

SECOND AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
BARIATRIC PARTNERS, INC.

EDMUND BUJALSKI hereby certifies that:

ONE: The date of filing of the original Certificate of Incorporation of this company with the Secretary of State of the State of Delaware was August 11, 2005.

TWO: He is the duly elected and acting Chief Executive Officer of **BARIATRIC PARTNERS, INC.**, a Delaware corporation.

THREE: The Certificate of Incorporation of this company is hereby amended and restated to read as follows:

I.

The name of this corporation is **BARIATRIC PARTNERS, INC.** (the "*Company*" or the "*Corporation*").

II.

The address of the registered office of this Corporation in the State of Delaware is Corporation Service Company, 2711 Centerville Road, Suite 400, City of Wilmington, County of New Castle, Zip Code 19808, and the name of the registered agent of this Corporation in the State of Delaware at such address is Corporation Service Company.

III.

The purpose of the Company is to engage in any lawful act or activity for which a corporation may be organized under the Delaware General Corporation Law ("*DGCL*").

IV.

A. The Company is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the Company is authorized to issue is twenty two million nine hundred and three thousand three hundred and thirty-four (22,903,334) shares, fourteen million (14,000,000) shares of which shall be Common Stock (the "*Common Stock*") and eight million nine hundred three thousand three hundred and thirty-four (8,903,334) shares of which shall be Preferred Stock (the "*Preferred Stock*"). The Preferred Stock shall have a par value of one-hundredth of one cent (\$0.0001) per

share and the Common Stock shall have a par value of one- hundredth of one cent (\$0.0001) per share.

B. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares of Common Stock then outstanding) by the affirmative vote of the holders of a majority of the stock of the Company entitled to vote (voting together as a single class on an as-if-converted basis).

C. Five million twenty thousand (5,020,000) of the authorized shares of Preferred Stock are hereby designated "Series A Preferred Stock" (the "*Series A Preferred*"). Seventy five thousand three hundred (75,300) of the authorized shares of Preferred Stock are hereby designated "Series B Preferred Stock" (the "*Series B Preferred*"). Three million seven hundred thirty-six thousand thirty-four (3,736,034) shares of the authorized shares of Preferred Stock are hereby designated "Series C Preferred Stock" (the "*Series C Preferred*"). Seventy-two thousand (72,000) shares of the authorized shares of Preferred Stock are hereby designated "Series D Preferred Stock" (the "*Series D Preferred*"). The Series A Preferred and the Series C Preferred are hereinafter collectively referred to as the "*Convertible Preferred*." The Series B Preferred and the Series D Preferred are hereinafter collectively referred to as the "*Non-Convertible Preferred*." The Series A Preferred, the Series B Preferred, the Series C Preferred and the Series D Preferred are hereinafter collectively referred to as the "*Series Preferred*."

D. The rights, preferences, privileges, restrictions and other matters relating to the Series Preferred are as follows:

1. **DIVIDEND RIGHTS.**

(a) Holders of the Non-Convertible Preferred, in preference to the holders of any other stock of the Company, shall be entitled to receive, on an equal priority *pari passu* basis, but only out of funds that are legally available therefor, cash dividends at the rate of eight percent (8%) of the applicable Original Issue Price (as defined below) per annum on each outstanding share of Non-Convertible Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof). Such dividends shall accrue on each share of the Non-Convertible Preferred on a monthly basis as measured from the date of issuance of such share of the Non-Convertible Preferred, whether or not earned or declared. Such accrued dividends shall also bear notional interest at a rate of eight percent (8%) of the applicable Original Issue Price (as defined below) per annum, compounding monthly (based on a thirty (30) day month) from the time such dividends are accrued (whether or not earned or declared) until such accrued dividends are paid in full. Such accrued dividends and notional interest shall be paid when and as declared by the Board of Directors (the "*Board*"), and, to the extent not previously paid, shall be included in the amount payable (i) upon the redemption of the Non-Convertible Preferred pursuant to Section 6 below or (ii) upon a Liquidation Event or an Acquisition or Asset Transfer pursuant to Sections 3 and 4 below.

(b) Holders of the Convertible Preferred, in preference to the holders of Common Stock shall be entitled to receive, on an equal priority *pari passu* basis, when and as

declared by the Board, but only out of funds that are legally available therefor, cash dividends at the rate of eight percent (8%) of the applicable Original Issue Price (as defined below) per annum on each outstanding share of the Convertible Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof). Such dividends shall be payable only when, as and if declared by the Board and shall be non-cumulative.

(c) The "*Original Issue Price*" of the Series A Preferred shall be one dollar (\$1.00) (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof), of the Series C Preferred shall be \$1.284785 (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof) and of the Non-Convertible Preferred shall be one hundred dollars (\$100) (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof).

(d) So long as any shares of the Non-Convertible Preferred shall be outstanding, the Company shall not pay or declare any dividend, whether in cash or property, or make any other distribution on the Convertible Preferred, or purchase, redeem or otherwise acquire for value any shares of the Convertible Preferred until all dividends and notional interest (as set forth in Section 1(a) above) on the Non-Convertible Preferred shall have been paid or declared and set apart. So long as any shares of the Series Preferred shall be outstanding, the Company shall not pay or declare any dividend, whether in cash or property, or make any other distribution on the Common Stock, or purchase, redeem or otherwise acquire for value any shares of Common Stock until all dividends and applicable notional interest (as set forth in Sections 1(a) and 1(b) above) on each such series of the Series Preferred shall have been paid or declared and set apart. Notwithstanding the foregoing, the provisions of this Section 1(d) shall not apply to:

(i) acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares at cost (or the lesser of cost or fair market value) upon termination of services to the Company; or

(ii) acquisitions of Common Stock in exercise of the Company's right of first refusal to repurchase such shares.

(e) In the event dividends are paid on any share of Common Stock, the Company shall pay an additional dividend on all outstanding shares of the Convertible Preferred on a *pro rata* basis in a per share amount equal (on an as-if-converted to Common Stock basis) to the amount paid or set aside for each share of Common Stock.

(f) The provisions of Sections 1(d) and 1(e) shall not apply to a dividend payable solely in Common Stock to which the provisions of Section 5(f) hereof are applicable, or any repurchase of any outstanding securities of the Company that is approved by (i) the Board and (ii) the vote or written consent of the holders of at least a majority of the outstanding Convertible Preferred.

2. VOTING RIGHTS.

(a) **General Rights.** Each holder of shares of the Convertible Preferred shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Convertible Preferred could be converted (pursuant to Section 5 hereof) immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent and shall have voting rights and powers equal to the voting rights and powers of the Common Stock and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Company. Except as otherwise provided herein or as required by law, the Convertible Preferred shall vote together with the Common Stock at any annual or special meeting of the stockholders and not as a separate class, and may act by written consent in the same manner as the Common Stock. Holders of shares of the Non-Convertible Preferred shall not be entitled to voting rights, except as may be required by applicable law.

(b) **Separate Vote of the Convertible Preferred.** For so long as at least 500,000 shares of the Convertible Preferred (subject to adjustment for any stock split, reverse stock split or other similar event affecting the Convertible Preferred after the filing date hereof) remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least a majority of the outstanding Convertible Preferred shall be necessary for effecting or validating the following actions (whether by merger, consolidation, recapitalization or otherwise):

(i) Any action that alters or changes the voting or other powers, preferences, or other special rights, privileges or restrictions of the Convertible Preferred or Non-Convertible Preferred;

(ii) Any amendment, alteration, waiver or repeal of any provision of the Certificate of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Designation);

(iii) Any increase or decrease in the authorized number of shares of Common Stock or Preferred Stock;

(iv) Any authorization or any designation, whether by reclassification or otherwise, of any new class or series of stock or any other securities convertible into equity securities of the Company ranking on a parity with or senior to the Convertible Preferred in right of redemption, liquidation preference, voting or dividend rights or any increase in the authorized or designated number of any such new class or series;

(v) Any redemption, repurchase, payment or declaration of dividends or other distributions with respect to (A) Common Stock (except for acquisitions of Common Stock by the Company permitted by Section 1(d)(i) or (ii) hereof) or (B) Preferred Stock (except pursuant to the provisions of Section 1(a) or Section 6 hereof);

(vi) Any agreement by the Company or its stockholders regarding an Asset Transfer or Acquisition (each as defined in Section 4 hereof);

(vii) Any action that results in the payment or declaration of a dividend on any shares of Common Stock or Preferred Stock (except pursuant to the provisions of Section 1(a) hereof);

(viii) Any voluntary dissolution or liquidation of the Company;

(ix) Any action that results in the acquisition of another entity, either through the purchase of shares or the purchase of substantially all of the assets of the acquired entity;

(x) Appointment of a new Chief Executive Officer of the Company; or

(xi) Any increase or decrease in the authorized number of members of the Company's Board.

(c) Election of Board of Directors.

(i) For so long as at least 1,300,000 shares of the Series A Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series A Preferred after the filing date hereof) the holders of Series A Preferred, voting as a separate class, shall be entitled to elect three (3) members of the Board at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors.

(ii) For so long as at least 1,000,000 shares of the Series C Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series C Preferred after the filing date hereof) the holders of Series C Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Board at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director.

(iii) The holders of Common Stock (which for purposes of this Section 2(c)(iii) shall not include any Convertible Securities (as defined below) which have not been converted into shares of Common Stock as of the record date for such vote), voting as a separate class, shall be entitled to elect one (1) member of the Board at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director.

(iv) The holders of Common Stock and the Convertible Preferred, voting together as a single class on an as-if-converted basis, shall be entitled to elect all remaining members of the Board at each meeting or pursuant to each consent of the

Company's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors.

3. LIQUIDATION RIGHTS.

(a) Upon any liquidation, dissolution, or winding up of the Company, whether voluntary or involuntary (a "**Liquidation Event**"), before any distribution or payment shall be made to the holders of any Common Stock, the holders of Series Preferred shall be entitled to be paid out of the assets of the Company legally available for distribution, an amount per share of Series Preferred equal to the sum of (i) the applicable Original Issue Price plus (ii) with respect to the Convertible Preferred, all declared and unpaid dividends on such shares, and with respect to the Non-Convertible Preferred, all accrued and unpaid dividends on such shares, including notional interest as provided in Section 1(a) above, for each share of Series Preferred held by them. If, upon any such Liquidation Event, the assets of the Company shall be insufficient to make payment in full to all holders of Series Preferred of the liquidation preference set forth in this Section 3(a), then such assets (or consideration) shall be distributed among the holders of Series Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled.

(b) After the payment of the full liquidation preference of the Series Preferred as set forth in Section 3(a) above, the assets of the Company legally available for distribution in such Liquidation Event (or the consideration received by the Company or its stockholders in such Acquisition or Asset Transfer), if any, shall be distributed ratably to the holders of the Common Stock and Convertible Preferred on an as-if-converted to Common Stock basis.

4. ASSET TRANSFER OR ACQUISITION RIGHTS.

(a) In the event that the Company is a party to an Acquisition or Asset Transfer (as hereinafter defined), then each holder of the Series Preferred shall be entitled to receive, for each share of the Series Preferred then held, out of the proceeds of such Acquisition or Asset Transfer, the amount of cash, securities or other property to which such holder would be entitled to receive in a Liquidation Event pursuant to Section 3(a) and 3(b) above.

(b) For the purposes of this Section 4: (i) "**Acquisition**" shall mean (A) any consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, other than any such consolidation, merger or reorganization in which the stockholders of the Company immediately prior to such consolidation, merger or reorganization, continue to hold at least a majority of the voting power of the surviving entity in substantially the same proportions (or, if the surviving entity is a wholly owned subsidiary, its parent) immediately after such consolidation, merger or reorganization; or (B) any transaction or series of related transactions to which the Company is a party in which in excess of fifty percent (50%) of the Company's voting power is transferred; *provided that* an Acquisition shall not include any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by the Company or any successor or indebtedness of the Company is cancelled or converted or a combination thereof; and (ii) "**Asset**

Transfer" shall mean a sale, lease, exclusive license or other disposition of all or substantially all of the assets of the Company.

(c) In any Acquisition or Asset Transfer, if the consideration to be received is property other than cash, its value will be deemed its fair market value as determined in good faith by the Board on the date such determination is made; *provided, however*, that, unless otherwise specified in the definitive agreement for such Acquisition or Asset Transfer, any securities shall be valued as follows:

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

(A) if traded on a nationally recognized securities exchange or on the Nasdaq National Market, the value shall be deemed to be the average of the closing sale prices of the securities on such exchange over the thirty (30) day period ending three (3) days prior to the closing of such Acquisition or Asset Transfer;

(B) if actively traded over-the-counter or through an automated dealer quotation system (other than the Nasdaq National Market), the value shall be deemed to be the average of the closing bid or sale prices (whichever are applicable) over the thirty (30) day period ending three (3) days prior to the closing of such Acquisition or Asset Transfer; and

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

(ii) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in subparagraphs 4(c)(i)(A), (B), or (C) to reflect the approximate fair market value thereof, as determined by the Board in good faith.

5. CONVERSION RIGHTS.

The holders of the Convertible Preferred shall have the following rights with respect to the conversion of the Convertible Preferred into shares of Common Stock (the "*Conversion Rights*");

(a) **Optional Conversion.** Subject to and in compliance with the provisions of this Section 5, any shares of the Convertible Preferred may, at the option of the holder, be converted at any time into fully-paid and nonassessable shares of Common Stock. The number of shares of Common Stock to which a holder of the Convertible Preferred shall be entitled upon conversion shall be the product obtained by multiplying the applicable "Convertible Preferred Conversion Rate" then in effect (determined as provided in Section 5(b)) by the number of shares of Convertible Preferred being converted.

(b) **Convertible Preferred Conversion Rate.** The conversion rate in effect at any time for conversion of any series of Convertible Preferred (the "**Convertible Preferred Conversion Rate**") shall be the quotient obtained by dividing the applicable Original Issue Price of such series of Convertible Preferred by the applicable "Convertible Preferred Conversion Price" of such series, calculated as provided in Section 5(c).

(c) **Convertible Preferred Conversion Price.** The conversion price for each series of Convertible Preferred shall initially be the applicable Original Issue Price of such series of Convertible Preferred (the "**Convertible Preferred Conversion Price**"). Such initial Convertible Preferred Conversion Price shall be adjusted from time to time in accordance with this Section 5. All references to the Convertible Preferred Conversion Price herein shall mean the applicable Convertible Preferred Conversion Price as so adjusted.

(d) **Mechanics of Conversion.** Each holder of Convertible Preferred who desires to convert the same into shares of Common Stock pursuant to this Section 5 shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Convertible Preferred, and shall give written notice to the Company at such office that such holder elects to convert the same. Such notice shall state the number of shares of Convertible Preferred being converted. Thereupon, the Company shall promptly issue and deliver at such office to such holder a certificate or certificates for the number of shares of Common Stock to which such holder is entitled and shall promptly pay (i) in cash or, to the extent sufficient funds are not then legally available therefor, in Common Stock (at the Common Stock's fair market value determined by the Board as of the date of such conversion), any declared and unpaid dividends on the shares of Convertible Preferred being converted and (ii) in cash (at the Common Stock's fair market value determined by the Board as of the date of conversion) the value of any fractional share of Common Stock otherwise issuable to any holder of Convertible Preferred. Such conversion shall be deemed to have been made at the close of business on the date of such surrender of the certificates representing the shares of Convertible Preferred to be converted, and the person entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Common Stock on such date.

(e) **Adjustment for Stock Splits and Combinations.** If at any time or from time to time after the Original Issue Date, as defined below, the Company effects a subdivision of the outstanding Common Stock without a corresponding subdivision of the Preferred Stock, the Convertible Preferred Conversion Price in effect immediately before that subdivision shall be proportionately decreased. Conversely, if at any time or from time to time on or after the Original Issue Date the Company combines the outstanding shares of Common Stock into a smaller number of shares without a corresponding combination of the Preferred Stock, the Convertible Preferred Conversion Price in effect immediately before the combination shall be proportionately increased. Any adjustment under this Section 5(e) shall become effective at the close of business on the date the subdivision or combination becomes effective. For the purposes of this Section 5, the "**Original Issue Date**" shall be the date upon which the first share of Series C Preferred is issued.

(f) Adjustment for Common Stock Dividends and Distributions.

If at any time or from time to time after the Original Issue Date the Company pays to holders of Common Stock a dividend or other distribution in additional shares of Common Stock without a corresponding dividend or other distribution to holders of the Convertible Preferred, the Convertible Preferred Conversion Price then in effect shall be decreased as of the time of such issuance, as provided below:

(i) The Convertible Preferred Conversion Price shall be adjusted by multiplying the Convertible Preferred Conversion Price then in effect by a fraction equal to:

(A) the numerator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance, and

(B) the denominator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance plus the number of shares of Common Stock issuable in payment of such dividend or distribution;

(ii) If the Company fixes a record date to determine which holders of Common Stock are entitled to receive such dividend or other distribution, the Convertible Preferred Conversion Price shall be fixed as of the close of business on such record date and the number of shares of Common Stock shall be calculated immediately prior to the close of business on such record date; and

(iii) If such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Convertible Preferred Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Convertible Preferred Conversion Price shall be adjusted pursuant to this Section 5(f) to reflect the actual payment of such dividend or distribution.

(g) Adjustment for Reclassification, Exchange, Substitution, Reorganization, Merger or Consolidation. If at any time or from time to time after the Original Issue Date the Common Stock issuable upon the conversion of the Convertible Preferred is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification, merger, consolidation or otherwise (other than an Acquisition or Asset Transfer as defined in Section 4 or a subdivision or combination of shares or stock dividend provided for elsewhere in this Section 5), in any such event each holder of Convertible Preferred shall then have the right to convert such stock into the kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification, merger, consolidation or other change by holders of the maximum number of shares of Common Stock into which such shares of Convertible Preferred could have been converted immediately prior to such recapitalization, reclassification, merger, consolidation or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 5 with respect to the rights of the holders of Convertible Preferred after

the capital reorganization to the end that the provisions of this Section 5 (including adjustment of the Convertible Preferred Conversion Price then in effect and the number of shares issuable upon conversion of the Convertible Preferred) shall be applicable after that event and be as nearly equivalent as practicable.

(h) Sale of Shares Below Convertible Preferred Conversion Price.

(i) If at any time or from time to time on or after the Original Issue Date, the Company issues or sells, or is deemed by the express provisions of this Section 5(h) to have issued or sold, Additional Shares of Common Stock (as defined below), other than as provided in Section 5(e), 5(f) or 5(g) above, for an Effective Price (as defined below) less than the then effective Convertible Preferred Conversion Price (a "*Qualifying Dilutive Issuance*"), then and in each such case, the then existing Convertible Preferred Conversion Price shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying the Convertible Preferred Conversion Price in effect immediately prior to such issuance or sale by a fraction equal to:

(A) the numerator of which shall be (A) the number of shares of Common Stock deemed outstanding (as determined below) immediately prior to such issue or sale, plus (B) the number of shares of Common Stock which the Aggregate Consideration (as defined below) received or deemed received by the Company for the total number of Additional Shares of Common Stock so issued would purchase at such then-existing Convertible Preferred Conversion Price, and

(B) the denominator of which shall be the number of shares of Common Stock deemed outstanding (as determined below) immediately prior to such issue or sale plus the total number of Additional Shares of Common Stock so issued.

For the purposes of the preceding sentence, the number of shares of Common Stock deemed to be outstanding as of a given date shall be the sum of (A) the number of shares of Common Stock outstanding, (B) the number of shares of Common Stock into which the then outstanding shares of Convertible Preferred could be converted if fully converted on the day immediately preceding the given date, and (C) the number of shares of Common Stock which are issuable upon the exercise or conversion of all other rights, options and convertible securities outstanding on the day immediately preceding the given date.

(ii) No adjustment shall be made to the Convertible Preferred Conversion Price in an amount less than one cent per share. Any adjustment required by this Section 5(h) shall be rounded to the nearest \$0.0001 per share. Any adjustment otherwise required by this Section 5(h) that is not required to be made due to the preceding two sentences shall be included in any subsequent adjustment to the Convertible Preferred Conversion Price.

(iii) For the purpose of making any adjustment required under this Section 5(h), the aggregate consideration received by the Company for any issue or sale of securities (the "*Aggregate Consideration*") shall be defined as: (A) to the extent it consists of cash, be computed at the gross amount of cash received by the Company before deduction of any

underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale and without deduction of any expenses payable by the Company, (B) to the extent it consists of property other than cash, be computed at the fair value of that property as determined in good faith by the Board, and (C) if Additional Shares of Common Stock, Convertible Securities (as defined below) or rights or options to purchase either Additional Shares of Common Stock or Convertible Securities are issued or sold together with other stock or securities or other assets of the Company for a consideration which covers both, be computed as the portion of the consideration so received that may be reasonably determined in good faith by the Board to be allocable to such Additional Shares of Common Stock, Convertible Securities or rights or options.

(iv) For the purpose of the adjustment required under this Section 5(h), if the Company issues or sells (x) Preferred Stock or other stock, options, warrants, purchase rights or other securities convertible into, Additional Shares of Common Stock (such convertible stock or securities being herein referred to as "*Convertible Securities*") or (y) rights or options for the purchase of Additional Shares of Common Stock or Convertible Securities and if the Effective Price of such Additional Shares of Common Stock is less than the Convertible Preferred Conversion Price, in each case the Company shall be deemed to have issued at the time of the issuance of such rights or options or Convertible Securities the maximum number of Additional Shares of Common Stock issuable upon exercise or conversion thereof and to have received as consideration for the issuance of such shares an amount equal to the total amount of the consideration, if any, received by the Company for the issuance of such rights or options or Convertible Securities plus:

(A) in the case of such rights or options, the minimum amounts of consideration, if any, payable to the Company upon the exercise of such rights or options; and

(B) in the case of Convertible Securities, the minimum amounts of consideration, if any, payable to the Company upon the conversion thereof (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities); *provided* that if the minimum amounts of such consideration cannot be ascertained, but are a function of antidilution or similar protective clauses, the Company shall be deemed to have received the minimum amounts of consideration without reference to such clauses.

(C) If the minimum amount of consideration payable to the Company upon the exercise or conversion of rights, options or Convertible Securities is reduced over time or on the occurrence or non-occurrence of specified events other than by reason of antidilution adjustments, the Effective Price shall be recalculated using the figure to which such minimum amount of consideration is reduced; *provided further*, that if the minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities is subsequently increased, the Effective Price shall be again recalculated using the increased minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities.

(D) No further adjustment of the Convertible Preferred Conversion Price, as adjusted upon the issuance of such rights, options or Convertible Securities, shall be made as a result of the actual issuance of Additional Shares of Common Stock or the exercise of any such rights or options or the conversion of any such Convertible Securities. If any such rights or options or the conversion privilege represented by any such Convertible Securities shall expire without having been exercised, the Convertible Preferred Conversion Price as adjusted upon the issuance of such rights, options or Convertible Securities shall be readjusted to the Convertible Preferred Conversion Price which would have been in effect had an adjustment been made on the basis that the only Additional Shares of Common Stock so issued were the Additional Shares of Common Stock, if any, actually issued or sold on the exercise of such rights or options or rights of conversion of such Convertible Securities, and such Additional Shares of Common Stock, if any, were issued or sold for the consideration actually received by the Company upon such exercise, plus the consideration, if any, actually received by the Company for the granting of all such rights or options, whether or not exercised, plus the consideration received for issuing or selling the Convertible Securities actually converted, plus the consideration, if any, actually received by the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) on the conversion of such Convertible Securities, *provided* that such readjustment shall not apply to prior conversions of Convertible Preferred.

(v) For the purpose of making any adjustment to the Conversion Price of the Convertible Preferred required under this Section 5(h), "*Additional Shares of Common Stock*" shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 5(h) (including shares of Common Stock subsequently reacquired or retired by the Company), other than:

(A) shares of Common Stock issued upon conversion of the Convertible Preferred;

(B) up to 1,390,279 shares of Common Stock and/or options, warrants or other Common Stock purchase rights and the Common Stock issued pursuant to such options, warrants or other rights (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like after the filing date hereof) in each such case issued after the Original Issue Date to employees, officers or directors of, or consultants or advisors to, the Company or any subsidiary pursuant to stock purchase or stock option plans or other arrangements that are approved by the Board; *provided, however*, that such amount shall be increased to reflect any shares of Common Stock (i) not issued pursuant to the rights, agreements, option or warrants ("*Unexercised Options*") entered into before or after the Original Issue Date as a result of the termination of such Unexercised Options or (ii) reacquired by the Company from employees, directors or consultants at cost (or the lesser of cost or fair market value) pursuant to agreements entered into before or after the Original Issue Date which permit the Company to repurchase such shares upon termination of services to the Company;

(C) shares of Common Stock issued pursuant to the exercise of Convertible Securities outstanding as of the Original Issue Date;

(D) shares of Common Stock or Convertible Securities issued for consideration other than cash pursuant to a merger, consolidation, acquisition or similar business combination approved by the Board;

(E) shares of Common Stock or Convertible Securities issued pursuant to any equipment loan or leasing arrangement, real property leasing arrangement or debt financing from a bank or similar financial institution approved by the Board; and

(F) shares of Common Stock or Convertible Securities the exclusion from the definition of "Additional Shares of Common Stock" is approved by (i) the Board and (ii) the holders of at least a majority of the outstanding Convertible Preferred.

References to Common Stock in the subsections of this clause (v) above shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 5(h). The "*Effective Price*" of Additional Shares of Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Common Stock issued or sold, or deemed to have been issued or sold by the Company under this Section 5(h), into the Aggregate Consideration received, or deemed to have been received by the Company for such issue under this Section 5(h), for such Additional Shares of Common Stock. In the event that the number of shares of Additional Shares of Common Stock or the Effective Price cannot be ascertained at the time of issuance, such Additional Shares of Common Stock shall be deemed issued immediately upon the occurrence of the first event that makes such number of shares or the Effective Price, as applicable, ascertainable.

(vi) In the event that the Company issues or sells, or is deemed to have issued or sold, Additional Shares of Common Stock in a Qualifying Dilutive Issuance (the "*First Dilutive Issuance*"), then in the event that the Company issues or sells, or is deemed to have issued or sold, Additional Shares of Common Stock in a Qualifying Dilutive Issuance other than the First Dilutive Issuance as a part of the same transaction or series of related transactions as the First Dilutive Issuance (a "*Subsequent Dilutive Issuance*"), then and in each such case upon a Subsequent Dilutive Issuance the Convertible Preferred Conversion Price shall be reduced to the Convertible Preferred Conversion Price that would have been in effect had the First Dilutive Issuance and each Subsequent Dilutive Issuance all occurred on the closing date of the First Dilutive Issuance.

(i) **Certificate of Adjustment.** In each case of an adjustment or readjustment of the Convertible Preferred Conversion Price for the number of shares of Common Stock or other securities issuable upon conversion of the Convertible Preferred, if the Convertible Preferred is then convertible pursuant to this Section 5, the Company, at its expense, shall compute such adjustment or readjustment in accordance with the provisions hereof and shall, upon request, prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage prepaid, to each registered holder of Convertible Preferred so requesting at the holder's address as shown in the Company's books. The certificate shall set forth such adjustment or readjustment, showing in detail the facts upon which such adjustment or readjustment is based, including a statement of (i) the consideration received or deemed to be received by the Company for any Additional Shares of Common Stock issued or

sold or deemed to have been issued or sold, (ii) the Convertible Preferred Conversion Price at the time in effect, (iii) the number of Additional Shares of Common Stock and (iv) the type and amount, if any, of other property which at the time would be received upon conversion of the Convertible Preferred. Failure to request or provide such notice shall have no effect on any such adjustment.

(j) Notices of Record Date. Upon (i) any taking by the Company of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend or other distribution, or (ii) any Acquisition (as defined in Section 4) or other capital reorganization of the Company, any reclassification or recapitalization of the capital stock of the Company, any merger or consolidation of the Company with or into any other corporation, or any Asset Transfer (as defined in Section 4), or any voluntary or involuntary dissolution, liquidation or winding up of the Company, the Company shall mail to each holder of Convertible Preferred at least ten (10) days prior to (x) the record date, if any, specified therein; or (y) if no record date is specified, the date upon which such action is to take effect (or, in either case, such shorter period approved by the holders of a majority of the outstanding Convertible Preferred) a notice specifying (A) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (B) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective, and (C) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

(k) Automatic Conversion.

(i) Each share of Convertible Preferred shall automatically be converted into shares of Common Stock, based on the then-effective Convertible Preferred Conversion Price, (A) at any time upon the affirmative election of the holders of at least a majority of the outstanding shares of the Convertible Preferred, or (B) immediately upon the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Company in which (i) the per share price is not less than \$6.42 (as adjusted for stock splits, dividends, recapitalizations and the like after the filing date hereof), and (ii) the gross cash proceeds to the Company (before underwriting discounts, commissions and fees) are not less than \$25,000,000. Upon such automatic conversion, any declared and unpaid dividends shall be paid in accordance with the provisions of Section 5(d).

(ii) Upon the occurrence of either of the events specified in Section 5(k)(i) above, the outstanding shares of Convertible Preferred shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Company or its transfer agent; *provided, however*, that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion unless the certificates evidencing such

shares of Convertible Preferred are either delivered to the Company or its transfer agent as provided below, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of the Convertible Preferred, the holders of Convertible Preferred shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Convertible Preferred. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock into which the shares of Convertible Preferred surrendered were convertible on the date on which such automatic conversion occurred, and any declared and unpaid dividends shall be paid in accordance with the provisions of Section 5(d).

(l) Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of Convertible Preferred. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Convertible Preferred by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Company shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the fair market value of one share of Common Stock (as determined by the Board) on the date of conversion.

(m) Reservation of Stock Issuable Upon Conversion. The Company shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Convertible Preferred, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Convertible Preferred. If at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Convertible Preferred, the Company will take such corporate action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

(n) Notices. Any notice required by the provisions of this Section 5 shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with verification of receipt. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Company.

(o) Payment of Taxes. The Company will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to the issue or delivery of shares of Common Stock upon conversion of shares of Convertible Preferred, excluding any tax or other charge imposed in connection with any transfer involved in

the issue and delivery of shares of Common Stock in a name other than that in which the shares of Convertible Preferred so converted were registered.

6. REDEMPTION.

(a) The Company shall be obligated to redeem the Non-Convertible Preferred as follows:

(i) The holders of at least a majority of the then outstanding shares of Non-Convertible Preferred, voting together as a separate class, may require the Company, to the extent it may lawfully do so, to redeem the Non-Convertible Preferred (i) upon (or, at the election of such holders, at any time after) the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Company (the "**IPO Redemption Date**"), or (ii) in four (4) equal annual installments beginning not prior to the sixth anniversary of the Original Issue Date (as defined above in Section IV.D.5(e)) (each an "**Installment Redemption Date**"). The Company shall effect such redemptions on the IPO Redemption Date or each Installment Redemption Date, as applicable (each a "**Redemption Date**"), by paying in cash in exchange for the shares of Non-Convertible Preferred to be redeemed on such date, a sum equal to (i) the Original Issue Price per share of the Non-Convertible Preferred plus (ii) all accrued and unpaid dividends on such shares as of such date, including notional interest, as provided in Section 1(a) above. The total amount to be paid for the Non-Convertible Preferred is hereinafter referred to as the "**Redemption Price**." The number of shares of Non-Convertible Preferred that the Company shall be required to redeem on the IPO Redemption Date shall be equal to the aggregate number of shares of Non-Convertible Preferred outstanding immediately prior to the IPO Redemption Date. The number of shares of Non-Convertible Preferred that the Company shall be required to redeem any one Installment Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Non-Convertible Preferred outstanding immediately prior to the Installment Redemption Date by (B) the number of remaining Installment Redemption Dates (including the Installment Redemption Date to which such calculation applies). Shares subject to redemption on an Installment Redemption Date pursuant to this Section 5(a) shall be redeemed from each holder of each series of Non-Convertible Preferred on a *pro rata* basis, based on the number of shares of such series then held. For purposes of this Section 5(a)(i), the "**Series B Original Issue Date**" shall be the date after the first share of Series B Preferred is issued.

(ii) At least thirty (30) days but no more than sixty (60) days prior to the IPO Redemption Date or the first Installment Redemption Date, as applicable, the Company shall send a notice (a "**Redemption Notice**") to all holders of Non-Convertible Preferred to be redeemed setting forth (A) the Redemption Price for the shares to be redeemed; and (B) the place at which such holders may obtain payment of the Redemption Price upon surrender of their share certificates. If the Company does not have sufficient funds legally available to redeem all shares to be redeemed at the Redemption Date, then it shall so notify such holders and shall redeem such shares *pro rata* (based on the portion of the aggregate Redemption Price payable to them) to the extent possible and shall redeem the remaining shares to be redeemed as soon as sufficient funds are legally available.