

State of Delaware  
Secretary of State  
Division of Corporations  
Delivered 05:32 PM 10/17/2006  
FILED 05:16 PM 10/17/2006  
SRV 060952990 - 4190074 FILE

ATTUNE FOODS, INC.

**AMENDED AND RESTATED CERTIFICATE OF INCORPORATION**

Attune Foods, Inc., a corporation organized and existing under and by virtue of the Delaware General Corporation Law, hereby certifies as follows:

The name of this corporation is Attune Foods, Inc. and the original Certificate of Incorporation of the corporation was filed with the Secretary of State of the State of Delaware on July 13, 2006.

The Amended and Restated Certificate of Incorporation in the form of Exhibit A attached hereto has been duly adopted in accordance with the provisions of Sections 242, 245 and 228 of the General Corporation Law of the State of Delaware ("Delaware General Corporation Law").

The text of the Amended and Restated Certificate of Incorporation as heretofore amended or supplemented is hereby restated and further amended to read in its entirety as set forth in Exhibit A attached hereto.

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been signed this 17th day of October, 2006.

ATTUNE FOODS, INC.

By: /s/ Robert Hurlbut  
Robert Hurlbut, Chief Executive Officer

## **EXHIBIT A**

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

#### **OF**

#### **ATTUNE FOODS, INC.**

#### **FIRST**

The name of this corporation is Attune Foods, Inc. (the "Company").

#### **SECOND**

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

#### **THIRD**

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

#### **FOURTH**

A. The Company is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The aggregate number of shares that the Company shall have authority to issue is 25,170,221, 20,000,000 shares of which shall be Common Stock with the par value of \$0.0001 per share (the "Common Stock"), and 5,170,221 shares of which shall be Preferred Stock with the par value of \$0.0001 per share. The Preferred Stock may be issued in one or more series. Of the Preferred Stock, 500,000 shares shall be designated Series A-1 Preferred Stock (the "Series A-1 Preferred"), and 4,670,221 shares shall be designated Series A-2 Preferred Stock (the "Series A-2 Preferred" and together with the Series A-1 Preferred, the "Preferred Stock").

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

1. Dividends.

(a) Treatment of Series A-1 Preferred and Series A-2 Preferred. The holders of the Series A-1 Preferred and Series A-2 Preferred, in preference to the holders of any other stock of the Company, shall be entitled to receive, when and as declared by the Board of

Directors, but only out of funds that are legally available therefor, non-cumulative cash dividends at the rate of \$0.0150 and \$0.0209, respectively, per annum on each outstanding share of Series A-1 Preferred and Series A-2 Preferred (as adjusted for stock splits, combinations, reorganizations and the like with respect to the Series A-1 Preferred and Series A-2 Preferred, respectively).

(b) Treatment of Common Stock. After payment of the dividends provided by Section 1(a), any additional dividends declared shall be distributed among all holders of Common Stock and Preferred Stock in proportion to the number of shares of Common Stock held by each such holder (or with respect to a holder of Preferred Stock the number of shares of Common Stock into which the holder's Preferred Stock is convertible). No dividends shall be declared or paid on the Common Stock unless and until the holders of Preferred Stock shall have received all unpaid dividends to which they are entitled under this Section 1 (whether or not declared).

(c) Other Distributions. Notwithstanding anything to the contrary contained herein, in the event the Company shall make or issue, or shall fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution with respect to Common Stock payable in (i) securities of the Company other than shares of Common Stock or (ii) assets, then, and in each such event, the holders of Series A-1 Preferred and Series A-2 Preferred shall receive prior to and in preference to any such dividend or distribution on the Common Stock securities and assets in amounts equivalent to the cash that would have been required to be distributed pursuant to Section 1(a) (whether or not declared), and then the holders of Preferred Stock shall receive, at the same time distribution is made to the holders of Common Stock, the number of securities or other assets which they would have received had their Preferred Stock been converted into Common Stock, immediately prior to the record date for determining holders of Common Stock entitled to receive such distribution.

(d) Consent to Certain Repurchases. As authorized by Section 402.5(c) of the General Corporation Law of California, Sections 502 and 503 of the General Corporation Law of California, to the extent otherwise applicable, shall not apply with respect to Distributions (as hereinafter defined) made by the Company in connection with the repurchase of shares of Common Stock issued to or held by employees, consultants, officers or directors at a price not greater than the amount paid by such person for such shares upon termination of their employment or services pursuant to agreements providing for the right of said repurchase or upon exercise of a right of first refusal, which agreements were authorized by the Board of Directors. For purposes of this Section 1(d), "Distribution" means the transfer of cash, property or securities without consideration, whether by way of dividend or otherwise, or the purchase of shares of the Company (other than in connection with the repurchase of shares of Common Stock issued to or held by employees, consultants, officers or directors at a price not greater than the amount paid by such persons for such shares upon termination of their employment or services pursuant to agreements providing for the right of said repurchase or upon exercise of a right of first refusal approved by the Board of Directors) for cash or property.

2. Liquidation Rights.

(a) Liquidation Preference. In the event of any Liquidation (as hereinafter defined), whether voluntary or involuntary, before any distribution or payment shall be made to the holders of Common Stock, the holders of Series A-1 Preferred and Series A-2 Preferred shall be entitled to be paid out of the assets of the Company, prior and in preference to the holders of the Common Stock, an amount per share of Series A-1 Preferred or Series A-2 Preferred equal to (i) \$0.2500 plus all declared and unpaid dividends on the Series A-1 Preferred (as adjusted for stock splits, combinations, reorganizations and the like with respect to the Series A-1 Preferred) for each share of Series A-1 Preferred held by them and (ii) \$0.3480 plus all declared and unpaid dividends on the Series A-2 Preferred (as adjusted for stock splits, combinations, reorganizations and the like with respect to the Series A-2 Preferred) for each share of Series A-2 Preferred held by them. If, upon any such Liquidation, the assets of the Company shall be insufficient to make payment in full to all holders of Series A-1 Preferred and Series A-2 Preferred of the liquidation preference set forth in this Section 2(a), then such assets shall be distributed among the holders of Series A-1 Preferred and Series A-2 Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be entitled.

(b) Remaining Assets. After the payment to the holders of the Preferred Stock of the full preferential amount specified above, any remaining assets of the Company shall be distributed pro rata among the holders of the Common Stock and the holders of the Preferred Stock on a pari passu basis according to the number of shares of Common Stock held by such holders, where each holder of shares of Preferred Stock shall be treated for this purpose as holding the greatest whole number of shares of Common Stock then issuable upon conversion of all shares of Preferred Stock held by such holder pursuant to Section 3.

(c) Liquidation. A "Liquidation" shall mean the liquidation, dissolution or winding up of the Company and, if so approved by the holders of a majority of the Preferred Stock then outstanding, voting together as a single separate class (on an as-converted to Common Stock basis), also shall be deemed to include (i) any reorganization, merger, consolidation or similar transaction (or series of related transactions) in which the outstanding capital stock of the Company immediately prior to such transaction or series of related transactions represents less than a majority of the voting power of (1) the surviving entity, or (2) the parent of such surviving entity if the surviving entity is owned by such parent, immediately following such transaction or series of related transactions; (ii) any transaction or series of related transactions to which the Company is a party in which in excess of fifty percent (50%) of the Company's voting power is transferred; and (iii) a sale, lease, exclusive license or other disposition of all or substantially all of the assets of the Company; provided that a Liquidation shall not include any transaction or series of related transactions principally for bona fide equity financing purposes in which cash is received by the Company or any successor or indebtedness of the Company is cancelled or converted or a combination thereof occurs.

(d) Determination of Value if Proceeds Other than Cash. In any Liquidation, if the proceeds received by the Company or its stockholders are other than cash, its value will be deemed its fair market value. Any securities shall be valued as follows:

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

(A) If traded on a securities exchange or through the Nasdaq National Market, the value shall be deemed to be the average of the closing prices of the securities on such exchange or system over the twenty (20) trading-day period ending three (3) trading days prior to the closing of the Liquidation;

(B) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the twenty (20) trading-day period ending three (3) trading days prior to the closing of the Liquidation; and

(C) If there is no active public market, the value shall be the fair market value thereof, as determined by the Board of Directors of the Company.

(ii) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in (i) (A), (B) or (C) to reflect the approximate fair market value thereof, as determined by the Board of Directors of the Company.

3. Conversion. The Preferred Stock shall have conversion rights as follows:

(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 Company or any transfer agent for the Preferred Stock. Each share of Series A-1 Preferred and Series A-2 Preferred shall be convertible into that number of fully-paid and nonassessable shares of Common Stock that is equal to \$0.2500 and \$0.3480, respectively (each as adjusted for stock splits, combinations, reorganizations and the like with respect to such shares) divided by the applicable Conversion Price (as hereinafter defined) for such series of Preferred Stock. The "Conversion Price" per share of Series A-1 Preferred and Series A-2 Preferred shall initially be \$0.2500 and \$0.3480, respectively, subject to adjustment as provided herein.

(b) Automatic Conversion. Each share of Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Conversion Price for such series of Preferred Stock immediately upon (i) the affirmative vote of the holders of a majority of the then outstanding shares of Preferred Stock (voting together as a single class on an as-converted basis), or (ii) the consummation of a firm commitment underwritten public offering with a nationally recognized investment bank of shares of the Company's Common Stock pursuant to the Securities Act of 1933, as amended (the "Securities Act"), on Form S-1 (as defined in the Securities Act) or any successor form resulting in the Company having a market capitalization (as determined by multiplying the offering price per share to the public by the number of shares of Common Stock outstanding immediately following the public offering) of at least \$50,000,000.

(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 Company shall pay the fair market value cash equivalent of such fractional share as determined in good faith by the Board of Directors. For such purpose, all shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Preferred Stock by a holder thereof shall be aggregated, and 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 certificate(s) therefor, it shall surrender the Preferred Stock certificate or certificates, duly endorsed, at the office of the Company or of any transfer agent for the Preferred Stock, and shall give written notice to the Company at such office that such holder elects to convert such shares; provided, however, that in the event of an automatic conversion pursuant to paragraph 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 Company or its transfer agent; and provided further, however, that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such automatic conversion unless either the certificates evidencing such shares of Preferred Stock are delivered to the Company or its transfer agent as provided above, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates.

In the event that there are any declared and unpaid dividends on any Preferred Stock converted pursuant to paragraph 3(a) or 3(b), the Company shall issue to the holder of the Preferred Stock converted pursuant to paragraph 3(a) or 3(b) that number of fully-paid and nonassessable shares of Common Stock that is equal to the amount of such dividends divided by the per share fair market value of the Common Stock as determined in good faith by the Board of Directors.

The Company shall, as soon as practicable after delivery of the Preferred Stock certificate(s), issue and deliver 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 and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of 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, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing of the sale of securities pursuant to such offering, 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 the sale of such securities.

All shares of Preferred Stock which shall have been surrendered for conversion as herein provided shall no longer be deemed to be outstanding and all rights with respect to such shares, including the rights, if any, to receive notices and to vote, shall immediately cease and terminate, except only the right of the holders thereof to receive shares of Common Stock in exchange therefor and to receive payment of any dividends declared but unpaid thereon. Any shares of Preferred Stock so converted shall be retired and cancelled and shall not be reissued as shares of such series, and the Company (without the need for stockholder action) may from time to time take such appropriate action as may be necessary to reduce the authorized number of shares of Preferred Stock accordingly.

Upon any such conversion, no adjustment to the applicable Conversion Price shall be made for any declared but unpaid dividends on any series of Preferred Stock surrendered for conversion or on the Common Stock delivered upon conversion.

(d) Adjustments for Subdivisions or Combinations of Common. If at any time or from time to time on or after the date that the first share of Preferred Stock is issued (the "Original Issue Date"), the outstanding shares of Common Stock shall be subdivided (by stock split, stock dividend or otherwise), into a greater number of shares of Common Stock without a corresponding subdivision of the Preferred Stock, the applicable Conversion Price in effect for each series of Preferred Stock immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. If at any time or from time to time on or after the Original Issue Date, if the outstanding shares of Common Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Common Stock without a corresponding combination of the Preferred Stock, the applicable Conversion Price in effect for each series of Preferred Stock immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(e) Adjustments for Reclassification, Exchange and Substitution. If at any time or from time to time on or after the Original Issue Date, 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 securities, whether by capital reorganization, recapitalization, reclassification or other event (other than a subdivision or combination of shares pursuant to Section 3(d) above), concurrently with the effectiveness of such capital reorganization, recapitalization, reclassification or other event, each series of Preferred Stock shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of securities equivalent to the number of such shares or securities that would have been received by the holder of a number of shares of Common Stock issuable upon conversion of such series of Preferred Stock immediately prior to such capital reorganization, recapitalization, reclassification or other event. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 3 with respect to the rights of the holders of Preferred Stock after the capital reorganization, recapitalization, reclassification or other event to the end that the provisions of this Section 3 (including adjustment of the applicable Conversion Price then in effect for each series of Preferred Stock and the number and type of shares or other securities issuable upon conversion of each series of Preferred Stock) shall be applicable after that event and be as nearly equivalent as practicable.

(f) Adjustment for Common Stock Dividends and Distributions. If at any time or from time to time on or after the Original Issue Date, the Company shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable on the Common Stock in additional shares of Common Stock, then and in each such event the applicable Conversion Price for each series of Preferred Stock in effect immediately before such event shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the applicable Conversion Price then in effect for each series of Preferred Stock by a fraction equal to:

(1) the numerator of which shall be 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, and

(2) the denominator of which shall be 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 shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the applicable 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 applicable Conversion Price for each series of Preferred Stock shall be adjusted pursuant to this subsection as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made if the holders of Preferred Stock simultaneously receive (i) a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock on the date of such event or (ii) a dividend or other distribution of shares of Preferred Stock which are convertible, as of the date of such event, into such number of shares of Common Stock as is equal to the number of additional shares of Common Stock being issued with respect to each share of Common Stock in such dividend or distribution.

(g) Adjustments for Other Dividends and Distributions. If at any time or from time to time on or after the Original Issue Date, the Company shall make or issue, or fix a record date for the determination of holders of capital stock of the Company entitled to receive, a dividend or other distribution payable in securities of the Company (other than a distribution of shares of Common Stock in respect of outstanding shares of Common Stock) or in other property and the provisions of Section 3(f) do not apply to such dividend or distribution, then and in each such event the holders of Preferred Stock shall receive, simultaneously with the distribution to the holders of such capital stock, a dividend or other distribution of such securities or other property in an amount equal to the amount of such securities or other property as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock on the date of such event.

(h) Adjustments for Reorganization, Merger, Consolidation or Sale of Assets. If at any time or from time to time on or after the Original Issue Date, 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 a reorganization, merger or consolidation of the Company with or into another entity, or the sale of all or substantially all of the Company's properties and assets to any other person or entity (other than as provided for elsewhere in this Section 3 or a transaction subject to Section 2 above) then, as a part of such reorganization, merger, consolidation or sale, provision shall be made so that the holders of each series of Preferred Stock shall thereafter be entitled to receive upon conversion of such series of Preferred Stock, the number of shares of stock or other securities or property of the Company, or of the successor entity resulting from such merger or consolidation or sale, to which a holder of Common Stock deliverable upon conversion of each series of Preferred Stock would have been entitled to receive upon such capital reorganization, merger consolidation or sale. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 3 with respect to the rights and interests of the holders of the then outstanding Preferred Stock after the reorganization, merger, consolidation or sale to the end that the provisions of this Section 3 (including adjustments of the applicable Conversion Price then in effect for each series of Preferred Stock and the number of shares purchasable upon conversion of each series of Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

(i) Adjustments for Dilutive Issuances.

(i) If at any time or from time to time on or after the Original Issue Date, the Company shall issue or sell any shares of Common Stock (as actually issued or, pursuant to paragraph (iii) below, deemed to be issued) for a consideration per share less than the Conversion Price for any series of Preferred Stock in effect immediately prior to such issue or sale, then immediately upon such issue or sale the Conversion Price for each such series of Preferred Stock shall be reduced to a price (calculated to the nearest cent) determined by multiplying the applicable Conversion Price in effect immediately prior to such issuance or sale by a fraction, the numerator of which shall be the number of shares of Calculated Securities (as hereinafter defined) outstanding immediately prior to such issue or sale plus the number of shares of Common Stock which the aggregate consideration received by the Company for the total number of shares of Common Stock so issued or sold (or deemed to be issued or sold) would purchase at the applicable Conversion Price in effect immediately prior to such issuance or sale, and the denominator of which shall be the number of shares of Calculated Securities outstanding immediately prior to such issue or sale plus the number of shares of Common Stock so issued or sold. "Calculated Securities" means (A) all shares of Common Stock actually outstanding and (B) all shares of Common Stock issuable upon exercise, conversion or exchange of all Convertible Securities (as hereinafter defined).

(ii) For the purposes of paragraph (i) above, none of the following issuances (or deemed issuances) shall be considered the issuance (or deemed issuance) or sale of Common Stock:

(A) The issuance of Common Stock upon the conversion of any outstanding Convertible Securities as of the date hereof or upon the conversion of the Preferred Stock, including the issuance of Common Stock as payment for any declared and unpaid dividends on such Preferred Stock. "Convertible Securities" shall mean any bonds, debentures,

notes or other evidences of indebtedness, and any stock, options, warrants, purchase rights or any other securities convertible into, exercisable for, or exchangeable for Common Stock.

(B) Shares of Common Stock issued or issuable by reason of a dividend, stock split, split up or other distribution on shares of Common Stock that is covered by Section 3(f) or Section 3(g) above and shares of Common Stock issued or deemed issued as a dividend or Distribution on Preferred Stock.

(C) Shares of Common Stock and/or options, warrants or other Common Stock purchase rights and the Common Stock issued or issuable pursuant to such options, warrants or other rights after the Original Issue Date to employees, officers or directors of, or consultants or advisors to, the Company or any subsidiary pursuant to stock purchase or stock option plans or other arrangements that are approved by the Board of Directors.

(D) The issuance of shares of Common Stock or Convertible Securities to lenders, financial institutions, equipment lessors or real estate lessors to the Company in connection with a bona fide borrowing or leasing transaction approved by the Board of Directors.

(E) The issuance of shares of Common Stock or Convertible Securities to distributors, suppliers or vendors of the Company approved by the Board of Directors.

(F) The issuance of Common Stock upon the conversion of Convertible Securities issued pursuant to that certain Convertible Note Purchase Agreement, dated on or about the date of filing of this Amended and Restated Certificate of Incorporation, by and among the Company and the other parties thereto

(G) The issuance of Common Stock upon the exercise, conversion or exchange of Convertible Securities issued in accordance with this subsection (ii).

(iii) For the purposes of paragraph (i) above, the following subparagraphs (A) to (E), inclusive, shall also be applicable:

(A) In case at any time the Company shall grant any warrants, rights or options to subscribe for, purchase or otherwise acquire Convertible Securities or Common Stock (excluding Convertible Securities and Common Stock issued in accordance with Section 3(i)(ii) above) (collectively "Options") or shall fix a record date for the determination of holders entitled to receive such Options, whether or not such Options are immediately exercisable, and the price per share for which Common Stock is issuable upon the exercise of such Options (determined by dividing (x) the total amount, if any, received or receivable by the Company as consideration for the granting of such Options, plus the minimum aggregate amount of additional consideration payable to the Company upon the exercise of such Options, plus, in the case of any such Options which relate to such Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable upon the issue or sale of such Convertible Securities and upon the conversion or exchange thereof, by (y) the total maximum number of shares of Common Stock

issuable upon the exercise of such Options or upon the conversion or exchange of all such Convertible Securities issuable upon the exercise of such Options as set forth in the instrument relating thereto assuming the satisfaction of any conditions to the exercisability, convertibility or exchangeability) shall be less than the applicable Conversion Price in effect immediately prior to the time of the granting of such Options, then the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon conversion or exchange of the total maximum amount of such Convertible Securities issuable upon the exercise of such Options shall (as of the date of granting of such Options) be deemed to be outstanding and to have been issued for such price per share.

(B) In case at any time the Company shall issue or sell any Convertible Securities (excluding Convertible Securities and Common Stock issued in accordance with Section 3(i)(ii) above), whether or not the rights to exchange or convert thereunder are immediately exercisable, and the price per share for which Common Stock is issuable upon such exercise, conversion or exchange (determined by dividing (x) the total amount received or receivable by the Company as consideration for the issue or sale of such Convertible Securities, plus the minimum aggregate amount of additional consideration, if any, payable to the Company upon the exercise, conversion or exchange thereof, by (y) the total maximum number of shares of Common Stock issuable upon the exercise, conversion or exchange of all such Convertible Securities as set forth in the instrument relating thereto assuming the satisfaction of any conditions to the exercisability, convertibility or exchangeability) shall be less than the Conversion Price in effect for any series of Preferred Stock immediately prior to the time of such issue or sale, then the total maximum number of shares of Common Stock issuable upon exercise, conversion or exchange of such Convertible Securities shall (as of the date of the issue or sale of such Convertible Securities) be deemed to be outstanding and to have been issued for such price per share, provided that if any such issue or sale of such Convertible Securities is made upon exercise of any rights to subscribe for or to purchase or any option to purchase any such Convertible Securities for which adjustments of the conversion price have been or are to be made pursuant to other provisions of this paragraph (iii), no further adjustment of the conversion price shall be made by reason of such issue or sale.

(C) In case at any time any shares of Common Stock, Convertible Securities or Options shall be issued or sold for cash, the consideration received therefor shall be deemed to be the amount received by the Company therefor. In case any shares of Common Stock, Convertible Securities or Options shall be issued or sold for a consideration other than cash, the amount of the consideration other than cash received by the Company shall be deemed to be the fair value of such consideration as determined by the Board of Directors. In case any shares of Common Stock, Convertible Securities or Options shall be issued in connection with any merger of another entity into the Company, the amount of consideration therefor shall be deemed to be the fair value of the assets of such merged corporation as determined by the Board of Directors after deducting therefrom all cash and other consideration (if any) paid by the Company in connection with such merger.

(D) If the terms of any Convertible Security or Option (excluding Convertible Securities or Options issued in accordance with Section 3(i)(ii) above), the issuance of which resulted in an adjustment to the Conversion Price for any series of Preferred Stock

pursuant to the terms of this Section 3(i), are revised (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms) to provide for either (1) any increase or decrease in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Convertible Security or Option or (2) any increase or decrease in the consideration payable to the Company upon such exercise, conversion or exchange, then, effective upon such increase or decrease becoming effective, the Conversion Price for such series of Preferred Stock computed upon the original issue of such Convertible Security or Option (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Conversion Price as would have been obtained had such revised terms been in effect upon the original date of issuance of such Convertible Security or Option.

Notwithstanding the foregoing, no adjustment pursuant to this paragraph (D) shall have the effect of increasing the Conversion Price for any series of Preferred Stock to an amount which exceeds the lower of (i) the Conversion Price for each such series of Preferred Stock on the original adjustment date, or (ii) the Conversion Price for each such series of Preferred Stock that would have resulted from any issuances of shares of Common Stock without consideration or for a consideration per share less than the Conversion Price in effect immediately prior to such issue or sale between the original adjustment date and such readjustment date.

(E) If the original issuance of any Convertible Security or Option (excluding Convertible Securities or Options which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive securities issued in accordance with Section 3(i)(ii) above), did not result in an adjustment to the Conversion Price for any series of Preferred Stock pursuant to the terms of Section 3(i), either because (1) the consideration per share (determined pursuant to Section 3(i)(iii)(C) above) of the Common Stock was equal to or greater than the Conversion Price then in effect for such series of Preferred Stock, or (2) such Convertible Security was issued before the date of filing of this Amended and Restated Certificate of Incorporation, are revised after the date of filing of this Amended and Restated Certificate of Incorporation (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms) to provide for either (A) any increase or decrease in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Convertible Security or Option or (B) any increase or decrease in the consideration payable to the Company upon such exercise, conversion or exchange, then such Convertible Security or Option, as so amended, and the Common Stock subject thereto (determined in the manner provided in Subsection 3(i)(iii)(A) and (B) above, as applicable) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(j) Certificate of Adjustments. Upon the occurrence of each adjustment of the Conversion Price for any series of Preferred Stock pursuant to this Section 3, the Company at its expense shall promptly compute such adjustment and furnish to each holder of such series of Preferred Stock a certificate setting forth such adjustment and showing in detail the facts upon which such adjustment is based. The Company shall, as promptly as practicable, upon the written request at any time of any holder of Preferred Stock, furnish to such holder a like certificate setting forth (i) any and all adjustments made to the Conversion Price for such series of Preferred Stock since the date of the first issuance of such series of Preferred Stock, (ii) the Conversion Price for such series of Preferred Stock at the time in effect, and (iii) the number of

shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of such series of Preferred Stock.

(k) Notices of Record Date. In the event that the Company shall propose at any time (i) to declare any dividend or distribution; (ii) to effect any reclassification or recapitalization; or (iii) to effect a Liquidation; then, in connection with each such event, the Company shall send to the holders of the Preferred Stock written notice at least 20 days prior to the record date or effective date for such event. The notice shall specify, as the case may be, (i) the record date for such dividend, distribution or right, and the amount and character of such dividend, distribution or right, or (ii) the effective date on which such reclassification, recapitalization or Liquidation is proposed to take place, and the time, if any is to be fixed, as of which the holders of record of Common Stock (or such other stock or securities at the time issuable upon the conversion of the Preferred Stock) shall be entitled to exchange their shares of Common Stock (or such other stock or securities) for securities or other property deliverable upon such reclassification, recapitalization or Liquidation, and the amount per share and character of such exchange applicable to each series of Preferred Stock and the Common Stock. Any notice required by the provisions hereof to be given to a holder of shares of Preferred Stock shall be deemed sent to such holder if deposited in the United States mail, postage prepaid, and addressed to such holder at such holder's address appearing on the books of the Company.

(l) Reservation of Stock Issuable Upon Conversion. The Company shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the 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 Company will take such corporate action as may, in the opinion of its counsel, be necessary (including, without limitation, engaging in reasonable best efforts to obtain the requisite stockholder approval of any amendment to this Amended and Restated Certificate of Incorporation) to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

#### 4. Voting.

(a) 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, including, but not limited to, with respect to any increase or decrease of the authorized shares of 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 the affirmative vote of the holders of a majority of the stock of the Company entitled to vote (voting together as a single class on an as-converted basis).

(b) Preferred Stock. Each holder of shares of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Preferred Stock held by such holder could then be converted. The holders of the Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the bylaws of

the Company. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares of Common Stock into which shares of Preferred Stock held by each holder could be converted), shall be disregarded.

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

5. Amendments and Changes.

(a) Approval by Preferred Stock. Notwithstanding Section 4 above and in addition to any vote otherwise required herein or by law, the approval (by vote or written consent as provided by law) of at least a two-thirds majority of the Preferred Stock then outstanding, voting together as a single, separate class (on an as-converted to Common Stock basis) shall be necessary for effecting or validating the following actions (whether by merger, recapitalization or otherwise):

- (i) any consummation of a Liquidation;
  - (ii) any amendment, alteration, repeal or waiver of any provision of this Amended and Restated Certificate of Incorporation or the bylaws of the Company;
  - (iii) any authorization, creation or issuance of any securities of the Company having rights, preferences or privileges senior to, or *pari passu* with, any of the rights, preferences or privileges of any series of the Preferred Stock;
  - (iv) any increase in the authorized number of shares of Preferred Stock;
  - (v) any redemption or repurchase of shares of the Company's stock or securities, or the payment of any dividend on shares of the Company's stock or securities, prior to redemption, repurchase or the payment of a dividend on any series of the Preferred Stock, except in connection with the repurchase of shares of Common Stock issued to or held by employees, consultants, officers or directors upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, which agreements were approved by the Board of Directors;
  - (vi) the creation of any debt security, other than equipment leases or bank lines of credit, if the Company's aggregate indebtedness would exceed \$100,000; provided that such approval shall not be required if the creation of such debt security has been approved by the Company's Board of Directors;
  - (vii) any change in the authorized number of directors of the Company;
- or
- (viii) the adoption of any stock option or equity compensation plans, other than a plan approved by the Company's Board of Directors.

6. Redemption. The Preferred Stock is not redeemable.

7. Notices. Any notice required by the provisions of this Article FOURTH to be given to the holders of Preferred Stock shall be in writing and shall be deemed given if deposited in the United States mail, postage prepaid, if deposited with a nationally recognized overnight courier, or if personally delivered, and addressed to each holder of record at such holder's address appearing on the books of the Company.

#### **FIFTH**

Subject to any additional vote required by this Amended and Restated Certificate of Incorporation, the Board of Directors shall have the power to adopt, amend and repeal the bylaws of the Company (except insofar as the bylaws of the Company as adopted by action of the stockholders of the Company shall otherwise provide). Any bylaws made by the directors under the powers conferred hereby may be amended or repealed by the directors or by the stockholders, and the powers conferred in this Article FIFTH shall not abrogate the right of the stockholders to adopt, amend and repeal bylaws.

#### **SIXTH**

Election of directors need not be by written ballot unless the bylaws of the Company shall so provide.

#### **SEVENTH**

Subject to the provisions set forth in this Amended and Restated Certificate of Incorporation, the Company reserves the right to amend the provisions in this Amended and Restated Certificate of Incorporation and in any certificate amendatory hereof in the manner now or hereafter prescribed by law and this Amended and Restated Certificate of Incorporation, and all rights conferred on stockholders or others hereunder or thereunder are granted subject to such reservation.

#### **EIGHTH**

A. To the fullest extent permitted by the Delaware General Corporation Law as the same exists or as may hereafter be amended, no director of the Company shall be personally liable to the Company or its stockholders for monetary damages for breach of fiduciary duty as a director. If the Delaware General Corporation Law is amended after the filing of this Amended and Restated Certificate of Incorporation to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Company shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law as so amended.

B. The Company shall indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding whether criminal, civil, administrative or investigative, by reason of the fact that he/she, his/her testator or intestate is or was a director or officer of the Company or any predecessor of the Company or serves or served

at any other enterprise as a director, officer, employee or agent at the request of the Company or any predecessor to the Company to the same extent as permitted by law.

C. The Company may indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding whether criminal, civil, administrative or investigative, by reason of the fact that he/she, his/her testator or intestate is or was an employee or agent of the Company or any predecessor of the Company or serves or served at any other enterprise as a director, officer, employee or agent at the request of the Company or any predecessor to the Company to the same extent as permitted by law.

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

E. The Company may maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Company or another corporation, partnership, joint venture, trust or other enterprise against any such expense, liability or loss, whether or not the Company would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law.