

2465094

FILED JMS
the office of the Secretary of State
of the State of California

SEP 09 2005

**FIFTH AMENDED AND RESTATED
ARTICLES OF INCORPORATION
OF AUCTIONDROP, INC.**

George E. Northup and James M. Keshland hereby certify that:

1. They are the duly elected President and Assistant Secretary, respectively, of AuctionDrop, Inc., a California corporation.
2. The Fourth Amended and Restated Articles of Incorporation of the Corporation shall be amended and restated to read in full as follows:

ARTICLE I

The name of the corporation is AuctionDrop, Inc. (the "*Corporation*").

ARTICLE II

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.

ARTICLE III

The Corporation is authorized to issue two classes of stock, designated "*Common Stock*" and "*Preferred Stock*." The total number of shares of Common Stock that the Corporation is authorized to issue is 275,000,000 shares, \$0.001 par value per share. The total number of shares of Preferred Stock that the Corporation is authorized to issue is 165,000,000 shares, \$0.001 par value per share.

The Preferred Stock may be issued from time to time in one or more series. The first series of Preferred Stock shall be comprised of 40,000,000 shares and shall be designated "*Series A Preferred Stock*." The second series of Preferred Stock shall be comprised of 22,000,000 shares and shall be designated "*Series A-1 Preferred Stock*." The third series of Preferred Stock shall be comprised of 65,500,000 shares and shall be designated "*Series B Preferred Stock*." The fourth series of Preferred Stock shall be comprised of 37,500,000 shares and shall be designated "*Series C Preferred Stock*." As used herein, the term "*Preferred Stock*" without designation shall refer to shares of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock, collectively.

A. Preferred Stock. The relative rights, preferences, privileges and restrictions granted to or imposed upon the Preferred Stock are as follows:

1. **Dividends.** The holders of the then outstanding Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors, out of assets legally available therefor, prior and in preference to any declaration or payment of any dividend on the Common Stock (payable other than in Common Stock or other securities or rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock), dividends at the rate of eight percent (8%) of the Original Series A Price (as defined in Article III, Paragraph A, Section 2(b)) per share per annum, eight percent (8%) of the Original Series A-1 Price (as defined in Article III, Paragraph A, Section 2(b)) per share per annum, and 7.999% of the Original Series B Price (as defined in Article III, Paragraph A, Section 2(b)) per share per annum, and eight percent (8%) of the Original Series C Price (as defined in Article III, Paragraph A, Section 2(a)) per share per annum, respectively, each as adjusted for any stock splits, reverse stock splits, stock dividends, and similar recapitalization events (each a "**Recapitalization Event**"). No dividends shall be paid on any share of Common Stock unless a dividend (including the amount of any dividends paid pursuant to the above provisions of this Section 1) is paid with respect to all outstanding shares of Preferred Stock in an amount for each such share of Preferred Stock equal to or greater than the aggregate amount of such dividends for all shares of Common Stock into which each such share of Preferred Stock could then be converted. The right to dividends on shares of Preferred Stock shall not be cumulative, and no right shall accrue to holders of Preferred Stock by reason of the fact that dividends on said shares are not declared in any period, nor shall any undeclared or unpaid dividend bear or accrue interest.

2. **Liquidation Preference.** In the event of any Liquidation Event subject to the rights of any series of Preferred Stock that may from time to time come into existence, the assets and funds of the Corporation available for distribution to shareholders shall be distributed as follows:

(a) First, the holders of shares of Series C Preferred Stock then outstanding shall be entitled to receive, out of the assets of the Corporation available for distribution to its shareholders, before any payment shall be made in respect of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Common Stock, an amount equal to three (3) times the Original Series C Price per share of Series C Preferred Stock, plus all declared and unpaid dividends on the Series C Preferred Stock to the date fixed for such distribution. The Original Series C Price is \$0.1826, as adjusted for any Recapitalization Events. If, upon the occurrence of any Liquidation Event, the assets of the Corporation available for distribution to its shareholders are insufficient to permit the payment to the holders of Series C Preferred Stock of the foregoing full preferential amount, then the entire assets of the Corporation available for distribution to its shareholders shall be distributed to the holders of the Series C Preferred Stock ratably in proportion to the full preferential amount which they would be entitled to receive pursuant to the preceding sentence of this Article III, Paragraph A, Section 2(a).

(b) After the full preferential amount due the holders of Series C Preferred Stock pursuant to Article III, Paragraph A, Section 2(a) has been paid or set aside, the holders of shares of Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock then outstanding shall be entitled to receive, out of the assets of the Corporation available for distribution to its shareholders, before any payment shall be made in respect of the Common

Recapitalization Events (the "**Original Series A Price**"), (ii) \$0.1826 per share of Series A-1 Preferred Stock, as adjusted for any Recapitalization Events (the "**Original Series A-1 Price**"), and (iii) \$0.1826 per share of Series B Preferred Stock, as adjusted for any Recapitalization Events (the "**Original Series B Price**"), plus all declared and unpaid dividends on the Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock, respectively, to the date fixed for such distribution. If, upon the occurrence of any Liquidation Event, the remaining assets of the Corporation available for distribution to its shareholders are insufficient to permit the payment to the holders of Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock of the foregoing full preferential amounts, then the entire remaining assets of the Corporation available for distribution to its shareholders shall be distributed to the holders of the Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock ratably in proportion to the full preferential amounts which they would be entitled to receive pursuant to the preceding sentence of this Article III, Paragraph A, Section 2(b).

(c) After the full preferential amounts due the holders of Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock pursuant to Article III, Paragraph A, Section 2(b) have been paid or set aside, the remaining assets of the Corporation available for distribution to its shareholders, if any, shall be distributed to the holders of Common Stock and Preferred Stock ratably in proportion to the number of shares of Common Stock then held, or issuable upon conversion of the shares of Preferred Stock then held, by each holder.

(d) Each of the following events shall be deemed to be a "**Liquidation Event**" as that term is used in this Fifth Amended and Restated Articles of Incorporation: (i) the liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, (ii) a merger or consolidation of the Corporation into or with another entity after which the shareholders of the Corporation immediately prior to such transaction do not own, immediately following the consummation of the transaction by virtue of their shares in the Corporation or securities received in exchange for such shares in connection with the transaction, more than fifty percent (50%) of the voting power of the surviving entity, (iii) the sale or transfer by the Corporation or its shareholders of more than fifty percent (50%) of the voting power of the Corporation in a transaction or series of related transactions, and (iv) the sale, lease, transfer or other disposition (but not including a transfer or disposition by pledge or mortgage to a bona fide lender) of all or substantially all of the assets of the Corporation (each of the transactions described in subsections (ii), (iii) and (iv) of this definition of Liquidation Event shall be known as a "**Change in Control Liquidation Event**"). Notwithstanding the foregoing, neither (A) a merger effected exclusively for the purpose of changing the domicile of the Corporation nor (B) the sale of shares of Preferred Stock of the Corporation in a transaction or series of related transactions effected primarily for equity financing purposes, shall be deemed a Liquidation Event.

(e) In the event of any Liquidation Event of the Corporation involving the distribution of assets other than cash to the shareholders of the Corporation, the value of the assets to be distributed shall be determined as follows:

(i) In the case of securities that are not subject to investment letter or other similar restrictions on free tradability,

(A) if traded on a national securities exchange or through the Nasdaq National Market, the value shall be deemed to be the average of the closing prices of the securities over the ten (10) day period ending three (3) days prior to the closing;

(B) if actively traded over-the-counter, the value shall be deemed to be the average of (i) the average of the last bid and ask prices or (ii) the closing sale prices (whichever is applicable) over the thirty (30) day period ending three (3) days prior to the closing; and

(C) if there is no active public market, the value shall be the fair market value thereof, as determined in good faith by the Board of Directors.

(ii) In the case of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a shareholder's status as an affiliate or former affiliate), the value shall be based on an appropriate discount from the market value determined as above in Section 2(d)(i) to reflect the approximate fair market value thereof, as determined in good faith by the Board of Directors.

(iii) In the case of any other property, the value shall be equal to the property's fair market value, as determined in good faith by the Board of Directors.

(f) **Consent to Certain Repurchases.** Each holder of shares of Preferred Stock shall be deemed to have consented, for purposes of Sections 502 and 503 of the General Corporation Law of California, to any distribution made by the Corporation in connection with the repurchase of shares of Common Stock issued to or held by employees, officers, directors, consultants or other service providers (i) upon termination of their employment or services, (ii) in connection with other repurchases from employees at the then deemed fair market value of the Common Stock, if approved by the Board of Directors, or (iii) in connection with the exercise by the Corporation of contractual rights of first refusal or first offer pursuant to agreements providing for the right of said repurchase between the Corporation and such persons, provided the terms of such repurchase shall have been approved by the Board of Directors.

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

(a) **Right to Convert.** Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for the Preferred Stock, into a number of fully paid and nonassessable shares of Common Stock equal to the Original Series A Price, in the case of the Series A Preferred Stock, the Original Series A-1 Price, in the case of the Series A-1 Preferred Stock, the Original Series B Price, in the case of the Series B Preferred Stock, or the Original Series C Price, in the case of the Series C Preferred Stock, divided by the Series A Conversion Price (as defined below), in the case of the Series A Preferred Stock, the Series A-1 Conversion Price (as defined below), in the case of the Series A-1 Preferred Stock, the Series B Conversion Price (as defined below), in the case of the Series B Preferred Stock, or the Series C Conversion Price (as defined below), in the case of the Series C Preferred Stock, each in effect at the time of conversion (each, a "**Conversion Rate**"). The conversion price for the Series A Preferred Stock

shall initially be \$0.0989 (the "**Series A Conversion Price**"), the conversion price for the Series A-1 Preferred Stock shall initially be \$0.1826 (the "**Series A-1 Conversion Price**"), the conversion price for the Series B Preferred Stock shall initially be \$0.1826 (the "**Series B Conversion Price**"), and the conversion price for the Series C Preferred Stock shall initially be \$0.1826 (the "**Series C Conversion Price**"). The Series A Conversion Price, Series A-1 Conversion Price, Series B Conversion Price and Series C Conversion Price (each a "**Conversion Price**," and together the "**Conversion Prices**") shall be subject to adjustment as provided in Section 3(d) below.

(b) **Automatic Conversion.** Each share of Preferred Stock shall automatically be converted into fully paid and nonassessable shares of Common Stock, at the then effective applicable Conversion Rate, upon (i) the vote or written consent of at least a majority of the voting power represented by the then outstanding shares of Preferred Stock or (ii) the closing of a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock at an offering price of not less than \$0.5478 per share, as adjusted for any Recapitalization Event, with aggregate gross proceeds to the Corporation (prior to underwriters' commissions and expenses) of not less than \$25,000,000 (a "**Qualified IPO**").

(c) **Mechanics of Conversion.** Before any holder of Preferred Stock shall be entitled to convert the same into shares of Common Stock, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the headquarters of the Corporation or of any transfer agent for the Corporation and shall give written notice to the Corporation at such office that the holder elects 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 (except that no such written notice of election to convert shall be necessary in the event of an automatic conversion pursuant to Section 3(b) hereof). The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Preferred Stock, 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 Preferred Stock to be converted (except that, in the case of an automatic conversion upon an initial public offering pursuant to Section 3(b), such conversion shall be deemed to have been made immediately prior to the closing of the offering) 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. Upon the occurrence of either of the events specified in Section 3(b) above, the outstanding shares of Preferred Stock shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; *provided, however*, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion 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 against any loss incurred by it in connection with such certificates.

(d) Adjustments to Conversion Price for Dilutive Issuances.

(i) Special Definitions. For purposes of this Article III, Paragraph A, Section 3(d), the following definitions shall apply:

(A) "Original Issue Date" shall mean the date on which shares of the Series C Preferred Stock are first issued by the Corporation.

(B) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Article III, Paragraph A, Section 3(d)(ii) below, deemed to be issued) by the Corporation after the Original Issue Date, other than:

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

(2) up to 21,264,404 shares of Common Stock (as adjusted for any Recapitalization Events) issued or issuable to officers, directors or employees of, or consultants to, the Corporation pursuant to any stock option plan or agreement or other employee stock incentive program or agreement approved by the Board of Directors; *provided, however, that such number shall be increased by the number of shares of Common Stock (i) as approved by at least eighty five percent (85%) of the Board of Directors, (ii) not issued pursuant to the rights, agreements, options or warrants (the "Unexercised Options") as a result of the termination or cancellation of such Unexercised Options, and (iii) reacquired by the Corporation from employees, directors or consultants at cost (or the lesser of cost or fair market value) pursuant to agreements which permit the Corporation to repurchase such shares upon termination of services to the Corporation (in the case of (i), (ii) or (iii), the "Increased Option Reserve"), and the shares of Common Stock representing the Increased Option Reserve shall also be excluded from the definition of Additional Shares of Common Stock;*

(3) shares issued or issuable to landlords, equipment lessors, lenders or other financial institutions in a commercial transaction or arrangement approved by the Board of Directors;

(4) shares issued upon exercise or conversion of any warrants and options that are outstanding as of the date of this Fifth Amended and Restated Articles of Incorporation;

(5) shares issued in connection with the acquisition by the Corporation of voting control or all or substantially all of the assets of another business entity in a transaction approved by the Board of Directors;

(6) shares issued in connection with the Qualified IPO;

(7) shares for which an adjustment is made pursuant to Article III, Paragraph A, Section 3(d)(v).

(8) shares issued in connection with a strategic investment and/or acquisition of technology or intellectual property in transactions that are approved by at least eighty five percent (85%) of the Board of Directors;

(9) Convertible Securities (as defined below) and warrants issued in connection with that certain Secured Note and Warrant Purchase Agreement, dated as of May 3, 2004, as such may be amended from time to time (the "**Note Purchase Agreement**"), and shares issued upon conversion and/or exercise of the Convertible Securities and warrants issued pursuant to the Note Purchase Agreement;

(10) shares issued upon approval (by vote or written consent) of the holders of at least a majority of the outstanding shares of Preferred Stock voting as a single class on an as-converted basis; or

(11) shares issued by way of dividend or other distribution on shares of Common Stock excluded from the definition of Additional Shares of Common Stock by the foregoing clauses (1) through (10).

(C) "**Options**" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities (as defined below).

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

(ii) **Deemed Issue of Additional Shares of Common Stock.** In the event the Corporation at any time or from time to time after the Original Issue Date 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 following provisions shall apply:

(A) 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 upon the conversion or exchange of such Convertible Securities shall be deemed to be Additional Shares of Common Stock issued as of the time of the issuance of such Option or Convertible Security or, in case such a record date shall have been fixed, as of the close of business on such record date.

(B) Except as provided in paragraphs (C) and (D) below, no further adjustment in the applicable Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities.

(C) 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

effect had the Initial Dilutive Issuance and each Subsequent Dilutive Issuance all occurred on the closing date of the Initial Dilutive Issuance.

(iv) **Determination of Consideration.** For purposes of this Article III, Paragraph A, Section 3(d), the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(A) **Cash and Property.** Such consideration shall:

(1) 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 the issuance and sale thereof;

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

(3) in the event Additional Shares of Common Stock are issued together with other securities or other assets of the Corporation for consideration that covers both, be the proportion of such consideration so received, computed as provided in clauses (1) and (2) above, as determined in good faith by the Board of Directors.

(B) **Options and Convertible Securities.** The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Article III, Paragraph A, Section 3(d) relating to Options and Convertible Securities shall be equal to:

(x) the total amount, if any, received or receivable by the Corporation as consideration for the issuance of such Options or Convertible Securities, plus the maximum 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, divided 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.

(v) **Other Adjustments to Conversion Price.**

(A) **Subdivisions, Combinations or Consolidations of Common Stock.** In the event the outstanding shares of Common Stock shall be subdivided, combined or consolidated, by stock split, reverse stock split or similar event, into a greater or lesser number of shares of Common Stock after the Original Issue Date, the Conversion Prices in

effect immediately prior to such subdivision, combination or consolidation shall, concurrently with the effectiveness of such subdivision, combination or consolidation, be proportionately adjusted.

(B) Common Stock Dividends and Distributions. If, after the Original Issue Date, the Corporation at any time or from time to time issues, or fixes a record date for determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, then in each such event, as of the time of such issuance or, in the event such record date is fixed, as of the close of business on such record date, the Conversion Prices that are then in effect shall be decreased by multiplying each Conversion Price then in effect by a fraction, (x) the numerator of which is the number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and (y) the denominator of which is the number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, that if such record date is fixed and such dividend or distribution is not paid in full on the date fixed therefor, each Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter each Conversion Price shall be adjusted pursuant to this Article III, Paragraph A, Section 3(d)(v)(B) to reflect the actual payment of such dividend or distribution.

(C) Other Distributions. In case the Corporation shall distribute to holders of its Common Stock shares of its capital stock (other than shares of Common Stock and other than as otherwise subject to adjustment pursuant to this Section 3(d)), stock or other securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (excluding cash dividends) or options or rights (excluding options to purchase and rights to subscribe for Common Stock or other securities of the Corporation convertible into or exchangeable for Common Stock), or shall fix a record date for determination of holders of Common Stock entitled to receive such a distribution, then, in each such case, provision shall be made so that the holders of Preferred Stock shall be entitled to receive, upon conversion thereof, in addition to the number of shares of Common Stock receivable thereupon, the amount of securities of the Corporation that they would have received had their Preferred Stock been converted into Common Stock on the date of, but prior to, such event (or on the record date with respect thereto, if such record date is fixed) and had they thereafter, during the period from the date of such event to and including the date of conversion, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Article III, Paragraph A, Section 3 with respect to the rights of the holders of Preferred Stock.

(D) Recapitalizations and Reorganizations. In the case of any capital recapitalization or reorganization (other than a subdivision, combination or other recapitalization provided for elsewhere in this Article III, Paragraph A, Section 3 or a Liquidation Event provided for in this Article III, Paragraph A, Section 2), or the fixing of any record date for determination of holders of Common Stock affected by such recapitalization or reorganization, provision shall be made so that the holders of Preferred Stock shall be entitled to receive, upon conversion thereof, the number of shares of stock or other securities or property of the Corporation or otherwise that they would have received had their Preferred Stock been

converted into Common Stock on the date of, but prior to, such event (or on the record date with respect thereto, if such record date is fixed) and had they thereafter, during the period from the date of such event to and including the date of conversion, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Article III, Paragraph A, Section 3 with respect to the rights of the holders of Preferred Stock.

(e) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of each of the Conversion Prices pursuant to this Section 3, 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 including the consideration received for any Additional Shares of Common Stock issued. 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 applicable Conversion Price at the time in effect, and (iii) the number of shares of Common Stock and the type and amount, if any, of other property which at the time would be received upon the conversion of such shares of Preferred Stock.

(f) Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of shares of Preferred Stock. In lieu of any fractional shares to which the holder of Preferred Stock would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the fair market value of one share of Common Stock as determined in good faith by the Board of Directors. The number of whole shares issuable to each holder of Preferred Stock upon such conversion shall be determined on the basis of the number of shares of Common Stock issuable upon conversion of the total number of shares of Preferred Stock being converted into Common Stock by such holder at that time.

(g) Notices of Record Date. In the event (i) the Corporation shall take a record of the holders of its capital stock for the purpose of entitling them to receive a dividend or other distribution (other than a cash dividend) or to subscribe for or purchase any shares of stock of any class or to receive any other rights, (ii) of any capital reorganization, reclassification or recapitalization (other than a subdivision or combination of its outstanding shares of Common Stock), or (iii) of any Liquidation Event, then, and in any such case, the Corporation shall cause to be mailed to each holder of record of the Preferred Stock at the address of record of such shareholder as set forth on the Corporation's books, at least ten (10) days prior to the earliest date hereinafter specified, a notice stating the material terms of the proposed transaction and the date on which (x) a record is to be taken for the purpose of such dividend, distribution or rights or (y) such reorganization, reclassification, recapitalization or Liquidation Event is to take place and the date, if any is to be fixed, as of which holders of capital stock of record shall be entitled to exchange their shares of capital stock for securities or other property deliverable upon such reorganization, reclassification, recapitalization, or Liquidation Event; provided, however, that such notice period may be shortened upon the written consent of the holders of at least a majority of the voting power of all then outstanding shares of Preferred Stock. If any material change in the facts set forth in the written notice shall occur, the Corporation shall promptly give written notice of such material change to each holder of Preferred Stock.

(h) No Impairment. Without obtaining such consent of the holders of Preferred Stock as may be required under Section 6, the Corporation will not, by amendment of its Articles of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 3 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.

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

(j) Waiver of Adjustment to Conversion Prices. Notwithstanding anything herein to the contrary, any downward adjustment of the Series A Conversion Price, Series A-1 Conversion Price, Series B Conversion Price or Series C Conversion Price required by this Article III, Paragraph A, Section 3 may be waived, either prospectively or retroactively, in a particular instance, by the written consent or vote of the holders of a majority of the outstanding shares of Series A Preferred Stock in the case of any downward adjustment of the Series A Conversion Price, the holders of a majority of the outstanding shares of Series A-1 Preferred Stock in the case of any downward adjustment of the Series A-1 Conversion Price, the holders of a majority of the outstanding shares of Series B Preferred Stock in the case of any downward adjustment of the Series B Conversion Price and the holders of a majority of the outstanding shares of Series C Preferred Stock in the case of any downward adjustment of the Series C Conversion Price. Any such waiver shall bind all future holders of shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock, as the case may be.

4. Redemption.

(a) Redemption Date and Price. Subject to the rights of any series of Preferred Stock that may from time to time come into existence, at any time after five (5) years from the Original Issue Date, but within ninety (90) days after receipt by the Corporation of a written request from the holders of not less than a majority of the then outstanding shares of the Preferred Stock that all or a specified percentage of such holders' shares of Preferred Stock be redeemed, the Corporation shall, to the extent it may lawfully do so, redeem the shares specified in such request in three (3) annual installments in accordance with the procedures set forth in this Section 4 by paying in cash therefor a sum per share equal to (i) \$0.0989 per share of Series A Preferred Stock (as adjusted for any Recapitalization Events), (ii) \$0.1826 per share of Series A-1 Preferred Stock (as adjusted for any Recapitalization Events), (iii) \$0.1826 per share of Series

B Preferred Stock (as adjusted for any Recapitalization Events) and (iv) \$0.1826 per share of Series C Preferred Stock (as adjusted for any Recapitalization Events), plus all declared or accumulated but unpaid dividends on such shares (the "**Redemption Price**"). The date fixed for redemption of each installment is referred to herein as a "**Redemption Date**." The number of shares of Preferred Stock that the Corporation shall be required to redeem on any Redemption Date shall be equal to (i) the aggregate number of shares of Preferred Stock outstanding immediately prior to such Redemption Date, divided by (ii) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). Any redemption of less than all of the outstanding Preferred Stock pursuant to this Section 4 shall be made pro rata among the holders of the Preferred Stock in proportion to the number of shares of Preferred Stock then held by each such holder.

(b) **Procedure.** Subject to the rights of any series of Preferred Stock that may from time to time come into existence, at least fifteen (15) but no more than thirty (30) days prior to each Redemption Date, written notice shall be mailed, first class postage prepaid, to each holder of record (at the close of business on the business day next preceding the day on which notice is given) of the Preferred Stock to be redeemed, at the address last shown on the records of the Corporation for such holder, notifying the holder of the redemption to be effected, specifying the number of shares to be redeemed from such holder, the Redemption Date, the applicable Redemption Price and 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, such holder's certificate or certificates representing the shares to be redeemed (the "**Redemption Notice**"). Except as provided in Section 4(c), on or after each Redemption Date, each holder of shares of Preferred Stock to be redeemed shall surrender to the Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the applicable Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be cancelled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

(c) **Effect of Redemption: Insufficient Funds.** From and after each Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of shares of Preferred Stock designated for redemption in the Redemption Notice relating to such Redemption Date (except the right to receive the applicable Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever. Subject to the rights of any series of Preferred Stock which may from time to time come into existence, if the funds of the Corporation legally available for redemption 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 shall be used to redeem the maximum possible number of such shares of the Preferred Stock ratably among the holders of such shares of Preferred Stock to be redeemed based upon the total Redemption Price applicable to their shares of Preferred Stock which are subject to redemption on such Redemption Date. The shares of Preferred Stock not redeemed shall remain outstanding and entitled to all the rights and preferences provided herein. Subject to the rights of any series of Preferred Stock that may from time to time come into

existence, 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.

5. Voting Rights.

(a) **General.** Each holder of Preferred Stock shall be entitled to a number of votes equal to the number of whole shares of Common Stock into which such holder's shares of Preferred Stock could then be converted and, except as otherwise required by law or as set forth herein, shall have voting rights and powers equal to the voting rights and powers of the Common Stock. Each holder of Preferred Stock shall be entitled to notice of any shareholders' meeting in accordance with the bylaws of the Corporation and shall be entitled to vote with the holders of Common Stock with respect to any matter upon which holders of Common Stock have the right to vote, except as otherwise provided herein or those matters required by law to be submitted to a class vote.

(b) **Election of Directors.** At each election of directors of the Corporation, (i) the holders of Preferred Stock, voting as a separate class, shall be entitled to elect two (2) directors, (ii) the holders of Common Stock, voting as a separate class, shall be entitled to elect one (1) director and (iii) the holders of Preferred Stock and Common Stock, voting together as a single class on an as-converted basis, shall be entitled to elect the remaining directors of the Corporation, if any. In the case of any vacancy (other than a vacancy caused by removal) in the office of a director occurring among the directors elected by the holders of a class or series of stock pursuant to this Section 5(b), the vote or written consent of the holders of the shares of that class or series in accordance with applicable law may elect a successor or successors to hold office for the unexpired term of the director or directors whose place or places shall be vacant.

6. **Protective Provisions.** Subject to the rights of any series of Preferred Stock that may from time to time come into existence, so long as any shares of Preferred Stock are outstanding, the Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of a majority of the voting power represented by the then outstanding shares of Preferred Stock:

(a) modify the rights, preferences, privileges or restrictions of the Preferred Stock whether directly or by merger, recapitalization or similar event;

(b) increase or decrease the total number of authorized shares of Common Stock or Preferred Stock;

(c) authorize or issue, or obligate itself to issue, or create (by reclassification or otherwise) any other equity security having a preference over, or on a parity with, the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series B Preferred Stock or the Series C Preferred Stock with respect to dividends, liquidation, redemption or voting;

(d) redeem, purchase or otherwise acquire, or take any action that results in the redemption or repurchase of, any shares of Common Stock or Preferred Stock other than in connection with (i) the repurchase of Common Stock at the original purchase price from

employees, officers, directors, consultants or other service providers pursuant to agreements providing for such repurchase upon termination of employment, (ii) the exercise of a contractual right of first refusal entitling the Corporation to purchase such shares upon substantially the same terms offered by a third party, provided that the purchase is approved by the Board of Directors, or (iii) the redemption of the Preferred Stock pursuant to Section 4:

- (e) consummate a Liquidation Event;
- (f) amend the Articles of Incorporation or bylaws of the Corporation in a manner that affects the Preferred Stock;
- (g) change the authorized number of directors of the Corporation;
- (h) declare or pay or take any action that results in the declaration or payment of any dividend on the Common Stock, other than a dividend payable solely in shares of Common Stock; or
- (i) incur indebtedness in excess of \$100,000.

7. **Status of Converted or Redeemed Stock.** In the event any shares of Preferred Stock shall be converted or redeemed pursuant to Section 3 or Section 4 hereof, or otherwise acquired by the Corporation, the shares so converted or redeemed shall be canceled and shall not be issuable by the Corporation, and the Articles of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

B. Common Stock. The rights, preferences, privileges and restrictions granted to and imposed upon the Common Stock are as follows:

1. **Dividends.** Subject to the prior rights of holders of all classes of stock at the time outstanding having prior rights as to dividends as set forth in Article III, Paragraph A, Section 1 hereof, the holders of Common Stock shall be entitled to receive, when, if and as declared by the Board of Directors, out of any assets of this Corporation legally available therefor, such dividends as may be declared from time to time by the Board of Directors.

2. **Liquidation.** Upon a Liquidation Event, the assets of this Corporation shall be distributed as provided in Article III, Paragraph A, Section 2 hereof.

3. **Redemption.** The Common Stock shall not be redeemable at the option of the holder.

4. **Voting Rights.** Each holder of Common Stock shall have the right to one vote for each share of Common Stock held by such holder, and shall be entitled to notice of any shareholders' meeting in accordance with the bylaws of this Corporation, and shall be entitled to vote with the holders of Preferred Stock with respect to any matter upon which holders of Preferred Stock have the right to vote, except as otherwise provided herein or by law.

ARTICLE IV

The liability of the directors of this Corporation for monetary damages shall be eliminated to the fullest extent permissible under California law. Any repeal or modification of this Article IV, or the adoption of any provision of the Articles of Incorporation inconsistent with this Article IV, shall only be prospective and shall not adversely affect the rights under this Article IV in effect at the time of the alleged occurrence of any action or omission to act giving rise to liability.

ARTICLE V

This Corporation is authorized to provide indemnification of agents (as defined in Section 317 of the General Corporation Law of California) through bylaw provisions, agreements with agents, vote of shareholders or disinterested directors, or otherwise, in excess of the indemnification otherwise permitted by Section 317 of the General Corporation Law of California, subject only to the applicable limits on indemnification set forth in Section 204 of the General Corporation Law of California with respect to actions for breach of duty to the Corporation or its shareholders. Any repeal or modification of this Article V, or the adoption of any provision of the Articles of Incorporation inconsistent with this Article V, shall only be prospective and shall not adversely affect the rights under this Article V in effect at the time of the alleged occurrence of any action or omission to act giving rise to indemnification.

* * *

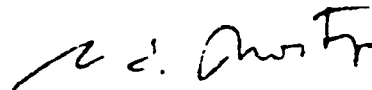
3. The foregoing amendment and restatement of the Fourth Amended and Restated Articles of Incorporation has been duly adopted by the Board of Directors.

4. The foregoing amendment and restatement of the Fourth Amended and Restated Articles of Incorporation has been duly approved by the required vote of the shareholders of the Corporation in accordance with Sections 902 and 903 of the General Corporation Law of California. The total number of outstanding shares of the Corporation entitled to vote with respect to the foregoing amendment and restatement of the Fourth Amended and Restated Articles of Incorporation was 17,955,142 shares of Common Stock, 39,278,058 shares of Series A Preferred Stock, 21,905,804 shares of Series A-1 Preferred Stock and 57,566,173 shares of Series B Preferred Stock. The number of shares voting in favor of the amendment and restatement equaled or exceeded the vote required, such required vote being a majority of the total number of outstanding shares of Common Stock, a majority of the total number of outstanding shares of Series B Preferred Stock, a majority of the total number of outstanding shares of Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock, voting together as a single class and on an as-converted basis, and a majority of the total number of outstanding shares of Common Stock, Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock, voting together as a single class and on an as-converted basis.

[signature page to follow]

The undersigned further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of their own knowledge.

IN WITNESS WHEREOF, the undersigned have executed this certificate in San Carlos, California, this 9th day of September, 2005.



George E. Northup, President

James M. Koshland, Assistant Secretary

The undersigned further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of their own knowledge.

IN WITNESS WHEREOF, the undersigned have executed this certificate in San Carlos, California, this 9th day of September, 2005.

George E. Northup, President

A handwritten signature in dark ink, appearing to read "James M. Koshland", is written over a horizontal line.

James M. Koshland, Assistant Secretary