

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
AVERA PHARMACEUTICALS, INC.

Dinu Sen hereby certifies that:

ONE: The original name of this company is Avera Pharmaceuticals, Inc. and the date of filing the original Certificate of Incorporation of this company with the Secretary of State of the State of Delaware was November 20, 2001.

TWO: He is the duly elected and acting Chief Executive Officer of Avera Pharmaceuticals, 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 company is **AVERA PHARMACEUTICALS, INC.** (the "*Company*" or the "*Corporation*").

II.

The address of the registered office of this Company in the State of Delaware is 2711 Centerville Road, Suite 400, City of Wilmington, County of New Castle, Zip Code 19808-1643, 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 437,500,000 shares, 237,500,000 shares of which shall be Common Stock (the "*Common Stock*") and 200,000,000 shares of which shall be Preferred Stock (the "*Preferred Stock*"). The Common Stock shall have a par value of \$0.001 per share and the Preferred Stock shall have a par value of \$0.001 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 (voting together on an as-if-converted basis).

C. 20,000,000 of the authorized shares of Preferred Stock are designated "Series B Preferred Stock" (the "***Series B Preferred***"), and 180,000,000 of the authorized shares of Preferred Stock are hereby designated Series C Preferred Stock (the "***Series C Preferred***" and together with the Series B Preferred, 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 Series C Preferred, in preference to the holders of Series B Preferred and Common Stock, shall be entitled to receive, but only out of funds that are legally available therefor, dividends at the rate of 8% of the applicable Original Issue Price (as defined below) per annum, compounded annually (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof), on each outstanding share of Series C Preferred (the "***Accruing Dividends***"). The Accruing Dividends shall accrue on each share of Series C Preferred from the date of original issue thereof until paid whether or not the Company has earnings, whether or not there are funds legally available for payment of such dividends, whether or not such dividends are declared by the Board of Directors of the Company (the "***Board***") and whether or not there has been a filing in bankruptcy affecting the Company, and shall be payable in cash or, at the holder's election, in additional shares of Common Stock at the applicable Series Preferred Conversion Price (as defined in Section 4(c) below) only upon the events described in, and subject to the terms of, Section 3, 4 (excluding any conversion under Section 4(r)) or 5 below. Accruing Dividends for any period less than a full quarter shall be computed on the basis of the actual number of days elapsed and a 360 day year consisting of four 90 day quarters.

(b) Subject to Section 1(a) above, holders of Series B Preferred, in preference to the holders of Common Stock, shall be entitled to receive, when and as declared by the Board, but only out of funds that are legally available therefor, cash dividends at the rate of 8% of the applicable Original Issue Price (as defined below) per annum (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof) on each outstanding share of Series B Preferred. 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 B Preferred shall be \$0.40. The "***Original Issue Price***" of the Series C Preferred shall be \$0.36.

(d) So long as any shares of Series Preferred are 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 as set forth in Section 1(a) above on the Series C Preferred and Section 1(b) on the Series B Preferred shall have been paid or declared and set apart, except

for: (i) acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares at cost upon termination of services to the Company; or (ii) acquisitions of Common Stock upon 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 Series Preferred 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 in Common Stock, or any repurchase of any outstanding securities of the Company that is approved by (i) the Board and (ii) the Series Preferred, which approval may be evidenced by the written approval of the Preferred Directors (as defined in Section 2(e)(ii) below) (which written approval may be reflected in the minutes of the applicable Board meeting or the applicable unanimous written consent of the Board).

(g) The holders of the Series Preferred expressly waive their rights, if any, as described in California Code Sections 502, 503 and 506 as they relate to repurchases of shares of Common Stock upon termination of employment or service as a consultant or director.

2. VOTING RIGHTS.

(a) **General Rights.** Each holder of shares of the Series Preferred shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Series Preferred could be converted (pursuant to Section 4 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 Series 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.

(b) **Separate Vote of Series B Preferred.** For so long as any shares of Series B Preferred 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 66⅔% of the outstanding Series B Preferred shall be necessary for effecting or validating any amendment, alteration, or repeal of any provision of the Amended and Restated Certificate of Incorporation of the Company (including any filing of a Certificate of Designation), that alters or changes the voting or other powers, preferences, or other special rights or privileges, or restrictions of the Series B Preferred.

(c) **Separate Vote of Series C Preferred.** For so long as any shares of Series C Preferred 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 66⅔% of the outstanding Series C Preferred shall be necessary for effecting or validating the following actions:

(i) Any amendment, alteration, or repeal of any provision of the Amended and Restated Certificate of Incorporation of the Company (including any filing of a Certificate of Designation or merger agreement effecting such an amendment, alteration or repeal) or Bylaws of the Company, that materially and adversely alters or changes the voting or other powers, preferences, or other special rights or privileges, or restrictions of the Series C Preferred;

(ii) Any action which increases or decreases the authorized number of shares of Preferred Stock or any series of Preferred Stock and any issuance of additional shares of Series C Preferred other than pursuant to the conversion of any notes or the exercise of any warrants issued pursuant to that certain Note and Warrant Purchase Agreement dated on or about the date hereof by and among the Company and the purchasers named therein (the "*Note and Warrant Purchase Agreement*");

(iii) 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 Series Preferred in right of redemption, liquidation preference, voting or dividends or any increase in the authorized or designated number of any such new class or series; and

(iv) Any Acquisition or Asset Transfer (as defined in Section 3(d)).

(d) Separate Vote of Series Preferred. For so long as any shares of Series Preferred 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 66⅔% of the outstanding Series Preferred shall be necessary for effecting or validating the following actions:

(i) Any redemption, repurchase or other distributions with respect to Common Stock, except for: (A) acquisitions of Common Stock upon exercise of the Company's right of first refusal to repurchase such shares approved by a majority of the Preferred Directors (as defined in Section 2(e)(ii) below); and (B) repurchases pursuant to employee, consultant or director restricted stock purchase agreements at cost upon termination in an amount, in the aggregate, not to exceed \$100,000 per year;

(ii) Any action that results in the payment or declaration of a dividend on any shares of Common Stock or Preferred Stock (other than in connection with any redemption of the Series C Preferred pursuant to Section 5 herein);

(iii) Any voluntary dissolution, liquidation or winding up of the Company;

(iv) Any acquisition of any stock, assets or business of any entity in any form of transaction or the formation of any joint venture with any other entity, but excluding any purchase of supplies or equipment used in the ordinary course of the Company's

business and excluding any technology licensed to the Company by any entity for use in the ordinary course of the Company's business;

(v) Any increase or decrease in the authorized number of members of the Board;

(vi) Any increase or decrease in the number of shares of Common Stock reserved under the Company's stock option plans by more than 5% per annum;

(vii) Any filing of any registration statement by the Company with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended (the "*Securities Act*"), which registers the sale of shares by the Company;

(viii) Any material change in the Company's lines of business;

(ix) Any transaction between or among the Company or any of its subsidiaries and any equity owners, directors, officers or affiliates of either the Company or any of its subsidiaries, unless such transaction is approved by a majority of the Board (including a majority of the Preferred Directors); and

(x) Any amendment or restatement of the Certificate of Incorporation that would amend, alter or repeal any provision of this Section 2(d).

(e) Election of Board of Directors.

(i) The holders of Series B Preferred, voting as a separate class, shall be entitled to elect one member of the Board (the "*Series B Director*") 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;

(ii) The holders of Series C Preferred, voting as a separate class, shall be entitled to elect three members of the Board (the "*Series C Directors*" and together with the Series B Director, the "*Preferred Directors*") 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;

(iii) The holders of Common Stock, voting as a separate class, shall be entitled to elect one 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 directors and to fill any vacancy caused by the resignation, death or removal of such directors; and

(iv) The holders of Common Stock and the holders of Series 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.

(v) No person entitled to vote at an election for directors may cumulate votes to which such person is entitled, unless, at the time of such election, the Company is subject to Section 2115 of the California General Corporation Law ("*CGCL*"). During such time or times that the Company is subject to Section 2115(b) of the *CGCL*, every stockholder entitled to vote at an election for directors may cumulate such stockholder's votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which such stockholder's shares are otherwise entitled, or distribute the stockholder's votes on the same principle among as many candidates as such stockholder desires. No stockholder, however, shall be entitled to so cumulate such stockholder's votes unless (i) the names of such candidate or candidates have been placed in nomination prior to the voting and (ii) the stockholder has given notice at the meeting, prior to the voting, of such stockholder's intention to cumulate such stockholder's votes. If any stockholder has given proper notice to cumulate votes, all stockholders may cumulate their votes for any candidates who have been properly placed in nomination. Under cumulative voting, the candidates receiving the highest number of votes, up to the number of directors to be elected, are elected.

(vi) During such time or times that the Company is subject to Section 2115(b) of the *CGCL*, the Board or any individual director may be removed from office at any time without cause by the affirmative vote of the holders of at least a majority of the outstanding shares entitled to vote; *provided, however*, that unless the entire Board is removed, no individual director may be removed when the votes cast against such director's removal, or not consenting in writing to such removal, would be sufficient to elect that director if voted cumulatively at an election which the same total number of votes were cast (or, if such action is taken by written consent, all shares entitled to vote were voted) and the entire number of directors authorized at the time of such director's most recent election were then being elected.

3. LIQUIDATION RIGHTS.

(a) Upon any liquidation, dissolution or winding up of the Company, whether voluntary or involuntary (a "*Liquidation*"), before any distribution or payment shall be made to the holders of any Series B Preferred or Common Stock, the holders of the Series C Preferred shall be entitled to be paid out of the assets of the Company legally available for distribution, or the consideration received in such transaction, an amount per share of Series C Preferred equal to two times the applicable Original Issue Price (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof) plus all unpaid Accruing Dividends for each share of Series C Preferred held by them. If, upon any such liquidation, dissolution, or winding up, the assets of the Company (or the consideration received in such transaction) shall be insufficient to make payment in full to all holders of Series C 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 C Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled under this Section 3(a).

(b) Upon any Liquidation, after the completion of the distribution required by Section 3(a) and before any distribution or payment shall be made to the holders of any Common Stock, the holders of Series B Preferred shall be entitled to be paid out of the assets of the Company legally available for distribution, or the consideration received in such transaction an amount of \$0.36 per share of Series B Preferred held by them. If, upon any such liquidation, dissolution, or winding up, after the completion of the distribution required by Section 3(a) the remaining assets of the Company (or the consideration received in such transaction) shall be insufficient to make payment in full to all holders of Series B Preferred of the liquidation preference set forth in this Section 3(b), then such remaining assets (or consideration) shall be distributed among the holders of Series B Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled under this Section 3(b).

(c) After the payment of the full liquidation preference of the Series C Preferred as set forth in Section 3(a) above and the Series B Preferred as set forth in Section 3(b) above, the assets of the Company legally available for distribution (or the consideration received in such transaction), if any, shall be distributed ratably to the holders of the Common Stock and Series Preferred on an as-if-converted to Common Stock basis.

(d) The following events shall be considered a Liquidation under this Section 3:

(i) any consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, in which the stockholders of the Company immediately prior to such consolidation, merger or reorganization own less than 50% of the voting power of the surviving entity immediately after such consolidation, merger or reorganization, or any transaction or series of related transactions to which the Company is a party in which in excess of 50% of the Company's voting power is transferred, excluding (x) any consolidation or merger effected exclusively to change the domicile of the Company or (y) any transaction or series of transactions solely for bona fide equity financing purposes in which cash is received by the Company or indebtedness of the Company is cancelled or converted or a combination thereof (an "*Acquisition*"); or

(ii) a sale, lease or other disposition of all or substantially all of the assets of the Company (an "*Asset Transfer*").

(iii) In any of such events, if the consideration received by the Company is other than cash, its value will be deemed its fair market value as determined in good faith by the Board. Any securities shall be valued as follows:

(A) Securities not subject to investment letter or other similar restrictions on free marketability covered by (B) below:

(1) If traded on a securities exchange or through the Nasdaq Global Market, the value shall be deemed to be the average of the closing prices of the securities on such quotation system over the 30 day period ending three days prior to the closing;

(2) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the 30 day period ending three days prior to the closing; and

(3) If there is no active public market, the value shall be the fair market value thereof, as determined by the Board, including at least a majority of the Series C Directors.

(B) The method of valuation of securities subject to an 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 (A)(1), (2) or (3) to reflect the approximate fair market value thereof, as determined by the Board.

4. CONVERSION RIGHTS.

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

(a) **Optional Conversion.** Subject to and in compliance with the provisions of this Section 4, any shares of Series 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 Series Preferred shall be entitled upon conversion shall be the product obtained by multiplying the applicable Series Preferred Conversion Rate then in effect (determined as provided in Section 4(b)) by the number of shares of Series Preferred being converted.

(b) **Series Preferred Conversion Rate.** The conversion rate in effect at any time for conversion of any series of Series Preferred (the "***Series Preferred Conversion Rate***" for such series) shall be the quotient obtained by dividing the Original Issue Price of such series of Series Preferred by the applicable Series Preferred Conversion Price calculated as provided in Section 4(c).

(c) **Series Preferred Conversion Price.** The conversion price for any series of Series Preferred shall initially be the Original Issue Price of such series of Series Preferred (the "***Series Preferred Conversion Price***"). Such initial Series Preferred Conversion Price shall be adjusted from time to time in accordance with this Section 4. All references to the Series Preferred Conversion Price herein shall mean the applicable Series Preferred Conversion Price as so adjusted.

(d) **Mechanics of Conversion.** Each holder of Series Preferred who desires to convert the same into shares of Common Stock pursuant to this Section 4, except as provided in Section 4(r), shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Series 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 Series 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) with respect to the Series C Preferred, any unpaid Accruing Dividends in cash, or at the holder's election, upon any conversion effected pursuant to Section 4(l) or to the extent sufficient funds are not legally available therefor, in shares of Common Stock at the applicable Series Preferred Conversion Price, (ii) with respect to the Series B Preferred, 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 Series B Preferred being converted, if any, and (iii) 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 Series 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 Series 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 date the first share of Series C Preferred is issued (the "*Original Issue Date*") the Company effects a subdivision of the outstanding Common Stock without a corresponding subdivision of any series of Series Preferred, the applicable Series Preferred Conversion Price in effect immediately before that subdivision shall be proportionately decreased. Conversely, if at any time or from time to time 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 any series of Series Preferred, the applicable Series Preferred Conversion Price in effect immediately before the combination shall be proportionately increased. Any adjustment under this Section 4(e) shall become effective at the close of business on the date the subdivision or combination becomes effective.

(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 a dividend or other distribution in additional shares of Common Stock, each Series Preferred Conversion Price that is then in effect shall be decreased as of the time of such issuance, as provided below:

(i) Each Series Preferred Conversion Price shall be adjusted by multiplying each such Series Preferred Conversion Price then in effect by an amount, rounded to the fifth decimal place, equal to:

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

(B) 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, each Series 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, each Series Preferred Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter each Series Preferred Conversion Price shall be adjusted pursuant to this Section 4(f) to reflect the actual payment of such dividend or distribution.

(g) Adjustment for Reclassification, Exchange and Substitution. If at any time or from time to time after the Original Issue Date, the Common Stock issuable upon the conversion of the Series Preferred is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification or otherwise (other than an Acquisition or Asset Transfer as defined in Section 3(e) or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 4), in any such event each holder of Series 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 or other change by holders of the maximum number of shares of Common Stock into which such shares of Series Preferred could have been converted immediately prior to such recapitalization, reclassification or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

(h) Reorganizations, Mergers or Consolidations. If at any time or from time to time after the Original Issue Date, there is a capital reorganization of the Common Stock or the merger or consolidation of the Company with or into another corporation or another entity or person (other than an Acquisition or Asset Transfer as defined in Section 3(e) or a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section 4), as a part of such capital reorganization, provision shall be made so that the holders of the Series Preferred shall thereafter be entitled to receive upon conversion of the Series Preferred the number of shares of stock or other securities or property of the Company to which a holder of the number of shares of Common Stock deliverable upon conversion would have been entitled on such capital reorganization, subject to adjustment in respect of such stock or securities by the terms thereof. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4 with respect to the rights of the holders of Series Preferred after the capital reorganization to the end that the provisions of this Section 4 (including adjustment of each Series Preferred Conversion Price then in effect and the number of shares issuable upon conversion of the Series Preferred) shall be applicable after that event and be as nearly equivalent as practicable.

(i) Sale of Shares Below Series Preferred Conversion Price.

(i) If at any time or from time to time after the Original Issue Date, the Company issues or sells, or is deemed by the express provisions of this Section 4(i) to have issued or sold, Additional Shares of Common Stock (as defined below), other than as provided in Section 4(e), 4(f), 4(g) or 4(h) above, for an Effective Price (as defined below) less than the applicable then-effective Series Preferred Conversion Price (a "*Qualifying Dilutive Issuance*"), then and in each such case, the applicable Series 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 applicable Series Preferred Conversion Price in effect immediately prior to such issuance or sale by an amount equal to:

(A) the sum of (1) the number of shares of Common Stock deemed outstanding (as determined below) immediately prior to such issue or sale, plus (2) the number of shares of Common Stock which the Aggregate Consideration (as defined below) received by the Company for the total number of Additional Shares of Common Stock so issued would purchase at such then-existing Series Preferred Conversion Price, divided by

(B) the sum of (i) the number of shares of Common Stock deemed outstanding (as determined below) immediately prior to such issue or sale, plus (2) 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 (1) the number of shares of Common Stock outstanding, (2) the number of shares of Common Stock into which the then outstanding shares of Series Preferred and other outstanding convertible securities could be converted if fully converted on the day immediately preceding the given date and (3) the number of shares of Common Stock into which any outstanding warrants, options or other rights for the purchase of shares of Common Stock, Preferred Stock or other convertible securities could be converted if fully exercised and fully converted on the day immediately preceding the given date.

(ii) No adjustment shall be made to the applicable Series Preferred Conversion Price in an amount less than \$0.01 per share. Any adjustment otherwise required by this Section 4(i) that is not required to be made due to the preceding sentence shall be included in any subsequent adjustment to such Series Preferred Conversion Price.

(iii) For the purpose of making any adjustment required under this Section 4(i), 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 net amount of cash received by the Company after deduction of any underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale but 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 4(i), if the Company issues or sells (x) stock 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 applicable Series 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.

(v) 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*, 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.

(vi) No further adjustment of any Series 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 applicable Series Preferred Conversion Price as adjusted upon the issuance of such rights, options or Convertible Securities shall be readjusted to the Series 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 Series Preferred.

(vii) For the purpose of making any adjustment to the Conversion Price of the Series Preferred required under this Section 4(i), "***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 4(i) (including shares of Common Stock subsequently reacquired or retired by the Company), other than:

(A) up to an aggregate amount of 33,550,000 shares of Common Stock (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to the Common Stock after the filing date hereof) 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, and increased to take into account any shares of Common Stock (i) not issued pursuant to the options, warrants or other rights to the extent that they terminate unexercised or (ii) acquired by the Company from employees, directors, or consultants pursuant to agreements which permit the Company to repurchase such shares at cost upon termination of services to the Company), issued or to be issued, whether prior to or after the Original Issue Date, to employees, officers or directors of, or consultants or advisors to the Company or any subsidiary, in each case, pursuant to issuances approved by the Board under the Company's 2002 Equity Incentive Plan, as amended;

(B) shares of Common Stock issued or issuable pursuant to any rights or agreements, options, warrants or convertible securities outstanding as of the Original Issue Date;

(C) shares of Common Stock or Preferred Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or rights, issued for consideration other than cash pursuant to a merger, consolidation, acquisition, strategic alliance or similar business combination approved by the Board (including the approval of a majority of the Preferred Directors);

(D) shares of Common Stock issued in connection with any stock split, stock dividend or recapitalization by the Company;

(E) shares of Common Stock issued upon conversion of the Series Preferred;

(F) any shares of Common Stock or Preferred Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or rights, issued pursuant to any equipment loan or leasing arrangement, real property leasing arrangement, commercial credit arrangement, debt financing or similar transaction with a bank or similar financial or lending institution or landlord approved by the Board (including a the approval of a majority of the Preferred Directors);

(G) any shares of Common Stock issued by the Company pursuant to an effective registration statement under the Securities Act covering the offer and sale of Common Stock for the account of the Company in which the per share price is at least \$0.72 (as adjusted for stock splits, dividends, recapitalizations and the like after the filing date hereof), and the gross cash proceeds to the Company (before underwriting discounts, commissions and fees) are at \$50,000,000 (a "*Qualified IPO*");

(H) any Common Stock or Preferred Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or rights, issued in connection with strategic or commercial transactions involving the Company and other persons or entities, including but not limited to (i) joint ventures or manufacturing, marketing, distribution or other commercial arrangements or (ii) technology transfer or development arrangements, in every case not principally for equity financing purposes and approved by the Board (including the approval of a majority of the Preferred Directors);

(I) any shares of Series C Preferred issued by the Company pursuant to that certain Series C Preferred Stock Purchase Agreement dated February 8, 2006 by and among the Company and the purchasers named therein; and

(J) any notes or warrants or other Common Stock or Preferred Stock purchase rights, and the Common Stock or Preferred Stock issued pursuant to such notes, warrants or rights, issued pursuant to the Note and Warrant Purchase Agreement.

References to Common Stock in the subsections of this clause (vii) above shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 4(i). 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 4(i), into the Aggregate Consideration received, or deemed to have been received by the Company for such issue under this Section 4(i), for such Additional Shares of Common Stock.

(viii) 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 (a "*Subsequent Dilutive Issuance*") pursuant to the same instruments as the First Dilutive Issuance, then and in each such case upon a Subsequent Dilutive Issuance the Series Preferred Conversion Price shall be reduced to the Series 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.

(j) Certificate of Adjustment. In each case of an adjustment or readjustment of any Series Preferred Conversion Price for the number of shares of Common Stock or other securities issuable upon conversion of any series of Series Preferred, if such Series Preferred is then convertible pursuant to this Section 4, the Company, at its expense, shall compute such adjustment or readjustment in accordance with the provisions hereof and prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage prepaid, to each registered holder of such series of Series Preferred 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 applicable Series 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 such Series Preferred.

(k) 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 3(e)) 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 3(e)), or any voluntary or involuntary dissolution, liquidation or winding up of the Company, the Company shall mail to each holder of Series Preferred at least 30 days prior to the record date specified therein (or such shorter period approved by the holders of a majority of the outstanding Series 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.

(l) Automatic Conversion.

(i) Each share of Series C Preferred shall automatically be converted into shares of Common Stock, based on the applicable then-effective Series Preferred Conversion Price, (A) at any time upon the affirmative election of the holders of at least 66⅔% of the outstanding shares of the Series C Preferred or (B) immediately upon the closing of a

firmly underwritten public offering pursuant to a Qualified IPO. Upon such automatic conversion, any unpaid Accruing Dividends shall be paid in accordance with the provisions of Section 4(d).

(ii) Each share of Series B Preferred shall automatically be converted into shares of Common Stock, based on the applicable then-effective Series Preferred Conversion Price, (A) at any time upon the affirmative election of the holders of at least 50% of the outstanding shares of the Series B Preferred or (B) immediately upon the closing of a firmly underwritten public offering pursuant to a Qualified IPO. Upon such automatic conversion, any declared and unpaid dividends shall be paid in accordance with the provisions of Section 4(d).

(iii) Upon the occurrence of any of the events specified in Section 4(l)(i) above with respect to the Series C Preferred and the occurrence of any of the events specified in Section 4(l)(ii) with respect to the Series B Preferred, the applicable outstanding shares of Series 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 Series 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 either the Series C Preferred or the Series B Preferred, the holders of the class of Series Preferred being converted shall surrender the certificates representing such shares at the office of the Company or any transfer agent for such Series 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 Series 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 4(d).

(m) Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of Series Preferred. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series 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 Common Stock's fair market value (as determined by the Board) on the date of conversion.

(n) 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 Series 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 Series 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 Series Preferred, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

(o) Notices. Any notice required by the provisions of this Section 4 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 days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one 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.

(p) 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 Series 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 Series Preferred so converted were registered.

(q) No Dilution or Impairment. Without the consent of the holders of then outstanding Series Preferred as may be required under Section 2, the Company shall not amend its Amended and Restated Certificate of Incorporation or participate in any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or take any other voluntary action, for the purpose of avoiding or seeking to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Company, but shall at all times in good faith assist in carrying out all such action as may be reasonably necessary or appropriate in order to protect the conversion rights of the holders of the Series Preferred against dilution or other impairment.

(r) Special Mandatory Conversion.

(i) In the event that any holder of Series C Preferred is not deemed a Purchaser (as defined in the Note and Warrant Purchase Agreement) under the Note and Warrant Purchase Agreement, then, effective immediately upon the Effective Date (as defined in the Note and Warrant Purchase Agreement), all of such holder's shares of Series C Preferred shall automatically and without further action on the part of such holder be converted into the number of shares of Common Stock determined in accordance with the last sentence of Section 4(a) hereof. Upon conversion pursuant to this Section 4(r)(i), the shares of Series C Preferred so converted shall be canceled and not subject to reissuance.

(ii) At any time on or after the date hereof, if a holder of shares of Series C Preferred is designated as a Breaching Purchaser (as defined in the Note and Warrant Purchase Agreement) pursuant to Section 2.2 of the Note and Warrant Purchase Agreement, then, effective immediately upon the Closing Date (as defined in the Note and Warrant Purchase

Agreement) on which the designation of such holder as a Breaching Purchaser occurs, all of such holder's shares of Series C Preferred shall automatically and without further action on the part of such holder be converted into the number of shares of Common Stock determined in accordance with the last sentence of Section 4(a) hereof. Upon conversion pursuant to this Section 4(r)(ii), the shares of Series C Preferred so converted shall be canceled and not subject to reissuance.

(iii) Following the date of conversion of shares of Series C Preferred into Common Stock pursuant to Sections 4(r)(i) or 4(r)(ii), the Company shall provide written notice to each holder whose shares of Series C Preferred were so converted. Such notice shall be sent by first class or registered mail, postage prepaid, to each such holder at such holder's address last shown on the records of the Company's transfer agent (or the records of the Company, if it serves as its own transfer agent). Upon receipt of such notice, each such holder shall surrender his or its certificate or certificates for all such shares so converted, duly endorsed, at the office of the Company or any transfer agent of the Company, and shall thereafter receive certificates for the number of shares of Common Stock to which such holder is entitled pursuant to Section 4(r)(i) or 4(r)(ii), as applicable. As promptly thereafter as is practicable, the Company shall issue and deliver to such holder, at the place designated by such holder, a certificate or certificates for the number of full shares of Common Stock to which such holder is entitled. The person in whose name the certificate for such shares of Common Stock is to be issued shall be deemed to have become a holder of Common Stock on the effective date of the conversion of the Series C Preferred, unless the transfer books of the Company are closed on that date, in which case such person shall be deemed to have become a stockholder of record on the next succeeding date on which the transfer books are open.

5. REDEMPTION.

(a) The Company shall be obligated to redeem the Series C Preferred as follows:

(i) The holders of at least a majority of the then outstanding shares of Series C Preferred may require the Company, to the extent it may lawfully do so, to redeem the Series C Preferred held by such holders that is specified in a written request for redemption (a "***Redemption Request***"), delivered to the Company at any time from time to time, beginning on the fifth anniversary of the Original Issue Date, and ending on the date two years from such first redemption date, which redemption shall occur within 90 days after the date of such Redemption Request (each a "***Redemption Date***"). Within 20 days of receipt of such Redemption Request, the Company shall send notice of such Redemption Request and inquiry as to participation in such redemption (a "***Redemption Inquiry***") to any holder of Series C Preferred who was not a party to the Redemption Request. If such holder does not reply to the Redemption Inquiry within 20 days of receipt of such Redemption Inquiry, such holder will not be included in such redemption. The Company shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series C Preferred to be redeemed on such Redemption Date a sum equal to the applicable Original Issue Price per share of such Series C Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like after the filing date hereof) plus any unpaid Accruing Dividends with respect to such shares as of

such Redemption Date. The total amount to be paid for the Series C Preferred to be redeemed on such Redemption Date is hereinafter referred to as the "**Redemption Price**."

(ii) At least 30 days but no more than 60 days prior to the applicable Redemption Date, the Company shall send a notice (a "**Redemption Notice**") to all holders of Series C 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, on a Redemption Date, the Company is prohibited under the applicable law from redeeming all shares of Series C Preferred for which redemption is required hereunder, then it shall redeem such shares on a pro rata basis among the holders of Series C Preferred in proportion to the full respective Redemption Price to which they are entitled hereunder to the extent possible and shall redeem the remaining shares to be redeemed as soon as the Company is not prohibited from redeeming some or all of such shares under applicable law. The shares of Series C Preferred not redeemed shall remain outstanding and entitled to all of the rights and preferences provided in this Restated Certificate. In the event that the Company fails for any reason to redeem shares on a Redemption Date, including without limitation due to a prohibition of such redemption under applicable law, then during the period from the applicable Redemption Date through the date on which such shares are redeemed, the applicable Redemption Price of such shares shall bear interest at the rate of 10% per annum, with such interest to accrue daily in arrears and to be compounded annually.

(b) On or after each such Redemption Date, each holder of shares of Series C Preferred to be redeemed shall surrender such holder's certificates representing such shares to the Company in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be canceled. In the event less than all the shares represented by such certificates are redeemed, a new certificate shall be issued representing the unredeemed shares. From and after such Redemption Date, unless there shall have been a default in payment of the Redemption Price or the Company is unable to pay the Redemption Price due to not having sufficient legally available funds, all rights of the holder of such shares as holder of Series C Preferred (except the right to receive the Redemption Price without interest upon surrender of their certificates), shall cease and terminate with respect to such shares.

(c) In the event of a call for redemption of any shares of Series C Preferred, the Conversion Rights (as defined in Section 4) for such Series C Preferred shall terminate as to the shares designated for redemption at the close of business on the fifth day preceding the applicable Redemption Date, unless default is made in payment of the Redemption Price.

V.

A. The liability of the directors of the Company for monetary damages shall be eliminated to the fullest extent under applicable law.

B. The Company is authorized to provide indemnification of agents (as defined in Section 317 of the CGCL) for breach of duty to the Company and its stockholders through bylaw provisions or through agreements with the agents, or through stockholder resolutions, or otherwise, in excess of the indemnification otherwise permitted by Section 317 of the CGCL, subject, at any time or times that the Company is subject to Section 2115(b) of the CGCL, to the limits on such excess indemnification set forth in Section 204 of the CGCL.

C. Any repeal or modification of this Article V shall only be prospective and shall not affect the rights under this Article V in effect at the time of the alleged occurrence of any action or omission to act giving rise to liability.

VI.

For the management of the business and for the conduct of the affairs of the Company, and in further definition, limitation and regulation of the powers of the Company, of its directors and of its stockholders or any class thereof, as the case may be, it is further *provided* that:

A. The management of the business and the conduct of the affairs of the Company shall be vested in its Board. The number of directors which shall constitute the whole Board shall be fixed by the Board in the manner provided in the Bylaws, subject to any restrictions which may be set forth in this Restated Certificate.

B. Subject to any restriction contained in this Restated Certificate and the indemnification provisions in the Bylaws of the Company, the Board is expressly empowered to adopt, amend or repeal the Bylaws of the Company. The stockholders shall also have the power to adopt, amend or repeal the Bylaws of the Company; *provided however*, that, in addition to any vote of the holders of any class or series of stock of the Company required by law or by this Restated Certificate, the affirmative vote of the holders of at least a majority of the voting power of all of the then-outstanding shares of the capital stock of the Company entitled to vote generally in the election of directors, voting together as a single class, shall be required to adopt, amend or repeal any provision of the Bylaws of the Company.

C. The directors of the Company need not be elected by written ballot unless the Bylaws so provide.

* * * *

FOUR: This Amended and Restated Certificate of Incorporation has been duly adopted by the unanimous written consent of the Board and the written consent of the stockholders of the Company in accordance with Sections 141, 228, 242 and 245 of the DGCL. The total number of outstanding shares entitled to vote or act by written consent was 5,156,523 shares of Common Stock, 20,000,000 shares of Series B Preferred and 129,494,867 shares of Series C Preferred. A majority of the outstanding shares of Common Stock approved this Amended and Restated Certificate of Incorporation by written consent, and written notice of such approval was given in accordance with Section 228 of the DGCL.

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IN WITNESS WHEREOF, AVERA PHARMACEUTICALS, INC. has caused this Amended and Restated Certificate of Incorporation to be signed by its Chief Executive Officer this December 21, 2006.

AVERA PHARMACEUTICALS, INC.

/s/ Dinu Sen

Dinu Sen

Chief Executive Officer

[SIGNATURE PAGE TO AMENDED AND RESTATED CERTIFICATE OF INCORPORATION]