

**CERTIFICATE OF MERGER**

**MERGING**

**APERIO TECHNOLOGIES, INC., A CALIFORNIA CORPORATION**

**WITH AND INTO**

**APERIO TECHNOLOGIES, INC., A DELAWARE CORPORATION**

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Pursuant to Section 252 of the General Corporation Law of the State of Delaware

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Aperio Technologies, Inc., a California corporation, and Aperio Technologies, Inc., a Delaware corporation, do hereby certify as follows:

FIRST: That the name and state of incorporation of each of the constituent corporations of the merger are as follows:

<u>Name</u>	<u>State of Incorporation</u>
Aperio Technologies, Inc.	California
Aperio Technologies, Inc.	Delaware

SECOND: That an Agreement and Plan of Merger, dated as of May 31, 2011 (the "Merger Agreement") has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with Section 252 of the General Corporation Law of the State of Delaware.

THIRD: That the surviving corporation (the "Surviving Corporation") shall be Aperio Technologies, Inc., a Delaware corporation.

FOURTH: That the certificate of incorporation of the surviving corporation shall be amended and restated in its entirety as set forth on Exhibit A hereto, until thereafter amended in accordance with the General Corporation Law of the State of Delaware and such certificate of incorporation.

FIFTH: That an executed copy of the Merger Agreement is on file at the principal place of business of the Surviving Corporation at the following address:

1360 Park Center Drive, Vista, CA 92081.

SIXTH: That a copy of the Merger Agreement will be furnished by the Surviving Corporation, on request and without cost, to any stockholder of any constituent corporation.

SEVENTH: The authorized capital stock of Aperio Technologies., a California corporation, immediately prior to the time this Certificate of Merger is duly filed with the Secretary of State of the State of Delaware is one hundred eighty one million nine hundred twenty six thousand eighty eight (181,926,088) shares, consisting of one hundred six million nine hundred thousand (106,900,000) shares of Common Stock, no par value, and seventy five million twenty six thousand eighty eight (75,026,088) shares of Preferred Stock, no par value, eight million sixty two thousand five hundred (8,062,500) of which are designated Series A Preferred Stock, twenty seven million seven hundred seventy four thousand seven hundred ninety seven (27,774,797) of which are designated Series B Preferred Stock, eighteen million four hundred forty one thousand one hundred nineteen (18,441,119) of which are designated Series B-1 Preferred Stock and twenty million seven hundred forty seven thousand six hundred seventy two (20,747,672) of which are designated Series C Preferred Stock.

EIGHTH: That this Certificate of Merger shall be effective upon filing.

*[Remainder of this page intentionally left blank]*

IN WITNESS WHEREOF, Aperio Technologies, Inc., a California corporation, and Aperio Technologies, Inc., a Delaware corporation, have caused this Certificate of Merger to be executed in their respective corporate names as of June 3, 2011.

APERIO TECHNOLOGIES, INC.  
a California corporation

By   
Dirk Soenksen  
Chief Executive Officer

APERIO TECHNOLOGIES, INC.  
a Delaware corporation

By   
Dirk Soenksen  
President & CEO

Exhibit A

Amended and Restated Certificate of Incorporation

**AMENDED AND RESTATED**  
**CERTIFICATE OF INCORPORATION OF**  
**APERIO TECHNOLOGIES, INC.**

**ARTICLE I**

The name of the corporation is Aperio Technologies, Inc. (the "Corporation").

**ARTICLE II**

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

**ARTICLE III**

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

**ARTICLE IV**

The total number of shares of stock that the Corporation shall have authority to issue is 181,926,088 shares, consisting of 106,900,000 shares of Common Stock, \$0.0001 par value per share, and 75,026,088 shares of Preferred Stock, \$0.0001 par value per share, 8,062,500 of which are designated "Series A Preferred Stock", 27,774,797 of which are designated "Series B Preferred Stock", 18,441,119 of which are designated "Series B-1 Preferred Stock" and 20,747,672 of which are designated "Series C Preferred Stock".

**ARTICLE V**

The terms and provisions of the Common Stock and Preferred Stock are as follows:

1. Definitions. For purposes of this Article V, the following definitions shall apply:

(a) "Conversion Price" shall mean (i) \$0.40 per share for the Series A Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (ii) \$0.6070 per share for the Series B Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (iii) \$0.6070 per share for the Series B-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein) and (iv) \$0.9596 per share for the Series C Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein).

(b) "Convertible Securities" shall mean any evidences of indebtedness, shares or other securities convertible into or exchangeable for Common Stock or Preferred Stock.

(c) "Corporation" shall mean Aperio Technologies, Inc.

(d) **"Distribution"** shall mean the transfer of cash or other property without consideration whether by way of dividend or otherwise, other than dividends on Common Stock payable in Common Stock, or the purchase or redemption of shares of the Corporation for cash or property other than: (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, (iii) the repurchase of capital stock of the Corporation in connection with the settlement of disputes with any shareholder if unanimously approved by the Board of Directors of the Corporation, and (iv) any other repurchase or redemption of capital stock of the Corporation approved by holders of a majority of the then outstanding shares of Preferred Stock of the Corporation, voting as separate classes on an as-converted to Common Stock basis.

(e) **"Dividend Rate"** shall mean an annual rate of 8% of the Original Issue Price of the (i) Series A Preferred Stock per share for the Series A Preferred Stock, (ii) Series B Preferred Stock per share for the Series B Preferred Stock, (iii) Series B-1 Preferred Stock per share for the Series B-1 Preferred Stock, and (iv) Series C Preferred Stock per share for the Series C Preferred Stock.

(f) **"Liquidation Preference"** shall mean (i) \$0.40 per share for the Series A Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (ii) \$0.6070 per share for the Series B Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (iii) \$0.6070 per share for the Series B-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein) and (iv) \$1.0128 per share for the Series C Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein).

(g) **"Options"** shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock, Preferred Stock or Convertible Securities.

(h) **"Original Issue Price"** shall mean (i) \$0.40 per share for the Series A Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (ii) \$0.6070 per share for the Series B Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (iii) \$0.6070 per share for the Series B-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein) and (iv) \$1.0128 per share for the Series C Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein).

(i) **"Preferred Stock"** shall mean the Series A Preferred Stock, the Series B Preferred Stock, the Series B-1 Preferred Stock and the Series C Preferred Stock.

(j) **"Recapitalization"** shall mean any stock dividend, stock split, combination of shares, reorganization, recapitalization, reclassification or other similar event.

## 2. Dividends.

(a) **Series C Preferred Stock and Series B-1 Preferred Stock.** The holders of outstanding shares of Series C Preferred Stock and Series B-1 Preferred Stock shall be entitled to

receive dividends out of any assets at the time legally available therefor, at the Dividend Rate specified for such shares of Series C Preferred Stock and Series B-1 Preferred Stock payable in preference and priority to any declaration or payment of any Distribution on Series A Preferred Stock, Series B Preferred Stock or Common Stock of the Corporation. No Distributions shall be made with respect to the Series A Preferred Stock, Series B Preferred Stock or the Common Stock until all dividends on the Series C Preferred Stock and the Series B-1 Preferred Stock have been paid or set aside for payment to the Series C Preferred Stock holders and Series B-1 Preferred Stock holders. The right to receive dividends on shares of Series C Preferred Stock and Series B-1 Preferred Stock shall be cumulative, and shall accrue to holders of Series C Preferred Stock and Series B-1 Preferred Stock regardless of whether such dividends on said shares are declared or paid in any calendar year.

(b) Series B Preferred Stock. Subject to the payment in full or setting aside of the amounts payable to the holders of Series C Preferred Stock and Series B-1 Preferred Stock pursuant to Section 2(a), in any calendar year, the holders of outstanding shares of Series B Preferred Stock shall be entitled to receive dividends out of any assets at the time legally available therefor, at the Dividend Rate specified for such shares of Series B Preferred Stock payable in preference and priority to any declaration or payment of any Distribution on Series A Preferred Stock or Common Stock of the Corporation. No Distributions shall be made with respect to the Series A Preferred Stock or the Common Stock until all dividends on the Series B Preferred Stock have been paid or set aside for payment to the Series B Preferred Stock holders. The right to receive dividends on shares of Series B Preferred Stock shall be cumulative, and shall accrue to holders of Series B Preferred Stock regardless of whether such dividends on said shares are declared or paid in any calendar year.

(c) Series A Preferred Stock. Subject to the payment in full or setting aside of the amounts payable to the holders of Series C Preferred Stock, Series B-1 Preferred Stock and Series B Preferred Stock pursuant to Section 2(a) and Section 2(b), in any calendar year, the holders of outstanding shares of Series A Preferred Stock shall be entitled to receive dividends, when as, and if declared by the Board of Directors, out of any assets at the time legally available therefor, at the Dividend Rate specified for such shares of Series A Preferred Stock payable in preference and priority to any declaration or payment of any Distribution on Common Stock of the Corporation. No Distributions shall be made with respect to the Common Stock until all declared dividends on the Series A Preferred Stock have been paid or set aside for payment to the Series A Preferred Stock holders. The right to receive dividends on shares of Series A Preferred Stock shall not be cumulative, and no right to such dividends shall accrue to holders of Preferred Stock by reason of the fact that dividends on said shares are not declared or paid in any calendar year.

(d) Additional Dividends. After the payment or setting aside for payment of the dividends described in Section 2(a), Section 2(b) and Section 2(c), any additional dividends (other than dividends on Common Stock payable solely in Common Stock) declared or paid in any fiscal year shall be declared or paid among the holders of the Preferred Stock and Common Stock then outstanding in proportion to the greatest whole number of shares of Common Stock which would be held by each such holder if all shares of Preferred Stock were converted at the then-effective Conversion Rate (as defined in Section 4 hereof).

(e) Non-Cash Distributions. Whenever a Distribution provided for in this Section 2 shall be payable in property other than cash, the value of such Distribution shall be deemed to be the fair market value of such property as determined in good faith by the Board of Directors.

(f) Consent to Certain Distributions. As authorized by Section 402.5(c) of the California Corporations Code, Sections 502 and 503 of the California Corporations Code shall not apply with respect to payments made by the Corporation in connection with (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, or (iii) any other repurchases or redemptions of Common Stock or Series A Preferred Stock approved by the holders of Series C Preferred Stock, Series B-1 Preferred Stock and Series B Preferred Stock of the Corporation.

### 3. Liquidation Rights.

(a) Series C Preferred Stock and Series B-1 Preferred Stock Liquidation Preference. In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, prior and in preference to any Distribution of any of the assets or surplus funds of the Corporation to the holders of Common Stock, Series A Preferred Stock or Series B Preferred Stock (i) the holders of Series C Preferred Stock shall be entitled to receive an amount per share for each share of Series C Preferred Stock held by them equal to the sum of (A) one and a half (1.5) times the Liquidation Preference for such share of Series C Preferred Stock and (B) all declared or accrued but unpaid dividends on such share of Preferred Stock and (ii) the holders of Series B-1 Preferred Stock shall be entitled to receive an amount per share for each share of Series B-1 Preferred Stock held by them equal to the sum of (A) the Liquidation Preference for such share of Series B-1 Preferred Stock and (B) all declared or accrued but unpaid dividends on such share of Preferred Stock. If upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation legally available for Distribution to the holders of Series C Preferred Stock and Series B-1 Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(a), then the entire assets of the Corporation legally available for Distribution shall be distributed with equal priority and pro rata among the holders of Series C Preferred Stock and Series B-1 Preferred Stock ratably and in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(a).

(b) Series B Preferred Stock Liquidation Preference. Subject to the payment in full of the amounts payable to the holders of Series C Preferred Stock and Series B-1 Preferred Stock pursuant to Section 3(a), in the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the holders of Series B Preferred Stock 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 Common Stock or Series A Preferred Stock, an amount per share for each share of Series B Preferred Stock held by them equal to the sum of (i) one and a half (1.5) times the Liquidation Preference for such share of Series B Preferred Stock and (ii) all declared or accrued but unpaid dividends on such share of Preferred Stock. Subject to the payment to the holders of Series C Preferred Stock and Series B-1 Preferred Stock pursuant to Section 3(a), if upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation legally available for Distribution to the holders of Series B Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(b), then the entire assets of the Corporation legally available for Distribution, after making the payments set forth in Section 3(a), shall be distributed with equal priority and pro rata among the holders of Series B Preferred



Stock ratably and in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(b).

(c) Series A Preferred Stock Liquidation Preference. Subject to the payment in full of the amounts payable to the holders of Series C Preferred Stock, Series B-1 Preferred Stock and Series B Preferred Stock pursuant to Section 3(a) and Section 3(b) respectively, in the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the holders of Series A Preferred Stock 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 Common Stock, an amount per share for each share of Series A Preferred Stock held by them equal to the sum of (i) the Liquidation Preference for such share of Series A Preferred Stock and (ii) all declared and unpaid dividends on such share of Preferred Stock. Subject to the payment to the holders of Series C Preferred Stock, Series B-1 Preferred Stock and Series B Preferred Stock pursuant to Section 3(a) and Section 3(b), if upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation legally available for Distribution to the holders of Series A Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(c), then the entire assets of the Corporation legally available for Distribution, after make the payments set forth in Section 3(a) and Section 3(b), shall be distributed with equal priority and pro rata among the holders of Series A Preferred Stock ratably and in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(c).

(d) Remaining Assets. After the payment or setting aside for payment to the holders of Preferred Stock of the full amounts specified in Section 3(a), Section 3(b) and Section 3(c) above, the entire remaining assets of the Corporation legally available for Distribution in connection with a liquidation, dissolution or winding up of the Corporation shall be distributed with equal priority and pro rata among the holders of the Series C Preferred Stock, Series B-1 Preferred Stock, Series B Preferred Stock and Common Stock then outstanding in proportion to the number of shares of Common Stock held by them, with each share of Series C Preferred Stock, Series B-1 Preferred Stock and Series B Preferred Stock being treated for this purpose as if it had been converted to Common Stock at the then applicable Conversion Rate, until such time as (i) with respect to the holders of Series C Preferred Stock, such holders shall have received an aggregate liquidation amount under Section 3(a) and this Section 3(d) equal to three times the Series C Preferred Stock Liquidation Preference, (ii) with respect to the holders of Series B-1 Preferred Stock, such holders shall have received an aggregate liquidation amount under Section 3(a) and this Section 3(d) equal to two times the Series B-1 Preferred Stock Liquidation Preference and (iii) with respect to the holders of Series B Preferred Stock, such holders shall have received an aggregate liquidation amount under Section 3(b) and this Section 3(d) equal to three times the Series B Preferred Stock Liquidation Preference. In no event shall distributions to the holders of shares of Preferred Stock pursuant to Section 3(a), 3(b), 3(c) and 3(d), exceed three times their respective liquidation preference. Thereafter, all remaining assets and funds shall be distributed ratably among the holders of Common Stock.

(e) Shares not Treated as Both Preferred Stock and Common Stock in any Distribution. Shares of Preferred Stock shall not be entitled to be converted into shares of Common Stock in order to participate in any Distribution, or series of Distributions, as shares of Common Stock, without first foregoing participation in the Distribution, or series of Distributions, as shares of Preferred Stock. Notwithstanding the foregoing, each holder of Preferred Stock shall be entitled to receive, for each share of Preferred Stock then held, out of the proceeds of any liquidation,

dissolution or winding up of the Corporation, the greater of the amount of cash, securities or other property to which such holder would be entitled to receive if all proceeds from such liquidation, dissolution or winding up of the Corporation were distributed pursuant to (i) Section 3(a), 3(b), 3(c) and 3(d) above or (ii) the amount of cash, securities or other property to which such holder would be entitled to receive with respect to such shares if such shares had been converted to Common Stock immediately prior to such liquidation, dissolution or winding up of the Corporation.

(f) Reorganization. For purposes of this Section 3, a liquidation, dissolution or winding up of the Corporation shall be deemed to be occasioned by, and to include, (a) the acquisition of the Corporation by another entity by means of any transaction or series of related transactions to which the Corporation is party (including, without limitation, any stock acquisition, reorganization, merger or consolidation but excluding any sale of stock for capital raising purposes or any merger or consolidation effected exclusively to change the domicile of the Corporation) other than a transaction or series of transactions in which the holders of the voting securities of the Corporation outstanding immediately prior to such transaction continue to retain (either by such voting securities remaining outstanding or by such voting securities being converted into voting securities of the surviving entity), as a result of shares in the Corporation held by such holders prior to such transaction, at least a majority of the total voting power represented by the voting securities of the Corporation or such surviving entity outstanding immediately after such transaction or series of transactions; (b) a sale, lease, exclusive license or other conveyance of all or substantially all of the assets of the Corporation; or (c) any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary (a "Liquidation Event").

(g) Valuation of Non-Cash Consideration. If any assets of the Corporation distributed to shareholders in connection with any liquidation, dissolution or winding up of the Corporation are other than cash, then the value of such assets shall be their fair market value as determined in good faith by the Board of Directors, except that any publicly-traded securities to be distributed to shareholders shall be valued as follows:

(i) If the securities are then traded on a national securities exchange or the Nasdaq Stock Market (or a similar national quotation system), then the value of the securities shall be deemed to be the average of the closing prices of the securities on such exchange or system over the thirty (30) trading day period ending three (3) trading days prior to the Distribution;

(ii) if the securities are actively traded over-the-counter, then the value of the securities shall be deemed to be the average of the closing bid prices of the securities over the thirty (30) trading day period ending three (3) trading days prior to the Distribution.

In the event of a merger or other acquisition of the Corporation by another entity, the Distribution date shall be deemed to be the date such transaction closes.

For the purposes of this Section 3(g), "trading day" shall mean any day which the exchange or system on which the securities to be distributed are traded is open and "closing prices" or "closing bid prices" shall be deemed to be: (i) for securities traded primarily on the New York Stock Exchange, the American Stock Exchange or Nasdaq, the last reported trade price or sale price, as the case may be, at 4:00 p.m., New York time, on that day and (ii) for securities listed or traded on other exchanges, markets and systems, the market price as of the end of the regular hours trading period that is generally accepted as such for such exchange, market or system. If, after the date hereof, the benchmark times generally accepted in the securities industry for determining the market

price of a stock as of a given trading day shall change from those set forth above, the fair market value shall be determined as of such other generally accepted benchmark times.

4. Conversion. The holders of the Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert. Each share of Preferred Stock 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 the Preferred Stock, into that number of fully-paid, nonassessable shares of Common Stock determined by multiplying each share of Preferred Stock by the Conversion Rate (as defined below) then in effect for such Preferred Stock. The "Conversion Rate" for each such series shall be the quotient obtained by dividing the Original Issue Price for the relevant series of Preferred Stock by the Conversion Price for such series of Preferred Stock, calculated to the nearest hundredth. Upon any decrease or increase in the Conversion Price for any series of Preferred Stock, as described in this Section 4, the Conversion Rate for such series shall be appropriately increased or decreased.

(b) Automatic Conversion. Each share of Preferred Stock shall automatically be converted into fully-paid, non-assessable shares of Common Stock at the then effective Conversion Rate for such share (i) immediately prior to the closing of a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended (the "Securities Act"), covering the offer and sale of the Corporation's Common Stock, provided that the offering price per share is not less than \$3.04 (as adjusted for Recapitalizations) and the aggregate gross proceeds to the Corporation are not less than \$45,000,000, or (ii) upon the receipt by the Corporation of a written request for such conversion from the holders of a majority of the Preferred Stock (on an as-converted basis) then outstanding, or, if later, the effective date for conversion specified in such consent (each of the events referred to in (i) and (ii) are referred to herein as an "Automatic Conversion Event").

(c) Mechanics of Conversion. No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. 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 then fair market value of a share of Common Stock as determined by the Board of Directors. For such purpose, all shares of Preferred Stock held by each holder of Preferred Stock shall be aggregated, and, upon conversion, any resulting fractional share of Common Stock shall be paid in cash. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock, and to receive certificates therefor, they shall either (A) surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Preferred Stock or (B) notify the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and execute an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates, and shall give written notice to the Corporation at such office that they elect to convert the same; provided, however, that on the date of an Automatic Conversion Event, the outstanding shares of Preferred Stock 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; provided further, however, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion Event unless either the certificates evidencing such shares of Preferred Stock are 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. On the date of the occurrence of an Automatic Conversion Event, each holder of record of shares of Preferred Stock shall be deemed to be the holder of record of the Common Stock issuable upon such conversion, notwithstanding that the certificates representing such shares of Preferred Stock shall not have been surrendered at the office of the Corporation, that notice from the Corporation shall not have been received by any holder of record of shares of Preferred Stock, or that the certificates evidencing such shares of Common Stock shall not then be actually delivered to such holder.

The Corporation shall, as soon as practicable after such delivery, or after such agreement and indemnification, issue and deliver at such office to such holder of Preferred Stock, 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, plus any declared and unpaid dividends on the converted Preferred 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 Preferred Stock to be converted, 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; provided, however, that if the conversion is in connection with an underwritten offer of securities registered pursuant to the Securities Act or a merger, sale or liquidation of the Corporation, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing of such transaction, in which event the person(s) entitled to receive the Common Stock issuable upon such conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such transaction.

(d) Adjustments to Conversion Price for Diluting Issues.

(i) Special Definition. For purposes of this Section 4(d), "Additional Shares of Common" shall mean all shares of Common Stock issued (or, pursuant to Section 4(d)(iii), deemed to be issued) by the Corporation after the filing of this Amended and Restated Certificate of Incorporation, other than:

(1) shares of Common Stock issued or issuable upon conversion of shares of Preferred Stock;

(2) shares of Common Stock issued or issuable to officers, directors and employees of, or consultants to, the Corporation pursuant to stock grants, option plans, purchase plans or other employee stock incentive programs or arrangements approved by the Board of Directors, or upon exercise of options or warrants granted to such parties pursuant to any such plan or arrangement;

(3) shares of Common Stock or Preferred Stock issued upon the exercise or conversion of Options or Convertible Securities outstanding as of the date of the filing of this Amended and Restated Certificate of Incorporation;

(4) shares of Common Stock issued or issuable pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets or other reorganization or pursuant to a joint venture agreement;

(5) shares of Common Stock issued or issuable as a dividend or distribution on Preferred Stock or pursuant to any event for which adjustment is made pursuant to paragraph 4(c), (f), (g) or (h) hereof;

(6) shares of Common Stock issued or issuable to banks, equipment lessors or other financial institutions pursuant to a commercial leasing or debt financing transaction; and

(7) shares of Common Stock that are otherwise excluded by vote or written consent of holders of at least two-thirds (2/3) of the Series C Preferred Stock and Series B-1 Preferred Stock.

(ii) No Adjustment of Conversion Price. No adjustment in the Conversion Price of a particular series of Preferred Stock shall be made in respect of the issuance of Additional Shares of Common unless the consideration per share (as determined pursuant to Section 4(d)(v)) for an Additional Share of Common issued or deemed to be issued by the Corporation is less than the Conversion Price in effect on the date of, and immediately prior to, such issue, for such series of Preferred Stock.

(iii) Deemed Issue of Additional Shares of Common. In the event the Corporation at any time or from time to time after the date of the filing of this Amended and Restated Certificate of Incorporation shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities, the conversion or exchange of such Convertible Securities or, in the case of Options for Convertible Securities, the exercise of such Options and the conversion or exchange of the underlying securities, shall be deemed to have been issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that in any such case in which shares are deemed to be issued:

(1) no further adjustment in the Conversion Price of any series of Preferred Stock shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock in connection with the exercise of such Options or conversion or exchange of such Convertible Securities;

(2) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any change in the consideration payable to the Corporation or in the number of shares of Common Stock issuable upon the exercise, conversion or exchange thereof (other than a change pursuant to the anti-dilution provisions of such Options or Convertible Securities such as this Section 4(d) or pursuant to Recapitalization provisions of such Options or Convertible Securities such as Sections 4(e), 4(f), 4(g) and 4(h) hereof), the Conversion Price of each series of Preferred Stock and any subsequent adjustments based thereon shall be recomputed to

reflect such change as if such change had been in effect as of the original issue thereof (or upon the occurrence of the record date with respect thereto);

(3) no readjustment pursuant to clause (2) above shall have the effect of increasing the Conversion Price of a series of Preferred Stock to an amount above the Conversion Price that would have resulted from any other issuances of Additional Shares of Common and any other adjustments provided for herein between the original adjustment date and such readjustment date;

(4) upon the expiration of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised, the Conversion Price of each series of Preferred Stock computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto) and any subsequent adjustments based thereon shall, upon such expiration, be recomputed as if:

(A) in the case of Convertible Securities or Options for Common Stock, the only Additional Shares of Common issued were the shares of Common Stock, if any, actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities and the consideration received therefor was the consideration actually received by the Corporation for the issue of such exercised Options plus the consideration actually received by the Corporation upon such exercise or for the issue of all such Convertible Securities which were actually converted or exchanged, plus the additional consideration, if any, actually received by the Corporation upon such conversion or exchange, and

(B) in the case of Options for Convertible Securities, only the Convertible Securities, if any, actually issued upon the exercise thereof were issued at the time of issue of such Options, and the consideration received by the Corporation for the Additional Shares of Common deemed to have been then issued was the consideration actually received by the Corporation for the issue of such exercised Options, plus the consideration deemed to have been received by the Corporation (determined pursuant to Section 4(d)(v)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised; and

(5) if such record date shall have been fixed and such Options or Convertible Securities are not issued on the date fixed therefor, the adjustment previously made in the Conversion Price which became effective on such record date shall be canceled as of the close of business on such record date, and thereafter the Conversion Price shall be adjusted pursuant to this Section 4(d)(iii) as of the actual date of their issuance.

(iv) Adjustment of Conversion Price Upon Issuance of Additional Shares of Common. In the event the Corporation shall issue Additional Shares of Common (including Additional Shares of Common deemed to be issued pursuant to Section 4(d)(iii)) without consideration or for a consideration per share less than the applicable Conversion Price of a series of Preferred Stock in effect on the date of and immediately prior to such issue, then: (a) with respect to the Series A Preferred Stock, the Conversion Price of the Series A Preferred Stock shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying such Conversion Price by a fraction, (x) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common so issued would purchase at such Conversion Price, and (y) the denominator of which shall

be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such Additional Shares of Common so issued; and (b) with respect to the Series C Preferred Stock, the Series B-1 Preferred Stock and the Series B Preferred Stock, the Conversion Price of the Series C Preferred Stock, the Series B-1 Preferred Stock and the Series B Preferred Stock, respectively, shall be reduced, concurrently with such issue, to a price equal to the consideration per share received by the Corporation for such Additional Shares of Common so issued. Notwithstanding the foregoing, the Conversion Price shall not be reduced at such time if the amount of such reduction would be less than \$0.01. For the purposes of this Subsection 4(d)(iv), all shares of Common Stock issuable upon conversion of all outstanding shares of Preferred Stock and the exercise and/or conversion of any other outstanding Convertible Securities and all outstanding Options shall be deemed to be outstanding.

(v) Determination of Consideration. For purposes of this subsection 4(d), the consideration received by the Corporation for the issue (or deemed issue) of any Additional Shares of Common shall be computed as follows:

(1) Cash and Property. Such consideration shall:

(a) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation;

(b) insofar as it consists of property other than cash, be computed at the fair market value thereof at the time of such issue, as determined in good faith by the Board of Directors; and

(c) in the event Additional Shares of Common are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (a) and (b) above, as reasonably determined in good faith by the Board of Directors.

(2) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common deemed to have been issued pursuant to Section 4(d)(iii) shall be determined by dividing:

(x) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by

(y) the maximum number of shares of Common Stock issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities (as set forth in the instruments relating thereto, other than a change pursuant to the anti-dilution provisions of such Options or Convertible Securities such as this Section 4(d) or pursuant to Recapitalization provisions of such Options or Convertible Securities such as Sections 4(e), 4(f), 4(g) and 4(h) hereof).

(c) Adjustments for Subdivisions or Combinations of Common Stock. In the event the outstanding shares of Common Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Common Stock, the Conversion Price of each series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Common Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Common Stock, the Conversion Prices of each series of Preferred Stock in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(f) Adjustments for Subdivisions or Combinations of Preferred Stock. In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Preferred Stock, the Original Issue Price and Liquidation Preference of the affected series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Preferred Stock, the Original Issue Price and Liquidation Preference of the affected series of Preferred Stock in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(g) Adjustment for Common Stock Dividends and Distributions. If the Corporation, at any time or from time to time after the date of filing of this Amended and Restated Certificate of Incorporation, makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in shares of Common Stock, in each such event the Conversion Price then in effect for each series of Preferred Stock shall be decreased as of the time of such issuance or, in the event such record date is fixed, as of the close of business on such record date, by multiplying the Conversion Price then in effect for such series of Preferred Stock by a fraction (i) the numerator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issues or the close of business on such record date and (ii) the denominator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, that if such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Conversion Price for each series of Preferred Stock shall be recomputed accordingly as of the close of business on such record date and thereafter the Conversion Price shall be adjusted pursuant to this Section 4(g) to reflect the actual payment of such dividend or distribution.

(h) Adjustments for Reclassification, Exchange and Substitution. Subject to Section 3 above, if at any time or from time to time, the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by recapitalization, capital reorganization, reclassification or otherwise (other than a subdivision, combination of shares or merger or sale of assets provided for above or in Section 3), then, in any such event, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, each holder of such Preferred Stock shall have the right thereafter to convert such shares of Preferred Stock into a number of shares of such other class or classes of stock which a holder of the number of shares of Common Stock deliverable



upon conversion of such series of Preferred Stock immediately before that change would have been entitled to receive in such reorganization or reclassification, all subject to further adjustment as provided herein with respect to such other shares. In addition, to the extent applicable in any reorganization or recapitalization, provision shall be made so that the holders of the Preferred Stock shall thereafter be entitled to receive upon conversion of the Preferred Stock the number of shares of stock or other securities or property of the Corporation or otherwise, to which a holder of Common Stock deliverable upon conversion would have been entitled on such reorganization or recapitalization.

(i) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Conversion Price pursuant to this Section 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 Preferred Stock 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 at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price 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 Preferred Stock.

(j) 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 Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock; 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 the Preferred Stock, 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.

## 5. Voting.

(a) Restricted Class Voting. Except as otherwise expressly provided herein or as required by law, the holders of Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

(b) No Series Voting. Other than as provided herein or required by law, there shall be no series voting.

(c) Preferred Stock. Each holder of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares of Preferred Stock held by such holder could be converted at the then effective Conversion Rate immediately after the close of business on the record date fixed for a shareholders meeting or the effective date of a written consent. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted), shall be disregarded. The holders of shares of Preferred Stock shall be entitled to vote on all matters on which the Common Stock shall be entitled to vote and may act by written consent in the same manner as the Common Stock. Holders of Preferred Stock shall be entitled to notice of any shareholders' meeting in accordance with the Bylaws of the Corporation.

(d) Election of Directors. So long as at least 2,500,000 shares (as adjusted for Recapitalizations) of Series C Preferred Stock remain outstanding, the holders of Series C Preferred Stock, voting as a separate class, shall be entitled to elect one (1) members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors and to fill any vacancy caused by the resignation, death, or removal of such directors. So long as at least 2,500,000 shares (as adjusted for Recapitalizations) of Series B Preferred Stock remain outstanding, the holders of Series B Preferred Stock, voting as a separate class, shall be entitled to elect two (2) members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors and to fill any vacancy caused by the resignation, death, or removal of such directors. The holders of Preferred Stock, voting as a separate class, shall be entitled to elect one (1) member of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors and to fill any vacancy caused by the resignation, death, or removal of such directors. The holders of Preferred Stock and the holders of Common Stock, voting as a single class, shall be entitled to elect one (1) member of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors and to fill any vacancy caused by the resignation, death, or removal of such directors. The holders of Common Stock, voting as a separate class, shall be entitled to elect two (2) members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors and to fill any vacancy caused by the resignation, death, or removal of such directors. Any additional members of the Corporation's Board of Directors shall be elected by the holders of Common Stock and Preferred Stock, voting together as a single class. If a vacancy on the Board of Directors is to be filled by the Board of Directors, only directors elected by the same class or classes of stockholders as those who would be entitled to vote to fill such vacancy shall vote to fill such vacancy.

(e) Adjustment in Authorized Common Stock. Except as expressly provided herein, the number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares of Common Stock then outstanding and the number of shares of Common Stock issuable upon conversion of any shares of Preferred Stock then outstanding) by an affirmative vote of the holders of a majority of the Common Stock and Preferred Stock, voting together as a single class on an as-if converted to Common Stock basis, and subject to Section 7 below, irrespective of the provisions of Section 242(b)(2) of the DGCL.

(f) Common Stock. Each holder of shares of Common Stock shall be entitled to one vote for each share thereof held.

## 6. Redemption.

(a) At any time on or after June 30, 2015, and at the election of the holders of at least a majority of the then outstanding shares of Preferred Stock, this Corporation shall redeem in cash, out of funds legally available therefor, all (but not less than all) outstanding shares of Preferred Stock which have not been converted into Common Stock, in three (3) equal annual installments (each a "Redemption Date"). The Corporation shall redeem the shares of Preferred Stock by paying in cash an amount per share equal to the applicable Original Issue Price for such Preferred Stock, plus an amount equal to all declared or accrued but unpaid dividends thereon, whether or not earned (the "Redemption Price"). The number of shares of Preferred Stock that the Corporation shall be required under this Section 6 to redeem on any one (1) Redemption Date shall be equal to

the amount determined by dividing: (a) the aggregate number of shares of Preferred Stock outstanding immediately prior to the Redemption Date by; (b) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). If the funds legally available for redemption of the Preferred Stock shall be insufficient to permit the payment to such holders of the full respective Redemption Prices, the Corporation shall effect such redemption pro rata among the holders of the Preferred Stock so that each holder of Preferred Stock shall receive a redemption payment equal to a fraction of the aggregate amount available for redemption, the numerator of which is the number of shares of Preferred Stock held by such holder with each number multiplied by the Redemption Price of each share of Preferred Stock held by such holder, and the denominator of which is the number of shares of Preferred Stock outstanding multiplied by the Redemption Price of each such outstanding share of Preferred Stock, and the Corporation shall redeem the remaining shares to be redeemed as soon as sufficient funds are legally available.

(b) Any redemption effected pursuant to Section 6(a) shall be made on a pro rata basis among the holders of the Preferred Stock in proportion to the amount of the Redemption Price payable to them.

(c) At least ten (10), but no more than thirty (30) days prior to each Redemption Date, written notice shall be mailed, 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 to be redeemed, at 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 of shares to be redeemed from such holder, the Redemption Date, the Redemption Price, 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, the holder's certificate or certificates representing the shares to be redeemed (the "Redemption Notice"). Except as provided herein, on or after the Redemption Date each holder of Preferred Stock to be redeemed shall surrender to this Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be cancelled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

(d) From and after the applicable Redemption Dates, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of shares of Preferred Stock designated for redemption in the Redemption Notice as holders of Preferred Stock (except the right to receive the Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to the shares designated for redemption on such date, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever. The shares of Preferred Stock not redeemed shall remain outstanding and entitled to all the rights and preferences provided herein.

7. Series C Preferred Stock, Series B-1 Preferred Stock and Series B Preferred Stock Amendments and Changes. As long as an aggregate of at least 2,500,000 shares of Series C Preferred Stock, Series B-1 Preferred Stock and Series B Preferred Stock shall be issued and outstanding, the Corporation shall not (by amendment, merger, or otherwise), without first obtaining the approval (by vote or written consent as provided by law) of the holders of at least

two-thirds (2/3) of the outstanding shares of the Series C Preferred Stock, Series B-1 Preferred Stock and the Series B Preferred Stock, voting together on an as-converted basis as a single class:

(a) amend, alter or repeal any provision of the Amended and Restated Certificate of Incorporation or bylaws of the Corporation if such action would adversely alter the rights, preferences, privileges or powers of, or restrictions provided for the benefit of the Series C Preferred Stock, Series B-1 Preferred Stock or Series B Preferred Stock;

(b) increase the authorized number of shares of Common Stock or Preferred Stock, Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock or Series C Preferred Stock;

(c) authorize or create (by reclassification or otherwise) any new class or series of shares having rights, preferences or privileges senior to or on a parity with the Series B-1 Preferred Stock or Series C Preferred Stock;

(d) authorize a Liquidation Event;

(e) increase the number of shares authorized for issuance under any existing stock or option plan or create any new stock or option plan;

(f) take any action that results in the payment or declaration of a dividend on any shares of Common Stock or Preferred Stock other than pursuant to (i) Section 6, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase or (iii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right;

(g) incur indebtedness for money borrowed or any other liabilities (including without limitation operating and capital leases) in excess of \$1,000,000 in the aggregate;

(h) increase the size of the Board of Directors or any committee thereof; or

(i) acquire a material amount of assets through a merger or purchase of all or substantially all of the assets or capital stock of another entity.

8. Series C Amendments and Changes. As long as 2,500,000 shares of the Series C Preferred Stock shall be issued and outstanding, the Corporation shall not, without first obtaining the approval (by vote or written consent as provided by law) of the holders of at least two-thirds (2/3) of the outstanding shares of the Series C Preferred Stock, alter or change the rights, preferences, or restrictions of the Series C Preferred Stock through amendment of this Amended and Restated Certificate of Incorporation or the Corporation's Bylaws or by merger recapitalization or otherwise so as to affect the Series C Preferred Stock adversely in a different manner than the Series B-1 Preferred Stock, Series B Preferred Stock or Series A Preferred Stock.

9. Series A Amendments and Changes. As long as 800,000 shares of the Series A Preferred Stock shall be issued and outstanding, the Corporation shall not, without first obtaining the approval (by vote or written consent as provided by law) of the holders of a majority of the

outstanding shares of the Series A Preferred Stock, alter or change the rights, preferences, or restrictions of the Series A Preferred Stock by amending this Amended and Restated Certificate of Incorporation so as to affect the Series A Preferred Stock adversely in a different manner than the Series B-1 Preferred Stock or Series B Preferred Stock.

10. Reissuance of Preferred Stock. In the event that any shares of Preferred Stock shall be converted pursuant to Section 4, redeemed pursuant to Section 6 or otherwise repurchased by the Corporation, the shares so converted, redeemed or repurchased shall be cancelled and shall not be issuable by this Corporation.

11. Notices. Any notice required by the provisions of this Article V to be given to the holders of Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at such holder's address appearing on the books of the Corporation.

#### ARTICLE VI

The Corporation is to have perpetual existence.

#### ARTICLE VII

Elections of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

#### ARTICLE VIII

Unless otherwise set forth herein, the number of directors that constitute the Board of Directors of the Corporation shall be fixed by, or in the manner provided in, the Bylaws of the Corporation.

#### ARTICLE IX

Except as otherwise set forth herein, in furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to adopt, amend or repeal the Bylaws of the Corporation.

#### ARTICLE X

1. To the fullest extent permitted by the DGCL as the same exists or as may hereafter be amended, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for a breach of fiduciary duty as a director. If the DGCL is amended 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.

2. The Corporation shall have the power to indemnify, to the extent permitted by the DGCL, as it presently exists or may hereafter be amended from time to time, 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 (a "Proceeding") by reason of

the fact that he or she is or was a director, officer, employee or agent of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, including service with respect to employee benefit plans, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with any such Proceeding.

3. Neither any amendment nor repeal of this ARTICLE IX, nor the adoption of any provision of this Corporation's Certificate of Incorporation inconsistent with this ARTICLE IX, shall eliminate or reduce the effect of this ARTICLE IX, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this ARTICLE IX, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

#### ARTICLE XI

In the event that a member of the Board of Directors who is also a partner or employee of an entity that is a holder of Preferred Stock and that is in the business of investing and reinvesting in other entities, or an employee of an entity that manages or is affiliated with such an entity (each, a "Fund"), acquires knowledge of a potential transaction or other matter in such individual's capacity as a partner or employee of the Fund or the manager or general partner of the Fund (and other than directly in connection with such individual's service as a member of the Board of Directors of the Corporation) and that may be an opportunity of interest for both the Corporation and such Fund (a "Corporate Opportunity"), then the Corporation (i) renounces any expectancy that such director or Fund offer an opportunity to participate in such Corporate Opportunity to the Corporation and (ii) to the fullest extent permitted by law, waives any claim that such opportunity constitute a Corporate Opportunity that should have been presented by such director or Fund to the Corporation or any of its affiliates, *provided, however*, that such director acts in good faith.

To the fullest extent permitted by law, the Corporation renounces any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, any Excluded Opportunity. An "Excluded Opportunity" is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of, (i) any director of the Company who is not an employee of the Company or any of its subsidiaries, or (ii) any holder of Preferred Stock (or shares of Common Stock issuable upon conversion of the Preferred Stock) or any partner, member, director, stockholder, employee or agent of any such holder, other than someone who is an employee of the Company or any of its subsidiaries.

Neither any amendment nor repeal of this ARTICLE X, nor the adoption of any provision of this Corporation's Certificate of Incorporation inconsistent with this ARTICLE X, shall eliminate or reduce the effect of this ARTICLE X, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this ARTICLE X, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

#### ARTICLE XII

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the DGCL) outside of the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.