

**THIRD AMENDED AND RESTATED CERTIFICATE OF INCORPORATION  
OF  
RESHAPE MEDICAL, INC.**

George Wallace hereby certifies that:

**ONE:** The name of this corporation is **RESHAPE MEDICAL, INC.**, and the date of filing of the original Certificate of Incorporation of this corporation with the Secretary of State of Delaware is August 22, 2005, under the name Abdominis, Inc.

**TWO:** The First Amended and Restated Certificate of Incorporation of this corporation was filed with the Secretary of State of Delaware on September 16, 2005. The Second Amended and Restated Certificate of Incorporation of this corporation was filed with the Secretary of State of Delaware on May 1, 2006. A Certificate of Amendment of the Second Amended and Restated Certificate of Incorporation of this corporation was filed with the Secretary of State of Delaware on December 26, 2006.

He is the duly elected and acting President of **RESHAPE MEDICAL, INC.**, a Delaware corporation.

**THREE:** The Second Amended and Restated Certificate of Incorporation of this corporation is hereby amended and restated to read as follows:

**ARTICLE 1**

The name of this corporation is **RESHAPE MEDICAL, INC.** (the "*corporation*").

**ARTICLE 2**

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

**ARTICLE 3**

The purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, as amended from time to time.

**ARTICLE 4**

(a) Authorized Stock. This corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares of capital stock which this corporation has authority to issue is Thirteen Million (13,000,000) shares. Seven Million

Eight Hundred Twelve Thousand Five Hundred (7,812,500) shares shall be designated Common Stock, \$0.0001 par value per share and Five Million One Hundred Eighty Seven Thousand Five Hundred (5,187,500) shares shall be designated Preferred Stock, \$0.0001 par value per share.

(b) **Common Stock.**

**Section 1. General.** The voting, dividend and liquidation rights of the holders of the Common Stock are subject to and qualified by the rights, powers and preferences of the holders of the Preferred Stock set forth herein and as may be designated by resolution of the Board of Directors of the corporation with respect to any series of Preferred Stock as authorized herein.

**Section 2. Dividends.** Dividends may be declared and paid on the Common Stock, from funds lawfully available therefor if, as and when determined by the Board of Directors in their sole discretion, subject to provisions of law, any provision of this Third Amended and Restated Certificate of Incorporation, as amended from time to time, and subject to the relative rights and preferences of any shares of Preferred Stock authorized, issued and outstanding hereunder.

**Section 3. Liquidation.** Upon the dissolution or liquidation of the corporation, whether voluntary or involuntary, holders of Common Stock will be entitled to receive all assets of the Company available for distribution to its stockholders, subject to any preferential joint rights of any Series of Preferred Stock then outstanding.

**Section 4. Voting.** The holders of the Common Stock are entitled to one vote for each share of Common Stock held at all meetings of the corporation's stockholders and written actions in lieu of meetings. There shall be no cumulative voting.

(c) **Rights, Preferences and Restrictions of Series A and Series S Preferred Stock.** The Preferred Stock authorized by this Third Amended and Restated Certificate of Incorporation shall be issued in series. The rights, preferences, privileges and restrictions granted to and imposed on the Series A Preferred Stock, which series shall consist of Four Million Six Hundred Eighty Seven Thousand Five Hundred (4,687,500) shares, and the Series S Preferred Stock, which series shall consist of Five Hundred Thousand (500,000) shares, are as set forth below in this Article 4(c).

**Section 1. Designation and Amount.** The Series A Preferred Stock shall be designated "Series A Convertible Preferred Stock," par value \$0.0001 per share (the "Series A Preferred Stock"), and the number of shares constituting such series shall be Four Million Six Hundred Eighty Seven Thousand Five Hundred (4,687,500). The Series S Preferred Stock shall be designated as "Series S Convertible Preferred Stock," par value \$0.0001 per share (the "Series S Preferred Stock"), and the number of shares constituting such series shall be Five Hundred Thousand (500,000).

**Section 2. Dividend Provisions.** The holders of shares of Series A Preferred Stock and Series S Preferred Stock shall be entitled to receive dividends, out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of this corporation) on the Common Stock of this corporation, at the rate of eight percent (8%) per share of the Original Series A Issue Price, as hereinafter defined, or Original Series S Issue Price, as hereafter defined, respectively, of the Series A Preferred Stock or Series S Preferred Stock, respectively, per annum (as determined on a per annum basis and an as converted basis for the Preferred Stock), payable quarterly when, as and if declared by the Board of Directors. Such dividends shall not be cumulative.

Section 3.      Liquidation Preference.

(a) In the event of any liquidation, dissolution or winding up of this corporation, either voluntary or involuntary, the holders of Series A Preferred Stock and Series S Preferred Stock, on a *pari passu* basis, shall be entitled to receive, prior and in preference to any distribution of any of the assets of this corporation to the holders of Common Stock by reason of their ownership thereof, an amount per share equal to the purchase price originally paid by such holders of Series A Preferred Stock and Series S Preferred Stock for each outstanding share of Series A Preferred Stock and Series S Preferred Stock (as adjusted for any stock dividends, contributions or splits with respect to such shares) (the "Original Series A Issue Price" and "Original Series S Issue Price," respectively), plus all declared but unpaid dividends on such share. If upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A Preferred Stock and Series S Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then, the entire assets and funds of the corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock and Series S Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

(b) Upon the completion of the distribution required by subparagraph (a) of this Section 3 the remaining assets of the corporation available for distribution to stockholders shall be distributed among the holders of the Common Stock of this corporation pro rata based on the number of shares of Common Stock held by each.

(c) (i) For purposes of this Section 3, unless the holders of at least two-thirds of the then outstanding Series A Preferred Stock and Series S Preferred Stock, voting together as a single class on an as-converted basis, elect otherwise, a liquidation, dissolution or winding up of this corporation shall be deemed to be occasioned by, or to include, (A) the acquisition of the corporation by another entity by means of any transaction or series of related transactions (including, without limitation, any reorganization, merger (whether or not the corporation is a surviving entity after the merger, but, excluding any merger effected exclusively for the purpose of changing the domicile of the corporation), consolidation, issuance of capital stock by the corporation or sale of outstanding capital stock of the corporation); (B) a sale or other disposition of all or substantially all of the assets of the corporation; or (C) the disposition by sale, assignment, license or otherwise of all or substantially all of the intellectual property of the corporation (collectively, the events described in (A)-(C) of this Section 3(c)(i) are referred to herein as a "Deemed Liquidation Event"); provided, however, that in no event shall a Deemed Liquidation Event be deemed to have occurred if the corporation's stockholders of record as constituted immediately prior to such acquisition, sale, disposition or license will, immediately after such acquisition, sale, disposition or license (by virtue of securities issued as consideration for the corporation's acquisition, sale, disposition or license or otherwise) hold at least 50% of the voting power of the surviving or acquiring entity.

(ii) If a Deemed Liquidation Event occurs, the holders of Series A Preferred Stock and Series S Preferred Stock shall be entitled to receive the greater of (A) the liquidation amount set forth in subsection 3(a) above, or (B) the amount per share that would be received by the holders of Series A Preferred Stock and Series S Preferred Stock and Common Stock based on the pro rata ownership of shares of Common Stock held by each (assuming conversion of all such Series A Preferred Stock and Series S Preferred Stock).

(iii) If a Deemed Liquidation Event occurs, if the consideration received by the corporation is other than cash, its value will be deemed its fair market value. Any securities shall be valued as follows:

(A) Securities not subject to investment letter or other similar restrictions on free marketability:

(1) 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 over the thirty-day period ending three (3) days prior to the closing;

(2) 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 thirty-day period ending three (3) days prior to the closing; and

(3) If there is no active public market, the value shall be the fair market value thereof, as mutually determined by the corporation and the holders of at least a majority of the voting power of all then outstanding shares of Series A Preferred Stock and Series S Preferred Stock, voting together as a single class on an as-converted basis.

(B) 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 (A) (1), (2) or (3) to reflect the approximate fair market value thereof, as mutually determined by the corporation and the holders of at least a majority of the voting power of all then outstanding shares of Series A Preferred Stock and Series S Preferred Stock, voting together as a single class on an as-converted basis.

(iv) In the event the requirements of this subsection 3(c) are not complied with, this corporation shall forthwith either:

(A) cause such closing to be postponed until such time as the requirements of this Section 3 have been complied with; or

(B) cancel such transaction, in which event the rights, preferences and privileges of the holders of the Series A Preferred Stock and Series S Preferred Stock shall revert to and be the same as such rights, preferences and privileges existing immediately prior to the date of the first notice referred to in subsection 3(c)(v) hereof.

(v) The corporation shall give each holder of record of Series A Preferred Stock and Series S Preferred Stock written notice of such impending transaction not later than twenty (20) days prior to the stockholders' meeting called to approve such transaction, or twenty (20) days prior to the closing of such transaction, whichever is earlier, and shall also notify such holders in writing of the final approval of such transaction. The first of such notices shall describe the material terms and conditions of the impending transaction and the provisions of this Section 3, and the corporation shall thereafter give such holders prompt notice of any material changes. The transaction shall in no event take place sooner than twenty (20) days after the corporation has given the first notice provided for herein or sooner than ten (10) days after the corporation has given notice of any material changes provided for herein; provided, however, that such periods may be shortened upon the written consent of the holders of the Series A Preferred Stock and Series S Preferred Stock that are entitled to such notice rights or similar notice rights and that represent at least a majority of the voting power of all then outstanding shares of Series A Preferred Stock and Series S Preferred Stock, respectively.

Section 4. Redemption.

(a) No Redemption of Series S Preferred Stock. The shares of Series S Preferred Stock shall not be redeemable.

(b) Series A Preferred Stock Redemption. Shares of Series A Preferred Stock shall be redeemed by the corporation out of funds lawfully available therefor at a price equal to the Original Series A Issue Price, plus all declared but unpaid dividends thereon (the "Redemption Price"), in three (3) equal annual installments commencing within twenty (20) business days following receipt by the corporation, at any time on or after the fifth (5<sup>th</sup>) anniversary of the date of filing of this Third Amended and Restated Certificate of Incorporation, from the holders of at least a majority of the then outstanding shares of Series A Preferred Stock, of written notice requesting redemption of all shares of Series A Preferred Stock (the date of each such installment being referred to as a "Redemption Date"). On each Redemption Date, the corporation shall redeem, on a pro rata basis in accordance with the number of shares of Series A Preferred Stock determined by dividing (i) the total number of shares of Series A Preferred Stock outstanding immediately prior to such Redemption Date by (ii) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). If the corporation does not have sufficient funds legally available to redeem on any Redemption Date all shares of Series A Preferred Stock to be redeemed on such Redemption Date, the corporation shall redeem a pro rata portion of each holder's redeemable shares of such Series A Preferred Stock out of funds legally available therefor, based on the respective amounts which would otherwise be payable in respect of the shares to be redeemed if the legally available funds were sufficient to redeem all such shares, and shall redeem the remaining shares to have been redeemed as soon as practicable after the corporation has funds legally available therefor.

(c) Redemption Notice. Written notice of the mandatory redemption (the "Redemption Notice") shall be sent to each holder of record of Series A Preferred Stock not less than ten (10) days prior to each Redemption Date. Each Redemption Notice shall state:

(i) the number of shares of Series A Preferred Stock held by the holder that the corporation shall redeem on the applicable Redemption Date;

(ii) the Redemption Date and the Redemption Price;

(iii) the date upon which the holder's right to convert such shares terminates (which date shall be five (5) days before the applicable Redemption Date); and

(iv) that the holder is to surrender to the corporation, in the manner and at the place designated, his, her or its certificate or certificates representing the shares of Series A Preferred Stock to be redeemed.

(d) Surrender of Certificates; Payment. On or before the applicable Redemption Date, each holder of shares of Series A Preferred Stock to be redeemed on such Redemption Date, unless such holder has exercised his, her or its right to convert such shares as provided in Section 5 below, shall surrender the certificate or certificates representing such shares (or, if such registered holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the corporation to indemnify the corporation against any claim that may be made against the corporation on account of the alleged loss, theft or destruction of such certificate) to the corporation, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price for such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof. In the event less than all of the shares of Series A Preferred Stock

represented by a certificate are redeemed, a new certificate representing the unredeemed shares of Series A Preferred Stock shall promptly be issued to such holder.

(e) Rights Subsequent to Redemption. If the Redemption Notice shall have been duly given, and if on the applicable Redemption Date the Redemption Price payable upon redemption of the shares of Series A Preferred Stock to be redeemed on such Redemption Date is paid or tendered for payment or deposited with an independent payment agent so as to be available therefor, then notwithstanding that the certificates evidencing any of the shares of Series A Preferred Stock so called for redemption shall not have been surrendered, dividends with respect to such shares of Series A Preferred Stock shall cease to accrue after such Redemption Date and all rights with respect to such shares shall forthwith after the Redemption Date terminate, except only the right of the holders to receive the Redemption Price without interest upon surrender of their certificate or certificates therefor.

Section 5. Conversion. The holders of the Series A Preferred Stock and Series S Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert. Each share of Series A Preferred Stock and Series S 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 this corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Original Series A Issue Price or the Original Series S Issue Price, as applicable, by the Conversion Price applicable to the Series A Preferred Stock or Series S Preferred Stock, as the case may be, determined as hereafter provided, in effect on the date the certificate is surrendered for conversion. The initial Conversion Price per share for shares of Series A Preferred Stock shall be the Original Series A Issue Price and the initial Conversion Price per share for the shares of Series S Preferred Stock shall be the Original Series S Issue Price; provided, however, that the Conversion Price for the Series A Preferred Stock and Series S Preferred Stock shall be subject to adjustment as set forth in subsection 5(d).

(b) Automatic Conversion. Each share of Series A Preferred Stock and Series S Preferred Stock shall automatically be converted into shares of Common Stock at the Conversion Price at the time in effect for such Series A Preferred Stock and Series S Preferred Stock, as applicable, immediately upon, except as provided below in subsection 5(c), (i) the corporation's sale of its Common Stock in a firm commitment underwritten public offering pursuant to a registration statement on Form S-1 or SB-2 under the Securities Act of 1933, as amended, the public offering price of which was not less than \$4.80 per share (as adjusted for any stock dividends, contributions or splits with respect to such shares) and results in aggregate proceeds to the corporation of at least \$30 million, or (ii) upon the consent of not less than a majority of the holders of the Series A Preferred Stock and Series S Preferred Stock, voting together as a single class, on an as-converted basis.

(c) Mechanics of Conversion. Before any holder of Series A Preferred Stock or Series S Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of this corporation or of any transfer agent for the Series A Preferred Stock or Series S Preferred Stock, as applicable, and shall give written notice to this corporation at its principal corporate office, of the election to convert the same and shall state therein the name or names in which the certificate or certificates for shares of Common Stock are to be issued. This corporation shall, as soon as practicable thereafter, issue and deliver to such holder of Series A Preferred Stock or Series S Preferred Stock, as appropriate, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Series A Preferred Stock or Series S 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 as of such date. If the conversion is in connection with an underwritten offering of securities registered pursuant to the Securities Act of 1933, the conversion may, at the option of any holder tendering Series A Preferred Stock or Series S Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock upon conversion of the Series A Preferred Stock or Series S Preferred Stock, as applicable, shall not be deemed to have converted such Series A Preferred Stock or Series S Preferred Stock until immediately prior to the closing of such sale of securities.

(d) Conversion Price Adjustments of Series A Preferred Stock and Series S Preferred Stock Upon Certain Events and for Certain Dilutive Issuances, Splits and Combinations. The Conversion Price of the Series A Preferred Stock and the Series S Preferred Stock shall be subject to adjustment from time to time as follows:

(i) (A) If the corporation shall issue, after the date upon which this Third Amended and Restated Certificate of Incorporation is filed ("Effective Date"), any Additional Stock (as defined below) without consideration or for a consideration per share less than the Conversion Price for such series in effect immediately prior to the issuance of such Additional Stock, the Conversion Price for such series in effect immediately prior to each such issuance shall forthwith (except as otherwise provided in this clause (i)) be adjusted to a price (calculated to the nearest cent) determined by multiplying such Conversion Price by a fraction, the numerator of which shall be the amount calculated in clause (x) below and the denominator of which shall be the amount calculated in clause (y) below as follows:

(x) the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the corporation for the total number of shares of Additional Stock so issued would purchase at such Conversion Price in effect immediately prior to such issuance, and

(y) the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such shares of Additional Stock so issued.

For the purpose of the above calculation, the number of shares of Common Stock outstanding immediately prior to such issue shall be calculated on a fully diluted basis, as if all shares of Series A Preferred Stock and Series S Preferred Stock and all securities directly or indirectly convertible into or exchangeable for Common Stock had been fully converted into shares of Common Stock immediately prior to such issuance and any issued and outstanding warrants, options or other rights for the purchase of shares of stock or convertible securities had been fully exercised immediately prior to such issuance (and the resulting securities fully converted into shares of Common Stock, if so convertible) as of such date, but not including in such calculation any additional shares of Common Stock issuable with respect to shares of Series A Preferred Stock, Series S Preferred Stock, convertible securities, or outstanding options, warrants or other rights for the purchase of shares of stock or convertible securities, solely as a result of the adjustment of the respective Conversion Price (or other conversion ratios) resulting from the issuance of the Additional Stock causing the adjustment in question;

(B) No adjustment of the Conversion Price for the Series A Preferred Stock and Series S Preferred Stock shall be made in an amount less than one cent per share, provided that any adjustments which are not required to be made by reason of this sentence shall be carried forward and shall be either taken into account in any subsequent adjustment made prior to 3 years from the date of the

event giving rise to the adjustment being carried forward, or shall be made at the end of 3 years from the date of the event giving rise to the adjustment being carried forward. Except to the limited extent provided for in subsections (E)(3) and (E)(4), no adjustment of such Conversion Price pursuant to this subsection 5(d)(i) shall have the effect of increasing the Conversion Price above the Conversion Price in effect immediately prior to such adjustment.

(C) In the case of the issuance of Common Stock for cash, the consideration for such issuance shall be deemed to be the amount of cash paid therefor before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by this corporation for any underwriting or otherwise in connection with the issuance and sale thereof.

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

(E) In the case of the issuance (whether before, on or after the first date the Series A Preferred Stock or Series S Preferred Stock, respectively, was issued and sold or the "Purchase Date") of options to purchase or rights to subscribe for Common Stock, securities by their terms convertible into or exchangeable for Common Stock or options to purchase or rights to subscribe for such convertible or exchangeable securities, the following provisions shall apply for all purposes of this subsection 5(d)(i) and subsection 5(d)(ii):

(1) The aggregate maximum number of shares of Common Stock deliverable upon exercise of such options to purchase or rights to subscribe for Common Stock shall be deemed to have been issued at the time such options or rights were issued and for a consideration equal to the consideration (determined in the manner provided in subsections 5(d)(i)(C) and 5(d)(i)(D)), if any, received by the corporation upon the issuance of such options or rights plus the minimum exercise price provided in such options or rights for the Common Stock covered thereby.

(2) The aggregate maximum number of shares of Common Stock deliverable upon conversion of or in exchange for any such convertible or exchangeable securities or upon the exercise of options to purchase or rights to subscribe for such convertible or exchangeable securities and subsequent conversion or exchange thereof shall be deemed to have been issued at the time such securities were issued or such options or rights were issued and for a consideration equal to the consideration, if any, received by the corporation for any such securities and related options or rights (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by the corporation upon the conversion or exchange of such securities or the exercise of any related options or rights (the consideration in each case to be determined in the manner provided in subsections 5(d)(i)(C) and 5(d)(i)(D)).

(3) In the event of any change in the number of shares of Common Stock deliverable or in the consideration payable to this corporation upon exercise of such options or rights or upon conversion of or in exchange for such convertible or exchangeable securities, including, but not limited to, a change resulting from the antidilution provisions thereof (except for changes resulting from the application of this Section 5 to the Conversion Price of the Series A Preferred Stock or Series S Preferred Stock, as applicable), the Conversion Price of the Series A Preferred Stock and



the Series S Preferred Stock, as applicable, to the extent in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Common Stock or any payment of such consideration upon the exercise of any such options or rights or the conversion or exchange of such securities.

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

(5) The number of shares of Common Stock deemed issued and the consideration deemed paid therefor pursuant to subsections 5(d)(i)(E)(1) and (2) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either subsection 5(d)(i)(E)(3) or (4).

(ii) "Additional Stock" shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to subsection 5(d)(i)(E)) by this corporation after the Purchase Date other than:

(A) Common Stock issued pursuant to a transaction described in subsection 5(d)(iii) hereof, and

(B) Up to 1,000,000 Shares of Common Stock issuable pursuant to the exercise of stock options granted or restricted stock purchases offered under a stock incentive plan approved by the stockholders and Board of Directors (including by each of the Series A Director and Series S Director).

(iii) In the event the corporation should at any time or from time to time after the Purchase Date fix a record date for the effectuation of a split or subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock (hereinafter referred to as "Common Stock Equivalents") without payment of any consideration by such holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date (or the date of such dividend distribution, split or subdivision if no record date is fixed), the Conversion Price of the Series A Preferred Stock and Series S Preferred Stock, as applicable, shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase of the aggregate number of shares of Common Stock outstanding (after taking account of such increase in shares issuable upon conversion of the Series A Preferred Stock and Series S Preferred Stock) and those issuable with respect to such Common Stock Equivalents with the number of shares issuable with respect to Common Stock Equivalents determined from time to time in the manner provided for deemed issuances in subsection 5(d)(i)(E).

(iv) If the number of shares of Common Stock outstanding at any time after the Purchase Date is decreased by a combination of the outstanding shares of Common Stock, then, following the record date of such combination, the Conversion Price for the Series A Preferred Stock and Series S Preferred Stock, as applicable, shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in outstanding shares.

(e) Other Distributions. In the event this corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by this corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in subsection 5(d)(iv), then, in each such case for the purpose of this subsection 5(e), the holders of Series A Preferred Stock and Series S Preferred Stock shall be entitled to a proportionate share of any such distribution as though they were the holders of the number of shares of Common Stock of the corporation into which their shares of Series A Preferred Stock and Series S Preferred Stock, respectively, are convertible as of the record date fixed for the determination of the holders of Common Stock of the corporation entitled to receive such distribution.

(f) Recapitalizations. If at any time or from time to time there shall be a recapitalization of the Common Stock (other than a subdivision, combination or merger or sale of assets transaction provided for elsewhere in this Section 5 or Section 3) provision shall be made so that the holders of the Series A Preferred Stock and Series S Preferred Stock shall thereafter be entitled to receive upon conversion of the Series A Preferred Stock or Series S Preferred Stock, as applicable, the number of shares of stock or other securities or property of this corporation or otherwise, to which a holder of Common Stock deliverable upon conversion would have been entitled on such recapitalization. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 5 with respect to the rights of the holders of the Series A Preferred Stock and Series S Preferred Stock after the recapitalization to the end that the provisions of this Section 5 (including adjustment of the Conversion Price then in effect and the number of shares purchasable upon conversion of the Series A Preferred Stock and Series S Preferred Stock, respectively) shall be applicable after that event as nearly equivalent as may be practicable.

(g) No Impairment. This corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by this corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 5 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Series A Preferred Stock and Series S Preferred Stock against impairment.

(h) No Fractional Shares and Certificate as to Adjustments.

(i) No fractional shares shall be issued upon the conversion of any share or shares of the Series A Preferred Stock or Series S Preferred Stock, and the number of shares of Common Stock to be issued shall be rounded to the nearest whole share. Whether or not fractional shares are issuable upon such conversion shall be determined on the basis of the total number of shares of Series A Preferred Stock or Series S Preferred Stock, as applicable, the holder is at the time converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion.

(ii) Upon the occurrence of each adjustment or readjustment of the Conversion Price of Series A Preferred Stock or Series S Preferred Stock pursuant to this Section 5, this corporation, at its expense, shall promptly compute such adjustment or readjustment in accordance with

the terms hereof and prepare and furnish to each holder of Series A Preferred Stock or Series S Preferred Stock, as applicable, a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. This corporation shall, upon the written request at any time of any holder of Series A Preferred Stock or Series S Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (a) such adjustment and readjustment, (b) the Conversion Price for such series of Series A Preferred Stock or Series S Preferred Stock, as applicable, at the time in effect, and (c) 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 a share of Series A Preferred Stock or Series S Preferred Stock, as applicable.

(i) Notices of Record Date. In the event of any taking by this corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property, or to receive any other right, this corporation shall mail to each holder of Series A Preferred Stock and Series S Preferred Stock, at least 10 days prior to the date specified therein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right.

(j) Reservation of Stock Issuable Upon Conversion. This corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series A Preferred Stock and Series S Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Preferred Stock and Series S 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 Series A Preferred Stock and Series S Preferred Stock, in addition to such other remedies as shall be available to the holder of such Series A Preferred Stock and Series S Preferred Stock, this 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 purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to the Certificate of Incorporation of this corporation.

(k) Notices. Any notice required by the provisions of this Section 5 to be given to the holders of shares of Series A Preferred Stock and Series S Preferred Stock shall be deemed given five (5) business days after being deposited in the United States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of this corporation.

Section 6.      Voting Rights.

(a) Subject to Section 6(b), the holder of each share of Series A Preferred Stock and Series S Preferred Stock shall have the right to one vote for each share of Common Stock into which such Series A Preferred Stock or Series S Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any stockholders' meeting in accordance with the bylaws of this corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote. Fractional votes shall not, however, be permitted and any fractional voting rights available on an as-converted basis (after aggregating all shares into which shares of Series A Preferred Stock and Series S Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

(b) The total number of Directors on the Company's Board of Directors shall be five (5). The holders of record of the Series A Preferred Stock, voting as a separate class, shall be entitled to elect one (1) Director of this corporation (the "Series A Director"), the holders of record of the Series S Preferred Stock, voting as a separate class, shall be entitled to elect one (1) Director of this corporation (the "Series S Director"), the holders of record of the Common Stock, voting as a separate class, shall be entitled to elect two (2) Directors of this corporation until the date which falls on the nine (9) month anniversary of the date on which a Chief Executive Officer who is not affiliated with the holders of a majority of the Common Stock outstanding on such date is duly appointed, then the holders of record of Common Stock, voting as a separate class, shall be entitled to elect one (1) director of this corporation (the "Common Director" or "Common Directors", as appropriate), and the remaining member of the Board of Directors shall be the Chief Executive Officer of this corporation (the "CEO Director"), if any, provided, that at any time at which there is no duly authorized Chief Executive Officer of the Company the total number of Directors on the Company's Board of Directors shall be four (4).

In the case of any vacancy (other than a vacancy caused by removal) in the office of director occurring among the directors elected by the holders of a class or series of stock pursuant to this Section 6(b), the remaining directors so elected by that class or series may by affirmative vote of a majority thereof (or the remaining director so elected if there be but one, or if there are no such directors remaining, by the affirmative vote of the holders of a majority of the shares of that class or series), elect a successor or successors to hold office for the unexpired term of the director or directors whose place or places shall be vacant. Any director who shall have been elected by the holders of a class or series of stock or by any directors so elected as provided in the immediately preceding sentence hereof may be removed during the aforesaid term of office, either with or without cause, by and only by, the affirmative vote of the holders of the shares of such class or series of stock entitled to elect such director or directors, given either at a special meeting of such stockholders duly called for such purpose or pursuant to written consent of stockholders, and any vacancy thereby created may be filled by the holders of that class or series of stock represented at the meeting or pursuant to written consent of such holders. Any amendment to this Section 6(b) shall require the affirmative vote of the holders of the shares of at least a majority of each class or series of stock entitled to elect directors hereunder.

Section 7.      Protective Provisions.

(a) So long as at least ten percent (10%) of the number of shares of Series A Preferred Stock authorized in this Third Amended and Restated Certificate of Incorporation, or at least ten percent (10%) of the number of shares of Series S Preferred Stock authorized in this Third Amended and Restated Certificate of Incorporation are outstanding, this corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least a two-thirds majority

of the then-outstanding shares of Series A Preferred Stock and Series S Preferred Stock (voting together as a single class on an as-converted basis):

(i) except as set forth in Section 4, redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purpose) any share or shares of Preferred Stock or Common Stock; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for this corporation or any subsidiary pursuant to agreements under which this corporation has the option to repurchase such shares at the original cost thereof upon the occurrence of certain events, including, but not limited to, the termination of employment;

(ii) sell, convey, or otherwise dispose of or encumber all or substantially all of its assets, property or business or merge into or consolidate with any other corporation (other than a wholly-owned subsidiary corporation) or effect any transaction or series of related transactions in which more than fifty percent (50%) of the voting power of this corporation is disposed of;

(iii) voluntarily liquidate, dissolve, or wind-up this corporation;

(iv) enter into any amendment hereto that increases or decreases the authorized number of shares of Preferred Stock or Common Stock or that creates any new series or class of Preferred Stock having rights, preferences, or privileges senior or *pari passu* to the Series A Preferred Stock or Series S Preferred Stock;

(v) amend or waives any provision of the bylaws of the corporation or the certificate of incorporation in a manner that adversely affects holders of the Series A Preferred Stock or Series S Preferred Stock (including but not limited to any amendment that would amend the bylaws to be inconsistent with any provision of this Third Amended and Restated Certificate of Incorporation);

(vi) increase or decrease the authorized size of the Board of Directors of the corporation; or

(vii) declare or pay any dividend on any shares of Common Stock or Preferred Stock.

(b) So long as any shares of Series A Preferred are outstanding, this corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least a two-thirds majority of the then-outstanding shares of Series A Preferred Stock voting as a separate class, alter or change the rights, preferences or privileges of the shares of the Series A Preferred Stock so as to affect adversely the shares.

(c) So long as any shares of Series S Preferred are outstanding, this corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least a two-thirds majority of the then-outstanding shares of Series S Preferred Stock voting as a separate class, alter or change the rights, preferences or privileges of the shares of the Series S Preferred Stock so as to affect adversely the shares.

(d) So long as any shares of Series A Preferred Stock are outstanding, this corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least a majority of the then-outstanding shares of Series A Preferred Stock:

- (i) assume any debt in excess of \$250,000; or
- (ii) guarantee any debt or other obligations of any other entity.

Section 8. Status of Redeemed or Converted Stock. In the event any shares of Series A Preferred Stock or Series S Preferred Stock shall be redeemed or converted pursuant to Sections 4 or 5 hereof, respectively, the shares so redeemed or converted shall be cancelled and shall not be issuable by the corporation. The Certificate of Incorporation of this corporation shall be appropriately amended to effect the corresponding reduction in the corporation's authorized capital stock.

Section 9. Fractional Shares. Series A Preferred Stock and Series S Preferred Stock, as applicable, may be issued in fractions of a share which shall entitle the holder, in proportion to such holder's fractional shares, to exercise voting rights, receive dividends, participate in distributions and to have the benefit of all other rights of holders of Series A Preferred Stock and Series S Preferred Stock, as applicable.

## ARTICLE 5

(a) The business and affairs of the corporation shall be managed by or under the direction of the Board of Directors and elections of directors need not be by written ballot unless otherwise provided in the Bylaws. The number of directors of the corporation shall be fixed from time to time by the Board of Directors either by a resolution or Bylaw adopted by the affirmative vote of a majority of the entire Board of Directors.

(b) Meetings of the 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 Delaware Statutes) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or by the Bylaws of the corporation.

## ARTICLE 6

A director of this corporation shall not be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that this provision shall not eliminate or limit the liability of a director (i) for any breach of his duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, (iii) under Section 174 of the General Corporation Law of the State of Delaware, or (iv) for any transaction from which the director derives an improper personal benefit. If the General Corporation Law of the State of Delaware is hereafter amended to authorize corporate action further limiting or eliminating the personal liability of directors, then the liability of the directors of the corporation shall be limited or eliminated to the fullest extent permitted by the General Corporation Law of the State of Delaware, as so amended from time to time. Any repeal or modification of this Article 6 by the stockholders of the corporation shall be prospective only, and shall not adversely affect any limitation on the personal liability of a director of the corporation existing at the time of such repeal or modification.

## ARTICLE 7

The Board of Directors of the corporation shall have the power to make, alter, amend, change, add to or repeal the Bylaws of the corporation, subject to Section 6(a)(v) and (vi) of Article 4 hereof.

\* \* \* \*

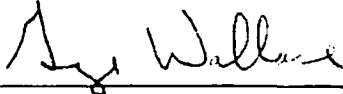
**FOUR:** This Third Amended and Restated Certificate of Incorporation has been duly approved by the Board of Directors of this corporation.

**FIVE:** This Third Amended and Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Section 228, 242 and 245 of the General Corporation Law of the State of Delaware by the Board of Directors and the stockholders of the corporation. The total number of outstanding shares entitled to vote or act by written consent was One Million Six Hundred Twenty Five Thousand (1,625,000) shares of Common Stock, Five Hundred Thousand (500,000) shares of Series S Preferred Stock and Two Million Eight Hundred Twelve Thousand Five Hundred (2,812,500) shares of Series A Preferred Stock. A majority of the outstanding shares of Common Stock and a two-thirds majority of the outstanding shares of Series S Preferred Stock and Series A Preferred Stock, voting together as a single class, approved this Third Amended and Restated Certificate of Incorporation by written consent in accordance with Section 228 of the General Corporation Law of the State of Delaware and written notice was given by the corporation in accordance with said Section 228.

*[Remainder of this Page Intentionally Left Blank]*

IN WITNESS WHEREOF, RESHAPE MEDICAL, INC. , has caused this Third Amended and Restated Certificate of Incorporation to be signed by the President in Newport Beach, California, this 14th day of August, 2007.

RESHAPE MEDICAL, INC.

By:   
George Wallace, President