

ALEREON, INC.

SECOND AMENDED AND RESTATED CERTIFICATE OF INCORPORATION

SW-2

Alereon, Inc., a corporation organized and existing under the laws of the State of Delaware (the "Corporation"), hereby certifies as follows:

A. The name of the Corporation is Alereon, Inc. The Corporation filed its original Certificate of Incorporation with the Delaware Secretary of State on April 22, 2003. The name of the Corporation at the time of its original filing was Time Domain Networks, Inc.

B. This Second Amended and Restated Certificate of Incorporation (the "Restated Certificate") was duly adopted by the Corporation's directors and stockholders in accordance with the applicable provisions of Sections 228, 242 and 245 of the Delaware General Corporation Law (the "DGCL").

C. This Restated Certificate restates, integrates and amends the provisions of the Certificate of Incorporation of this Corporation, as heretofore amended.

D. The text of the Certificate of Incorporation, as heretofore amended, is hereby amended and restated in its entirety to read as follows:

ARTICLE I

The name of this Corporation is Alereon, Inc.

ARTICLE II

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the DGCL.

ARTICLE III

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

ARTICLE IV

This Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares of capital stock that this Corporation shall have authority to issue is 136,029,798. The total number of shares of Common Stock this Corporation shall have authority to issue is 75,000,000 with a par value of \$0.001 per share. The total number of shares of Preferred Stock this Corporation shall have authority to issue is 61,029,798 with a par value of \$0.001 per share, 41,460,716 of which shall be designated Series A Preferred Stock (referred to herein as "Series A Preferred Stock") and 19,569,082 of which shall be designated Series B Preferred Stock (referred to herein as

"Series B Preferred Stock;" and together, with the Series A Preferred Stock, referred to herein as "Preferred Stock."

The relative rights, preferences, privileges, limitations and restrictions granted to or imposed on the respective classes and series of the shares of capital stock or the holders thereof are as follows:

#### 4.1 *Dividends.*

(A) The holders of the Series B Preferred Stock shall be entitled to receive dividends, on a pari passu basis, out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend on the Corporation's Series A Preferred Stock or Common Stock (payable other than in Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock ("Common Stock Equivalents")) at the rate of \$0.088 per share (as adjusted for any stock dividend, stock split or combination with respect to such share) per annum.

(B) The holders of the Series A Preferred Stock shall be entitled to receive dividends, on a pari passu basis, out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock ("Common Stock Equivalents")) on the Corporation's Common Stock at the rate of \$0.08 per share (as adjusted for any stock dividend, stock split or combination with respect to such share) per annum.

(C) The right to receive dividends on shares of any series of Preferred Stock shall be cumulative, and shall begin to accrue on any outstanding shares of Preferred Stock from and after the date on which the Corporation issues such shares of such series of Preferred Stock. Except as otherwise set forth herein, upon conversion of any share of any series of Preferred Stock pursuant to subsection (A) or (B) of Section 4.3, all dividends declared or accrued but unpaid on such share shall be paid in cash or shares of Common Stock, in the discretion of the Board of Directors of the Corporation, and if paid in Common Stock then at the then fair market value as determined in good faith by the Corporation's Board of Directors. No dividends shall be declared or paid, and no distribution shall be made, on any shares of Common Stock unless all dividends declared or accrued but unpaid on any series of Preferred Stock have been paid or set apart for payment. After the payment or setting aside for payment of the dividends described in the first sentence of this Section 4.1, any additional dividends (payable other than in Common Stock or Common Stock Equivalents) declared or paid in any year shall be declared or paid among the holders of Preferred Stock and Common Stock then outstanding based on the number of shares of Common Stock held by each such holder (assuming full conversion of each series of Preferred Stock).

#### 4.2 *Liquidation Preference.*

(A) *Preferred Stock Preference.* In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, (1) the holders of Series B

Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the Corporation's assets or surplus funds to the holders of the Corporation's Series A Preferred Stock or Common Stock by reason of their ownership thereof, an amount equal to \$1.10 per share (as adjusted for any stock dividend, stock split or combination with respect to such share) (the "Series B Original Issue Price") plus an additional amount equal to any dividends accrued or declared but unpaid on each such share, and (2) the holders of Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the Corporation's assets or surplus funds to the holders of the Corporation's Common Stock by reason of their ownership thereof, an amount equal to \$1.00 per share (as adjusted for any stock dividend, stock split or combination with respect to such share) (the "Series A Original Issue Price") plus an additional amount equal to any dividends accrued or declared but unpaid on each such share. If, upon such liquidation, dissolution or winding up, the assets and funds distributed are insufficient to permit the payment to each holder of Preferred Stock of the full aforesaid preferential amount, the entire assets and funds legally available for distribution shall be distributed ratably among the holders of the Series B Preferred Stock first and then the holders of the Series A Preferred Stock, as the case may be, based on the number of shares of Series B Preferred Stock and Series A Preferred Stock held by each such holder. The Series A Original Issue Price and the Series B Original Issue Price are sometimes referred to herein respectively as the "Original Issue Price."

(B) *Remaining Assets.* Upon the completion of the distribution required by subsection (A) of this Section 4.2, the Corporation's remaining assets or funds available for distribution to stockholders shall be distributed ratably to the holders of Series B Preferred Stock and Series A Preferred Stock and Common Stock based on the number of shares of Common Stock held by each such holder (assuming full conversion of the Preferred Stock).

(C) (1) Unless otherwise determined by the holders of at least sixty percent (60%) (the "Designated Percentage") of the Preferred Stock then outstanding, for the purposes of this Section 4.2, a liquidation, dissolution or winding up of the Corporation shall be deemed to include (X) the acquisition of the Corporation by another entity by means of any transaction or series of related transactions (including, without limitation, any merger, consolidation or other form of reorganization in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring entity or its subsidiary, but excluding any transaction effected primarily for the purpose of changing the Corporation's jurisdiction of incorporation), *unless* the Corporation's stockholders of record as constituted immediately prior to such transaction or series of related transactions will, immediately after such transaction or series of related transactions hold at least a majority of the voting power of the surviving or acquiring entity or (Y) a sale, exclusive license, transfer or other disposition of all or substantially all of the assets of the Corporation.

(2) If any assets of the Corporation distributed to stockholders 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 Corporation's Board of Directors; *provided, however*, any publicly-traded securities shall be valued as follows:

(a) 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 to the average of the closing prices of the securities on such exchange or system over the ten (10) trading day period ending five (5) trading days prior to the distribution; and

(b) 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 ten (10) trading day period ending five (5) trading days prior to the distribution.

(3) In the event the requirements of this subsection (C) are not complied with, the Corporation shall forthwith either:

(a) cause such closing to be postponed until such time as the requirements of this Section 4.2 have been complied with, or

(b) cancel such transaction, in which event the rights, preferences, privileges and restrictions of the holders of the Preferred Stock shall revert to and be the same as such rights, preferences, privileges and restrictions existing immediately prior to the date of the first notice referred to in subsection (C)(4).

(4) The Corporation shall give each holder of record of Preferred Stock written notice of a transaction described in subsection (C)(1) not later than twenty (20) days prior to the stockholders' meeting called to approve such transaction, or twenty (20) days prior to the closing of such transaction, whichever is earlier, and shall also notify such holders in writing of the final approval of such transaction. The first of such notices shall describe the material terms and conditions of the impending transaction and the provisions of this Section 4.2, and the Corporation shall thereafter give such holders prompt notice of any material changes. The transaction shall in no event take place sooner than twenty (20) days after the Corporation has given the first notice provided for herein or sooner than ten (10) days after the Corporation has given notice of any material changes provided for herein; *provided, however*, that such periods may be shortened upon the written consent of the holders of at least the Designated Percentage of the shares of Preferred Stock then outstanding.

4.3 *Conversion.* The holders of the Preferred Stock have conversion rights as follows:

(A) *Right to Convert.*

(1) Each share of each series of Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share and on or prior to the fifth day prior to the Redemption Date, if any, as may have been fixed in any Redemption Notice with respect to the Preferred Stock, at the office of the Corporation or any transfer agent for the Preferred Stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Original Issue Price for such series of Preferred Stock by the Conversion Price for such series of Preferred Stock, determined as hereinafter provided, in effect at the time of the conversion (the "Conversion Rate"). The initial "Series A Conversion Price" per share for the Series A Preferred Stock shall be \$1.00 and the initial "Series B Conversion Price" per share for the Series B Preferred Stock shall be \$1.10. The

Series A Conversion Price and Series B Conversion Price are sometimes referred to herein respectively as the "Conversion Price." Such initial Conversion Price for each series of Preferred Stock shall be subject to adjustment as provided in subsection (D) of this Section 4.3.

(2) Holders of Preferred Stock agree to be bound by the provisions contractually obligating their conversion of their Preferred Stock upon certain conditions pursuant to Section 2.4 of that certain Investors' Rights Agreement, as amended, entered into in connection with the purchase of Preferred Stock. Should such provisions mandate conversion under Section 4.3(A)(1) above, the converting holder shall not be entitled to accrued dividends payable under Section 4.1 above on the Preferred Stock.

(B) *Automatic Conversion.* Each share of each series of Preferred Stock shall automatically be converted into fully paid and nonassessable shares of Common Stock at its then effective Conversion Rate upon the earlier of (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 Common Stock to the public for the account of the Corporation in which the public offering price (prior to underwriter's discounts or commissions and offering expenses) exceeds \$2.20 per share of Common Stock (as adjusted for any stock dividend, stock split or combination with respect to such share) and the aggregate gross proceeds raised exceeds \$25,000,000 (a "Qualified IPO") or (ii) the date specified by written consent or agreement of the holders of at least the Designated Percentage of the then outstanding shares of Preferred Stock.

(C) *Mechanics of Conversion.*

(1) Before any holder of Preferred Stock shall be entitled to convert the same into shares of Common Stock, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such Preferred Stock, and shall give written notice to the Corporation at such office that such holder elects to convert the same and shall state therein the name or names in which such holder wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall, as soon as practicable thereafter, 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. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of 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 in the event of an automatic conversion pursuant to Section 4.3(B) above, 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 unless the certificates evidencing such shares of Preferred Stock are either delivered to the Corporation or its transfer agent as provided above.

(2) If the conversion is in connection with a Qualified IPO, the conversion may, at the option of any holder tendering shares of Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock upon conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

(D) *Adjustment of Conversion Price.* The Conversion Price for each series of Preferred Stock shall be subject to adjustment from time to time as follows:

(1) (a) If the Corporation shall issue, after the date of filing of this Restated Certificate, any Additional Stock (as defined in subsection (D)(2)) without consideration or for a consideration per share less than the respective Conversion Price for any series of Preferred Stock in effect immediately prior to the issuance of such Additional Stock, the respective Conversion Price for such series in effect immediately prior to each such issuance of Additional Stock shall forthwith (except as otherwise provided in this subsection (D)) be adjusted to a price equal to (calculated to the nearest cent) the product obtained by multiplying the Conversion Price for such series of Preferred Stock in effect immediately prior to such issuance of Additional Stock by a fraction, the numerator of which is equal to the sum of (x) the total number of shares of Common Stock outstanding (including any shares of Common Stock deemed to be issued pursuant to subsection (D)(1)(e)(i) or (ii) of this Section 4.3) immediately prior to such issuance of Additional Stock plus (y) the number of shares of Common Stock that the aggregate consideration received by this Corporation for such issuance of Additional Stock would purchase at the Conversion Price for such series of Preferred Stock in effect immediately prior to such issuance of Additional Stock, and the denominator of which is equal to the sum of (x) the total number of shares of Common Stock outstanding (including any shares of Common Stock deemed to be issued pursuant to subsection (D)(1)(e)(i) or (ii) of this Section 4.3) immediately prior to such issuance of Additional Stock plus (y) the number of shares of Additional Stock issued. For purposes of adjusting the Conversion Price of a series of Preferred Stock, the issuance of Additional Stock consisting of the same series or class at the same price at two (2) or more related closings held within a six (6) month period shall be aggregated and treated as one issuance of Additional Stock occurring on the first date on which such Additional Stock was issued.

(b) No adjustment in the Conversion Price for any series of Preferred Stock need be made if such adjustment would result in a change in the Conversion Price of less than \$0.01. Any adjustment of less than \$0.01 that is not made shall be carried forward and shall be made at the time of and together with any subsequent adjustment that, on a cumulative basis, amounts to an adjustment of \$0.01 or more in the Conversion Price. Except to the limited extent provided for in subsections (D)(1)(e)(iii) or (iv), no adjustment of the Conversion Price for any series of Preferred Stock pursuant to this subsection (D)(1) shall have the effect of increasing any such Conversion Price above the Conversion Price in effect immediately prior to such adjustment.

(c) In the case of the issuance of Additional Stock for cash, the consideration shall be deemed to be the amount of cash paid therefor before deducting any

discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with the issuance and sale thereof.

(d) In the case of the issuance of Additional Stock for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined in good faith by the Corporation's Board of Directors irrespective of any accounting treatment.

(c) In the case of the issuance (whether before, on or after the date of filing of this Restated Certificate) of (i) options to purchase or rights to subscribe for Common Stock, (ii) securities by their terms convertible into or exchangeable for Common Stock or (iii) options to purchase or rights to subscribe for securities by their terms convertible into or exchangeable for Common Stock, the following provisions shall apply for all purposes of subsections (D)(1) and (2):

(i) The aggregate maximum number of shares of Common Stock deliverable upon exercise (assuming the satisfaction of any conditions to exercisability, including without limitation, the passage of time, but without taking into account potential antidilution adjustments) of such options to purchase or rights to subscribe for Common Stock shall be deemed to have been issued at the time such options or rights were issued and for a consideration equal to the consideration (determined in the manner provided in subsections (D)(1)(c) and (D)(1)(d)), if any, received by the Corporation upon the issuance of such options or rights plus the minimum exercise price provided in such options or rights (without taking into account potential antidilution adjustments) for the Common Stock covered thereby.

(ii) The aggregate maximum number of shares of Common Stock deliverable upon conversion of or in exchange (assuming the satisfaction of any conditions to convertibility or exchangeability, including without limitation, the passage of time, but without taking into account potential antidilution adjustments) for any such convertible or exchangeable securities or upon the exercise of options to purchase or rights to subscribe for such convertible or exchangeable securities and subsequent conversion or exchange thereof shall be deemed to have been issued at the time such securities were issued or such options or rights were issued and for a consideration equal to the consideration, if any, received by the Corporation for any such securities and related options or rights (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by the Corporation (without taking into account potential antidilution adjustments) upon the conversion or exchange of such securities or the exercise of any related options or rights (the consideration in each case to be determined in the manner provided in subsections (D)(1)(c) and (D)(1)(d)).

(iii) In the event of any change in the number of shares of Common Stock deliverable or in the consideration payable to this Corporation upon exercise of such options or rights or upon conversion of or exchange for such convertible or exchangeable securities, including, but not limited to, a change resulting from the antidilution provisions thereof, the Conversion Price for each series of Preferred Stock, to the extent in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Common Stock or any

payment of such consideration upon the exercise of any such options or rights or the conversion or exchange of such securities.

(iv) Upon the expiration of any such options or rights, the termination of any such rights to convert or exchange or the expiration of any options or rights related to such convertible or exchangeable securities, the Conversion Price for each series of Preferred Stock, to the extent in any way affected by or computed using such options, rights or securities or options or rights related to such securities, shall be recomputed to reflect the issuance of only the number of shares of Common Stock (and convertible or exchangeable securities that remain in effect) actually issued upon the exercise of such options or rights, upon the conversion or exchange of such securities or upon the exercise of the options or rights related to such securities.

(v) The number of shares of Common Stock deemed issued and the consideration deemed paid therefor pursuant to subsections (D)(1)(e)(i) and (ii) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either subsection (D)(1)(e)(iii) or (iv).

(2) "Additional Stock" shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to subsection (D)(1)(e) of this Section 4.3) by this Corporation after the date of filing of this Restated Certificate other than:

(a) shares of Common Stock or Common Stock Equivalents issued pursuant to an event or transaction described in subsection (D)(3) of this Section 4.3;

(b) shares of Common Stock issued at any time upon conversion of any series of Preferred Stock;

(c) shares of Common Stock issued (or deemed to have been issued pursuant to subsection (D)(1)(e) of this Section 4.3) to the Corporation's employees, officers, directors, consultants, advisors or services providers pursuant to any plan, agreement or similar arrangement approved by the Corporation's Board of Directors;

(d) shares of Common Stock issued (or deemed to have been issued pursuant to subsection (D)(1)(e) of this Section 4.3) to banks or equipment lessors in connection with bona fide debt financing or equipment leasing transactions, provided such issuance is approved by the Corporation's Board of Directors;

(e) shares of Common Stock issued (or deemed to have been issued pursuant to subsection (D)(1)(e) of this Section 4.3) in connection with sponsored research, collaboration, technology license, development, OEM, marketing or other similar agreements or strategic partnerships, provided such issuance is approved by the Corporation's Board of Directors;

(f) shares of Common Stock issued (or deemed to have been issued pursuant to subsection (D)(1)(e) of this Section 4.3) in connection with a bona fide business acquisition of or by the Corporation (whether by merger, consolidation, sale of assets,



sale or exchange of stock or otherwise), provided such acquisition is approved by the Corporation's Board of Directors;

(g) shares of Common Stock issued in a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act pursuant to which all outstanding shares of each series of Preferred Stock are converted to Common Stock; or

(h) shares of Common Stock issued (or deemed to have been issued pursuant to subsection (D)(1)(e) of this Section 4.3) for any purpose up to a maximum of 100,000 shares of Common Stock (net of any cancellations, expirations or repurchases and as adjusted for any stock dividend, stock split or combination with respect to such shares), provided such issuance is unanimously approved by the Corporation's Board of Directors.

(3) *Subdivision, etc.* In the event this Corporation should at any time or from time to time after the date of filing of this Restated Certificate, fix a record date for the effectuation of a split or subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or Common Stock Equivalents without payment of any consideration by such holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date (or the date of such dividend distribution, split or subdivision if no record date is fixed), the Conversion Price for each series of Preferred Stock shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase of the aggregate of shares of Common Stock outstanding and those issuable with respect to such Common Stock Equivalents.

(4) *Combination.* If the number of shares of Common Stock outstanding at any time after the date of filing of this Restated Certificate is decreased by a combination of the outstanding shares of Common Stock, then, on the effective date of such combination, the Conversion Price for each series of Preferred Stock shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of any shares of Preferred Stock shall be decreased in proportion to such decrease in outstanding shares.

(E) *Other Distributions.* In the event the Corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by this Corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in subsection (D)(3) of this Section 4.3, then, in each such case for the purpose of this subsection (E), the holders of Preferred Stock shall be entitled to a proportionate share of any such distribution as though they were the holders of the number of shares of Common Stock of the Corporation into which their respective shares of Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

(F) *Recapitalizations.* If, at any time or from time to time after the date of filing of this Restated Certificate, there shall be a recapitalization of the Corporation's Common

Stock (other than (x) a subdivision or combination provided for in subsections (D)(3) or (D)(4) of this Section 4.3 or (y) a merger or sale of assets referred to in Section 4.2(C)) provision shall be made so that the holders of each series of Preferred Stock shall thereafter be entitled to receive upon conversion of each such series of 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 of such series of Preferred Stock would have been entitled on such recapitalization. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4.3 with respect to the rights of the holders of each series of Preferred Stock after the recapitalization to the end that the provisions of this Section 4.3 (including adjustment of the Conversion Price then in effect and the number of shares issuable upon conversion of each series of Preferred Stock) shall be applicable after that event as nearly equivalent as prior to that event as may be practicable.

(G) *No Impairment.* The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, recapitalization, 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 Restated Certificate and in the taking of all such action as may be necessary or appropriate in order to protect the rights of the holders of each series of Preferred Stock set forth in this Restated Certificate against impairment. This provision shall not restrict the Corporation's right to amend its Certificate of Incorporation with the requisite stockholder consent.

(H) *No Fractional Shares and Certificate as to Adjustment.*

(1) No fractional shares shall be issued upon the conversion of any share of any series of Preferred Stock and, in lieu of any fractional shares to which any holder of Preferred Stock would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the fair market value of a share of Common Stock on the date of conversion as determined in good faith by the Board of Directors. Whether or not fractional shares are issuable upon such conversion shall be determined on the basis of the total number of shares of Preferred Stock the holder is at the time converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion.

(2) Upon the occurrence of each adjustment or readjustment of the Conversion Rate for any series of Preferred Stock pursuant to this Section 4.3, the Corporation, at its expense, shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of such series 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 written request at any time of any holder of any series of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) all such adjustments and readjustments, (ii) the Conversion Rate at the time in effect, and (iii) the number of shares of Common Stock and the amount, if any, of other property that at the time would be received upon the conversion of such holder's shares of Preferred Stock.

(I) *Notices of Record Date.* In the event of any taking by the Corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property or to receive any other right, the Corporation shall mail to each holder of Preferred Stock at least twenty (20) days prior to such record date, a notice specifying the date on which any such record is to be taken for the purpose of such dividend or distribution or right, and the amount and character of such dividend, distribution or right.

(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 outstanding shares of Preferred Stock 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 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 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, including, without limitation, engaging its best efforts to obtain the requisite stockholder approval for any necessary amendment to this Restated Certificate.

#### 4.4 *Redemption.*

(A) At any time after December 17, 2010, but within forty-five (45) days after the receipt by this Corporation of a written request from the holders of at least the Designated Percentage of the then outstanding shares of any series of Preferred Stock, that all or, if less than all, a specified percentage of such holders' shares of such series of Preferred Stock be redeemed, and concurrently with surrender by such holders of the certificates representing such shares, this Corporation shall, to the extent it may lawfully do so, redeem in two (2) annual installments (each payment date being referred to herein as a "Redemption Date") the shares specified in such request by paying in cash therefor an amount per share equal to the greater of (i) the Series A Original Issue Price or Series B Original Issue Price, as the case may be, or (ii) the fair market value of the Series A Preferred Stock or Series B Preferred Stock, as the case may be, as determined in good faith by the Corporation's Board of Directors irrespective of any accounting treatment and on a going concern basis to the extent the Corporation is not in the process of liquidation or winding up its business and affairs at the time of such valuation, in each case, plus an additional amount equal to any dividends declared or accrued but unpaid on each such share (the "Redemption Price"). The number of shares of Preferred Stock that this Corporation shall be required to redeem on each Redemption Date shall be equal to the amount determined by dividing (i) the aggregate number of shares of each series of Preferred Stock outstanding immediately prior to any such Redemption Date that have been requested to be redeemed pursuant to this subsection (A) by (ii) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). Any redemption effected pursuant to this Section 4.4 shall be made on a pro rata basis among the holders of Preferred Stock to be redeemed in proportion to the number of shares of such affected series of Preferred Stock then held by such holders.

(B) *Redemption Procedure.* As used in this subsection (B) and in subsections (C) and (D) below, the term "Redemption Price" shall refer to the respective Redemption Price (for either Series A Preferred Stock or Series B Preferred Stock, as the case may be). At least twenty (20) days prior to each Redemption Date, written notice (the "Redemption Notice") shall be mailed, 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 or given by the holder to the Corporation for the purpose of notice or if no such address appears or is given, at the place where the principal executive office of the Corporation is located, notifying such holder of the redemption to be effected, specifying the number of shares to be redeemed from such holder, 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, its certificate or certificates representing the shares to be redeemed. Except as provided in subsection (C) below, on or after each Redemption Date, each holder of Preferred Stock to be redeemed shall surrender to the Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the aggregate 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.

(C) *Effect of Redemption.* From and after each Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of the shares of Preferred Stock to be redeemed on a Redemption Date (except the right to receive their respective Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever. If the funds of the Corporation legally available for redemption on any Redemption Date are insufficient to redeem the total number of shares requested to be redeemed on such date, those funds which are legally available will be used to redeem the maximum possible number of such shares ratably among the holders of such shares to be redeemed based upon their holdings of Preferred Stock. The shares not redeemed shall remain outstanding and be entitled to all the rights and preferences provided herein. At any time thereafter when additional funds of the Corporation are legally available for the redemption of shares not redeemed, such funds will immediately be set aside for the redemption of the balance of the shares which the Corporation has become obligated to redeem on any Redemption Date but which it has not redeemed.

(D) *Redemption Funding.* On or prior to each Redemption Date, the Corporation shall deposit the Redemption Price of all shares of Preferred Stock designated for redemption in the Redemption Notice, and not yet redeemed or converted, with a bank or trust company having aggregate capital and surplus in excess of \$100,000,000 as a trust fund for the benefit of the respective holders of the shares designated for redemption and not yet redeemed. Simultaneously, the Corporation shall deposit irrevocable instructions and authority to such bank or trust company to pay, on and after the date fixed for redemption or prior thereto, the Redemption Price of the Preferred Stock to the holders thereof, upon receipt of notification from the Corporation that such holder has surrendered such holder's certificates pursuant to

subsection (B) above. Any money deposited by the Corporation pursuant to this subsection (D) for the redemption of shares which are thereafter converted into shares of Common Stock no later than the close of business on the last business day prior to the Redemption Date shall be returned to the Corporation forthwith upon such conversion. The balance of any money deposited by the Corporation pursuant to this subsection (D) remaining unclaimed at the expiration of six months following the applicable Redemption Date shall thereafter be returned to the Corporation, provided that the stockholder to which such money would be payable hereunder shall be entitled, upon proof of its ownership of the Preferred Stock and payment of any bond requested by the Corporation, to receive such monies but without interest from the Redemption Date.

#### 4.5 *Voting.*

(A) *General.* Each holder of each share of each series of Preferred Stock (i) shall be entitled to the number of votes equal to the number of shares of Common Stock into which such share of Preferred Stock could be converted at the record date for determination of the stockholders entitled to vote, or, if no such record date is established, at the date such vote is taken or any written consent of stockholders is solicited, (ii) shall have voting rights and powers equal to the voting rights and powers of the Common Stock (except as otherwise provided herein or as required by law, voting together with the Common Stock as a single class) and (iii) shall be entitled to notice of any stockholders' meeting in accordance with the Corporation's Bylaws. Fractional votes shall not, however, be permitted and any fractional voting resulting from the above formula (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward). Each holder of each share of Common Stock shall be entitled to one vote.

(B) *Adjustment in Authorized Common Stock.* The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares of Common Stock then outstanding) by an affirmative vote of the holders of a majority of the stock of the Corporation entitled to vote and without the separate affirmative vote of the holders of a majority of the Common Stock entitled to vote, irrespective of the provisions of Section 242(b)(2) of the DGCL.

#### (C) *Election of Directors.*

(1) 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 stockholders for the election of directors. The holders of Preferred Stock, voting together as a single class, shall be entitled to elect three (3) members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors. The holders of Common Stock and Preferred Stock, voting as separate classes, shall be entitled to elect the remaining members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors.

(2) Whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more directors pursuant to Section 4.5(C)(1), vacancies in the

position of the director(s) elected by (a) the Common Stock class may be filled by the affirmative vote of the holders of at least a majority of the shares of that class, and (b) the outstanding shares of Preferred Stock may be filled by the affirmative vote of the Designated Percentage of the shares of Preferred Stock, subject to any applicable voting agreements.

(3) Any director who was elected by a specified class or classes of stock may be removed during such director's term of office, with or without cause, only by the affirmative vote of the holders of at least a majority of the outstanding shares of the Common Stock class, or a Designated Percentage of the outstanding shares of the Preferred Stock, subject to any applicable voting agreements, that initially elected such director.

4.6 *Preferred Stock Protective Provisions.* So long as any shares of Series A Preferred Stock or Series B Preferred Stock are outstanding, the Corporation shall not, without first obtaining the separate class approval (by vote or written consent) of the holders of at least the Designated Percentage of the Series A Preferred Stock or Series B Preferred Stock, as such series may be affected, then outstanding:

(A) take any action (including amending this Restated Certificate or by way of merger, reclassification, consolidation or otherwise) that would alter or change the powers, preferences or special rights of the shares of such series of Preferred Stock then outstanding so as to affect such shares adversely;

(B) authorize any new class or series of equity securities having any preference, rights or priority as to voting, dividends, adjustment to conversion price, or distribution of assets upon liquidation, merger or otherwise which is superior to or on a parity with any such preference, rights or priority of any series of Preferred Stock then outstanding;

(C) reclassify any outstanding shares into shares having preferences superior to or on parity with the Series A Preferred Stock or Series B Preferred Stock, as the case may be; or

(D) increase or decrease (other than by conversion or redemption) the number of authorized shares of such series of Preferred Stock.

So long as any shares of Series A Preferred Stock and Series B Preferred Stock are outstanding, the Corporation shall not, without first obtaining the approval (by vote or written consent) of the holders of at least the Designated Percentage of the Preferred Stock then outstanding, voting together as a single class:

(A) redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purpose) any shares of Common Stock; *provided, however*, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for this Corporation pursuant to agreements under which this Corporation has the right to repurchase such shares upon the occurrence of certain events, such as the termination of services;

(B) redeem, purchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purpose) any share or shares of Preferred Stock; *provided, however*,

that this restriction shall not apply to any redemption in accordance with Section 4.4 of this ARTICLE IV;

(C) pay or declare a dividend on any shares of Common Stock (payable other than in Common Stock or Common Stock Equivalents);

(D) permit any subsidiary to issue or sell, or obligate itself to issue or sell, except to the Corporation or any wholly owned subsidiary, any stock of such subsidiary;

(E) increase the number of authorized directors of the Corporation's Board of Directors to more than five (unless unanimously approved by the Corporation's Board of Directors);

(F) authorize any additional shares of common stock to be allocated to employees, consultants, or advisors under any plan, or issue any additional shares of Common Stock to employees, consultants, or advisors other than shares of Common Stock reserved for issuance pursuant to the Corporation's 2003 Stock Option Plan;

(G) incur any indebtedness greater than \$1,000,000;

(H) make any material change in the Corporation's business, business strategy or business plan;

(I) form, capitalize, make capital contributions to, advance or loan assets or money to, or otherwise guaranty the debts of, any entity in which the Corporation directly owns or would own 50% or more of the equity or voting interests of such entity;

(J) sell, exclusively license, transfer or otherwise dispose of all or substantially all of its assets, or merge into or consolidate with any other entity (other than a wholly-owned subsidiary corporation), or effect any transaction or series of related transactions in which the Corporation's stockholders as constituted immediately prior to such transaction or series of related transactions own immediately after such transaction or series of related transactions less than fifty percent (50%) of the voting power of the surviving or acquiring entity;

(K) amend the Corporation's Certificate of Incorporation or Bylaws; or

(L) dissolve, liquidate or wind up this Corporation, or file any voluntary petition for bankruptcy of the Corporation.

The provisions of this Section 4.6 shall not limit or restrict any rights which any holder of Preferred Stock may have under the DGCL.

**4.7 Status of Redeemed or Converted Stock.** In the event any shares of any series of Preferred Stock are converted pursuant to Section 4.3 or redeemed pursuant to Section 4.4, the Corporation shall never again issue the shares so converted or redeemed and all such shares so converted or redeemed shall, upon such conversion or redemption, cease to be a part of the Corporation's authorized stock. The Corporation's Restated Certificate, as amended or restated

from time to time, shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized stock.

4.8 *Notices.* Any notice required by the provisions of Sections 4.2, 4.3 and 4.4 to be given to the holders of shares of any series of Preferred Stock shall be in writing and shall be delivered personally by hand or by courier, mailed by United States first-class mail, postage prepaid, sent by facsimile (receipt confirmed) directed to each holder of record at such holder's address, or facsimile number appearing on the Corporation's books, or sent by electronic transmission in accordance with § 232 of the DGCL. Any such notice shall be effective or deemed given on the date of delivery, mailing, confirmed facsimile transfer, or electronic transmission.

## **ARTICLE V**

Except as may otherwise be provided in this Restated Certificate, in furtherance and not in limitation of the powers conferred by the laws of the state of Delaware, the Corporation's Board of Directors is expressly authorized to make, alter, amend or repeal the Corporation's Bylaws.

## **ARTICLE VI**

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

## **ARTICLE VII**

7.1 *Limitation of Director's Liability.* To the fullest extent permitted by the DGCL, as the same exists or may hereafter be amended, a director of this Corporation shall not be personally liable to this Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.

7.2 *Indemnification of Directors and Officers.* To the fullest extent permitted by applicable law, this Corporation is authorized to provide indemnification of, and advancement of expenses to, directors, officers, employees and other agents of this Corporation and any other persons to which the DGCL permits this Corporation to provide indemnification.

7.3 *Repeal or Modification.* Any repeal or modification of this ARTICLE VII, by amendment of this ARTICLE VII or by operation of law, shall not adversely affect any right or protection of a director, officer, employee or other agent of this Corporation existing at the time of, or increase the liability of any such person with respect to any acts or omissions in their capacity as a director, officer, employee, or other agent of the corporation occurring prior to, such repeal or modification.

## **ARTICLE VIII**

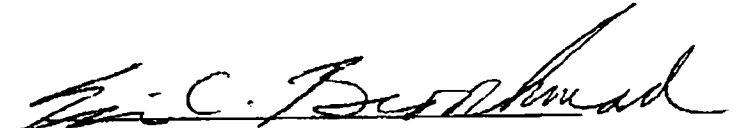
Subject to Section 4.6 of ARTICLE IV, the Corporation reserves the right to amend, alter, change or repeal any provision contained in this Restated Certificate, in the manner now or



hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

IN WITNESS WHEREOF, the Corporation has caused this Second Amended and Restated Certificate of Incorporation to be signed by its Chief Executive Officer on September 29, 2005.

Alcreon, Inc.

  
Eric C. Broockman