

**SECOND AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION OF
AXIAL BIOTECH, INC.**

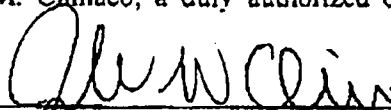
Axial Biotech, Inc., a corporation organized and existing under the laws of the State of Delaware (the "*Corporation*"), certifies that:

A. The name of the Corporation is Axial Biotech, Inc. The Corporation's original Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on November 1, 2002, and the Amended and Restated Certificate of Incorporation was filed on January 28, 2005. The original name of the Corporation was Scolicure, LLC.

B. This Second Amended and Restated Certificate of Incorporation was duly adopted in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware, and restates, integrates and further amends the provisions of the Corporation's Certificate of Incorporation.

C. The text of the Certificate of Incorporation is amended and restated to read as set forth in Exhibit A attached hereto.

IN WITNESS WHEREOF, Axial Biotech, Inc. has caused this Second Amended and Restated Certificate of Incorporation to be signed by John M. Climaco, a duly authorized officer of the Corporation, on March 23 2007.



John M. Climaco
President

EXHIBIT A

ARTICLE I

The name of the Corporation is Axial Biotech, Inc.

ARTICLE II

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

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, 19801. The name of the registered agent at such address is Corporate Service Company.

ARTICLE IV

The total number of shares of stock that this corporation shall have authority to issue is 47,000,000, consisting of 30,000,000 shares of Common Stock, \$0.001 par value per share, which Common Stock shall consist of 27,900,000 shares of voting Common Stock (the "***Voting Common Stock***") and 2,100,000 shares of non-voting Common Stock (the "***Non-Voting Common Stock***") and 17,000,000 shares of Preferred Stock, \$0.001 par value per share, 6,000,000 of which shall be designated "***Series A Preferred Stock***", 6,400,000 of which shall be designated "***Series B-1 Voting Preferred Stock***", 600,000 of which shall be designated "***Series B-1 Non-Voting Preferred Stock***", 2,500,000 of which shall be designated "***Series B-2 Voting Preferred Stock***", and 1,500,000 of which shall be designated "***Series B-2 Non-Voting Preferred Stock***". The Series B-1 Voting Preferred Stock and Series B-1 Non-Voting Preferred Stock shall be referred to collectively as the "***Series B-1 Preferred Stock***"; the Series B-2 Voting Preferred Stock and Series B-2 Non-Voting Preferred Stock shall be referred to collectively as the "***Series B-2 Preferred Stock***"; the Series B-1 Non-Voting Preferred Stock and the Series B-2 Non-Voting Preferred Stock shall be referred to collectively as the "***Series B Non-Voting Preferred Stock***"; and the Series B-1 Preferred Stock and Series B-2 Preferred Stock shall, whether voting or non-voting, be referred to collectively as the "***Series B Preferred Stock***." The rights and preferences of Series B Non-Voting Preferred Stock shall be substantially identical to those of the Series B Voting Stock, except that such shares shall have no voting rights.

ARTICLE V

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

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

(a) "**Change of Control**" shall mean the acquisition of the Corporation by another entity by means of any transaction or series of related transactions to which the Corporation is party (including, without limitation, any stock acquisition, reorganization, merger or consolidation but excluding any sale of stock for capital raising purposes) other than a transaction or series of transactions in which the holders of the voting securities (and/or the holders of the non-voting securities that are convertible into voting securities of the Corporation in accordance herewith) of the Corporation outstanding immediately prior to such transaction continue to retain (either by such voting securities remaining outstanding or by such voting securities or non-voting securities being converted into voting securities of the surviving entity), as a result of shares in the Corporation held by such holders prior to such transaction, at least a majority of the total issued and outstanding securities of the Corporation or such surviving entity outstanding immediately after such transaction or series of transactions.

(b) "**Conversion Price**" shall mean the Original Issue Price for the applicable series of Preferred Stock.

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

(d) "**Corporation**" shall mean Axial Biotech, Inc.

(e) "**Distribution**" shall mean the transfer of cash or other property without consideration whether by way of dividend or otherwise (other than dividends on Common Stock payable in Common Stock) or the purchase or redemption of shares of the Corporation for cash or property other than: (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, and (iii) any other repurchase or redemption of capital stock of the Corporation approved by the Board of Directors, including at least one director elected by the holders of Series A Preferred Stock (each, a "**Series A Director**") and one director elected by the holders of Series B Preferred Stock (each, a "**Series B Director**").

(f) "**Dividend Rate**" shall mean an annual rate of \$0.025165 per share for the Series A Preferred Stock, \$0.05432 per share for the Series B-1 Preferred Stock and \$0.07056 per share for the Series B-2 Preferred Stock (subject, in each case, to adjustment for Recapitalizations as set forth elsewhere herein).

(g) "**Liquidation Preference**" shall mean an amount per share equal to the sum of the Original Issue Price plus any accrued but unpaid dividends for the relevant series of Preferred Stock as further described in Section 2(a) of this Article.

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

(i) "**Original Issue Date**" shall mean with respect to each series of Preferred Stock, the date of the first issuance of any shares of such series of Preferred Stock.

(j) "**Original Issue Price**" shall mean \$0.7190 per share for the Series A Preferred Stock, \$1.552 per share for the Series B-1 Preferred Stock and \$2.016 per share for the Series B-2 Preferred Stock, in each case subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein.

(k) "**Preferred Stock**" shall mean the Series A Preferred Stock, the Series B-1 Preferred Stock and the Series B-2 Preferred Stock, subject to the rights of other series of Preferred Stock which may from time to time come into existence.

(l) "**Qualified IPO**" shall mean a firmly underwritten public offering of Common Stock of the Corporation pursuant to an effective registration statement filed under the Securities Act, covering the offer and sale of Common Stock for the account of the Corporation with a per share public offering price (after deduction of underwriter commissions and expenses) equal to or greater than five times the Original Issue Price for the Series B-1 Preferred Stock and with aggregate offering proceeds to the Corporation of not less than \$25,000,000 after deduction of underwriters commissions and expenses.

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

(n) "**Securities Act**" shall mean the Securities Act of 1933, as amended

2. Dividends.

(a) Series B Preferred Stock. From and after the date of the issuance of any shares of Series B Preferred Stock, in any calendar year, dividends at the Dividend Rate for the Series B Preferred Stock shall accrue (the "**Series B Accruing Dividends**") in preference and priority to any declaration or payment of any Distribution on Series A Preferred Stock or Common Stock in such calendar year. The Series B Accruing Dividends shall accrue from day to day pro rata from the Original Issue Date of such shares of Series B Preferred Stock, whether or not earned or delivered, and shall be cumulative. The Series B Accruing Dividend shall be payable by the Corporation (i) when, as and if declared by the Board of Directors, or (ii) upon a (A) Liquidation Event (so long as such Liquidation Event is not an Affiliated Change of Control), or (B) a Qualified IPO. An "**Affiliated Change of Control**" shall mean a Change of Control in which a party affiliated with Johnson & Johnson Development Corporation or DePuy Corporation merges with or acquires the Corporation or substantially all or substantially all of its assets. Any accrued but unpaid dividends provided for in this Section 2 shall be payable in cash or in Common Stock, as agreed at such time by the Corporation and the holders of a majority of the Series B Preferred Stock, with the number of shares of Common Stock of a holder into which such dividends may be converted being determined by dividing the aggregate amount of the accumulated but unpaid dividend due such holder by the then fair market value of one share of Common Stock. For purposes of this Section 2, the fair market value of one share of Common Stock shall be (x) the initial "price to the public" specified in

the final prospectus with respect to a Qualified IPO; (y) the value received by the holders of Common Stock pursuant to a Change of Control for each share of such securities or (z) in the event that neither (x) nor (y) above have occurred, the fair market value as determined in good faith by the Board of Directors. No Distributions shall be made with respect to the Common Stock until the Accruing Dividends and all declared dividends on the Preferred Stock have been paid or set aside for payment to the holders of Preferred Stock.

(b) Series A Preferred Stock. From and after the date of the issuance of any shares of Series A Preferred Stock, in any calendar year, dividends at the Dividend Rate for the Series A Preferred Stock shall accrue (the "***Series A Accruing Dividends***") in preference and priority to any declaration or payment of any Distribution on Common Stock in such calendar year. The Series A Accruing Dividends shall accrue from day to day pro rata from the Original Issue Date, whether or not earned or delivered, and shall be cumulative. The Series A Accruing Dividend shall be payable by the Corporation (i) when, as and if declared by the Board of Directors, or (ii) upon a (A) Liquidation Event (so long as such Liquidation Event is not an Affiliated Change of Control), or (B) a Qualified IPO. Any accrued but unpaid dividends provided for in this Section 2 shall be payable in cash or in Common Stock, as agreed at such time by the Corporation and the holders of a majority of the Series A Preferred Stock, with the number of shares of Common Stock of a holder into which such dividends may be converted being determined by dividing the aggregate amount of the accumulated but unpaid dividend due such holder by the then fair market value of one share of Common Stock. No Distributions shall be made with respect to the Common Stock until the Accruing Dividends and all declared dividends on the Preferred Stock have been paid or set aside for payment to the holders of Preferred Stock.

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

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

3. Liquidation Rights.

(a) Series B Liquidation Preference. In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary: the holders of Series B Preferred Stock shall be entitled to receive, prior and in preference to any Distribution of any of the assets of the Corporation to the holders of the Series A Preferred Stock or Common Stock solely by reason of their ownership of such stock, an amount per share for each share of Series B Preferred Stock held by them equal to the Liquidation Preference specified for such share of Series B Preferred Stock. If upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation

legally available for distribution to the holders of the Series B Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(a), then the entire assets of the Corporation legally available for distribution shall be distributed with equal priority and pro rata among the holders of the Series B Preferred Stock in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(a).

(b) Series A Liquidation Preference. After the distribution described in Section 3(a) above has been paid in full, prior to and in preference to any distribution of any of the assets of the Corporation to the holders of Common Stock by reason of their ownership thereof, the holders of Series A Preferred Stock shall be entitled to receive an amount per share for each share of Series A Preferred Stock held by them equal to the Liquidation Preference specified for such share of Series A Preferred Stock. If upon the occurrence of such event, the assets of the Corporation legally available for distribution to the holders of the Series A Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(b), then the entire remaining assets of the Corporation legally available for distribution shall be distributed with equal priority and pro rata among the holders of the Series A Preferred Stock in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(b).

(c) Remaining Assets. After the payment to the holders of Preferred Stock of the full preferential amounts specified above, the entire remaining assets of the Corporation legally available for distribution by the Corporation shall be distributed with equal priority and *pro rata* among the holders of the Preferred Stock and Common Stock in proportion to the number of shares of Common Stock held by them, with the shares of Preferred Stock being treated for this purpose as if they had been converted to shares of Common Stock at the then applicable Conversion Rate.

(d) Shares not Treated as Both Preferred Stock and Common Stock in any Distribution. Shares of Preferred Stock shall not be entitled to be converted into shares of Common Stock in order to participate in any Distribution, or series of Distributions, as shares of Common Stock, without first foregoing participation in the Distribution, or series of Distributions, as shares of Preferred Stock.

(e) Reorganization. For purposes of this Section 3, a liquidation, dissolution or winding up of the Corporation shall be deemed to be occasioned by, or to include, (a) a Change of Control; (b) a sale, lease or other conveyance of all or substantially all of the assets of the Corporation; or (c) any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary (collectively, a "**Liquidation Event**").

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

(i) if the securities are then traded on a national securities exchange or the Nasdaq Stock Market (or a similar national quotation system), then the value of the securities shall

be deemed to be the average of the closing prices of the securities on such exchange or system over the 10 trading day period ending 5 trading days prior to the Distribution; and

(ii) if the securities are actively traded over-the-counter, then the value of the securities shall be deemed to be the average of the closing bid prices of the securities over the 10 trading day period ending 5 trading days prior to the Distribution.

In the event of a Change of Control, the Distribution date shall be deemed to be the date such transaction closes.

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

(a) Right to Convert. Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the Preferred Stock, into that number of fully paid, nonassessable shares of Common Stock determined by dividing the Original Issue Price for the relevant series by the Conversion Price for such series. (The number of shares of Common Stock into which each share of Preferred Stock of a series may be converted is hereinafter referred to as the “*Conversion Rate*” for each such series.) Upon any decrease or increase in the Conversion Price for any series of Preferred Stock, as described in this Section 4, the Conversion Rate for such series shall be appropriately increased or decreased. Each share of Series B Voting Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the Preferred Stock, into one fully paid, nonassessable share of Series B Non-Voting Preferred Stock. Each share of Series B Non-Voting Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the Preferred Stock, into one fully paid, nonassessable share of Series B Voting Preferred Stock.

(b) Automatic Conversion. Each share of Preferred Stock shall automatically be converted into fully-paid, non-assessable shares of Common Stock at the then effective Conversion Rate for such share (i) immediately prior to the closing of a Qualified IPO or (ii) as to a series of Preferred Stock of the Corporation, upon the receipt by the Corporation of a written request for such conversion from the holders of a majority of the shares of such series of Preferred Stock then outstanding, or, if later, the effective date for conversion specified in such requests (each of the events referred to in (i) and (ii) are referred to herein as an “*Automatic Conversion Event*”).

(c) Mechanics of Conversion. No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the then fair market value of a share of Common Stock as determined by the Board of Directors. For such purpose, all shares of Preferred Stock held by each holder of Preferred Stock shall be aggregated, and any resulting fractional share of Common Stock shall be paid in cash. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock, and to receive certificates therefor, he shall either (A) surrender the certificate or certificates therefor, duly

endorsed, at the office of the Corporation or of any transfer agent for the Preferred Stock or (B) notify the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and execute an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates, and shall give written notice to the Corporation at such office that he elects to convert the same; *provided, however*, that on the date of an Automatic Conversion Event, the outstanding shares of Preferred Stock shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; *provided further*, however, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion Event unless either the certificates evidencing such shares of Preferred Stock are delivered to the Corporation or its transfer agent as provided above, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. On the date of the occurrence of an Automatic Conversion Event, each holder of record of shares of Preferred Stock shall be deemed to be the holder of record of the Common Stock issuable upon such conversion, notwithstanding that the certificates representing such shares of Preferred Stock shall not have been surrendered at the office of the Corporation, that notice from the Corporation shall not have been received by any holder of record of shares of Preferred Stock, or that the certificates evidencing such shares of Common Stock shall not then be actually delivered to such holder.

The Corporation shall, as soon as practicable after such delivery, or after such agreement and indemnification, issue and deliver at such office to such holder of Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which he shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock, plus any declared and unpaid dividends on the converted Preferred Stock. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date; *provided, however*, that if the conversion is in connection with an underwritten offer of securities registered pursuant to the Securities Act or a merger, sale, financing, or liquidation of the Corporation or other event, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing of such transaction or upon the occurrence of such event, in which case the person(s) entitled to receive the Common Stock issuable upon such conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such transaction or the occurrence of such event.

(d) Adjustments to Conversion Price for Diluting Issues.

(i) Special Definition. For purposes of this Section 4(d), “*New Securities*” shall mean all shares of Common Stock issued (or, pursuant to Section 4(d)(iii), deemed

to be issued) by the Corporation after the filing of this Second Amended and Restated Certificate of Incorporation, other than issuances or deemed issuances of:

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

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

(3) shares of Common Stock issued or issuable to officers, directors and employees of, or consultants to, the Corporation pursuant to stock grants, option plans, purchase plans or other employee stock incentive programs or arrangements approved by the Board of Directors, or upon exercise of Options granted to such parties pursuant to any such plan or arrangement, provided, that such issuances are approved by the Board of Directors, including a Series A Director and a Series B Director;

(4) shares of Common Stock issued or issuable to banks, equipment lessors or other financial institutions pursuant to a debt financing or commercial leasing transaction approved by the Board of Directors, provided, that such issuances are approved by the Board of Directors, including a Series A Director and a Series B Director;

(5) shares of Common Stock issued or issuable pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets or other reorganization or to a joint venture agreement or the entry by the Corporation into partnering or licensing relationships or joint ventures with a non-affiliated third party provided, that such issuances are approved by the Board of Directors, including a Series A Director and a Series B Director; and

(6) shares of Common Stock issued or issuable in connection with any issuance unanimously approved by the Board of Directors.

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

(iii) Deemed Issue of New Securities. In the event that the Corporation at any time or from time to time after the date of the filing of this Second Amended and Restated Certificate of Incorporation shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating

thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of such Convertible Securities, the conversion or exchange of such Convertible Securities or, in the case of Options for Convertible Securities, the exercise of such Options and the conversion or exchange of the underlying securities, shall be deemed to have been issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that in any such case in which shares are deemed to be issued:

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

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

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

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

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

(b) in the case of Options for Convertible Securities, only the Convertible Securities, if any, actually issued upon the exercise thereof were issued at the time of

issue of such Options, and the consideration received by the Corporation for the New Securities deemed to have been then issued was the consideration actually received by the Corporation for the issue of such exercised Options, plus the consideration deemed to have been received by the Corporation (determined pursuant to Section 4(d)(v)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised; and

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

(iv) Adjustment of Conversion Price Upon Issuance of New Securities. In the event this Corporation shall issue New Securities (including New Securities deemed to be issued pursuant to paragraph 4(d)(iii)) without consideration or for a consideration per share less than the applicable Conversion Price of a series of Preferred Stock in effect on the date of and immediately prior to such issue, then, the Conversion Price of the affected series of Preferred Stock shall be reduced, concurrently with such issue, to a price equal to the consideration per share received by the Corporation for such New Securities so issued. Notwithstanding the foregoing, the Conversion Price shall not be reduced at such time if the amount of such reduction would be less than \$0.01, but any such amount shall be carried forward, and a reduction will be made with respect to such amount at the time of, and together with, any subsequent reduction which, together with such amount and any other amounts so carried forward, equal \$0.01 or more in the aggregate.

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

(1) Cash and Property. Such consideration shall:

(a) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with such issuance;

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

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

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

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

(y) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

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

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

(g) Adjustments for Reclassification, Exchange and Substitution. Subject to Section 3 above ("**Liquidation Rights**"), if 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 capital reorganization, reclassification or otherwise (other than a subdivision or combination of shares provided for above), then, in any such event, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive

each holder of such Preferred Stock shall have the right thereafter to convert such shares of Preferred Stock into a number of shares of such other class or classes of stock which a holder of the number of shares of Common Stock deliverable upon conversion of such series of Preferred Stock immediately before that change would have been entitled to receive in such reorganization or reclassification, all subject to further adjustment as provided herein with respect to such other shares.

(h) No Impairment. The Corporation will not through any reorganization, transfer of assets, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of Preferred Stock against impairment. Notwithstanding the foregoing, nothing in this Section 4(h) shall prohibit the Corporation from amending its Certificate of Incorporation with the requisite consent of its stockholders and the board of directors.

(i) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Conversion Price pursuant to this Section 4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price at the time in effect and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of Preferred Stock.

(j) Waiver of Adjustment of Conversion Price. Notwithstanding anything herein to the contrary, any downward adjustment of the Conversion Price of any series of Preferred Stock may be waived by the consent or vote of the holders of the majority of the outstanding shares of such series either before or after the issuance causing the adjustment.

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

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

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

(iii) to voluntarily liquidate or dissolve or to enter into any transaction deemed to be a liquidation, dissolution or winding up of the corporation pursuant to Section 3(e);

then, in connection with each such event, this Corporation shall send to the holders of the Preferred Stock at least 10 days' prior written notice of the date on which a record shall be taken for such Distribution (and specifying the date on which the holders of Common Stock shall be entitled thereto and, if applicable, the amount and character of such Distribution) or for determining rights to vote in respect of the matters referred to in (ii) and (iii) above.

Such written notice shall be given by first class mail (or express courier), postage prepaid, addressed to the holders of Preferred Stock at the address for each such holder as shown on the books of the Corporation and shall be deemed given on the date such notice is mailed.

The notice provisions set forth in this section may be shortened or waived prospectively or retrospectively by the vote or written consent of the holders of a majority of the Preferred Stock.

(l) Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of (i) Voting Common Stock solely for the purpose of effecting the conversion of the shares of the Voting Preferred Stock and the Non-Voting Preferred Stock, such number of its shares of Voting Common Stock as shall from time to time be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock; (ii) Non-Voting Common Stock solely for the purpose of effecting the conversion of the shares of the Non-Voting Preferred Stock or, if converted in accordance with clause (i) hereof, Voting Common Stock, such number of its shares of Non-Voting Common Stock as shall from time to time be sufficient to effect the conversion of all then outstanding shares of the Non-Voting Preferred Stock and the Voting Common Stock. If at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

5. Right to Convert. Each share of Voting Common Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the Common Stock, into one share of fully paid, nonassessable shares of Non-Voting Common Stock, and each share of Non-Voting Common Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the Common Stock, into one share of fully paid, nonassessable shares of Voting Common Stock.

6. Voting.

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

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

(c) Preferred Stock. Each holder of Voting Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares of Voting Preferred Stock held by such holder could be converted as of the record date. The holders of shares of the Voting Preferred Stock shall be entitled to vote on all matters on which the Common Stock shall be entitled to vote. Holders of Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted), shall be disregarded.

(d) Election of Directors.

(i) So long as the holders of the Series B Preferred Stock (including, for the avoidance of doubt, the shares of issued and outstanding Series B Non-Voting Preferred Stock) hold 20% or more of then issued and outstanding shares the Corporation, calculated on a fully diluted, as if converted basis, they, voting as a separate class, shall be entitled to elect two 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. So long as the holders of the Series B Preferred Stock (including, for the avoidance of doubt, the shares of issued and outstanding Series B Non-Voting Preferred Stock) hold less than 20% of then issued and outstanding shares of the Corporation, they, voting as a separate class, shall be entitled to elect one 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.

(ii) So long as the holders of the Series A Preferred Stock hold 20% or more of the combined voting power of the Corporation, they, voting as a separate class, shall be entitled to elect two 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. So long as the holders of the Series A Preferred Stock hold less than 20% of the combined voting power of the Corporation, they, voting as a separate class, shall be entitled to elect one 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.

(iii) The holders of Common Stock, voting as a separate class, shall be entitled to elect two (2) members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors.

(iv) Any additional members of the Corporation's Board of Directors shall be elected by the holders of Common Stock and Preferred Stock, voting together as a single class.

(e) 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 (i) the holders of a majority of the stock of the Corporation and (ii) the holders of a majority of the outstanding shares of the Series B Preferred Stock voting as a single class as further described in Section 7 hereof.

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

7. Redemption.

(a) At any time after the 5th anniversary of the Original Issue Date of the Series B-2 Preferred Stock (or if the issuance of the Series B-2 Preferred Stock does not occur, the Original Issue Date of the Series B-1 Preferred Stock), and at the election of the holders of at least a majority of the then outstanding shares of Series B Preferred Stock, this Corporation shall redeem, out of funds legally available therefor, all (but not less than all) outstanding shares of Preferred Stock which have not been converted into Common Stock pursuant to Section 4 hereof, in three equal annual installments (each a "**Redemption Date**"). The Corporation shall redeem the shares of Series B Preferred Stock and Series A Preferred Stock by paying in cash an amount per share equal to the Original Issue Price for such series of Preferred Stock, plus an amount equal to all accrued but unpaid dividends thereon, whether or not earned (the "**Redemption Price**"). The number of shares of Preferred Stock that the Corporation shall be required under this Section 7 to redeem on any one Redemption Date shall be equal to the amount determined by dividing: (a) the aggregate number of shares of Preferred Stock outstanding immediately prior to the Redemption Date by; (b) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). If the funds legally available for redemption of the Preferred Stock shall be insufficient to permit the payment to such holders of the full respective Redemption Prices, the Corporation shall effect such redemption pro rata among the Preferred Stock so that each holder of Preferred Stock shall receive a redemption payment equal to a fraction of the aggregate amount available for redemption, the numerator of which is the number of shares of Preferred Stock held by such holder with each number multiplied by the Redemption Price of each share of Preferred Stock held by such holder, and the denominator of which is the number of shares of Preferred Stock outstanding multiplied by the Redemption Price of each such outstanding share of Preferred Stock.

(b) Any redemption effected pursuant to Section 7(a) shall be made on a pro rata basis among the holders of the Preferred Stock in proportion to the shares of Preferred Stock then held by them.

(c) At least 15, but no more than 30 days prior to each Redemption Date, written notice shall be mailed, first class postage prepaid, to each holder of record (at the close of business on the business day next preceding the day on which notice is given) of the Preferred Stock to be redeemed, at the address last shown on the records of the Corporation for such holder, notifying such holder of the redemption to be effected, specifying the number of shares to be redeemed from such holder, the Redemption Date, the Redemption Price, the place at which payment may be obtained and calling upon such holder to surrender to the Corporation, in the manner and at the place designated, the holder's certificate or certificates representing the shares to be redeemed (the "**Redemption Notice**"). Except as provided herein, on or after the Redemption Date each holder of Preferred Stock to be redeemed shall surrender to this Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose

name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be cancelled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

(d) From and after the applicable Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of shares of Preferred Stock designated for redemption in the Redemption Notice as holders of Preferred Stock (except the right to receive the Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to the shares designated for redemption on such date, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever. If the funds of the Corporation legally available for redemption of shares of Preferred Stock on any Redemption Date are insufficient to redeem the total number of shares of Preferred Stock 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 of Preferred Stock not redeemed shall remain outstanding and 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 of Preferred Stock such funds will immediately be used to redeem the balance of the shares which the Corporation has become obliged to redeem on any Redemption Date, but which it has not redeemed.

(e) 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 with a bank or trust corporation 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, with irrevocable instructions and authority to the bank or trust corporation to pay the Redemption Price for such shares to their respective holders on or after the Redemption Date upon receipt of notification from the Corporation that such holder has surrendered a share certificate to the Corporation pursuant to Section 7(c) above. As of the Redemption Date, the deposit shall constitute full payment of the shares to their holders, and from and after the Redemption Date the shares so called for redemption shall be redeemed and shall be deemed to be no longer outstanding, and the holders thereof shall cease to be stockholders with respect to such shares and shall have no rights with respect thereto except the right to receive from the bank or trust corporation payment of the Redemption Price of the shares, without interest, upon surrender of their certificates therefor. Such instructions shall also provide that any moneys deposited by the Corporation pursuant to this Section 7(e) for the redemption of shares thereafter converted into shares of the Corporation's Common Stock pursuant to Section 4 hereof prior to the Redemption Date shall be returned to the Corporation forthwith upon such conversion. The balance of any moneys deposited by the Corporation pursuant to this Section 7(e) remaining unclaimed at the expiration of 2 years following the Redemption Date shall thereafter be returned to the Corporation upon its request expressed in a resolution of its Board of Directors.

8. Amendments and Changes. As long as 50% of the maximum number of shares of Series B Preferred Stock ever issued remain outstanding, the Corporation shall not, without first obtaining

the approval (by vote or written consent as provided by law) of the holders of one-third of the outstanding shares of the Series B Voting Preferred Stock, which shall include the holders of a majority of the outstanding shares of the Series B Non-Voting Preferred Stock (so long as such holders of Series B Non-Voting Preferred Stock hold at least one-third of the outstanding shares of the Series B Voting Preferred Stock), each voting as a separate class:

(a) materially and adversely alter or change the rights, preferences or privileges of the Series B Preferred whether by merger, consolidation or otherwise;

(b) voluntarily liquidate or dissolve or enter into any transaction or series of related transactions constituting a Liquidation Event pursuant to Section 3(e) above;

(c) amend, alter or repeal any provision of the Certificate of Incorporation or bylaws of the Corporation (including pursuant to a merger) relative to the Series B Preferred Stock;

(d) authorize or create (by reclassification, merger or otherwise) any new class or series of shares having a preference over, or being on parity with, the Series B Preferred Stock with respect to voting, dividends, redemption, conversion or upon liquidation;

(e) redeem any shares of Common Stock or Preferred Stock (other than as then provided in the Corporation's Certificate of Incorporation or pursuant to restricted stock purchase agreements or employment or service agreements that provide for the Corporation to have a right to repurchase shares (i) at cost upon termination of service or (ii) at any price pursuant to the Corporation's exercise of a right of first refusal or right to purchase such shares upon an involuntary termination);

(f) increase or decrease (other than for decreases resulting from conversion of the Preferred Stock) the authorized number of shares of Series B Preferred Stock or Common Stock;

(g) declare or pay any Distribution on Common Stock or Preferred Stock of the Corporation;

(h) authorize a Change of Control;

(i) increase or decrease the authorized number of directors from seven; or

(j) take any action that results in a transaction with an affiliate of the Corporation (other than transactions that are approved by a majority of the disinterested directors).

As long as 50% of the maximum number of shares of the Preferred Stock ever issued remain outstanding, the Corporation shall not, without first obtaining the approval (by vote or written consent as provided by law) of the holders of a majority of the outstanding shares of the Series A Preferred Stock and Series B Voting Preferred Stock, voting together as single class:

(i) voluntarily liquidate or dissolve or enter into any transaction or series of related transactions constituting a Liquidation Event pursuant to Section 3(e) above;

(ii) authorize a Change of Control; or

(iii) take any action that results in a transaction with an affiliate of the Corporation (other than transactions that are approved by a majority of the disinterested directors).

As long as 50% of the maximum number of shares of Series A Preferred Stock ever issued remain outstanding, the Corporation shall not, without first obtaining the approval (by vote or written consent as provided by law) of the holders of a majority of the outstanding shares of the Series A Preferred Stock materially and adversely alter or change the rights, preferences or privileges of the Series A Preferred.

9. Reissuance of Preferred Stock. In the event that any shares of Preferred Stock shall be converted pursuant to Section 4, redeemed pursuant to Section 7 or otherwise repurchased by the Corporation, the shares so converted, redeemed or repurchased shall be cancelled and shall not be issuable by this Corporation.

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

ARTICLE VI

Elections of directors need not be by written ballot unless a stockholder demands election by written ballot at the meeting and before voting begins or unless the Bylaws of the Corporation shall so provide.

ARTICLE VII

Unless otherwise set forth herein, the number of directors which constitute the Board of Directors of the Corporation shall be designated in the Bylaws of the Corporation.

ARTICLE VIII

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors of the Corporation is expressly authorized to make, alter, amend or repeal the Bylaws of the Corporation.

ARTICLE IX

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

2. The Corporation 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, his testator or intestate is or was a director of the Corporation or any predecessor of the Corporation or serves or served at any other enterprise as a director at the request of the Corporation or any predecessor to the Corporation.

3. The Corporation 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, his testator or intestate is or was an officer or employee of the Corporation or any predecessor of the Corporation or serves or served at any other enterprise as an officer or employee at the request of the Corporation or any predecessor to the Corporation.

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

5. To the maximum extent permitted from time to time under the law of the State of Delaware, the Corporation renounces any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, business opportunities that are from time to time being presented to its officers, directors or stockholders, other than (i) those officers, directors or stockholders who are employees of the Corporation and (ii) those opportunities presented to such officers, directors or stockholders expressly as a result of their activities as a director, officer or stockholder of the Corporation. No amendment or repeal of this provision shall apply to or have any effect on the liability or alleged liability of any officer, director or stockholder of the Corporation for or with respect to any opportunities which such officer, director or stockholder becomes aware prior to such amendment or repeal.

ARTICLE X

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