

**FIFTH AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
ASCENSION ORTHOPEDICS, INC.**

SW-3

Ascension Orthopedics, Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware (the "**Corporation**"), does hereby certify that:

1. The original Certificate of Incorporation was filed with the Secretary of State of Delaware on November 21, 1996, and was amended and restated on December 16, 1999 and again on December 18, 2002.

2. The Fifth Amended and Restated Certificate of Incorporation in the form attached hereto as **Exhibit A** has been duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware by the directors and stockholders of the Corporation, and prompt written notice was duly given pursuant to Section 228 to those stockholders who did not approve the Fourth Amended and Restated Certificate of Incorporation by written consent.

3. The Fifth Amended and Restated Certificate of Incorporation so adopted reads in full as set forth in **Exhibit A** attached hereto and is hereby incorporated herein by this reference.

IN WITNESS WHEREOF, Ascension Orthopedics, Inc. has caused this Certificate to be signed by the Chief Executive Officer this 21<sup>st</sup> day of October, 2005.

**ASCENSION ORTHOPEDICS, INC.**

By: \_\_\_\_\_

Jerry Klawitter, Chief Executive Officer

State of Delaware  
Secretary of State  
Division of Corporations  
Delivered 02:22 PM 10/21/2005  
FILED 02:17 PM 10/21/2005  
SRV 050862175 - 2686969 FILE

## **EXHIBIT A**

### **FIFTH AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF**

**ASCENSION ORTHOPEDICS, INC.**

#### **FIRST**

The name of the Corporation is Ascension Orthopedics, Inc.

#### **SECOND**

The address of the registered office of the Corporation in the State of Delaware is the Corporation Trust Center, 1209 Orange Street, City of Wilmington, County of New Castle, 19801. The name of its registered agent at such address is The Corporation Trust Company.

#### **THIRD**

The nature of the business or purposes to be conducted or promoted 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, as amended from time to time (the "DGCL").

#### **FOURTH**

A. The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is 50,000,000 shares, comprised of 30,000,000 shares of Common Stock with a par value of \$.001 per share (the "**Common Stock**") and 20,000,000 shares of Preferred Stock with a par value of \$.001 per share (the "**Preferred Stock**").

B. The Preferred Stock may be issued from time to time in one or more series. Subject to the provisions of Section D.6 hereof, the Board of Directors of the Corporation (the "**Board of Directors**") is expressly authorized, within the limitations and restrictions stated in this Certificate, to fix the number of shares in each such series and to determine or alter for each such series, such voting powers, full or limited, or no voting powers, and such designations, preferences, and relative, participating, optional, or other rights and such qualifications, limitations, or restrictions thereof, as shall be stated and expressed in the resolution or resolutions adopted by the Board of Directors providing for the issue of such shares and as may be permitted by the DGCL. Subject to the provisions of Section D.6 hereof, the Board of Directors is also expressly authorized to increase or decrease (but not below the number of shares of such series then outstanding) the number of shares of any series subsequent to the issue of shares of that series. In case the number of shares of any such series shall be so decreased, the shares constituting such decrease shall resume the status that they had prior to the adoption of the resolution originally fixing the number of shares of such series.

C. 4,911,163 shares of the authorized shares of Preferred Stock are hereby designated "Series A Preferred Stock" (the "**Series A Preferred**"), 2,238,806 shares of the

authorized shares of Preferred Stock are hereby designated "Series A-1 Preferred Stock" (the "**Series A-1 Preferred**"), 4,765,230 shares of the authorized shares of Preferred Stock are hereby designated "Series B Preferred Stock" (the "**Series B Preferred**"), and 3,200,000 shares of the authorized shares of Preferred Stock are hereby designated "Series C Preferred Stock" (the "**Series C Preferred**"). The Series A Preferred, the Series A-1 Preferred, the Series B Preferred, and the Series C Preferred are from time to time collectively referred to herein as the "**Series Preferred**."

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

1. **Dividend Rights.**

(a) The holders of Series C Preferred shall be entitled to receive, out of funds legally available therefor, dividends at an annual rate equal to 8% of the Original Series C Issue Price (hereinafter defined) of each share of Series C Preferred, payable when, as and if declared by the Board of Directors, in preference and priority to the payment of dividends on any shares of stock which rank junior to the Series C Preferred, the Series B Preferred and the Series A Preferred as to the payment of dividends, including without limitation the Common Stock and the Series A-1 Preferred ("**Series A/B Junior Stock**") (other than a dividend payable solely in Common Stock or involving the repurchase of shares of Common Stock from terminated employees, officers, directors, or consultants pursuant to contractual arrangements between such persons and the Corporation approved by the vote of at least two-thirds (2/3rds) of the entire Board of Directors). The Series C Preferred shall rank *pari passu* with the Series B Preferred and the Series A Preferred with respect to the payment of dividends, treating each share of Series C Preferred, Series B Preferred and Series A Preferred on an as if converted basis. In the event dividends are paid to the holders of Series C Preferred that are less than the full amounts to which such holders are entitled pursuant hereto, such holders shall share ratably in the total amount of dividends paid according to the respective amounts due each such holder if such dividends were paid in full. After payment of dividends to the holders of Series C Preferred, dividends may be declared and distributed among all holders of Series A/B Junior Stock; provided, however, that no dividend may be declared and distributed among holders of Series A/B Junior Stock at a rate greater than the rate at which dividends are paid to the holders of Series C Preferred based on the number of shares of Common Stock into which such shares of Series C Preferred are convertible (as adjusted for stock splits and the like) on the date such dividend is declared. The dividends payable to the holders of the Series C Preferred shall not be cumulative, and, except as set forth in Section D.2 of this Article Fourth, no right shall accrue to the holders of the Series C Preferred by reason of the fact that dividends on the Series C Preferred are not declared or paid in any previous fiscal year of the Corporation, whether or not the earnings of the Corporation in that previous fiscal year were sufficient to pay such dividends in whole or in part. In the event that the Corporation shall have declared but unpaid dividends outstanding immediately prior to, and in the event of, a conversion of Series C Preferred (as provided in Section D.4 hereof), the Corporation shall, at the option of the Corporation, pay in cash to the holder(s) of Series C Preferred subject to conversion the full amount of any such dividends or allow such dividends to be converted into Common Stock in accordance with, and pursuant to the terms specified in, Section D.4 hereof.

(b) The holders of Series B Preferred shall be entitled to receive, out of funds legally available therefor, dividends at an annual rate equal to 8% of the Original Series B Issue Price (hereinafter defined) of each share of Series B Preferred, payable when, as and if declared by the Board of Directors, in preference and priority to the payment of dividends on any shares of stock which rank junior to the Series C Preferred, the Series B Preferred and the Series A Preferred as to the payment of dividends, including without limitation the Series A/B Junior Stock (other than a dividend payable solely in Common Stock or involving the repurchase of shares of Common Stock from terminated employees, officers, directors, or consultants pursuant to contractual arrangements between such persons and the Corporation approved by the vote of at least two-thirds (2/3rds) of the entire Board of Directors). The Series B Preferred shall rank *pari passu* with the Series C Preferred and the Series A Preferred with respect to the payment of dividends, treating each share of the Series C Preferred, Series B Preferred and Series A Preferred on an as if converted basis. In the event dividends are paid to the holders of Series B Preferred that are less than the full amounts to which such holders are entitled pursuant hereto, such holders shall share ratably in the total amount of dividends paid according to the respective amounts due each such holder if such dividends were paid in full. After payment of dividends to the holders of Series B Preferred, dividends may be declared and distributed among all holders of Series A/B Junior Stock; provided, however, that no dividend may be declared and distributed among holders of Series A/B Junior Stock at a rate greater than the rate at which dividends are paid to the holders of Series B Preferred based on the number of shares of Common Stock into which such shares of Series B Preferred are convertible (as adjusted for stock splits and the like) on the date such dividend is declared. The dividends payable to the holders of the Series B Preferred shall not be cumulative, and, except as set forth in Section D.2 of this Article Fourth, no right shall accrue to the holders of the Series B Preferred by reason of the fact that dividends on the Series B Preferred are not declared or paid in any previous fiscal year of the Corporation, whether or not the earnings of the Corporation in that previous fiscal year were sufficient to pay such dividends in whole or in part. In the event that the Corporation shall have declared but unpaid dividends outstanding immediately prior to, and in the event of, a conversion of Series B Preferred (as provided in Section D.4 hereof), the Corporation shall, at the option of the Corporation, pay in cash to the holder(s) of Series B Preferred subject to conversion the full amount of any such dividends or allow such dividends to be converted into Common Stock in accordance with, and pursuant to the terms specified in, Section D.4 hereof.

(c) The holders of Series A Preferred shall be entitled to receive, out of funds legally available therefor, dividends at an annual rate equal to 8% of the Original Series A Issue Price (hereinafter defined) of each share of Series A Preferred, payable when, as and if declared by the Board of Directors, in preference and priority to the payment of dividends on any shares which rank junior to the Series C Preferred, the Series B Preferred and the Series A Preferred as to the payment of dividends, including without limitation the Series A/B Junior Stock (other than a dividend payable solely in Common Stock or involving the repurchase of shares of Common Stock from terminated employees, officers, directors, or consultants pursuant to contractual arrangements between such persons and the Corporation approved by the vote of at least two-thirds (2/3rds) of the entire Board of Directors). The Series A Preferred shall rank *pari passu* with the Series C Preferred and the Series B Preferred with respect to the payment of dividends, treating each share of Series A Preferred, Series B Preferred and Series C Preferred on an as if converted basis. In the event dividends are paid to the holders of Series A Preferred that are less

than the full amounts to which such holders are entitled pursuant hereto, such holders shall share ratably in the total amount of dividends paid according to the respective amounts due each such holder if such dividends were paid in full. After payment of dividends to the holders of Series A Preferred, dividends may be declared and distributed among all holders of Series A/B Junior Stock; provided, however, that no dividend may be declared and distributed among holders of Series A/B Junior Stock at a rate greater than the rate at which dividends are paid to the holders of Series A Preferred based on the number of shares of Common Stock into which such shares of Series A Preferred are convertible (as adjusted for stock splits and the like) on the date such dividend is declared. The dividends payable to the holders of the Series A Preferred shall not be cumulative, and, except as set forth in Section D.2 of this Article Fourth, no right shall accrue to the holders of the Series A Preferred by reason of the fact that dividends on the Series A Preferred are not declared or paid in any previous fiscal year of the Corporation, whether or not the earnings of the Corporation in that previous fiscal year were sufficient to pay such dividends in whole or in part. In the event that the Corporation shall have declared but unpaid dividends outstanding immediately prior to, and in the event of, a conversion of Series A Preferred (as provided in Section D.4 hereof), the Corporation shall, at the option of the Corporation, pay in cash to the holder(s) of Series A Preferred subject to conversion the full amount of any such dividends or allow such dividends to be converted into Common Stock in accordance with, and pursuant to the terms specified in, Section D.4 hereof.

(d) The holders of the Series A-1 Preferred shall be entitled to receive dividends to the same extent and at the same time as Common Stock of this Corporation only when, as and if declared and paid on the Common Stock, on parity with the Common Stock and without any preference or priority over the Common Stock.

## **2. Liquidation Preferences.**

(a) In the event of any liquidation, dissolution, or winding up of the Corporation, whether voluntary or not, or the consummation of an Organic Transaction (as defined below) (each a "**Liquidation Event**"), distributions to the stockholders of the Corporation shall be made in the following manner:

(i) Each holder of Series C Preferred shall be entitled to receive, prior, and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of Series A/B Junior Stock, by reason of their ownership of such stock, the amount of \$1.68 per share (as adjusted for combinations, consolidations, subdivisions, or stock splits with respect to such shares) (the "**Original Series C Issue Price**") for each share of Series C Preferred then held by such holder, plus an amount equal to 8% of the Original Series C Issue Price per annum from the date of issuance of such share to the date of distribution by the Corporation (collectively, the "**Series C Preference**").

(ii) Each holder of Series B Preferred shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of Series A/B Junior Stock, by reason of their ownership of such stock, the amount of \$1.34 per share (as adjusted for combinations, consolidations,

subdivisions, or stock splits with respect to such shares) (the "**Original Series B Issue Price**") for each share of Series B Preferred then held by such holder, plus an amount equal to 8% of the Original Series B Issue Price per annum from the date of issuance of such share to the date of distribution by the Corporation (collectively, the "**Series B Preference**").

(iii) Each holder of Series A Preferred shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of Series A/B Junior Stock, by reason of their ownership of such stock, the amount of \$1.72 per share (as adjusted for combinations, consolidations, subdivisions, or stock splits with respect to such shares) (the "**Original Series A Issue Price**") for each share of Series A Preferred then held by such holder, plus an amount equal to 8% of the Original Series A Issue Price per annum from the date of issuance of such share to the date of distribution by the Corporation (collectively, the "**Series A Preference**").

(iv) ~~The Series C Preferred, the Series B Preferred and the Series A Preferred shall rank pari passu with each other with respect to any distributions in connection with or following a Liquidation Event, treating each on an as if converted basis.~~ If, upon the occurrence of a Liquidation Event, the assets and funds available to be distributed among the holders of the Series C Preferred, the Series B Preferred and the Series A Preferred shall be insufficient to permit the payment to such holders of the full Series C Preference, Series B Preference and Series A Preference, then the entire assets and funds of the Corporation legally available for distribution to such holders shall be distributed ratably based on the total preferential amount due each such holder under this Section D.2(a)(i), Section D.2(a)(ii) and Section D.2(a)(iii).

(v) Each holder of Series A-1 Preferred shall be entitled to receive, after payment of the Series C Preference, the Series B Preference, the Series A Preference, and prior in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Common Stock, by reason of their ownership of such stock, the amount of \$1.34 per share (as adjusted for combinations, consolidations, subdivisions, or stock splits with respect to such shares) (the "**Original Series A-1 Issue Price**") for each share of Series A-1 Preferred then held by such holder (collectively the "**Series A-1 Preference**"). If, upon the occurrence of a Liquidation Event, the assets and funds available to be distributed among the holders of the Series A-1 Preferred shall be insufficient to permit the payment to such holders of the full Series A-1 Preference, then the entire assets and funds of the Corporation legally available for distribution to such holders shall be distributed ratably based upon the total preferential amount due to each such holder under this Section D.2(a)(iv).

(vi) Each holder of Series C Preferred, each holder of Series B Preferred, each holder of Series A Preferred and each holder of Common Stock shall be entitled to receive, after the payment of the Series C Preference, the Series B Preference, the Series A Preference and the Series A-1 Preference, and prior in preference to any additional distribution of any of the assets or surplus funds of the Corporation, by reason

of their ownership of such stock, the amount of \$1.34 per share (which amount (1) shall be adjusted for combinations, consolidations, subdivisions, or stock splits with respect to such shares, (2) shall be calculated per share of Series C Preferred, Series B Preferred and Series A Preferred on an as converted basis and (3) shall be calculated without regard to the prior payment of the Series C Preference, the Series B Preference or the Series A Preference) for each share of Series C Preferred, Series B Preferred, Series A Preferred and Common Stock then held by such holder (collectively the "**Third Tier Distribution**"). If, upon the occurrence of a Liquidation Event, the assets and funds available to be distributed among the holders of the Series C Preferred, the Series B Preferred, the Series A Preferred and the Common Stock shall be insufficient to permit the payment to such holders of the full Third Tier Distribution, then the entire assets and funds of the Corporation legally available for distribution to such holders shall be distributed ratably, based upon the total preferential amount due to each such holder under this Section D.2(a)(v). Without the consent of the holders of the Series A-1 Preferred, the Board of Directors of the Corporation is expressly authorized to create one or more series of preferred stock having preferences and priorities over the Series A-1 Preferred after the distribution of the Series A-1 Preference. In no event shall the Third Tier Distribution be considered a preference or priority of the Series A Preferred, the Series B Preferred or the Series C Preferred.

(vii) After payment of the Third Tier Distribution, the remaining assets of the Corporation available for distribution to stockholders shall be distributed ratably among the holders of Common Stock and the Series Preferred on an as converted basis.

(b) Each holder of Series Preferred shall be deemed to have consented to distributions made by the Corporation in connection with the repurchase of shares of Common Stock issued to or held by officers, directors, or employees of, or consultants to, the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements between such persons and the Corporation approved by the vote of at least two-thirds (2/3rds) of the entire Board of Directors providing for the right of said repurchase between the Corporation and such persons.

(c) The value of securities and property paid or distributed pursuant to this Section D.2 shall be computed at fair market value at the time of payment to the Corporation or at the time made available to stockholders, all as determined by the Board of Directors in the good faith exercise of its reasonable business judgment, provided that (i) if such securities are listed on any established stock exchange or a national market system, their fair market value shall be the closing sales price for such securities as quoted on such system or exchange (or the largest such exchange) for the date the value is to be determined (or if there are no sales for such date, then for the last preceding business day on which there were sales), as reported in the Wall Street Journal or similar publication, and (ii) if such securities are regularly quoted by a recognized securities dealer but selling prices are not reported, their fair market value shall be the mean between the high bid and low asked prices for such securities on the date the value is to be determined (or if there are no quoted prices for such date, then for the last preceding business day on which there were quoted prices).

(d) Nothing hereinabove set forth shall affect in any way the right of each holder of Series Preferred to convert such shares at any time and from time to time into Common Stock in accordance with Section D.4 hereof.

(e) The term "**Organic Transaction**" means:

(i) any person or persons acting together in a way which would constitute a "group" for purposes of Section 13(d) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**") (other than any person or group which includes any stockholder of the Corporation on the date hereof (each a "**Stockholder**") or any Affiliates (as defined below) thereof), beneficially own (as defined in Rule 13d-3 under the Exchange Act), directly or indirectly, securities of the Corporation representing greater than 50% of the total combined voting power of the Corporation entitled to vote in the election of the Board of Directors of the Corporation;

(ii) the consummation of a merger or consolidation of the Corporation with or into another entity or any other corporate reorganization, if persons who were not stockholders of the Company immediately prior to such merger, consolidation or other reorganization own immediately after such merger, consolidation or other reorganization 50% or more of the voting power of the outstanding securities of each of (i) the continuing or surviving entity and (ii) any direct or indirect parent corporation of such continuing or surviving entity; or

(iii) the consummation of the sale or other disposition (in one transaction or a series of related transactions) of all or substantially all of the assets of the Corporation and its subsidiaries, taken as a whole, to one or more persons or groups (as defined above).

(f) The term "**Affiliate**" means (i) in the case of an entity, any person or entity who or which, directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, any specified person or entity, where the term "**control**," "**controls**" or "**controlled**" means the possession, directly or indirectly, of the power to cause the direction of the management and policies of such entity, whether through the ownership of voting interests or voting securities, as the case may be, by contract or otherwise or (ii) in the case of an individual, such individual's spouse, children, grandchildren or parents or a trust primarily for the benefit of any of the foregoing.

### **3. Voting Rights.**

(a) Except as otherwise required by law or hereunder, the holder of each share of Common Stock issued and outstanding, shall have one vote per share and the holder of each share of Series Preferred shall be entitled to the number of votes per share equal to the number of shares of Common Stock into which such share of Series Preferred could be converted at the record date for determination of the stockholders entitled to vote on such matters, or, if no such record date is established, at the date such vote is taken or any written consent of stockholders is solicited, such votes to be counted together with all other shares of stock of the Corporation having general voting power and not separately as a class. Fractional votes by the holders of



Series Preferred shall not, however, be permitted and any fractional voting rights shall (after aggregating all shares into which shares of Series Preferred held by each holder could be converted) be rounded to the nearest whole number (with one-half being rounded upward). Holders of Common Stock and Series Preferred shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation.

(b) The Corporation's Board of Directors shall consist of five (5) members. Notwithstanding the provisions of paragraph (a), at each annual or special meeting called for the purpose of electing directors:

(i) the holders of Series A Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Board of Directors;

(ii) the holders of the Series B Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Board of Directors;

(iii) the holders of the Series C Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Board of Directors; and

(iv) the holders of the Series A-1 Preferred and the Common Stock, voting together as a separate class and on an as converted basis, shall be entitled to elect two (2) members of the Board of Directors.

The provisions of this Section D.3(b) shall expire and be of no further force or effect upon conversion of all outstanding shares of Series C Preferred, Series B Preferred and Series A Preferred into Common Stock pursuant to the provisions of Section D.4 hereof. In the case of any vacancy in the office of a director elected by a specified group of stockholders, a successor shall be elected to hold office for the unexpired term of such director by the affirmative vote of a majority of the shares of such specified group given at a special meeting of such stockholders duly called or by an action by written consent for that purpose. Any director who shall have been elected by a specified group of stockholders may be removed during the aforesaid term of office, either for or without cause, by, and only by, the affirmative vote of the holders of a majority of the shares of such specified group, given at a special meeting of such stockholders duly called or by an action by written consent for that purpose, and any such vacancy thereby created, may be filled by the vote of the holders of a majority of the shares of such specified group represented at such meeting or in such consent.

#### **4. Conversion Rights.**

The holders of Series Preferred shall have conversion rights as follows:

(a) **Right to Convert.** Each share of Series Preferred shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for such Series Preferred.

(i) Series C Preferred. Each share of Series C Preferred shall be convertible into such number of fully-paid and non-assessable shares of Common Stock

as is determined by dividing the Original Series C Issue Price by the then applicable Series C Conversion Price for such Series C Preferred, determined as hereinafter provided, in effect at the time of conversion. As of the date of filing of this Fourth Amended and Restated Certificate of Incorporation, the price at which shares of Common Stock shall be deliverable upon conversion of the Series C Preferred is \$1.68 per share (the "**Series C Conversion Price**"). The Series C Conversion Price shall be subject to adjustment as provided in accordance with Section D.4(d) of this Article Fourth.

(ii) **Series B Preferred.** Each share of Series B Preferred shall be convertible into such number of fully-paid and non-assessable shares of Common Stock as is determined by dividing the Original Series B Issue Price by the then applicable Series B Conversion Price for such Series B Preferred, determined as hereinafter provided, in effect at the time of conversion. As of the date of filing of this Fourth Amended and Restated Certificate of Incorporation, the price at which shares of Common Stock shall be deliverable upon conversion of the Series B Preferred is \$1.34 per share (the "**Series B Conversion Price**"). The Series B Conversion Price shall be subject to adjustment as provided in accordance with Section D.4(d) of this Article Fourth.

(iii) **Series A Preferred.** Each share of Series A Preferred shall be convertible into such number of fully-paid and non-assessable shares of Common Stock as is determined by dividing the Original Series A Issue Price by the then applicable Series A Conversion Price for such Series A Preferred, determined as hereinafter provided, in effect at the time of conversion. As of the date of filing of this Fourth Amended and Restated Certificate of Incorporation, the price at which shares of Common Stock shall be deliverable upon conversion of the Series A Preferred is \$1.34 per share (the "**Series A Conversion Price**"). The Series A Conversion Price shall be subject to adjustment as provided in accordance with Section D.4(d) of this Article Fourth.

(iv) **Series A-1 Preferred.** Each share of Series A-1 Preferred shall be convertible into such number of fully-paid and non-assessable shares of Common Stock as is determined by dividing the Original Series A-1 Issue Price by the then applicable Series A-1 Conversion Price for such Series A-1 Preferred, determined as hereinafter provided, in effect at the time of conversion. As of the date of filing of this Fourth Amended and Restated Certificate of Incorporation, the price at which shares of Common Stock shall be deliverable upon conversion of the Series A-1 Preferred is \$1.34 per share (the "**Series A-1 Conversion Price**"). The Series A-1 Conversion Price shall be subject to adjustment as provided in accordance with Section D.4(d) of this Article Fourth. As the context requires, each of the Series B Conversion Price, the Series A Conversion Price and the Series A-1 Conversion Price are sometimes referred to herein as the "**Conversion Price.**"

(b) **Automatic Conversion.**

(i) Each share of Series Preferred shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Price upon the closing of a firm commitment underwritten public offering pursuant to an effective

registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Corporation to the public with aggregate proceeds to the Corporation in excess of \$25,000,000 (before deduction for underwriters commissions and expenses) and a per share price not less than \$3.50 per share (appropriately adjusted for any stock combination, stock split, stock dividend, recapitalization, or other similar transaction) (an **"IPO Automatic Conversion"**). In the event of an IPO Automatic Conversion of the Series Preferred, the person(s) entitled to receive the Common Stock issuable upon such conversion of such Series Preferred shall not be deemed to have converted such Series Preferred until immediately prior to the closing of such sale of securities.

(ii) Each share of Series C Preferred, each share of Series B Preferred and each share of Series A Preferred shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Price upon the affirmative vote or written consent of (i) a majority of the outstanding shares of Series A Preferred, voting as a separate class, (ii) a majority of the outstanding shares of Series B Preferred, voting as a separate class, and (iii) a majority of the outstanding shares of Series C Preferred, voting as a separate class (a **"Series Vote Automatic Conversion"**).

(iii) As the context requires, each of a Series Vote Automatic Conversion and an IPO Automatic Conversion are sometimes referred to herein as an **"Automatic Conversion"**.

(c) **Mechanics of Conversion.** No fractional shares of Common Stock shall be issued upon conversion of Series Preferred. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the applicable Conversion Price. Before any holder of Series Preferred shall be entitled to convert the same into full shares of Common Stock and to receive certificates therefor, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Series Preferred, and shall give written notice to the Corporation at such office that he or she elects to convert the same; provided, however, that in the event of an Automatic Conversion, the 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 Corporation or its transfer agent, and provided further that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion unless the certificates evidencing such shares of Series Preferred are either delivered to the Corporation or its transfer agent as provided above, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen, or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. The Corporation shall, as soon as practicable after such delivery, or such agreement and indemnification in the case of a lost certificate, issue and deliver at such office to such holder of Series Preferred, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock. Such conversion shall be deemed to have been made immediately prior to the

close of business on the date of such surrender of the shares of Series Preferred to be converted, or in the case of Automatic Conversion, on the date of closing of the offering (in the case of an IPO Automatic Conversion), or the date set forth in the resolution relating to the Automatic Conversion approved by the requisite affirmative vote or written consent (in the case of a Series Vote Automatic Conversion), and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

**(d) Adjustments to Conversion Price.**

**(i) Adjustments for Dividends, Splits, Subdivisions, Combinations, or Consolidation of Common Stock.** In the event the outstanding shares of Common Stock shall be increased by stock dividend payable in Common Stock, stock split, subdivision, or other similar transaction occurring after the filing of this Fourth Amended and Restated Certificate of Incorporation into a greater number of shares of Common Stock, the applicable Conversion Price for each series of Series Preferred then in effect shall, concurrently with the effectiveness of such event, be decreased in proportion to the percentage increase in the outstanding number of shares of Common Stock. In the event the outstanding shares of Common Stock shall be decreased by reverse stock split, combination, consolidation, or other similar transaction occurring after the filing of this Fourth Amended and Restated Certificate of Incorporation into a lesser number of shares of Common Stock, the applicable Conversion Price for each series of Series Preferred then in effect shall, concurrently with the effectiveness of such event, be increased in proportion to the percentage decrease in the outstanding number of shares of Common Stock.

**(ii) Adjustments for Other Distributions.** In the event the Corporation at any time or from time to time makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, any distribution payable in securities, cash, evidences of indebtedness or other assets (excluding regular cash dividends or distributions paid from retained earnings of the Corporation and dividends or distributions referred to in Sections D.4(d)(i) hereof) of the Corporation other than shares of Common Stock and other than as otherwise adjusted in this Section D.4, then and in each such event provision shall be made so that the holders of Series Preferred shall receive upon conversion thereof, in addition to the number of shares of Common Stock receivable thereupon, the amount of securities of the Corporation which they would have received had their Series Preferred been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the date of conversion, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Section 4 with respect to the rights of the holders of the Series Preferred.

**(iii) Adjustments for Reclassification, Exchange and Substitution.** If the Common Stock issuable upon conversion of the Series Preferred shall be changed into the same or a different number of shares of any other class or classes of stock,

whether by capital reorganization, reclassification, or otherwise (other than a subdivision or combination of shares provided for above), the applicable Conversion Price for each series of Series Preferred then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted such that the Series Preferred shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of such Series Preferred immediately before that change.

(iv) **Adjustments on Issuance of Additional Stock.** If the Corporation shall issue "Additional Stock" (as defined below) for consideration per share less than the applicable Conversion Price for the Series C Preferred, the Series B Preferred or the Series A Preferred, as applicable, in effect on the date and immediately prior to such issue, then and in such event, such applicable Conversion Price shall be reduced concurrently with such issue, to a price (calculated to three decimal places) determined by multiplying such applicable Conversion Price by a fraction (i) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of shares of Additional Stock so issued (or deemed to be issued) would purchase at such Conversion Price; and (ii) the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Additional Stock so issued; provided that for purposes of this Section D.4(d)(iv), all shares of Common Stock issuable upon conversion of the outstanding Series Preferred and all shares of Common Stock issuable upon exercise of outstanding stock options shall be deemed to be Common Stock outstanding. For purposes of this Section D.4(d)(iv), "Additional Stock" shall mean all shares of Common Stock issued by the Corporation after the date on which the first share of Series A Preferred was issued (the "Series A Original Issue Date") other than (A) shares of Common Stock issued or issuable at any time (a) upon conversion of the Series Preferred; (b) up to 3,814,000 shares of Common Stock (subject to adjustment for all subdivisions, combinations, stock dividends, recapitalizations and the like) issued or issuable after the date on which the first share of Series A Preferred was issued upon exercise of options outstanding or subsequently granted to officers, directors, and employees of, and consultants to, the Corporation as designated and approved by the Board of Directors; (c) as a dividend or distribution with respect to the Series A Preferred, the Series B Preferred and the Series C Preferred; (d) in connection with equipment leasing or bank financing transactions or acquisitions or settlements of disputed amounts unanimously approved by the Corporation's Board of Directors; (e) in an offering of Common Stock to the public generally pursuant to an effective registration statement under the Securities Act of 1933, as amended; (f) in connection with the Corporation's agreement with Dr. Jerry C. Griffin dated June 15, 1999 and amended on August 15, 1999; or (g) upon conversion of the shares of Series B Preferred issued upon the exercise of warrants issued to Frazier Healthcare III, L.P., Frazier Affiliates III, L.P. and The Brown Foundation on or prior to the date of filing this Fourth Amended and Restated Certificate of Incorporation (collectively, "Exempt

**Issuances**"); or (B) shares of Common Stock issued or issuable and otherwise described in subparagraphs (i), (ii) or (iii) of this Section D.4(d).

(v) **Calculation of Consideration.** For the purpose of making any adjustment in a Conversion Price as provided in this Section D.4(d), the consideration received by the Corporation for any issue or sale of Common Stock will be computed:

(1) to the extent it consists of cash, as the amount of cash received by the Corporation before deduction of any offering expenses payable by the Corporation and any underwriting or similar commissions, compensation, or concessions paid or allowed by the Corporation in connection with such issue or sale;

(2) to the extent it consists of property other than cash, at the fair market value of that property as determined in good faith by the consent of two-thirds (2/3) the Corporation's entire Board of Directors; provided, that to the extent the Board of Directors is unable to determine the value of any such property, the value of such property shall be determined at the Company's expense by a nationally recognized independent investment banking firm selected by the vote of a majority of the entire Board of Directors; and

(3) if Common Stock is issued or sold together with other stock or securities or other assets of the Corporation for a consideration which covers both, as the portion of the consideration so received that may be reasonably determined in good faith by the consent of two-thirds (2/3) of the Corporation's entire Board of Directors to be allocable to such Common Stock; provided, that to the extent the Board of Directors is unable to determine the portion of consideration to be allocable to such Common Stock, such portion shall be determined at the Company's expense by a nationally recognized independent investment banking firm selected by the vote of a majority of the entire Board of Directors.

(vi) **Adjustments for Options and Convertible Securities.**

If the Corporation (1) grants any options, warrants or other rights to subscribe for, purchase, or otherwise acquire shares of Common Stock, or (2) issues or sells any security convertible into or exchangeable for shares of Common Stock, then, in each case, the price per share of Common Stock issuable on the exercise of the options, warrants or other rights or the conversion or exchange of the securities will be determined by dividing the total amount, if any, received or receivable by the Corporation as consideration for the granting of the options, warrants or other rights or the issue or sale of the convertible or exchangeable securities, plus the minimum aggregate amount of additional consideration payable to the Corporation on exercise, conversion or exchange of the securities, by the maximum number of shares of Common Stock issuable on the exercise, conversion or exchange. Such granting or issue or sale will be considered to be an issue or sale for cash of the maximum number of shares of Common Stock issuable on exercise, conversion or exchange at the price per share determined under this subsection,

and each applicable Conversion Price will be adjusted as above provided to reflect (on the basis of that determination) the issue or sale, unless such issue or sale is excluded from the definition of "Additional Stock" set forth in Section D.4(d)(iv) above in which case no adjustments will be made. No further adjustment of such Conversion Price will be made as a result of the actual issuance of shares of Common Stock on the exercise of any such options, warrants or other rights or the conversion or exchange of any such convertible securities.

Upon the redemption or repurchase of any such securities or the expiration or termination of the right to convert into, exchange for, or exercise with respect to, Common Stock, each applicable Conversion Price if adjusted pursuant to the prior paragraph will be readjusted to such price as would have been obtained had the adjustment made upon their issuance been made upon the basis of the issuance of only the number of such securities as were actually converted into, exchanged for, or exercised with respect to, Common Stock. If the purchase price or conversion or exchange rate provided for in any such security changes at any time, then, upon such change becoming effective, each applicable Conversion Price then in effect if adjusted pursuant to the prior paragraph will be readjusted forthwith to such price as would have been obtained had the adjustment made upon the issuance of such securities been made upon the basis of (1) the issuance of only the number of shares of Common Stock theretofore actually delivered upon the conversion, exchange or exercise of such securities, and the total consideration received therefor, and (2) the granting or issuance, at the time of such change, of any such securities then still outstanding for the consideration, if any, received by the Corporation therefor and to be received on the basis of such changed price or rate.

(e) **No Impairment.** The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities, 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 but will at all times in good faith assist in the carrying out of all the provisions of this Section D.4 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of the Series Preferred against impairment.

(f) **Certificate as to Adjustments.** Upon the occurrence of each adjustment or readjustment of any Conversion Price pursuant to this Section D.4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of such series of Series Preferred a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request of any holder of Series Preferred, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the applicable Conversion Price for such series of Series Preferred at the time in effect, 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 series of Series Preferred.

(g) **Notices of Record Date.** In the event that this Corporation shall propose at any time:

(i) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock, or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus;

(ii) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights;

(iii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock;

(iv) to merge or consolidate with or into any other corporation, sell, lease, or convey all or substantially all its property or business, or to liquidate, dissolve, or wind up; or

(v) any other event described in Section D.4(d) which could give rise to an adjustment of any Conversion Price,

then, in connection with each such event, this Corporation shall send to the holders of the Series Preferred:

(1) at least 20 days' prior written notice of the date on which a record shall be taken for such dividend, distribution, or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote in respect of the matters referred to in (iii) and (iv) above; and

(2) in the case of the matters referred to in (iii), (iv) and (v) above, at least 20 days' prior written notice of the date when the same shall take place (and with respect to items (iii) and (iv), specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event or the record date for the determination of such holders if such record date is earlier).

Each such written notice shall be delivered personally or given by first class mail, postage prepaid, addressed to the holders of the Series Preferred at the address for each such holder as shown on the books of this Corporation.

(h) **Issue Taxes.** The Corporation shall pay any and all issue and other taxes (other than income taxes) that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of shares of Series Preferred pursuant hereto; provided, however, that the Corporation shall not be obligated to pay any transfer taxes resulting from any transfer requested by any holder in connection with any such conversion.



(i) **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 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 Series Preferred, including, without limitation, shares of Series Preferred underlying outstanding warrants; and 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 Series Preferred, including, without limitation, shares of Series Preferred underlying outstanding warrants, the Corporation 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, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to its Certificate of Incorporation.

(j) **Status of Converted Stock.** In case any series of Series Preferred shall be converted pursuant to this Section D.4, the shares so converted shall resume the status of authorized but unissued shares of Series Preferred undesignated as to series.

#### **5. Redemption Rights.**

The Series A Preferred, the Series A-1 Preferred, the Series B Preferred Stock and the Series C Preferred Stock shall each be nonredeemable.

#### **6. Covenants.**

In addition to any other rights provided by law, so long as any of the Series C Preferred, the Series B Preferred or Series A Preferred are outstanding, this Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of (i) a majority of the outstanding shares of Series A Preferred, voting as a separate class, (ii) a majority of the outstanding shares of Series B Preferred, voting as a separate class, and (iii) a majority of the outstanding shares of Series C Preferred, voting as a separate class:

(a) consummate or enter into an agreement with respect to an Organic Transaction;

(b) incur any indebtedness for borrowed money or grant, create or permit the imposition of any lien, charge, security interest or other encumbrance upon any of the assets or properties of the Corporation or any subsidiary or guaranty or provide surety for the obligations of any third party, other than (i) ordinary course trade payables, (ii) financings of budgeted capital expenditures reflected in annual budgets approved by the vote of at least two-thirds (2/3rds) of the entire Board of Directors and (iii) aggregate indebtedness for borrowed money not to exceed \$500,000;

(c) amend or modify (i) the Certificate of Incorporation or Bylaws of the Corporation or any of its subsidiaries or (ii) documentation relating to indebtedness for borrowed money of the Corporation or any subsidiary, other than indebtedness permitted under clause (b) above;

(d) make any payment on account of, or set aside any assets for a sinking or other analogous fund for, the purchase, redemption, defeasance, retirement or other acquisition of any equity interest of the Corporation or any subsidiary, except redemptions from officers, directors, employees or consultants to the Corporation upon termination of their employment or association with the Corporation pursuant to agreements between such persons and the Corporation approved by the vote of at least two-thirds (2/3rds) of the entire Board of Directors;

(e) voluntarily liquidate, wind-up, dissolve or commence any bankruptcy, insolvency, reorganization, debt arrangement or other case or proceeding under any bankruptcy or insolvency law or make a general assignment for the benefit of creditors;

(f) make any investment in one or more persons or entities in excess of \$50,000 individually or \$100,000 in the aggregate;

(g) change the line of business of the Corporation or any subsidiary;

(h) increase the size of the Board of Directors of the Corporation beyond five (5) directors;

(i) authorize, issue or agree to issue any securities of the Corporation or any subsidiary (including shares of stock or other equity securities and bonds, debentures, notes or other obligations convertible into or exchangeable for, or having option rights to purchase, any shares of stock), other than Exempt Issuances; or

(j) pay or make any dividends or distributions on account of any equity securities of the Corporation or any subsidiary, other than distributions by subsidiaries of the Corporation to the Corporation and/or distributions in respect of the Series C Preferred, the Series B Preferred and the Series A Preferred.

In addition to any other rights provided by law, so long as any of the shares of Series C Preferred, Series B Preferred or Series A Preferred are outstanding, this Corporation shall not (and shall not permit its subsidiaries to), without first obtaining the affirmative vote or written consent of at least two-thirds (2/3rds) of the entire Board of Directors, do or commit to do any of the following:

(x) enter into any transaction between or among the Corporation and/or any subsidiary, on the one hand, and any of their respective equity owners, directors, officers, employees or affiliates, on the other hand; provided, however, that nothing in this clause (x) shall be deemed to prohibit transactions between the Corporation and its wholly-owned subsidiaries (or between such subsidiaries);

(y) other than as approved by the Board of Directors prior to September 30, 2002, adopt any equity based or phantom incentive plan or program for the Corporation or any subsidiary.

In addition to any other rights provided by law, so long as any of the shares of Series C Preferred, Series B Preferred or Series A Preferred are outstanding, this Corporation

shall not terminate the Chief Executive Officer without cause, unless approved by the unanimous consent of the entire Board of Directors.

**7. Residual Rights.**

All rights accruing to the outstanding shares of the Corporation not expressly provided for to the contrary herein shall be vested in the Common Stock.

**FIFTH**

The rights, preferences, privileges and restrictions granted to and imposed on the Common Stock are as set forth below in this Article FIFTH.

1. **Dividend Rights.** Subject to the prior rights of holders of all classes of stock at the time outstanding having prior rights as to dividends, the holders of the Common Stock shall be entitled to receive, when, as and if declared by the Board of Directors, out of any assets of this Corporation legally available therefor, any dividends as may be declared from time to time by the Board of Directors.

2. **Liquidation Rights.** Upon the liquidation, dissolution or winding up of this Corporation, the assets of this Corporation shall be distributed as provided in Section D.2 of Article FOURTH hereof.

3. **Redemption.** The Common Stock shall be nonredeemable.

4. **Voting Rights.** The holder of each share of Common Stock shall have the right to one vote for each such share, and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of this Corporation, and shall be entitled to vote upon such matters and in such manner as may be provided by law. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding or reserved for issuance) by the affirmative vote of the holders of a majority of the Common Stock, Series A-1 Preferred, Series A Preferred, Series B Preferred and the Series C Preferred then outstanding, voting together as a single class on an as converted basis, irrespective of the provisions of Section 242(b)(2) of the DGCL.

**SIXTH**

The Corporation is to have perpetual existence.

**SEVENTH**

In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware:

1. **Board Authority.** The board of directors of the Corporation is expressly authorized:

- (a) To make, alter or repeal the bylaws of the Corporation.
- (b) To authorize and cause to be executed mortgages and liens upon the real and personal property of the Corporation.
- (c) To set apart out of any of the funds of the Corporation available for dividends a reserve or reserves for any proper purpose and to abolish any such reserve in the manner in which it was created.
- (d) By a majority of the whole board, to designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member of any committee. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the Corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the Certificate of Incorporation adopting an agreement of merger or consolidation under Sections 251 or 252 of the DGCL, recommending to the stockholders the sale, lease or exchange, of all or substantially all of the corporation's property and assets, recommending to the stockholders a dissolution of the Corporation or a revocation of a dissolution, or amending the bylaws of the Corporation; and, unless the resolution or bylaws expressly so provide, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock, or to adopt a certificate of ownership and merger pursuant to Section 253 of the DGCL.
- (e) When and as authorized by the stockholders in accordance with statute, to sell, lease or exchange all or substantially all of the property and assets of the Corporation, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property including shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors shall deem expedient and for the best interests of the Corporation.

2. **Election of Directors.** The election of directors need not be by written ballot unless the bylaws of the Corporation shall so provide.

3. **Corporate Records.** The books of the Corporation may be kept at such place within or without the State of Delaware as the bylaws of the Corporation may provide or as may be designated from time to time by the board of directors of the Corporation.

## **EIGHTH**

Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this 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 this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this Corporation under the provisions of

Section 291 of the DGCL or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 279 of the DGCL, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this Corporation, as the case may be, and also on this Corporation.

#### **NINTH**

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, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the DGCL, or (iv) for any transaction from which the director derived any improper personal benefit. If the DGCL is amended hereafter 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 DGCL, as so amended.

Any repeal or modification of the foregoing paragraph by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

#### **TENTH**

The Corporation reserves the right to amend or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon a stockholder herein are granted subject to this reservation.