, purchase or otherwise acquire, any of the Corporation's or any of its Subsidiaries' equity securities or interests, except as required by Section 5 of Part A hereof and except for repurchases of equity securities or interests from an employee, consultant or director of the Corporation or any of its Subsidiaries upon termination of such person's employment, consultancy or directorship with the Corporation or any of its Subsidiaries pursuant to any agreement or plan approved by the Board;

(c) Issuances. Authorize, issue, or enter into any agreement providing for the issuance (contingent or otherwise) of (x) any notes or debt securities containing equity features, including, but not limited to, any notes or debt securities convertible into or exchangeable for equity securities issued in connection with the issuance of equity securities or containing profit participation features, (y) any equity securities (or any securities convertible into or exchangeable for any equity securities), except for (i) options or other rights to acquire up to 366,481 shares of Common Stock (as adjusted for stock dividends, splits, combinations and the like with respect to the Common Stock) (and the issuance of shares of Common Stock upon the exercise of such options and rights) which may be issued under the Option Plan (as defined in the Series A Stock Purchase Agreement), (ii) shares of Common Stock issued in a Qualified Public Offering, (iii) shares of Common Stock issued on conversion of Series A Preferred Shares and (iv) shares of Common Stock issued upon exercise of the Nidus Warrant or the Advisory Fee Warrant, or (z) any capital appreciation or profit participation rights (other than bonus compensation paid to employees of the Corporation or any of its Subsidiaries as approved by the Board);

(d) Mergers. Merge or consolidate with any Person or permit any of its Subsidiaries to merge or consolidate with any Person (other than, in the case of a wholly-owned Subsidiary, with or into the Corporation or any other wholly-owned Subsidiary);

(e) Purchase or Sale of Assets. Purchase, acquire, sell, lease or otherwise dispose of, or permit any Subsidiary to purchase, acquire, sell, lease or otherwise dispose of, assets in one or more transactions that represent ten percent (10%) or more of the Corporation's consolidated assets, on either a book value or Fair Market Value basis (other than sales, leases or other dispositions in the ordinary course of business);

(f) Exclusive License. Enter into or modify, or permit any of its Subsidiaries to enter into or modify, any exclusive license agreement pursuant which the Corporation or its Subsidiary licenses its Software, Design Documentation or Proprietary Rights (each as defined in the Series A Stock Purchase Agreement) on an exclusive basis to any third party;

(g) Liquidations. Liquidate, dissolve or effect a recapitalization or reorganization in any form of transaction or permit any of its Subsidiaries to liquidate, dissolve or effect a recapitalization or reorganization in any form of transaction;

(h) Charter Amendments. Make any amendment to the Corporation's Certificate or any Subsidiary's certificate or articles of incorporation or formation, whether by merger, consolidation or otherwise, or make any amendments to the Corporation's by-laws or any Subsidiary's operating agreement, whether by merger, consolidation or otherwise;

(i) Affiliate Transactions. Enter into (directly or indirectly), or permit any of its Subsidiaries to enter into, any transaction with any of its or any of its Subsidiaries' Affiliates, or any officer, director or stockholder of the Corporation or any of its Subsidiaries, any of their respective Affiliates, or any entity in which such persons or their Affiliates may have an interest (excluding any interest of not more than 1% of the shares of stock of any public company having a class of equity securities actively traded on a recognized securities exchange or market);

(j) Other Business. Enter into (directly or indirectly through a new Subsidiary), or permit any of its Subsidiaries to enter into, the ownership, management or operation of any business other than the business anticipated to be conducted by the Corporation and its subsidiaries as of the date of the Initial Closing or any business directly related thereto;

(k) Indebtedness. Create, incur, assume or suffer to exist, or permit the Corporation and its Subsidiaries, taken as a whole, to create, incur, assume or suffer to exist, Indebtedness in an aggregate amount exceeding \$50,000 at any time outstanding, other than purchase money obligations, equipment leases or financing and trade debt in the ordinary course of business;

(l) Capital Expenditures. Make, or permit any Subsidiary to make, in any fiscal year any capital expenditures exceeding \$50,000, in the aggregate, unless such expenditures are set forth in the applicable Budget approved by the Board (including at least one (1) Series A Director);

(m) Bankruptcy. Voluntarily file any petition or application with any tribunal for the appointment of a custodian, trustee, receiver or liquidator of the Corporation or any Subsidiary of all or any substantial part of the assets of the Corporation or its Subsidiaries, commence any proceeding (other than a proceeding for the voluntary liquidation and dissolution of any wholly-owned Subsidiary) relating to the Corporation or any Subsidiary under any bankruptcy reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction, voluntarily file any such petition or application, make any assignment for the benefit of creditors of the Corporation or any Subsidiary, or otherwise make any admission of the Corporation's or any Subsidiary's inability to pay its debts generally as they become due;

(n) Settlement of Litigation. Settle or compromise any action, claim, suit or proceeding against the Corporation (other than actions or claims arising in the ordinary course of business or in which a party is seeking damages or other payment by the Corporation of less than \$50,000);

(o) Liens. Create or suffer to exist, or permit any of its Subsidiaries to, create or suffer to exist any Lien upon any of its respective properties or assets, now owned or hereafter acquired (other than Liens created in connection with any Indebtedness permitted to be incurred hereunder);

(p) Acquisitions or Investments. Acquire or permit any of its Subsidiaries to acquire, directly or indirectly, in any transaction or related series of transactions all or substantially all of the assets of any Person, or invest in or permit any of its Subsidiaries to invest in, directly or indirectly, in any debt or equity securities of any Person or enter into any joint venture agreement with any Person; or

(q) Board Size. Subject to any increase in the Board as may be permitted by the Stockholders Agreement as a result of the occurrence of an Event of Noncompliance, increase the number of directors on the Board.

Section 3. Cumulative Voting. The right of a holder of shares of the Corporation to cumulate its votes in elections of directors is hereby denied.

#### **PART D. Definitions.**

"Advisory Fee Warrant" has the meaning set forth in the Series A Stock Purchase Agreement.

"Board" means the Corporation's Board of Directors.

"Fair Market Value" means, with respect to the Corporation, the fair value of the Corporation's business as a whole, as determined jointly by the Corporation and the holders of two-thirds (2/3) of the then outstanding Series A Preferred Shares. If such parties are unable to reach agreement within sixty (60) days of the date such fair value is to be determined, such fair value will be determined by an independent appraiser jointly selected by the Corporation and the holders of two-thirds of the then outstanding Series A Preferred Shares. If the Corporation and the holders of two-thirds of the then outstanding Series A Preferred Shares are unable to mutually agree upon an appraiser, each of the Corporation and the holders of two-thirds of the then outstanding Series A Preferred Shares shall select an appraiser, and the two appraisers shall select a third appraiser to determine the Fair Market Value, which appraised fair value shall be binding on all parties. The fees and expenses of all appraisers shall be borne by the Corporation.

"Fundamental Change" means (a) a sale, transfer or other disposition of all or substantially all of the assets of the Corporation on a consolidated basis (computed on the basis of book value, determined in accordance with generally accepted accounting principles consistently applied, or fair market value, as determined by the Board (including the Series A Directors (as defined in the Stockholders Agreement) in its reasonable good faith judgment), in any transaction or series of related transactions (other than sales in the ordinary course of business), (b) any merger, consolidation or reorganization to which the Corporation is a party (except for a merger, consolidation or reorganization in which the Corporation is the surviving corporation and, after giving effect to such merger, consolidation or reorganization, the holders of the Corporation's outstanding capital stock (on a fully-diluted basis) immediately prior to the merger, consolidation or reorganization will own immediately following the merger, consolidation or reorganization, greater than 50% of the Corporation's outstanding capital stock (on a fully diluted basis) in the same proportion and having the same rights, preferences and privileges as the capital stock held by such holders immediately prior to such merger, consolidation or reorganization), (c) any acquisition in any transaction or series of related transactions by a person or group of affiliated persons (other than an underwriter of the Corporation's securities) of greater than 50% of the Corporation's outstanding voting stock (except for a transaction principally for purposes of a bona fide equity financing in which cash is received by the Corporation or Indebtedness of the Corporation is cancelled, converted into equity securities or a combination thereof or a transaction the sole purpose of which is to create a holding company that will be owned in substantially the same proportions by the holders of the Corporation's securities immediately prior to such transaction), or (d) any license agreement pursuant to which the Corporation licenses all or substantially all of its properties or assets.

"Initial Closing" has the meaning set forth in the Series A Stock Purchase Agreement.

"Junior Securities" means any equity securities of the Corporation other than the Preferred Shares.

"Market Price" of any security means the average of the closing prices of such security's sales on all securities exchanges on which such security may at the time be listed, or, if there has been no sales on any such exchange on any day, the average of the highest bid and lowest asked prices on the primary exchange on which such security is listed at the end of such day, or, if on any day such security is not so listed, the average of the representative bid and asked prices quoted in the NASDAQ System as of 4:00 P.M., New York time, or, if on any day such security is not quoted in the NASDAQ System, the average of the highest bid and lowest asked prices on such day in the domestic over-the-counter market as reported by the National Quotation Bureau, Incorporated, or any similar successor organization, in each such case averaged over a period of twenty (20) consecutive business days ending on the day prior to the day "Market Price" is being determined. The "Market Price" of a note or other obligation which is not listed on a securities exchange or quoted in the NASDAQ System or reported by the National Quotation Bureau, Incorporated, will equal the total consideration received by the Corporation (including interest), discounted at the corporate base rate of interest at Chase, Chicago, Illinois, in effect at the time the note or obligation is deemed to have been issued. If at any other time such security is not listed on any securities exchange or quoted in the NASDAQ System or the over-the-counter market, the "Market Price" will be the fair value thereof determined jointly by the Corporation and the holder or holders of not less than two-thirds (2/3) of the Common Stock that would be issuable upon conversion of each outstanding series of Preferred Shares for which the Series A Conversion Price is being adjusted by the Dilutive Event, with such series voting as a separate series. If such parties are unable to reach agreement within a reasonable period of time, such fair value will be determined by an independent appraiser jointly selected by the Corporation and the holder or holders of not less than two-thirds (2/3) of the Common Stock that would be issuable upon conversion of each outstanding series of Preferred Shares for which the Series A Conversion Price is being adjusted by the Dilutive Event, with such series voting as a separate series.

"Nidus Warrant" has the meaning set forth in the Series A Stock Purchase Agreement.

"Organic Change" means any capital reorganization or reclassification of the Corporation that is effected in such a way that holders of Common Stock are entitled to receive (either directly or upon subsequent liquidation) stock, securities or assets with respect to or in exchange for shares of Common Stock.

"Person" means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization and a governmental entity or any department, agency or political subdivision thereof.

"Public Offering" means any offering by the Corporation of its equity securities to the public pursuant to an effective registration statement under the Securities Act of 1933, as then in effect, or any comparable statement under any similar federal statute then in force; provided, that for purposes of Part A, Section 4.8, a Public Offering will not include an offering made in connection with a business acquisition or an employee benefit plan.

"Related Agreements" has the meaning set forth in the Series A Stock Purchase Agreement.

"Second Closing" has the meaning set forth in the Series A Stock Purchase Agreement.

"Series A Director" has the meaning set forth in the Stockholders Agreement.

"Series A Liquidation Value" of any share of Series A Preferred as of any particular date will be equal to \$0.6925 (adjusted appropriately in the event the shares of Series A Preferred are subdivided into a greater number, whether by stock split, stock dividend or otherwise, or combined into a lesser number, whether by reverse stock split or otherwise).

"Series A Stock Purchase Agreement" means the Series A Preferred Stock Purchase Agreement, dated as of January 12, 2006, by and among the Corporation and certain other Persons named therein, as such agreement may be amended from time to time in accordance with its terms.

"Stockholders Agreement" shall have the meaning set forth in the Series A Stock Purchase Agreement and shall also include any amendments or modifications to such agreement.

"Subsidiary" has the meaning set forth in the Series A Stock Purchase Agreement.

**FIFTH:** In furtherance and not in limitation of the powers conferred by statute and unless otherwise provided herein, the Board is, by action of the full Board, expressly authorized to make, alter or repeal the By-Laws of the Corporation in whole or in part.

**SIXTH:** Meetings of stockholders may be held within or outside of the State of Delaware, as the By-Laws of the Corporation may provide. The books of the Corporation may be kept outside the State of Delaware at such place or places as may be designated from time to time by the Board or in the By-Laws of the Corporation. Election of directors need not be by written ballot unless the By-Laws of the Corporation so provide.

**SEVENTH:** To the fullest extent permitted by the Delaware Law, no director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of his fiduciary duty as a director; provided, however, that this provision shall not eliminate or limit the liability of a director (1) for any breach of the director's duty of

loyalty to the Corporation or its stockholders, (2) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (3) under Section 174 of the Delaware Law, or (4) for any transaction from which the director derived an improper personal benefit.

**EIGHTH:** The Corporation shall indemnify, in accordance with and to the full extent now or hereafter permitted by law, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (including, but not limited to, an action by or in the right of the Corporation), by reason of his acting as a director or officer of the Corporation (and the Corporation, in the discretion of the Board, may so indemnify a person by reason of the fact that he is or was an employee of the Corporation or is or was serving at the request of the Corporation in any other capacity for or on behalf of the Corporation) against any liability or expense actually and reasonably incurred by such person in respect thereof. Such indemnification is not exclusive of any other right to indemnification provided by law or otherwise. Expenses incurred by an officer or director in defending a civil or criminal action, suit or proceeding shall be paid by the Corporation in advance of the final disposition of such action, suit, or proceeding upon receipt of an undertaking by or on behalf of such officer or director to repay such amount if it shall ultimately be determined that such officer or director is not entitled to be indemnified. The right to indemnification and advancement of expenses on the condition specified herein conferred by this Article shall be deemed to be a contract between the Corporation and each person referred to herein.

**NINTH:** No amendment to or repeal of Article SEVENTH or EIGHTH of this Certificate of Incorporation shall apply to or have any effect on the rights of any individual referred to in Article SEVENTH or EIGHTH for or with respect to acts or omissions of such individual occurring prior to such amendment or repeal.

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

the said application has been made, be binding on all the creditors or class of creditors, and /or on all the stockholders or class of stockholders, of the Corporation, as the case may be, and also on the Corporation.

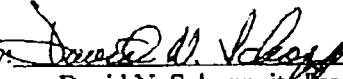
**ELEVENTH:** Unless this Certificate of Incorporation is amended or repealed with respect to this Article Eleventh or unless the By-Laws of the Corporation designate otherwise, the Corporation expressly elects not to be governed by Section 203 of the Delaware Law.

**TWELFTH:** The Certificate of Incorporation of the Corporation, as herein amended, shall constitute a restatement of and shall supersede the Certificate of Incorporation of the Corporation.



IN WITNESS WHEREOF, the Corporation has caused this Amended and Restated Certificate of Incorporation of Advanced ICU Care, Inc. to be signed on January 12, 2006.

ADVANCED ICU CARE, INC.

By:   
David N. Schopp, its President