

**FOURTH AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
APPLIED SPINE TECHNOLOGIES, INC.**

(Pursuant to Sections 242 and 245 of the General Corporation Law of the State of Delaware)

Applied Spine Technologies, Inc., a Delaware corporation, hereby certifies as follows:

1. The name of the corporation is Applied Spine Technologies, Inc. (the "**Corporation**"). The date of the filing of the original Certificate of Incorporation of the Corporation with the Secretary of State of the State of Delaware (the "**Secretary of State**") was January 14, 2004, as amended by the Amended and Restated Certificate of Incorporation filed with the Secretary of State on February 11, 2004, as further amended by the Second Amended and Restated Certificate of Incorporation filed with the Secretary of State on March 9, 2004, and as further amended by the Third Amended and Restated Certificate of Incorporation filed with the Secretary of State on February 17, 2005.

2. This Fourth Amended and Restated Certificate of Incorporation amends, restates and integrates the provisions of the Third Amended and Restated Certificate of Incorporation of the Corporation and has been duly adopted in accordance with the provisions of Section 242 and 245 of the General Corporation Law of the State of Delaware.

The text of the original Certificate of Incorporation, as amended, is hereby further amended and restated to read in full as follows:

ARTICLE I

The name of the Corporation is Applied Spine Technologies, Inc.

ARTICLE II

The registered office of the Corporation in the State of Delaware is located in the County of New Castle, 2711 Centreville Road, Suite 400, Wilmington, Delaware 19808 and its registered agent is the Corporation Service Corporation.

ARTICLE III

The nature of the business or purpose to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

ARTICLE IV

The total number of shares of capital stock which the Corporation shall have authority to issue is Fifty-Four Million One Hundred Eighty-Six Thousand Four Hundred Six (54,186,406) of which (i) Twenty-Three Million Four Hundred Seventy-Seven Thousand Four Hundred Three (23,477,403) shares shall be Preferred Stock, par value \$.001 per share, and (ii) Thirty Million Seven Hundred Nine Thousand Three (30,709,003) shares shall be common stock, par value \$.001 per share (the "**Common Stock**").

The voting powers, designations, preferences, privileges and relative, participating, optional or other special rights, and the qualifications, limitations or restrictions of each class of capital stock of the Corporation, shall be as provided in this Article IV.

A. CONVERTIBLE PREFERRED STOCK

1. Designation. Of the Twenty-Three Million Four Hundred Seventy-Seven Thousand Four Hundred Three (23,477,403) shares authorized as Preferred Stock, (a) Four Million (4,015,000) shares of the Corporation's Preferred Stock shall be designated as a series known as Series A Convertible Preferred Stock, par value \$.001 per share (the "***Series A Preferred Stock***"), (b) Seven Million Eight Hundred Fifty-Three Thousand Four Hundred (7,853,400) shares of the Corporation's Preferred Stock shall be designated as a series known as Series B Convertible Preferred Stock, par value \$.001 per share (the "***Series B Preferred Stock***"), and Eleven Million Six Hundred Nine Thousand Three (11,609,003) shares of the Corporation's Preferred Stock shall be designated as a series known as Series C Convertible Preferred Stock, par value \$.001 per share (the "***Series C Preferred Stock***"). The Series A Preferred Stock and the Series B Preferred Stock collectively are referred to herein as the "***Junior Preferred Stock.***" The Junior Preferred Stock and the Series C Preferred Stock collectively are referred to herein as the "***Preferred Stock.***"

2. Voting.

(a) Election of Directors. The holders of outstanding shares of Series A Preferred Stock shall, voting together as a separate class, be entitled to elect two (2) Directors of the Corporation. The holders of outstanding shares of Series B Preferred Stock shall, voting together as a separate class, be entitled to elect one (1) Director of the Corporation. The holders of outstanding shares of Series C Preferred Stock shall, voting together as a separate class, be entitled to elect one (1) Director of the Corporation. Each of such Directors shall be the candidate receiving the greatest number of affirmative votes of the outstanding shares of Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock (as the case may be), with votes cast against such candidate and votes withheld having no legal effect. The election of each of such Directors shall occur (i) at the annual meeting of holders of capital stock, (ii) at any special meeting of holders of capital stock, (iii) at any special meeting of holders of Preferred Stock called by holders of a majority of the outstanding shares of Preferred Stock or (iv) by the written consent of holders of the outstanding shares of Preferred Stock entitled to vote for each such Director in the manner and on the basis specified above. If at any time when any share of Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock (as the case may be) is outstanding any of the Directors elected by either of such series, respectively, should cease to be a Director for any reason, the vacancy shall only be filled by the vote or written consent of the holders of a majority of the outstanding shares of the series of Preferred Stock entitled to fill such vacancy, voting together as a separate class, in the manner and on the basis specified above or as otherwise provided by law. The holders of outstanding shares of Preferred Stock shall also be entitled to vote for all other Directors of the Corporation together with holders of all other shares of the Corporation's outstanding capital stock entitled to vote thereon, voting as a single class, with each outstanding share of Preferred Stock entitled to the number of votes specified in Section A.2(b). The holders of outstanding shares of a series of Preferred Stock entitled to elect one or more Directors hereunder may, in their sole discretion, determine not to elect such Director or Directors as provided herein from time to time, and during any such period the Board

of Directors of the Corporation (the "*Board of Directors*") nonetheless shall be deemed duly constituted.

(b) Voting Generally. Each outstanding share of Preferred Stock shall be entitled to a number of votes equal to the number of shares of Common Stock into which such share of Preferred Stock is then convertible pursuant to Section A.6 hereof as of the record date for the vote or written consent of stockholders, if applicable. Each holder of outstanding shares of Preferred Stock shall be entitled to notice of any stockholder's meeting in accordance with the by-laws of the Corporation and shall vote with holders of the Common Stock, voting together as single class, upon all matters submitted to a vote of stockholders, excluding those matters required to be submitted to a class or series vote pursuant to the terms hereof (including, without limitation, Section A.8) or by law.

3. Dividends.

(a) Series C Preferred Stock. The holders of shares of Series C Preferred Stock shall be entitled to receive, out of funds legally available therefor, non-cumulative dividends on each share of Series C Preferred Stock at the annual rate of eight percent (8%) of the Series C Original Issue Price (as hereinafter defined) for the Series C Preferred Stock, when, as and if declared by the Board of Directors. The "*Series C Original Issue Price*" with respect to each share of Series C Preferred Stock shall be \$2.41 (as adjusted for subsequent stock dividends, stock splits, combinations, subdivisions, recapitalizations or the like with respect to the Series C Preferred Stock). The Corporation shall not declare, pay or set aside any dividends on any other shares of capital stock of the Corporation unless the holders of the Series C Preferred Stock then outstanding shall first receive, or simultaneously receive, a dividend on each outstanding share of Series C Preferred Stock.

(b) Junior Preferred Stock. After the foregoing dividends on the Series C Preferred Stock shall have been declared and paid, if at all, the holders of shares of Junior Preferred Stock shall be entitled to receive, out of funds legally available therefor, non-cumulative dividends on each share of Junior Preferred Stock at the annual rate of eight percent (8%) of the Original Issue Price (as hereinafter defined) applicable to such series of Junior Preferred Stock, when, as and if declared by the Board of Directors. The "*Series A Original Issue Price*" with respect to each share of Series A Preferred Stock shall be \$1.00 (as adjusted for subsequent stock dividends, stock splits, combinations, subdivisions, recapitalizations or the like with respect to the Series A Preferred Stock); and the "*Series B Original Issue Price*" with respect to each share of Series B Preferred Stock shall be \$1.91 (as adjusted for subsequent stock dividends, stock splits, combinations, subdivisions, recapitalizations or the like with respect to the Series B Preferred Stock). The Corporation shall not declare, pay or set aside any dividends on Common Stock unless the holders of the Junior Preferred Stock then outstanding shall first receive, or simultaneously receive, a dividend on each outstanding share of Junior Preferred Stock. The Series A Original Issue Price, the Series B Original Issue Price and the Series C Original Issue Price, as appropriate, the "*Original Issue Price*."

(c) Common Stock. After the foregoing dividends on the Preferred Stock shall have been declared and paid, if at all, then the Corporation may (when, as and if declared by the Board of Directors) declare and distribute in such year dividends among the holders of Preferred Stock and the holders of Common Stock pro rata based on the number of shares of Common Stock held by each, determined on an as-if-converted basis (assuming full conversion

of all such Preferred Stock). No dividend shall be paid on the Common Stock at a rate greater than the rate at which dividends are paid on the Preferred Stock (based on the number of shares of Common Stock into which the shares of Preferred Stock are convertible on the date the dividend is declared).

(d) Stock Dividends. At the request of a Two-Thirds Interest (as defined in Section A.4(e)(iii)) of the Series C Preferred Stock, the Corporation shall pay the dividends set forth in Section A.3(a) in Series C Preferred Stock in lieu of cash, and at the request of a Two-Thirds Interest of the Junior Preferred Stock, the Corporation shall pay such dividends set forth in Section A.3(b) in the applicable series of Junior Preferred Stock in lieu of cash, in each case on the basis of the lesser of (i) the applicable Original Issue Price per share of such series of Preferred Stock, as adjusted for subsequent stock dividends, stock splits, combinations, subdivisions, recapitalizations or the like with respect to such share; or (ii) the method of valuing such shares as described in Section A.4(d). In the event of a QPO (as defined in Section A.6(b)), any and all declared and unpaid dividends shall be paid to holders of Preferred Stock immediately upon receipt of any proceeds arising out of such QPO.

(e) Date of Original Issuance. The date on which the Corporation initially issued any share of a series of Preferred Stock shall be deemed to be the “*date of original issuance*” for all shares of such series of Preferred Stock regardless of the number of times any transfer of such shares is made on the stock records maintained by or for the Corporation and regardless of the number of certificates which may be issued to evidence such shares.

4. Liquidation, Merger, etc.

(a) Series C Preferred Stock Liquidation Preference. Subject to Section A.7(e) below, upon any Liquidation Event (as defined in Section A.4(d)), whether voluntary or involuntary, each holder of outstanding shares of Series C Preferred Stock shall be entitled to be paid in cash, before any amount shall be paid or distributed to the holders of any other shares of capital stock of the Corporation, an amount per share of Series C Preferred Stock equal to the Series C Original Issue Price plus any declared and unpaid dividends on such share of Series C Preferred Stock (such amount to be adjusted appropriately for stock splits, stock dividends, combinations, subdivisions, recapitalizations and the like) (the “*Series C Preference Amount*”). If the amounts available for distribution by the Corporation to holders of Series C Preferred Stock upon a Liquidation Event are not sufficient to pay the aggregate Series C Preference Amount due to such holders, such holders shall share ratably in any distribution in connection with such Liquidation Event in proportion to the full respective preferential amounts to which they are entitled.

(b) Junior Preferred Stock Liquidation Preference. Subject to Section A.7(e) below, upon any Liquidation Event, whether voluntary or involuntary, each holder of outstanding shares of Junior Preferred Stock shall be entitled to be paid in cash, after payment in full of the Series C Preference Amount but before any amount shall be paid or distributed to the holders of the Common Stock, an amount per share of Junior Preferred Stock equal to the applicable Original Issue Price of such share plus any declared and unpaid dividends on such share of Junior Preferred Stock (such amount to be adjusted appropriately for stock splits, stock dividends, combinations, subdivisions, recapitalizations and the like) (the “*Junior Preference Amount*”). If, after payment of the Series C Preference Amount, the amounts available for distribution by the Corporation to holders of Junior Preferred Stock upon a Liquidation Event are not sufficient to

pay the aggregate Junior Preference Amount due to such holders, such holders shall share ratably in any distribution in connection with such Liquidation Event in proportion to the full respective preferential amounts to which they are entitled.

(c) Remaining Assets. Subject to Section A.7(e) below, upon any Liquidation Event, whether voluntary or involuntary, and after payment in full of the Series C Preference Amount and the Junior Preference Amount, the remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed ratably among the holders of shares of Common Stock and Preferred Stock on an as-converted basis.

(d) Liquidation Events; Amounts Payable. The following shall be treated as a liquidation event for the purposes of this Section A.4 (each, a "**Liquidation Event**"): (i) the consummation of a merger or consolidation of the Corporation into or with another corporation (except one in which the holders of capital stock of the Corporation immediately prior to such merger or consolidation continue to hold at least a majority of the voting power of the capital stock of the surviving entity in substantially the same proportions as immediately prior to such merger or consolidation), (ii) the closing of a sale, transfer or other disposition of all or substantially all of the assets of the Corporation, (iii) the exclusive license of all or substantially all of the Corporation's intellectual property, (iv) the closing of the transfer (whether by merger, consolidation or otherwise) of the Corporation's capital stock if, after such closing, a person or group of affiliated persons would hold fifty percent (50%) or more of the outstanding voting stock of the Corporation (or the surviving or acquiring entity) or (v) any liquidation, dissolution or winding up of the Corporation or its assets; provided, however, that a bona fide institutional equity financing transaction in which the Corporation issues shares of its capital stock shall not be treated as a Liquidation Event; and, further provided, that a transaction shall not constitute a Liquidation Event if its sole purpose is to change the Corporation's state of incorporation or to create a holding company that will be owned in substantially the same proportions by the persons who held the Corporation's capital stock immediately prior to such transaction. All consideration payable to the stockholders of the Corporation in connection with any Liquidation Event, or all consideration payable to the Corporation and distributable to its stockholders, together with all other available assets of the Corporation (net of obligations owed by the Corporation), in connection with a sale described in the preceding clause (ii), shall be paid or distributed, as applicable, to the holders of capital stock of the Corporation in accordance with the preferences and priorities set forth in Sections A.4(a) through (c) above. The Corporation shall promptly provide to the holders of shares of Preferred Stock such information concerning the terms of any Liquidation Event and the value of the assets of the Corporation as may reasonably be requested by the holders of Preferred Stock. If applicable, the Corporation shall cause the definitive agreement relating to such Liquidation Event to provide for a rate at which the shares of capital stock of the Corporation are converted into or exchanged for cash, new securities or other property, or redeemed on a basis which gives effect to the provisions of this Section A.4.

(e) Valuations of Securities. For purposes of valuing any securities or other noncash consideration to be delivered to the holders of the Preferred Stock in connection with any transaction to which this Section A.4 is applicable, the following shall apply:

(i) If any such securities are traded on a nationally recognized securities exchange or inter-dealer quotation system, the value shall be deemed to be the average

of the closing prices of such securities on such exchange or system over the thirty (30) day period ending three (3) trading days prior to the closing of the Liquidation Event;

(ii) If any such securities are traded over-the-counter, the value shall be deemed to be the average of the closing bid or sales prices (whichever is applicable) of such securities over the thirty (30) day period ending three (3) business days prior to the closing of the Liquidation Event; and

(iii) If there is no active public market for such securities, the value shall be the fair market value thereof, as mutually determined by the Corporation and the holders of not less than two-thirds (2/3) of the then outstanding voting power ("***Two-Thirds Interest***") of the Preferred Stock (voting together as a single class and on an as-converted basis) and a Two-Thirds Interest of the Series C Preferred Stock (voting as a separate class and on an as-converted basis); provided, that if the Corporation and the holders of a Two-Thirds Interest of the Preferred Stock (voting together as a single class and on an as-converted basis) and the holders of a Two-Thirds Interest of the Series C Preferred Stock (voting as a separate class and on an as-converted basis) are unable to reach agreement, then by independent appraisal by a mutually agreed to investment banker, the fees of which shall be paid by the Corporation.

5. Redemption.

(a) Optional Redemption: Time Based Redemptions. At any time on or after April 3, 2012, but within thirty (30) days after the date set forth in a written request received by the Corporation from the holders of not less than a Two-Thirds Interest of the Preferred Stock (voting together as a single class and on an as-converted basis) and a Two-Thirds Interest of the Series C Preferred Stock (voting as a separate class and on an as-converted basis), the Corporation shall, to the extent it may lawfully do so, redeem in three (3) annual installments (each payment date being referred to herein as a "***Preferred Stock Redemption Date***") the number of then outstanding shares of Preferred Stock set forth in such notice (the "***Redemption Shares***") by paying in cash therefor a sum per share equal to the applicable Preferred Stock Redemption Price (as defined below). The number of shares of each series of Preferred Stock that the Corporation shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (i) the aggregate number of Redemption Share for each series of Preferred Stock outstanding immediately prior to such Redemption Date by (ii) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). Any redemption of a series of Preferred Stock effected pursuant to this Section A.5 shall be made on a pro rata basis among the holders of such series of Preferred Stock in proportion to the aggregate Redemption Price of each such holder of Preferred Stock would otherwise be entitled to receive on the applicable Redemption Date.

(b) Redemption Price. The price for each share of Preferred Stock redeemed pursuant to this Section A.5 shall be an amount equal to the Applicable Original Issue Price for such shares of Preferred Stock (as adjusted for any stock splits, stock dividends, combinations, subdivisions, recapitalizations or the like) plus all declared and unpaid dividends thereon (the "***Preferred Stock Redemption Price***").

(c) Notice. At least fifteen (15) but not more than thirty (30) days prior to each Preferred Stock Redemption Date, written notice shall be mailed by the Corporation, first class postage prepaid, to each holder of record (at the close of business on the business day next

preceding the day on which notice is given) of the Preferred Stock, the address last shown on the records of the Corporation for such holder, notifying such holder of the redemption to be effected, specifying the number and series of shares to be redeemed from such holder, the Preferred Stock Redemption Date, the applicable Preferred Stock Redemption Price for each series of Preferred Stock, the place at which payment may be obtained and calling upon such holder to surrender to the Corporation, in the manner and at the place designated, such holder's certificate or certificates representing the shares to be redeemed (the "*Redemption Notice*").

(d) Unredeemed Preferred Stock. If any shares of Preferred Stock are not redeemed on a Preferred Stock Redemption Date for any reason, including but not limited to the Corporation's failure to pay the applicable Preferred Stock Redemption Price as of such Preferred Stock Redemption Date, then all such unredeemed shares of Preferred Stock shall remain outstanding and shall be entitled to all the rights and preferences provided herein.

(e) Insufficient Funds. If the funds of the Corporation legally available to redeem shares of Preferred Stock on a Preferred Stock Redemption Date are insufficient to redeem the total number of such shares required to be redeemed on such Preferred Stock Redemption Date, the Corporation shall (i) take any action necessary or appropriate, to the extent reasonably within its control, to remove promptly any impediments to its ability to redeem the total number of shares of Preferred Stock required to be so redeemed, including, without limitation, (A) to the extent permissible under applicable law, reducing the stated capital of the Corporation or causing a revaluation of the assets of the Corporation under Section 154 of the Delaware General Corporation Law to create sufficient surplus to make such redemption and (ii) in any event, use any funds that are legally available to redeem the maximum possible number of such shares from the holders of such shares to be redeemed in proportion to the respective number of such shares that otherwise would have been redeemed if all such shares had been redeemed in full. At any time thereafter when additional funds of the Corporation are legally available to redeem such shares of Preferred Stock, the Corporation shall immediately use such funds to redeem the balance of the shares that the Corporation became obligated to redeem on such Preferred Stock Redemption Date (but which it has not yet redeemed) at the applicable Preferred Stock Redemption Price.

(f) Dividend After Redemption Date. In the event that shares of Preferred Stock required to be redeemed are not redeemed and continue to be outstanding, such shares shall continue to be entitled to dividends and interest thereon when and as declared by the Board of Directors as provided in Section A.3 until the date on which the Corporation actually redeems such shares.

(g) Surrender of Certificates. Each holder of shares of Preferred Stock to be redeemed shall surrender the certificate or certificates representing such shares to the Corporation to the place specified in the Redemption Notice, duly assigned or endorsed for transfer to the Corporation (or accompanied by duly executed stock powers relating thereto), or, in the event the certificate or certificates are lost, stolen or missing, shall deliver an affidavit of loss, to the place specified in the Redemption Notice, and each surrendered certificate shall be canceled and retired and the Corporation shall thereafter make payment of the applicable Preferred Stock Redemption Price by certified check or wire transfer; provided, however, that if the Corporation has insufficient funds legally available to redeem all shares of Preferred Stock required to be redeemed, each such holder shall, in addition to receiving the payment of the portion of the

aggregate Preferred Stock Redemption Price that the Corporation is not legally prohibited from paying to such holder by certified check or wire transfer, receive a new stock certificate for those shares of Preferred Stock not so redeemed.

6. Conversion. The holders of Preferred Stock shall have the following conversion rights:

(a) Voluntary Conversion. Any holder of shares of Preferred Stock may convert such shares into Common Stock at any time after the date of issuance of such shares of Preferred Stock upon the written election of such holder and without payment of any additional consideration, and each outstanding share of Preferred Stock held by such holder shall be converted into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing (i) the applicable Original Issue Price by (ii) the Applicable Conversion Price at the time in effect for such share of Preferred Stock (the "*Conversion Rate*"). The initial "*Applicable Conversion Price*" per share for shares of each series of Preferred Stock shall be the applicable Original Issue Price with respect to such series, subject to adjustment as set forth in Section A.7. Any election by a holder of Preferred Stock pursuant to this Section A.6(a) shall be made by written notice to the Corporation, and such notice may be given at any time after the date of original issuance of such share and through and including the day which is five (5) days prior to the closing of any Liquidation Event; provided, however, that no notice may be given with respect to a share of Preferred Stock on the day prior to, or the day of, any Preferred Stock Redemption Date on which such share will be redeemed.

(b) Automatic Conversion.

(i) Each share of Preferred Stock shall automatically be converted, without the payment of any additional consideration, into fully paid and nonassessable shares of Common Stock at the applicable Conversion Rate upon the Corporation's first sale of its Common Stock in a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended (the "*Securities Act*"), provided that such registration statement covers the offer and sale of Common Stock of which the aggregate net proceeds to the Corporation are at least \$40,000,000 and the price per share is at least \$7.23 (appropriately adjusted for any stock split, combination, subdivision, reorganization, recapitalizations, stock dividend, or the like) (a "*QPO*"). If a closing of a QPO occurs, all outstanding shares of Preferred Stock shall be deemed to have been converted into shares of Common Stock immediately prior to such closing.

(ii) Prior to a QPO, upon the written election of the holders of a Majority Interest (as defined in Section A.8) of the Preferred Stock voting as a single class on an as-converted basis (a "*Conversion Election*"), and without the payment of any additional consideration, all of the outstanding shares of Preferred Stock shall be converted into fully paid and nonassessable shares of Common Stock at the Applicable Conversion Rate for each series of Preferred Stock; provided, that no shares of Series C Preferred Stock shall be converted into shares of Common Stock unless the Conversion Election has been signed by the holders of at least a Two-Thirds Interest of the Series C Preferred Stock (as a separate class and on an as-converted basis). Any Conversion Election made pursuant to this Section A.6(b)(ii) shall (a) be made by written notice to the Corporation and the other holders of Preferred Stock, and such notice may be given at any time after the date on which shares of Series C Preferred Stock are first issued (the "*Closing Date*") through and including the date which is five (5) days prior to the

closing of any Liquidation Event, and (b) bind all holders of Preferred Stock; provided, that such Conversion Election shall not bind the holders of the Series C Preferred Stock unless such Conversion Election has been signed by the holders of at least a Two-Thirds Interest of the Series C Preferred Stock (as a separate class and on an as-converted basis).

(c) Procedure for Conversion.

(i) Voluntary Conversion. Upon election to convert pursuant to Section A.6(a), the relevant holder of Preferred Stock shall surrender the certificate or certificates representing the Preferred Stock being converted to the Corporation, duly assigned or endorsed for transfer to the Corporation (or accompanied by duly executed stock powers relating thereto) or shall deliver an affidavit of loss to the Corporation, at its principal executive office or such other place as the Corporation may from time to time designate by notice to the holders of the Preferred Stock. Upon surrender of such certificate(s) or delivery of an affidavit of loss, the Corporation shall issue and send by hand delivery, by courier or by first class mail (postage prepaid) to the holder thereof or to such holder's designee, at the address designated by such holder, certificates for the number of shares of Common Stock to which such holder shall be entitled upon conversion. The issuance of certificates for Common Stock upon conversion of Preferred Stock shall be deemed effective as of the date of surrender of such Preferred Stock certificates or delivery of such affidavit of loss and will be made without charge to the holders of such shares for any issuance tax in respect thereof or other costs incurred by the Corporation in connection with such conversion and the related issuance of such stock.

(ii) Automatic Conversion. As of the closing of a QPO or upon a Conversion Election (the "***Automatic Conversion Date***"), all outstanding shares of Preferred Stock or all outstanding shares of Junior Preferred Stock, as the case may be (the "***Conversion Shares***"), shall be converted into shares of Common Stock without any further action by the holders of such shares and whether or not the certificates representing such Conversion Shares are surrendered to the Corporation. On the Automatic Conversion Date, all rights with respect to the Conversion Shares so converted shall terminate, except any of the rights of the holders thereof upon surrender of their certificate or certificates therefor or delivery of an affidavit of loss thereof to receive certificates for the number of shares of Common Stock into which such Conversion Shares have been converted. If so required by the Corporation, certificates surrendered for conversion shall be endorsed, or accompanied by a written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or by his, her or its attorney duly authorized in writing. Upon surrender of such certificates or affidavit of loss, the Corporation shall issue and deliver to such holder, promptly (and in the event of an automatic conversion in connection with a QPO in such time as is sufficient to enable such holder to participate in such QPO) 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 Conversion Shares surrendered are convertible on the Automatic Conversion Date.

(d) Reservation of Stock Issuable Upon Conversion. The Corporation 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 Preferred Stock, such number of shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of Preferred Stock; and if at any time the number of authorized but unissued

shares of Common Stock is insufficient to effect the conversion of all outstanding shares of Preferred Stock, the Corporation will take such corporate action as may be necessary to increase the number of its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, and to reserve the appropriate number of shares of Common Stock for issuance upon such conversion.

(e) No Closing of Transfer Books. The Corporation shall not close its books against the transfer of shares of Preferred Stock in any manner that would interfere with the timely conversion of any shares of Preferred Stock.

7. Adjustments.

(a) Adjustments to the Applicable Conversion Price. Except as provided in Section A.7(b) and except in the case of an event described in Section A.7(c), if and whenever after the Closing Date the Corporation shall issue or sell, or is, in accordance with this Section A.7(a), deemed to have issued or sold, any shares of Common Stock without consideration or for a consideration per share (determined as provided in Section A.7(a)(vi)) less than the Applicable Conversion Price for a series of Preferred Stock in effect immediately prior to the time of such issuance or sale, then, upon such issuance or sale (or deemed issuance or sale), the Applicable Conversion Price with respect to such series of Preferred Stock shall be reduced to the price determined by dividing (i) an amount equal to the sum of (A) the total number of shares of Common Stock outstanding immediately prior to such issuance or sale (or deemed issuance or sale) (including, for this purpose, all shares of Common Stock issuable upon exercise or conversion of any Options (as defined below) or Convertible Securities (as defined below) outstanding as of the date of such issuance or sale (or deemed issuance or sale)) multiplied by the then existing Applicable Conversion Price and (B) the consideration, if any, received by the Corporation upon such issuance or sale (or deemed issuance or sale) by (ii) the total number of shares of Common Stock outstanding immediately prior to such issuance or sale (or deemed issuance or sale) (including, for this purpose, all shares of Common Stock issuable upon exercise or conversion of Options or Convertible Securities outstanding as of the date of such issuance or sale (or deemed issuance or sale)) plus the number of shares of Common Stock so issued or sold (or so deemed issued or sold).

For purposes of this Section A.7(a), the following shall also be applicable:

(i) Issuance of Rights or Options. If the Corporation shall, at any time after the Closing Date, in any manner grant (whether directly or by assumption in a merger or otherwise), any warrants or other rights to subscribe for or to purchase, or any options for the purchase of, Common Stock or any stock or security convertible into or exchangeable for Common Stock (such warrants, rights or options being called "*Options*" and such convertible or exchangeable stock or securities being called "*Convertible Securities*"), in each case for no consideration or for consideration per share (determined as provided in this paragraph and in Section A.7(a)(vi)) less than the Applicable Conversion Price for a series of Preferred Stock, whether or not such Options or the right to convert or exchange any such Convertible Securities are immediately exercisable, then the total maximum number of shares of Common Stock issuable upon the exercise of such Options, or upon conversion or exchange of the total maximum amount of such Convertible Securities issuable upon exercise of such Options, shall be deemed to have been issued as of the date of granting of such Options (and thereafter shall be deemed to be outstanding), at a price per share equal to the amount determined by dividing (A)

the total amount, if any, received or receivable by the Corporation as consideration for the granting of such Options, plus the minimum aggregate amount of additional consideration payable to the Corporation upon the exercise of all such Options, plus, in the case of such Options which relate to Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable upon the issue or sale of such Convertible Securities and upon the conversion or exchange thereof, by (B) the total maximum number of shares of Common Stock deemed to have been so issued. Except as otherwise provided in Section A.7(a)(iii), no further adjustment of the Applicable Conversion Price with respect to such series of Preferred Stock shall be made upon the actual issuance of such Common Stock or of such Convertible Securities upon exercise of such Options or upon the actual issuance of such Common Stock upon conversion or exchange of such Convertible Securities.

(ii) Issuance of Convertible Securities. If the Corporation shall, at any time after the Closing Date, in any manner issue or sell any Convertible Securities for no consideration or for consideration per share (determined as provided in this paragraph and in Section A.7(a)(vi)) less than the Applicable Conversion Price for a series of Preferred Stock, whether or not the rights to exchange or convert any such Convertible Securities are immediately exercisable, then the total maximum number of shares of Common Stock issuable upon conversion or exchange of all such Convertible Securities shall be deemed to have been issued as of the date of the issuance or sale of such Convertible Securities (and thereafter shall be deemed to be outstanding), at a price per share equal to the amount determined by dividing (A) the total amount, if any, received or receivable by the Corporation as consideration for the issuance or sale of such Convertible Securities, plus the minimum aggregate amount of additional consideration, if any, payable to the Corporation upon the conversion or exchange thereof, by (B) the total maximum number of shares of Common Stock deemed to have been so issued; provided that (1) except as otherwise provided in Section A.7(a)(iii), no further adjustment of the Applicable Conversion Price with respect to such series of Preferred stock shall be made upon the actual issuance of such Common Stock upon conversion or exchange of such Convertible Securities and (2) if any such issuance or sale of such Convertible Securities is made upon exercise of any Options to purchase any such Convertible Securities, no further adjustment of the Applicable Conversion Price shall be made by reason of such issue or sale.

(iii) Change in Option Price or Conversion Rate. If there shall occur a change in (A) the maximum number of shares of Common Stock issuable in connection with any Option referred to in Section A.7(a)(i) or any Convertible Securities referred to in Section A.7(a)(i) or (ii), (B) the minimum aggregate purchase price (whether as consideration for the grant, consideration paid at the time of exercise or other consideration paid to the Corporation in connection with an Option) provided for in any Option referred to in Section A.7(a)(i), (C) the minimum additional consideration, if any, payable upon the conversion or exchange of any Convertible Securities referred to in Section A.7(a)(i) or (ii) or (D) the rate at which Convertible Securities referred to in Section A.7(a)(i) or (ii) are convertible into or exchangeable for Common Stock (in each case, other than an event described in Section A.7(b)), then the Applicable Conversion Price with respect to each series of Preferred Stock in effect at the time of such event shall be readjusted to the Applicable Conversion Price for each series of Preferred Stock that would have been in effect at such time had such Options or Convertible Securities that are still outstanding provided for such changed maximum number of shares, purchase price, additional consideration or conversion rate, as the case may be, at the time initially granted, issued or sold; and on the termination of any such Option or any such right to convert or

exchange such Convertible Securities, the Applicable Conversion Price with respect to each series of Preferred Stock then in effect hereunder shall be increased to the Applicable Conversion Price for each such series of Preferred Stock that would have been in effect at the time of such termination had such Option or Convertible Securities, to the extent outstanding immediately prior to such termination (*i.e.*, to the extent that fewer than the number of shares of Common Stock deemed to have been issued in connection with such Option or Convertible Securities were actually issued), never been issued.

(iv) Stock Dividends. If the Corporation shall declare a dividend or make any other distribution upon any stock of the Corporation payable in Common Stock, Options or Convertible Securities, any Common Stock, Options or Convertible Securities, as the case may be, issuable in payment of such dividend or distribution shall be deemed to have been issued or sold without consideration, and the Applicable Conversion Price with respect to each series of Preferred Stock will be adjusted pursuant to this Section A.7(a)(iv); provided that no adjustment shall be made to the Applicable Conversion Price for a series of Preferred Stock if the holders of such series of Preferred Stock are entitled to, and do, receive such dividend or distribution in accordance with Section A.3; and provided further that if any adjustment is made to the Applicable Conversion Price for a series of Preferred Stock as a result of the declaration of a dividend and such dividend is not effected, then the Applicable Conversion Price for such series of Preferred Stock shall be appropriately readjusted.

(v) Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Closing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities or other property of the Corporation other than shares of Common Stock, then and in each such event provision shall be made so that the holders of the outstanding shares of Preferred Stock shall receive upon conversion thereof, in addition to the number of shares of Common Stock receivable thereupon, the amount of such other securities of the Corporation or the value of such other property that they would have received had the Preferred Stock been converted into Common Stock immediately prior to the record date of such event and had such holders thereafter, during the period from the record date of such event to and including the conversion date, retained such securities or other property receivable by them during such period giving application to all adjustments called for during such period under this Section A.7 with respect to the rights of the holders of the outstanding shares of Preferred Stock; provided, however, that no such adjustment shall be made if the holders of Preferred Stock simultaneously receive a dividend or other distribution of such securities or other property in an amount equal to the amount of such securities or other property as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock immediately prior to the record date of such event.

(vi) Consideration for Stock. In case any shares of Common Stock shall be issued or sold, or deemed issued or sold, for cash, the consideration received therefor shall be deemed to be the amount received or to be received by the Corporation therefor before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation in connection with such issuance or sale (or deemed issuance or sale) (determined with respect to deemed issuances and sales in connection with Options and Convertible Securities in accordance with clause (A) of Section A.7(a)(i) or (ii), as appropriate). In case any shares of Common Stock shall be issued or sold, or deemed issued or sold, for a

consideration other than cash, the amount of the consideration other than cash received by the Corporation shall be deemed to be the fair value of such consideration received or to be received by the Corporation (determined with respect to deemed issuances and sales in connection with Options and Convertible Securities in accordance with clause (A) of Section A.7(a)(i) or (ii), as appropriate) as determined by the Board of Directors. In case any Options shall be issued in connection with the issue and sale of other securities of the Corporation, together comprising one integral transaction in which no specific consideration is allocated to such Options by the parties thereto, such Options shall be deemed to have been issued for such consideration as determined by the Board of Directors.

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

(viii) Treasury Shares. The number of shares of Common Stock outstanding at any given time shall not include shares owned or held by or for the account of the Corporation; *provided* that the disposition of any such shares shall be considered an issuance or sale of Common Stock for the purpose of this Section A.7.

(b) Certain Issues of Common Stock Excepted. Anything herein to the contrary notwithstanding, the Corporation shall not be required to make any adjustment of the Applicable Conversion Price in the case of the issuance from and after the Closing Date of (in each case, "*Excluded Shares*"): (i) shares of Common Stock issued or issuable upon conversion of shares of Preferred Stock; (ii) shares of Common Stock issuable or issued to directors, officers, employees, consultants, or advisors or vendors (if in transactions with non-financing purposes) of the Corporation pursuant to a stock option, stock bonus, stock purchase or restricted stock plan or agreement, if such option, bonus, plan or agreement is approved by the Board of Directors ("*Option Shares*"), (iii) shares of Common Stock issued or issuable in a QPO, (iv) Common Stock issued or deemed issued pursuant to a bona fide business acquisition of or by the Corporation whether by merger, consolidation, combination, purchase of all or substantially all of the assets of the Corporation or exclusive license of all or substantially all of the Corporation's intellectual property or sale or exchange of stock or otherwise, (v) Common Stock issued or deemed issued in connection with any equipment leasing arrangement or debt financing from a bank or similar financial institution for other than equity financing purposes approved unanimously by the Board of Directors, (vi) Common Stock issued or deemed issued in exchange for property (real or personal) or services approved unanimously by the Board of Directors and at fair market value as determined unanimously by the Board of Directors, (vii) Common Stock issued or issuable as a dividend or distribution on the Preferred Stock pursuant to Section A.3, (viii) shares of Common Stock issued pursuant to a transaction described in Section A.7(c), (ix) shares of Common Stock issued pursuant to options or warrants outstanding as of the Closing Date, or (x) shares of Common Stock issued or deemed issued as a result of a decrease in the Applicable Conversion Price of any series of Preferred Stock resulting from the operation of Section A.7.

(c) Subdivision or Combination of Common Stock. In case the Corporation shall at any time after the Closing Date subdivide its outstanding shares of Common Stock into a greater number of shares (by any stock split, stock dividend or otherwise) without a corresponding subdivision of the Preferred Stock, the Applicable Conversion Price for each series of Preferred Stock in effect immediately prior to such subdivision shall be proportionately reduced, and, conversely, in case the Corporation shall at any time after the Closing Date combine its outstanding shares of Common Stock into a smaller number of shares (by any reverse stock split or otherwise) without a corresponding combination of the Preferred Stock, the Applicable Conversion Price for each series of Preferred Stock in effect immediately prior to such combination shall be proportionately increased. In the case of any such subdivision, no further adjustment shall be made pursuant to Section A.7(a)(iv) by reason thereof.

(d) Reorganization or Reclassification. If any capital reorganization or reclassification of the capital stock of the Corporation shall be effected in such a way that holders of Common Stock shall be entitled to receive stock, securities or assets with respect to or in exchange for Common Stock, then, as a condition of such reorganization or reclassification, lawful and adequate provisions shall be made whereby each holder of a share or shares of Preferred Stock shall thereupon have the right to receive, upon the basis and upon the terms and conditions specified herein and in lieu of the shares of Common Stock immediately theretofore receivable upon the conversion of such share or shares of Preferred Stock, as the case may be, such shares of stock, securities or assets as may be issued or payable with respect to or in exchange for a number of outstanding shares of such Common Stock equal to the number of shares of such Common Stock immediately theretofore receivable upon such conversion had such reorganization or reclassification not taken place, and in any such case appropriate provisions shall be made with respect to the rights and interests of such holder to the end that the provisions hereof (including, without limitation, provisions for adjustments of the Applicable Conversion Price for such holders shares of Preferred Stock) shall thereafter be applicable, as nearly as may be, in relation to any shares of stock, securities or assets thereafter deliverable upon the exercise of such conversion rights.

(e) Liquidation Events. Upon the election of a Two-Thirds Interest of the Preferred Stock, including a Two-Thirds Interest of the Series C Preferred Stock, made in connection with any Liquidation Event, the liquidation provisions of Sections A.4(a) and (b) shall not apply and each share of Preferred Stock shall remain outstanding and shall thereafter be convertible (or shall be converted into a security which shall be convertible) into the kind and amount of securities or other property to which a holder of the number of shares of Common Stock of the Corporation deliverable upon conversion of such share of Preferred Stock would have been entitled upon such Liquidation Event; and, in such case, appropriate adjustment (as determined by the Board of Directors) shall be made in the application of the provisions of Section A.7 set forth with respect to the rights and interests thereafter of the holders of the Preferred Stock, to the end that the provisions set forth in Section A.7 (including provisions with respect to changes in and other adjustments of the Applicable Conversion Price) shall thereafter be applicable, as nearly as possible, in relation to any securities or other property thereafter deliverable upon the conversion of the Preferred Stock. Any election pursuant to and in accordance with this Section A.7(e) shall be made by written notice to the Corporation and the other holders of Preferred Stock at least five (5) days prior to the closing of the Liquidation Event. Upon any election pursuant to and in accordance with this Section A.7(e), all holders of Preferred Stock shall be deemed to have elected to so participate in such Liquidation Event in the

manner provided in this Section A.7(e) and such election shall bind all holders of Preferred Stock.

8. Covenants.

(a) So long as any shares of Preferred Stock remain outstanding, the Corporation shall not (by way of agreement, amendment, merger, operation of law, consolidation or otherwise), without first having provided written notice of such proposed action to each holder of outstanding shares of Preferred Stock and having obtained the affirmative vote or written consent of the holders of at least a majority of the outstanding voting power (a "*Majority-in-Interest*") of the Preferred Stock (voting together as a single class and on an as-converted basis):

(i) declare or pay any dividend or make any distributions of cash, property or securities of the Corporation on or with respect to shares of the capital stock of this Corporation;

(ii) redeem, repurchase or otherwise acquire any shares of its capital stock; provided, however, that this restriction shall not apply to (A) the repurchase of shares of capital stock from employees, directors, officers, consultants or other persons performing services for the Corporation or any subsidiary pursuant to agreements under which the Corporation has the option to repurchase such shares upon the occurrence of certain events, such as the termination of employment or service, or pursuant to a right of first refusal or (B) the redemption of any share or shares of Preferred Stock pursuant to and as provided in this Fourth Amended and Restated Certificate of Incorporation;

(iii) alter or amend the Corporation's 2004 Stock Plan in a manner that increases the number of shares of Common Stock reserved for issuance thereunder as of the Closing Date;

(iv) effect a reclassification or recapitalization of the outstanding capital stock of the Corporation;

(v) authorize or issue, or obligate itself to issue, any equity security (including any other security convertible into or exercisable or exchangeable for any such equity security), having a preference over, or being on parity with, any series of Preferred Stock as to liquidation, sale or merger preferences, redemption, dividend rights, or voting rights, or permit any subsidiary of the Corporation to issue any capital stock other than to the Corporation;

(vi) amend, alter or repeal any provision of, or add any provision to, this Fourth Amended and Restated Certificate of Incorporation;

(vii) increase or decrease (other than by redemption or conversion) the authorized number of shares of Preferred Stock or Common Stock; or

(viii) effect any Liquidation Event.

(b) For so long as any shares of Series C Preferred Stock remain outstanding, the Corporation shall not (by way of agreement, amendment, merger, operation of law, consolidate or otherwise), without first having provided written notice of such proposed action to

each holder of the outstanding shares of the Series C Preferred Stock and having obtained the affirmative vote or written consent of the holders of a Two-Thirds Interest of the Series C Preferred Stock:

(i) increase or decrease (other than by redemption or conversion) the authorized number of shares of Series C Preferred Stock;

(ii) amend, alter or repeal any provision of, or add any provision to, this Fourth Amended and Restated Certificate of Incorporation or the Corporation's by-laws;

(iii) alter or change the rights, powers, preferences or privileges of the Series A Preferred Stock or Series B Preferred Stock so as to affect them favorably without a comparable change to the Series C Preferred Stock; or

(iv) authorize or issue any shares Series C Preferred Stock (other than shares issued pursuant to that certain Series C Preferred Stock Purchase Agreement, dated on or about the Closing Date, between the Corporation and the parties thereto), or any other shares of capital stock having preference over, or being on parity with, the Series C Preferred Stock as to liquidation, sale or merger preferences, redemption, dividend rights or voting rights.

(c) For so long as any shares of Series B Preferred Stock remain outstanding, the Corporation shall not (by way of agreement, amendment, merger, operation of law, consolidate or otherwise), without first having provided written notice of such proposed action to each holder of the outstanding shares of the Series B Preferred Stock and having obtained the affirmative vote or written consent of the holders of a Two-Thirds Interest of the Series B Preferred Stock:

(i) increase or decrease (other than by redemption or conversion) the authorized number of shares of Series B Preferred Stock; or

(ii) amend, alter or repeal any provision of, or add any provision to, this Fourth Amended and Restated Certificate of Incorporation.

(d) For so long as any shares of Series A Preferred Stock remain outstanding, the Corporation shall not (by way of agreement, amendment, merger, operation of law, consolidate or otherwise), without first having provided written notice of such proposed action to each holder of the outstanding shares of the Series A Preferred Stock and having obtained the affirmative vote or written consent of the holders of a Two-Thirds Interest of the Series A Preferred Stock, increase or decrease (other than by redemption or conversion) the authorized number of shares of Series A Preferred Stock.

Further, without the written approval of a Majority Interest of the Junior Preferred Stock and a Two-Thirds Interest of the Series C Preferred Stock, the Corporation shall not, by amendment, alteration or repeal of this Fourth Amended and Restated Certificate of Incorporation (by way of merger, operation of law, or otherwise) or through any Liquidation Event or other reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities, agreement or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation and shall at all times in good faith assist in the carrying out of all the provisions of this Article IV and

in the taking of all such action as may be necessary or appropriate in order to protect the rights of the holders of the Preferred Stock against impairment. Notwithstanding the foregoing, nothing herein shall be construed to prohibit impairment where the appropriate vote of the stockholders of the Corporation has been obtained under the General Corporation Law of the State of Delaware or under the terms of this Fourth Amended and Restated Certificate of Incorporation. Unless waived by a Majority in Interest of the Junior Preferred Stock and a Two-Thirds Interest of the Series C Preferred Stock, any successor to the Corporation shall agree in writing, as a condition to such succession, to carry out and observe the obligations of the Corporation hereunder with respect to the Preferred Stock.

9. Notice.

(a) Corporate Actions, Etc. In the event the Corporation establishes a record date to determine the holders of any class of securities who are entitled to receive any dividend or other distribution or who are entitled to vote at a meeting (or by written consent), the Corporation shall mail or cause to be mailed by first class mail (postage prepaid) to each holder of Preferred Stock at least ten (10) days prior to such record date specified therein, a notice specifying the date of such record date for the purpose of such dividend or distribution or meeting or consent and a description of such dividend or distribution or the action to be taken at such meeting or by such consent. With respect to any action to be taken at a meeting (or by written consent) in connection with a Liquidation Event, QPO or other any other similar transaction, such notice shall be accompanied by a certificate prepared by the chief financial officer of the Corporation describing in detail (1) the facts of such transaction, (2) the amount(s) per share of Preferred Stock or Common Stock each holder of Preferred Stock would receive pursuant to the applicable provisions of this Fourth Amended and Restated Certificate of Incorporation, and (3) the facts upon which such amounts were determined.

(b) Adjustments, Calculations. At the end of each calendar year, in the event of one or more adjustment or readjustment of the Applicable Conversion Price pursuant to Section A.7 during that year, the Corporation at its expense shall compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Preferred Stock a certificate setting forth in detail (i) such adjustment or readjustment, (ii) the Applicable Conversion Price before and after such adjustment or readjustment, and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of such holder's shares of Preferred Stock. All such calculations shall be made to the nearest cent or to the nearest one hundredth (1/ 100) of a share as the case may be.

(c) Waiver of Notice. The holder or holders of a Two-Thirds Interest of a series of Preferred Stock may, at any time upon written notice to the Corporation, waive any notice or certificate delivery provisions specified herein for the benefit of such holders of such series of Preferred Stock, and any such waiver shall be binding upon all holders of such series of Preferred Stock.

10. No Reissuance of Preferred Stock. No share or shares of Preferred Stock acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be reissued, and all such shares shall be canceled, retired and eliminated from the shares which the Corporation shall be authorized to issue.

11. Contractual Rights of Holders. The various provisions set forth herein for the benefit of the holders of the Preferred Stock shall be deemed contract rights enforceable by them, including, without limitation, one or more actions for specific performance.

B. COMMON STOCK

1. Voting.

(a) Election of Directors. The holders of Common Stock, voting as a separate class, shall be entitled to elect one (1) Director of the Corporation. The holders of Common Stock voting together with the holders of outstanding Preferred Stock as a single class on an as-converted to Common-Stock basis shall be entitled to elect one (1) Director of the Corporation with each outstanding share of Preferred Stock entitled to the number of votes specified in Section A.2(b). Each such Director shall be the candidate receiving the greatest number of affirmative votes entitled to be cast with votes cast against such candidate and votes withheld having no legal effect. The election of such Directors shall occur at the annual meeting of holders of capital stock or at any special meeting called and held in accordance with the by-laws of the Corporation, or by consent in lieu thereof in accordance with this Third Amended Restated Certificate of Incorporation and applicable law. If at any time fewer than the number of Directors indicated above has been elected, the Board of Directors shall nonetheless be deemed duly constituted.

(b) Voting Generally. Except as otherwise expressly provided herein or required by law, each holder of outstanding shares of Common Stock shall be entitled to one (1) vote in respect of each share of Common Stock held thereby of record on the books of the Corporation for the election of directors and on all matters submitted to a vote of stockholders of the Corporation. Notwithstanding the provisions of Section 242(b)(2) of the Delaware General Corporation Law, the number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of a majority of the Common Stock and Preferred Stock voting together as a single class on an as-converted to Common-Stock basis.

2. Dividends. Subject to the payment in full of all preferential dividends to which the holders of the Preferred Stock are entitled hereunder and the payment in full of all declared and unpaid dividends on the Preferred Stock, the holders of Common Stock shall be entitled to receive dividends out of funds legally available therefor at such times and in such amounts as the Board of Directors may determine in its sole discretion, with holders of Preferred Stock and Common Stock sharing *pari passu* in such dividends, as contemplated by Article IV, Section A.3.

3. Liquidation. Upon any Liquidation Event, after the payment or provision for payment of all debts and liabilities of the Corporation and all preferential amounts to which the holders of Preferred Stock are entitled with respect to the distribution of assets in liquidation, the holders of Common Stock and the holders of the Preferred Stock on an as-converted basis shall be entitled to share ratably in the remaining assets of the Corporation available for distribution, as contemplated by Article IV, Section A.4(b).

ARTICLE V

In furtherance of and not in limitation of powers conferred by statute, it is further provided:

1. Election of Directors need not be by written ballot unless the by-laws of the Corporation so provide.
2. The Board of Directors is expressly authorized to adopt, amend or repeal the by-laws of the Corporation to the extent specified therein.
3. The number of directors constituting the entire Board of Directors shall be seven (7).

ARTICLE VI

To the fullest extent permitted by law, the Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative by reason of the fact that he or she is or was a director or officer of the Corporation, or is or was serving at the request of the Corporation as a director or officer of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), liability, loss, judgment, fines and amounts paid in settlement actually and reasonably incurred by him or her in connection with such action, suit or proceeding if he or she acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceedings, had no reasonable cause to believe his or her conduct was unlawful. The termination of any action, upon a plea of nolo contendere or equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect of any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

Such indemnity shall inure to the benefit of the heirs, executors and administrators of any such person so indemnified pursuant to this Article. The right to indemnification under this Article shall be a contract right and shall include the right to be paid by the Corporation the expenses incurred in defending any such proceeding in advance of its disposition; *provided, however*, that if the Delaware General Corporation Law requires, the payment of such expenses incurred by a director or officer in advance of the final disposition of a proceeding shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such director or officer, to repay all amounts so advanced if it shall ultimately be determined that such director or officer is not entitled to be indemnified under this Article or otherwise. Such indemnification and advancement of expenses shall be in addition to any other rights to which those seeking indemnification and advancement of expenses may be entitled under any law, Bylaw, agreement, vote of stockholders, or otherwise.

The Corporation may, to the fullest extent permitted by applicable law, at any time without further stockholder approval, purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation or is or was serving at the request of the Corporation as director, officer, employee or agent of another corporation,

partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power to indemnify such person against such liability under applicable law.

Any repeal or amendment of this Article by the stockholders of the Corporation or by changes in applicable law shall, to the extent permitted by applicable law, be prospective only, and shall not adversely affect any right to indemnification or advancement of expenses of a director or officer of the Corporation existing at the time of such repeal or amendment. In addition to the foregoing, the right to indemnification and advancement of expenses shall be to the fullest extent permitted by the General Corporation Law of the State of Delaware or any other applicable law and all amendments to such laws as hereafter enacted from time to time.

ARTICLE VII

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

ARTICLE VIII

Meetings of stockholders may be held within or without the State of Delaware, as the by-laws of the Corporation may provide.

ARTICLE IX

To the extent permitted by law, the books of the Corporation may be kept outside the State of Delaware at such place or places as may be designated in the by-laws of the Corporation or from time to time by its Board of Directors.

ARTICLE X

A Director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a Director of the Corporation, except for liability (a) for any breach of the Director's duty of loyalty to the Corporation or its stockholders, (b) for acts or omissions not in good faith or which involve intentional misconduct

or a knowing violation of law, (c) under Section 174 of the Delaware General Corporation Law, or (d) for any transaction from which the Director derived an improper personal benefit. If the Delaware General Corporation Law is amended after the effective date of this Fourth Amended and Restated Certificate of Incorporation to authorize corporate action further eliminating or limiting the personal liability of Directors, then the liability of a Director of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law of the State of Delaware.

Any repeal or modification of this Article X by the stockholders of the Corporation or by an amendment to the Delaware General Corporation Law shall not adversely affect any right or protection existing at the time of such repeal or modification with respect to any acts or omissions occurring either before or after such repeal or modification of a person serving as a Director prior to or at the time of such repeal or modification.

ARTICLE XI

All of the powers of the Corporation, insofar as the same may be lawfully vested by this Fourth Amended and Restated Certificate of Incorporation in the Board of Directors, are hereby conferred upon the Board of Directors. In furtherance and not in limitation of that power the Board of Directors shall have the power to make, adopt, alter, amend and repeal from time to time the by-laws of this Corporation, subject to the right of the stockholders entitled to vote with respect thereto to adopt, alter, amend and repeal the by-laws made by the Board of Directors.

* * * * *

IN WITNESS WHEREOF, Applied Spine Technologies, Inc. has caused this Fourth Amended and Restated Certificate of Incorporation to be signed by its President and Chief Executive Officer this 2nd day of April, 2007.

/s/ Thomas E. Wood
Name: Thomas E. Wood
Title: President and Chief Executive Officer

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