

**AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
ACUFOCUS, INC.**

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

1. The name of the Corporation is AcuFocus, Inc.
2. The Corporation was originally incorporated and the original Certificate of Incorporation of the Corporation was filed with the Secretary of the State of Delaware on November 8, 2001 under the name AcuFocus, Inc.
3. This Amended and Restated Certificate of Incorporation was duly adopted in accordance with the provisions of Sections 141(f), 242, 245 and 228 of the General Corporation Law of the State of Delaware by the written consent of the Corporation's Board of Directors and its stockholders. This Amended and Restated Certificate of Incorporation restates, integrates, amends and supersedes the provisions of the Amended and Restated Certificate of Incorporation of the Corporation previously filed with the Secretary of State of the State of Delaware on January 3, 2007.
4. The text of the Amended and Restated Certificate of Incorporation is hereby amended and restated to read in its entirety as follows:

FIRST: The name of the corporation (the "Corporation") is AcuFocus, Inc.

SECOND: The address of the Corporation's registered office in the State of Delaware is: 160 Greentree Drive, Suite 101, Dover, Delaware 19904, County of Kent. The registered agent in charge thereof is National Registered Agents, Inc.

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

FOURTH: The total number of shares of all classes of stock which the Corporation shall have authority to issue is Sixty-Six Million Three Hundred Ninety Thousand One Hundred Sixty-Two (66,390,162) shares, of which: (i) Forty-One Million Seven Hundred Thousand (41,700,000) shall be designated shares of common stock, \$0.0001 par value per share (the "Common Stock"), and (ii) Twenty Four Million Six Hundred Ninety Thousand One Hundred Sixty-Two (24,690,162) shall be designated shares of preferred stock, \$0.0001 par value per share (the "Preferred Stock"). Of the shares designated Preferred Stock, Two Million Four Hundred Sixty-Six Thousand Six Hundred Sixty-Seven (2,466,667) shares of Preferred Stock shall be designated "Series A Convertible Preferred Stock" (the "Series A Preferred Stock"), Seven Million Nine Hundred Sixty-Eight Thousand Four Hundred Forty-Six (7,968,446) shares of Preferred Stock shall be designated "Series B Convertible Preferred Stock" (the "Series B Preferred Stock"), Seven Hundred Twenty-Four Thousand Six Hundred Thirty-Eight (724,638) shares of Preferred Stock shall be designated "Series B-1 Convertible Preferred Stock" (the "Series B-1 Preferred Stock"), Eight Million Nine Hundred Sixty-Nine Thousand Three Hundred Forty-One (8,969,341) shares of Preferred Stock shall be designated "Series C Convertible

Preferred Stock" (the "Series C Preferred Stock"), Two Million Four Hundred Fifty Thousand (2,450,000) shares of Preferred Stock shall be designated "Series D Convertible Preferred Stock" (the "Series D Preferred Stock"), One Million One Hundred Eleven Thousand Seventy (1,111,070) shares of Preferred Stock shall be designated "Series E Convertible Preferred Stock" (the "Series E Preferred Stock") and One Million (1,000,000) shares of Preferred Stock shall be designated "Series F Convertible Preferred Stock" (the "Series F Preferred Stock").

The following is a statement of the designations and the powers, privileges and rights, and the qualifications, limitations or restrictions thereof in respect of each class of capital stock of the Corporation.

A. COMMON STOCK.

1. General. The voting, dividend and liquidation rights of the holders of the Common Stock are subject to and qualified by the rights of the holders of the Preferred Stock as may be designated by the Board of Directors upon any issuance of the Preferred Stock of any series.

2. Voting. The holders of the Common Stock are entitled to one vote for each share of Common Stock held at all meetings of stockholders (and actions by written consent of the stockholders in lieu of meetings) with respect to any and all matters presented to the stockholders of the Corporation for their action or consideration. There shall be no cumulative voting.

3. Number of Shares. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the Corporation entitled to vote, irrespective of the provisions of Section 242(b)(2) of the General Corporation Law of Delaware.

4. 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 and subject to any preferential dividend rights of any then outstanding Preferred Stock.

5. Liquidation. Upon the liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary (a "Liquidation Event"), the holders of Common Stock will be entitled to receive all assets of the Corporation available for distribution to its stockholders, subject to any preferential rights of any then outstanding Preferred Stock.

B. PREFERRED STOCK.

1. Dividends. The holders of the Preferred Stock shall be entitled to receive, in preference to the holders of the Junior Stock (as defined in Section B.2(a) below), out of funds legally available therefor, if, as and when declared by the Corporation's Board of Directors, cash dividends annually at a rate equal to the greater of (i) eight percent (8%) per annum multiplied by the original purchase price per share paid to the Corporation by the initial holder of such share, and (ii) the dividends payable on the Common Stock into which such shares of Preferred Stock would have been converted, had such shares of Preferred Stock been converted into shares of Common Stock on the record date for the dividend (the "Dividend Rate"). Such dividends shall not be cumulative. Unless all declared dividends on the Preferred Stock shall have been

paid or a sum sufficient for the payment thereof set apart, no dividend shall be paid or declared, and no distribution shall be made, on any Junior Stock and no redemption of any Junior Stock shall occur. Except as otherwise provided herein, if at any time the Corporation pays less than the total amount of dividends then declared but unpaid with respect to the Preferred Stock, such payment shall be distributed ratably among the holders of Preferred Stock in proportion to the payment each such holder would receive if the full amount of such dividend were paid. Upon any conversion of shares of Preferred Stock, all rights to such preferential dividends (whether or not declared) on such shares shall terminate.

The original purchase price per share for each series of Preferred Stock for the purpose of calculating dividends, and for all other purposes of this Amended and Restated Certificate of Incorporation, is as follows (with all per share figures subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization affecting such shares): \$0.75 per share for the Series A Preferred Stock (the "Series A Original Purchase Price"), \$1.175 per share for the Series B Preferred Stock (the "Series B Original Purchase Price"), \$1.38 per share for the Series B-1 Preferred Stock (the "Series B-1 Original Purchase Price"), \$3.066 per share for the Series C Preferred Stock (the "Series C Original Purchase Price"), \$7.3469 per share for the Series D Preferred Stock (the "Series D Original Purchase Price"), \$5.4002 per share for the Series E Preferred Stock (the "Series E Original Purchase Price") and a price per share for the Series F Preferred Stock equal to the Series F Share Price (the "Series F Original Purchase Price"), as such amount is calculated pursuant to the Securities Purchase Agreement dated December 29, 2006 between the Company and the original purchaser of Series D Preferred Stock (as amended from time to time, the "Securities Purchase Agreement").

The "Series D/E Average Price" is the weighted average of the Series D Original Purchase Price and the Series E Original Purchase Price calculated using the following formula (rounded to the nearest hundredth of a cent): $(D \times Y) + (E \times Z) / D + E$, where D equals the number of outstanding shares of Series D Preferred Stock, Y equals the Series D Original Purchase Price, E equals the number of outstanding shares of Series E Preferred Stock, and Z equals the Series E Original Purchase Price. As of the date hereof, the Series D/E Average Price is \$6.7395. Such figure is subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization affecting the shares of Series D Preferred Stock and/or the Series E Preferred Stock.

The "Series D/E/F Average Price" is the weighted average of the Series D Original Purchase Price, the Series E Original Purchase Price and the Series F Original Purchase Price calculated using the following formula (rounded to the nearest hundredth of a cent): $(D \times X) + (E \times Y) + (F \times Z) / D + E + F$, where D equals the number of outstanding shares of Series D Preferred Stock, X equals the Series D Original Purchase Price, E equals the number of outstanding shares of Series E Preferred Stock, Y equals the Series E Original Purchase Price, F equals the number of outstanding shares of Series F Preferred Stock, and Z equals the Series F Original Purchase Price.

2. Distributions to Preferred Stockholders upon a Liquidation Event that is Not a Series D Acquisition.

This Section B.2. governs distributions to holders of Preferred Stock of the Corporation in the event of a Liquidation Event other than a "Series D Acquisition." A "Series D

Acquisition” is defined as the acquisition of all or substantially all of the outstanding stock of the Corporation, whether by stock purchase, merger, asset purchase or otherwise, by the original purchaser of Series D Preferred Stock or its designee (the “Series D Holder”), pursuant to the terms of the Agreement and Plan of Merger, dated as of December 29, 2006, by and among the Series D Holder, a wholly-owned subsidiary of the Series D Holder, the Corporation and the members of the Stockholder Representative Committee referenced therein (as amended from time to time, the “Merger Agreement”), or a Stock Purchase Agreement (the “Stock Purchase Agreement”) entered into pursuant to the Option and Voting Agreement, dated as of December 29, 2006, by and among the Series D Holder, the Corporation, the other holders of the Common Stock and Preferred Stock named therein, and the members of the Stockholder Representative Committee referenced therein (as amended from time to time, the “Option Agreement”).

(a) In the event of a Liquidation Event that is not a Series D Acquisition, the holders of shares of Preferred Stock then outstanding shall be entitled to be paid out of the total amount of funds and other assets available for distribution to the Corporation’s stockholders (the “Total Distributable Amount”), before any payment shall be made to the holders of Common Stock or any other class or series of stock ranking on liquidation junior to the Preferred Stock (such Common Stock and other stock being collectively referred to as “Junior Stock”) by reason of their ownership thereof, the amount determined pursuant to subsections (b), (c), (d), (e), (f), (g) or (h) below, as applicable, plus any dividends declared but unpaid on such shares, based on a per share amount (the “Initial Calculation”) determined by dividing the value of such assets and funds of the Corporation available for distribution to its stockholders by the total number of shares of Common Stock then outstanding, calculated in all cases assuming conversion of all Preferred Stock into Common Stock.

(b) If shares of Series F Preferred Stock have been issued and the Initial Calculation is greater than or equal to two times the Series D/E/F Average Price, then the Total Distributable Amount shall be distributed among the holders of shares of Preferred Stock, Common Stock and any other class or series of stock entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each (assuming conversion into Common Stock of all such shares of Preferred Stock).

(c) If no shares of Series F Preferred Stock have been issued and the Initial Calculation is greater than or equal to two times the Series D/E Average Price, then the Total Distributable Amount shall be distributed among the holders of shares of Preferred Stock, Common Stock and any other class or series of stock entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each (assuming conversion into Common Stock of all such shares of Preferred Stock).

(d) Whether or not shares of Series F Preferred Stock have been issued, if the Initial Calculation is less than two times Series A Original Purchase Price, then the holders of the Series A Preferred Stock shall receive the Series A Distribution Amount, the holders of the Series B Preferred Stock shall receive the Series B Distribution Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Distribution Amount, the holders of Series C Preferred Stock shall receive the Series C Distribution Amount, the holders of Series D Preferred Stock shall receive the Series D Distribution Amount, the holders of Series

E Preferred Stock shall receive the Series E Distribution Amount and the holders of Series F Preferred Stock (if any) shall receive the Series F Distribution Amount, up to a maximum amount per share equal to the original purchase price per share for each series of Preferred Stock, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Distribution Amount for each share of such series. The terms above in this subsection shall have the following meanings:

“Series A Distribution Amount”	= TDA x	$\frac{A1 \times A2}{TAI}$
“Series B Distribution Amount”	= TDA x	$\frac{B1 \times B2}{TAI}$
“Series B-1 Distribution Amount”	= TDA x	$\frac{B-1-1 \times B-1-2}{TAI}$
“Series C Distribution Amount”	= TDA x	$\frac{C1 \times C2}{TAI}$
“Series D Distribution Amount”	= TDA x	$\frac{D1 \times D2}{TAI}$
“Series E Distribution Amount”	= TDA x	$\frac{E1 \times E2}{TAI}$
“Series F Distribution Amount”	= TDA x	$\frac{F1 \times F2}{TAI}$

TDA = Total Distributable Amount.

TAI = Total Amount Invested, which is defined as the total dollars initially invested by all holders of Preferred Stock, calculated as follows: $(A1 \times A2) + (B1 \times B2) + (B-1-1 \times B-1-2) + (C1 \times C2) + (D1 \times D2) + (E1 \times E2) + (F1 \times F2)$.

A1 = Number of shares of Series A Preferred Stock outstanding.

A2 = Series A Original Purchase Price.

B1 = Number of shares of Series B Preferred Stock outstanding.

B2 = Series B Original Purchase Price.

B-1-1 = Number of shares of Series B-1 Preferred Stock outstanding.

B-1-2 = Series B-1 Original Purchase Price.

C1	=	Number of shares of Series C Preferred Stock outstanding.
C2	=	Series C Original Purchase Price.
D1	=	Number of shares of Series D Preferred Stock outstanding.
D2	=	Series D Original Purchase Price.
E1	=	Number of shares of Series E Preferred Stock outstanding.
E2	=	Series E Original Purchase Price.
F1	=	Number of shares of Series F Preferred Stock outstanding.
F2	=	Series F Original Purchase Price

Thereafter, the remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed among the holders of shares of Preferred Stock, Common Stock and any other class or series of stock entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each such holder (assuming conversion into Common Stock of all such shares of Preferred Stock).

(e) If shares of Series F Preferred Stock have been issued and if the Initial Calculation is (1) greater than or equal to two times the Series A Original Purchase Price and (2) less than two times the Series D/E/F Average Price, then the holders of the Series A Preferred Stock shall receive the Series A Distribution Amount, the holders of the Series B Preferred Stock shall receive the Series B Distribution Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Distribution Amount, the holders of the Series C Preferred Stock shall receive the Series C Distribution Amount, the holders of the Series D Preferred Stock shall receive the Series D Distribution Amount, the holders of the Series E Preferred Stock shall receive the Series E Distribution Amount and the holders of the Series F Preferred Stock shall receive the Series F Distribution Amount, up to a maximum amount per share equal to the original purchase price per share for each series of Preferred Stock, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Distribution Amount for each share of such series. Thereafter, any remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed as set forth in subsections (x) and (y) following subsection (f) immediately below.

(f) If no shares of Series F Preferred Stock have been issued and if the Initial Calculation is (1) greater than or equal to two times the Series A Original Purchase Price and (2) less than two times the Series D/E Average Price, then the holders of the Series A Preferred Stock shall receive the Series A Distribution Amount, the holders of the Series B Preferred Stock shall receive the Series B Distribution Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Distribution Amount, the holders of the Series C Preferred Stock shall receive the Series C Distribution Amount, the holders of the Series D Preferred Stock shall receive the Series D Distribution Amount and the holders of the Series E Preferred Stock shall receive the Series E Distribution Amount, up to a maximum amount per

share equal to the original purchase price per share for each series of Preferred Stock, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Distribution Amount for each share of such series. Thereafter, any remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed as set forth in subsections (x) and (y) immediately below this subsection (f).

After the distributions set forth in subsection (e) or (f) above, as applicable, have been made, any remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed:

(x) first, among the holders of shares of Preferred Stock, Common Stock and any other class or series of stock entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each such holder (assuming conversion into Common Stock of all such shares of Preferred Stock); provided, that the aggregate amount to be distributed among the holders of Preferred Stock (the "Remaining Preferred Amount") shall be allocated as follows: the holders of the Series A Preferred Stock shall receive the Series A Remaining Amount, the holders of the Series B Preferred Stock shall receive the Series B Remaining Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Remaining Amount, the holders of the Series C Preferred Stock shall receive the Series C Remaining Amount, the holders of the Series D Preferred Stock shall receive the Series D Remaining Amount, the holders of the Series E Preferred Stock shall receive the Series E Remaining Amount and the holders of the Series F Preferred Stock (if any) shall receive the Series F Remaining Amount, up to a maximum amount per share (including all amounts received by a holder of a share of Preferred Stock pursuant to subsection (e) or this subsection (f), as applicable) equal to two times the Original Purchase Price per share for each series of Preferred Stock, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Remaining Amount for each share of such series. The terms above in this subsection shall have the following meanings:

"Series A Remaining Amount"	=	Remaining Preferred Amount	x	$\frac{A1 \times A2}{TAI}$
"Series B Remaining Amount"	=	Remaining Preferred Amount	x	$\frac{B1 \times B2}{TAI}$
"Series B-1 Remaining Amount"	=	Remaining Preferred Amount	x	$\frac{B-1-1 \times B-1-2}{TAI}$
"Series C Remaining Amount"	=	Remaining Preferred Amount	x	$\frac{C1 \times C2}{TAI}$
"Series D Remaining Amount"	=	Remaining Preferred Amount	x	$\frac{D1 \times D2}{TAI}$
"Series E Remaining Amount"	=	Remaining Preferred Amount	x	$\frac{E1 \times E2}{TAI}$

$$\text{"Series F Remaining Amount"} = \text{Remaining Preferred Amount} \times \frac{\text{TAI}}{\frac{F1 \times F2}{\text{TAI}}}$$

(y) next, any remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed among the holders of shares of Common Stock and any other class or series of stock (excluding the Preferred Stock) entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each (assuming conversion into Common Stock of all such shares of any other class or series of stock).

(g) If upon a Liquidation Event, the remaining assets of the Corporation available for distribution to its stockholders shall be insufficient to pay to each of the holders of Preferred Stock an amount at least equal to the Original Purchase Price per share of such Preferred Stock, then the holders of the Series A Preferred Stock shall receive the Series A Distribution Amount, the holders of the Series B Preferred Stock shall receive the Series B Distribution Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Distribution Amount, the holders of the Series C Preferred Stock shall receive the Series C Distribution Amount, the holders of the Series D Preferred Stock shall receive the Series D Distribution Amount, the holders of the Series E Preferred Stock shall receive the Series E Distribution Amount and the holders of the Series F Preferred Stock (if any) shall receive the Series F Distribution Amount, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Distribution Amount for each share of such series.

(h) Notwithstanding the provisions of Sections B.2(a) through (g) of this Article Fourth, in the event the amount distributable to the Corporation's stockholders in connection with a Liquidation Event is payable in installments, then prior to the time a distribution (the "Current Distribution") is to be made, the total amount available for the Current Distribution will be cumulated with all prior distributions made in connection with the Liquidation Event, and a calculation of the amount distributable to each stockholder will be made as if the total cumulative amount had been paid in a single initial distribution, assuming for purposes of such calculation that each series of Preferred Stock elected to convert such series of Preferred Stock to Common Stock in a manner that would yield such series of Preferred Stock the largest distribution. The amount allocated to each stockholder in such calculation is called the stockholder's "Cumulative Distribution." In the Current Distribution, each stockholder will receive an amount such that when the portion of the Current Distribution distributed to such stockholder is added to all prior distributions to such stockholder in connection with the Liquidation Event, such stockholder will have received its Cumulative Distribution.

(i) In the event of any merger or consolidation of the Corporation into or with another corporation (except one in which the holders of capital stock of the Corporation immediately prior to such merger or consolidation continue to hold at least seventy percent (70%) by voting power of the capital stock of the surviving corporation), the sale of all of the outstanding capital stock of the Corporation to a single entity or group of related entities in one transaction or a series of transactions or the sale of all or substantially all the assets of the

Corporation, such merger, consolidation, stock sale or asset sale shall be deemed to be a liquidation of the Corporation and all consideration payable to the stockholders of the Corporation (in case of a merger, consolidation or stock sale) or all consideration payable to the Corporation, together with all other available assets of the Corporation (in case of an asset sale), shall be distributed to the holders of capital stock of the Corporation in accordance with Sections B.2(a) through 2(h) of this Article Fourth, unless the holders of at least fifty percent (50%) of the then outstanding shares of Preferred Stock so elect not to treat such event as a liquidation of the Corporation by giving written notice thereof to the Corporation at least three (3) days before the effective date of such event. The Corporation shall promptly provide to the holders of shares of Preferred Stock such information concerning the terms of such merger, consolidation, stock sale or asset sale and the value of the assets of the Corporation as may reasonably be requested by the holders of Preferred Stock in order to assist them in determining whether to make such an election. The Corporation shall use its best efforts to amend the agreement or plan of merger or consolidation to adjust the rate at which the shares of capital stock of the Corporation are converted into or exchanged for cash, new securities or other property to give effect to Sections B.2(a) through 2(h) of this Article Fourth. The amount deemed distributed to the holders of Preferred Stock upon any such merger or consolidation shall be the cash or the value of the property, rights or securities distributed to such holders by the acquiring person, firm or other entity. The value of such property, rights or other securities shall be determined in good faith by the Board of Directors of the Corporation and the holders of a majority of the Preferred Stock, provided that if the property is securities that are traded on a securities exchange, the Nasdaq Stock Market or over-the-counter, the value of the securities shall be deemed to be the average of the closing prices (with respect to securities listed on a securities exchange or the Nasdaq Stock Market) or the closing bid and asked prices (with respect to securities listed over-the-counter) of the securities on such exchange or over-the-counter over the ten (10) day period ending three (3) days prior to the closing of the transaction which will constitute a liquidation of the Corporation.

3. Distributions to Preferred Stockholders Upon a Series D Acquisition.

This Section B.3 governs distributions to holders of Preferred Stock in the event of a Series D Acquisition, which for all purposes will be treated as a Liquidation Event.

(a) In the event of a Series D Acquisition, all outstanding shares of Series D Preferred Stock, Series E Preferred Stock and Series F Preferred Stock (and any shares of Common Stock issued upon the conversion thereof) will be automatically cancelled and the holders thereof will not be entitled to receive any payments made by or on behalf of the acquirer in the Series D Acquisition. After giving effect to the cancellation of such shares, the holders of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock, Series C Preferred Stock and Common Stock outstanding at the time of the Series D Acquisition shall be entitled to be paid out of the assets and funds of the Corporation available for distribution to its stockholders following the Series D Acquisition the amounts determined pursuant to the applicable subsections below of this Section B.3. All capitalized terms used by not defined in this Section B.3. shall have the meanings given to them in the Merger Agreement.

(b) The amounts deposited with the Paying Agent with respect to the Net Estimated Closing Payment and any Underpayment Amount (collectively, the "Initial Payments") that is allocable to the capital stock of the Corporation will be distributed to the

holders of Common Stock and Preferred Stock pursuant to Sections 2.1(a) and 2.1(b) of the Merger Agreement.

(c) After the Initial Payments have been distributed, the first \$5,000,000 (the "Catch-up Amount") of any amounts deposited with the Paying Agent with respect to a Contingent Payment shall be distributed to the parties who held Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock and Series C Preferred Stock at the time of the Series D Acquisition as follows: the holders of the Series A Preferred Stock shall receive the Series A Catch-up Amount, the holders of the Series B Preferred Stock shall receive the Series B Catch-up Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Catch-up Amount and the holders of Series C Preferred Stock shall receive the Series C Catch-up Amount, distributed ratably among the holders of such series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Catch-up Amount for each share of such series. The terms above in this subsection shall have the following meanings:

"Series A Catch-up Amount"	=	Catch-up Amount x	$\frac{A1 \times A2}{TAIC}$
"Series B Catch-up Amount"	=	Catch-up Amount x	$\frac{B1 \times B2}{TAIC}$
"Series B-1 Catch-up Amount"	=	Catch-up Amount x	$\frac{B-1-1 \times B-1-2}{TAIC}$
"Series C Catch-up Amount"	=	Catch-up Amount x	$\frac{C1 \times C2}{TAIC}$

TAIC = Total Amount Invested Calculation, which is defined as the total dollars initially invested by all holders of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock and Series C Preferred Stock, calculated as follows: $(A1 \times A2) + (B1 \times B2) + (B-1-1 \times B-1-2) + (C1 \times C2)$.

(d) After the Initial Payments and the Catch-up Amount have been distributed, any amounts received by the Paying Agent under the Merger Agreement, Stock Purchase Agreement or Escrow Agreement shall be distributed to the parties who held Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock, Series C Preferred Stock and Common Stock at the time of the Series D Acquisition in accordance with subsections (e), (f), (g), (h) and (i) below. For purposes of such subsections, the term "Initial Calculation" means the per share amount determined by dividing the assets and funds available for distribution to such stockholders of the Corporation by the total number of shares of Common Stock outstanding at the time of the Series D Acquisition (other than Series D Preferred Stock, Series E Preferred Stock, Series F Preferred Stock or Common Stock issued upon conversion thereof) calculated in all cases assuming conversion of Preferred Stock to Common Stock. "Total Distributable Amount" means the assets and funds available for distribution to the Corporation's stockholders in connection with a Series D Acquisition (and includes the Initial Payments, the Catch-up Amount and any amount deposited with the Paying Agent under the Merger Agreement, Stock Purchase Agreement or Escrow Agreement). For purposes of allocating

distributions under this subsection (d) and subsections (e), (f), (g), (h) and (i) below: (1) each holder of a Company Stock Option shall be treated as owning the number of shares of Common Stock with respect to which the Company Stock Option may be exercised; (2) the amounts allocated to each such holder per share shall be reduced by the amount by which the applicable Per Share Strike Price exceeds the Per Share Common Stock Closing Payment in accordance with Section 2.1(c) of the Merger Agreement or in accordance with the Stock Purchase Agreement; and (3) the aggregate amounts by which the allocations to holders of Company Stock Options are reduced pursuant to clause (2) shall be treated as additional deposits with the Paying Agent.

(e) If the Initial Calculation is greater than or equal to two times the Series C Original Purchase Price, the Total Distributable Amount shall be distributed among the holders of shares of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock, Series C Preferred Stock, Common Stock and any other class or series of stock entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each (assuming conversion into Common Stock of all such shares of Preferred Stock).

(f) If the Initial Calculation is less than two times the Series A Original Purchase Price, then the holders of the Series A Preferred Stock shall receive the Series A Acquisition Distribution Amount, the holders of the Series B Preferred Stock shall receive the Series B Acquisition Distribution Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Acquisition Distribution Amount and the holders of Series C Preferred Stock shall receive the Series C Acquisition Distribution Amount, up to a maximum amount per share equal to the Original Purchase Price per share for each such series of Preferred Stock, distributed ratably among the holders of such series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Acquisition Distribution Amount for such share of such series. The terms above in this subsection shall have the following meanings:

“Series A Acquisition Distribution Amount “	= TDA x	$\frac{A1 \times A2}{TAIC}$
“Series B Acquisition Distribution Amount “	= TDA x	$\frac{B1 \times B2}{TAIC}$
“Series B-1 Acquisition Distribution Amount “	= TDA x	$\frac{B-1-1 \times B-1-2}{TAIC}$
“Series C Acquisition Distribution Amount “	= TDA x	$\frac{C1 \times C2}{TAIC}$

Thereafter, the remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed among the holders of shares of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock, Series C Preferred Stock, Common Stock and any other class or series of stock entitled to participate in liquidation distributions with the holders of

Common Stock, *pro rata* based on the number of shares of Common Stock held by each such holder (assuming conversion into Common Stock of all such shares of Preferred Stock).

(g) If the Initial Calculation is (1) greater than or equal to two times the Series A Original Purchase Price and (2) less than two times the Series C Original Purchase Price, the holders of the Series A Preferred Stock shall receive the Series A Acquisition Distribution Amount, the holders of the Series B Preferred Stock shall receive the Series B Acquisition Distribution Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Acquisition Distribution Amount and the holders of the Series C Preferred Stock shall receive the Series C Acquisition Distribution Amount up to a maximum amount per share equal to the Original Purchase Price per share for each series of Preferred Stock, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Acquisition Distribution Amount for each share of such series.

Thereafter, any remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed:

(x) first, among the holders of shares of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock, Series C Preferred Stock, Common Stock and any other class or series of stock entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each such holder (assuming conversion into Common Stock of all such shares of Preferred Stock); provided, that such amount collectively distributed among the holders of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock and Series C Preferred Stock (the "Remaining Acquisition Amount") shall be allocated as follows: the holders of the Series A Preferred Stock shall receive the Series A Remaining Acquisition Amount, the holders of the Series B Preferred Stock shall receive the Series B Remaining Acquisition Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Remaining Acquisition Amount and the holders of the Series C Preferred Stock shall receive the Series C Remaining Acquisition Amount, up to a maximum amount per share (including all amounts received by a holder of a share of Preferred Stock pursuant to this subsection (g)) equal to two times the Original Purchase Price per share for each shares of Preferred Stock, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Remaining Acquisition Amount for each share of such series. The terms above in this subsection shall have the following meanings:

$$\text{"Series A Remaining Acquisition Amount"} = \text{Remaining Acquisition Amount} \times \frac{A1 \times A2}{TAIC}$$

$$\text{"Series B Remaining Acquisition Amount"} = \text{Remaining Acquisition Amount} \times \frac{B1 \times B2}{TAIC}$$

$$\text{"Series B-1 Remaining Acquisition Amount"} = \text{Remaining Acquisition Amount} \times \frac{B-1-1 \times B-1-2}{TAIC}$$

“Series C Remaining Acquisition Amount” = Remaining Acquisition Amount $\times \frac{C1 \times C2}{TAIC}$

(y) next, any remaining assets and funds of the Corporation available for distribution to its stockholders shall be distributed among the holders of shares of Common Stock and any other class or series of stock (excluding the Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock and Series C Preferred Stock) entitled to participate in liquidation distributions with the holders of Common Stock, *pro rata* based on the number of shares of Common Stock held by each (assuming conversion into Common Stock of all such shares of any other class or series of stock).

(h) If upon a Liquidation Event, the remaining assets of the Corporation available for distribution to its stockholders shall be insufficient to pay to each of the holders of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock and Series C Preferred Stock an amount at least equal to the Original Purchase Price per share of such Preferred Stock, then the holders of the Series A Preferred Stock shall receive the Series A Acquisition Distribution Amount, the holders of the Series B Preferred Stock shall receive the Series B Acquisition Distribution Amount, the holders of the Series B-1 Preferred Stock shall receive the Series B-1 Acquisition Distribution Amount and the holders of the Series C Preferred Stock shall receive the Series C Acquisition Distribution Amount, distributed ratably among the holders of each series of Preferred Stock, such that each holder of a share of a particular series of Preferred Stock receives the same percentage of the applicable Acquisition Distribution Amount for each share of such series.

(i) Recognizing the fact that the amount distributable to the holders of Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock and Series C Preferred Stock in connection with a Series D Acquisition is anticipated to be paid in installments, prior to the time a Current Distribution of any installment is to be made, the total amount available for the Current Distribution will be cumulated with all prior distributions made in connection with the Series D Acquisition (including distributions relating to the Initial Payments and the Catch-up Amount), and a calculation of the amount distributable to each stockholder will be made as if the total cumulative amount had been paid in a single initial distribution, assuming for purposes of such calculation that the Series A Preferred Stock, Series B Preferred Stock, Series B-1 Preferred Stock and Series C Preferred Stock elected to convert such series of Preferred Stock to Common Stock in a manner that would yield such series of Preferred Stock the largest distribution. In the Current Distribution, each such stockholder will receive an amount such that when the portion of the Current Distribution distributed to such stockholder is added to all prior distributions to such stockholder in connection with the Series D Acquisition, such stockholder will have received its Cumulative Distribution.

4. Voting.

(a) General. Each holder of outstanding shares of Preferred Stock shall be entitled to the number of votes equal to the number of whole shares of Common Stock into which the shares of Preferred Stock held by such holder are then convertible (as adjusted from time to time pursuant to Section B.5 hereof), at each meeting of stockholders of the Corporation (and actions by written consent of the stockholders in lieu of meetings) with respect to any and all matters presented to the stockholders of the Corporation for their action or

consideration. There shall be no cumulative voting. Except as provided by law, by the provisions of Section B.8 hereof or by the provisions establishing any other series of preferred stock, holders of Preferred Stock and of any other outstanding series of preferred stock shall vote together with the holders of Common Stock as a single class.

(b) Size of Board of Directors. Unless increased or decreased in accordance with Section 8(b)(i) hereof, the Board of Directors shall consist of nine (9) members, who shall be elected as follows:

(i) The holders of Preferred Stock, voting together as a single class, shall be entitled to elect five (5) members of the Board of Directors.

(ii) The holders of Common Stock, voting as a single class, shall be entitled to elect two (2) members of the Board of Directors.

(iii) The holders of Common Stock and Preferred Stock, voting together as a single class, shall be entitled to elect two (2) members of the Board of Directors.

5. Optional Conversion.

(a) Right to Convert. Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time and from time to time, and without the payment of additional consideration by the holder thereof, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Original Purchase Price for the applicable series of Preferred Stock by its Conversion Price (as defined below) in effect at the time of conversion. The initial "Conversion Price" shall be the Series A Original Purchase Price for the Series A Preferred Stock, the Series B Original Purchase Price for the Series B Preferred Stock, the Series B-1 Original Purchase Price for the Series B-1 Preferred Stock, the Series C Original Purchase Price for the Series C Preferred Stock, the Series D Original Purchase Price for the Series D Preferred Stock, the Series E Original Purchase Price for the Series E Preferred Stock and, if shares of Series F Preferred Stock have been issued, the Series F Original Purchase Price for the Series F Preferred Stock.

In the event of a notice of redemption of any shares of Preferred Stock pursuant to Section B.7 hereof, the conversion rights of the shares designated for redemption shall terminate at the close of business on the fifth (5th) full day preceding the date fixed for redemption, unless the redemption price is not paid when due, in which case the conversion rights for such shares shall continue until such price is paid in full. In the event of a liquidation of the Corporation, the conversion rights shall terminate at the close of business on the first (1st) full day immediately preceding the date fixed for the payment of any amounts distributable on liquidation to the holders of Preferred Stock.

(b) Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of the Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay to such holder an amount equal to such fraction multiplied by the fair market value of the Common Stock as determined in good faith by the Corporation's Board of Directors.

(c) Mechanics of Conversion.

(i) If a holder of Preferred Stock elects to convert shares of Preferred Stock into shares of Common Stock pursuant to subsection (a) above, such holder shall surrender the certificate or certificates for such shares of Preferred Stock at the principal office of the Corporation together with written notice that such holder elects to convert all or any number of the shares of the Preferred Stock represented by such certificate or certificates. Such notice shall state such holder's name or the names of the nominees in which such holder wishes the certificate or certificates for shares of Common Stock to be issued and the effective date of the conversion (the "Conversion Date"), which may be any date within the sixty (60) day period following the date on which such notice is received by the Corporation. If required by the Corporation, certificates surrendered for conversion shall be endorsed or accompanied by a written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or such holder's attorney duly authorized in writing. The converting holder shall be deemed to be the record holder of the resulting shares of Common Stock on the Conversion Date and the Corporation shall, as soon as practicable after the Conversion Date (and in any event within fifteen (15) business days), issue and deliver at such office of such holder of Preferred Stock, or to such holder's nominees, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled, together with payment in lieu of any fraction of a share pursuant to Section B.5(b) above.

(ii) The Corporation shall at all times when the Preferred Stock shall be outstanding, reserve and keep available out of its authorized but unissued stock, for the purpose of effecting the conversion of the Preferred Stock, such number of its duly authorized shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding Preferred Stock. Before taking any action which would cause an adjustment reducing the Conversion Price below the then par value of the shares of Common Stock issuable upon conversion of the Preferred Stock, the Corporation will, to the extent permitted by applicable law, take any corporate action which may, in the opinion of its counsel, be necessary in order that the Corporation may validly and legally issue fully paid and nonassessable shares of Common Stock at such adjusted Conversion Price.

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

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

(v) The Corporation shall pay any and all issue and other taxes (other than taxes based on income) that may be payable in respect of any issuance or delivery of shares of Common Stock upon conversion of shares of Preferred Stock pursuant to this Section B.5. The Corporation shall not, however, be required to pay any tax which may be payable in

respect of any transfer involved in the issuance and delivery of shares of Common Stock in a name other than that in which the shares of Preferred Stock so converted were registered, and no such issuance or delivery shall be made unless and until the person or entity requesting such issuance has paid to the Corporation the amount of any such tax or has established, to the satisfaction of the Corporation, that such tax has been paid.

(d) Adjustment for Dilution. If at any time after the date of the filing of this Amended and Restated Certificate of Incorporation with the Secretary of State of the State of Delaware (the "Filing Date"), the Corporation shall issue any shares of Common Stock, or shall issue any Common Stock Equivalents (as hereinafter defined), for a consideration per share less than the Conversion Price for any series of Preferred Stock in effect immediately prior to the issuance of such Common Stock or Common Stock Equivalents, the Conversion Price of such series of Preferred Stock in effect immediately prior to each such issuance shall be decreased to the amount determined in accordance with the following formula:

$$\text{Conversion Price} = \frac{(P1 \times Q1) + (P2 \times Q2)}{Q1 + Q2}$$

For purposes of the foregoing formula:

P1 = Conversion Price in effect immediately prior to such issuance.

Q1 = Number of shares of Common Stock deemed outstanding (in accordance with subparagraph (vi) below) immediately prior to such issuance.

P2 = Average price per share received by the Corporation upon such issuance (determined in accordance with subparagraphs (iii) and (vi) below).

Q2 = Number of shares of Common Stock issued or sold, or deemed to have been issued or sold (in accordance with subparagraph (vi) below) upon such issuance.

For purposes of any adjustment of the Conversion Price pursuant to this Section B.5(d), the following provisions shall be applicable:

(i) "Common Stock Equivalents" means any stock or security convertible into or exercisable or exchangeable for Common Stock, including the Preferred Stock, and any right, warrant or option to acquire Common Stock or any such convertible, exercisable or exchangeable security, provided, that the term Common Stock Equivalents shall not include any rights, warrants or options to acquire Common Stock where the exercise or "strike" price, or other amount payable in connection with the exercise or exchange of such security, exceeds the fair market value of the shares of Common Stock issuable upon such exercise.

(ii) The per share consideration for the sale or issuance of Common Stock shall be the price per share received by the Corporation before payment of commissions, discounts and other expenses. The value of any non-cash consideration received or receivable upon the sale or issuance of Common Stock or Common Stock Equivalents shall be determined in good faith by the Board of Directors of the Corporation.

(iii) In the case of the sale or issuance of Common Stock Equivalents, the per share consideration shall be determined by dividing the maximum number of shares of Common Stock issuable with respect to such Common Stock Equivalents into the aggregate consideration received by the Corporation upon the sale or issuance of such Common Stock Equivalents plus the minimum aggregate amount of any additional consideration receivable by the Corporation upon the conversion or exercise of such Common Stock Equivalents. For the purpose of calculation, such maximum number of shares shall be assumed to be issued on the earlier of the payment date or record date for a distribution of such Common Stock Equivalents.

(iv) If any Common Stock Equivalents included in adjustments under this Section B.5(d) expire or terminate without the Common Stock to which they related having been issued, the Conversion Price shall be readjusted to eliminate the effect of the assumed issuance of such Common Stock. If any Common Stock Equivalents by their terms provide for subsequent increases in the additional consideration payable for the related Common Stock or for subsequent decreases in the number of shares of Common Stock obtainable, then, upon any such increase or decrease, the Conversion Price shall be appropriately readjusted to the extent such Common Stock Equivalents have not then expired or been exercised or converted. The aggregate increase in the Conversion Price caused by all such readjustments shall not exceed the decrease in Conversion Price made upon the issuance of the Common Stock Equivalents to which such readjustments relates. If any Common Stock Equivalents by their terms provide for subsequent decreases in the additional consideration payable for the related Common Stock or for subsequent increases in the number of shares of Common Stock obtainable, then, upon any such decrease or increase, the Conversion Price shall be appropriately adjusted to the extent such Common Stock Equivalents have not then expired or been exercised or converted.

(v) In case the Corporation shall declare a dividend or make any other distribution upon any stock of the Corporation payable in Common Stock or Common Stock Equivalents, such Common Stock or Common Stock Equivalents shall be deemed to have been issued or sold without consideration as of the earlier of the related record or payment date.

(vi) The number of shares of Common Stock outstanding at any point in time shall include all shares then issuable or to become issuable pursuant to any Common Stock Equivalent then issued or to be issued.

(vii) The following issuances of Common Stock or Common Stock Equivalents shall be excluded from the adjustment of the Conversion Price under this Section B.5(d): (1) any dividend or distribution on any Preferred Stock; (2) any stock for which adjustment of the Conversion Price is made pursuant to Sections B.5(c), B.5(f), B.5(g) or B.5(h) below; (3) securities offered by the Corporation to the public in a Qualified Public Offering (as defined in Section B.6(a) below); (4) securities reissued to directors, employees, or consultants following the Corporation's acquisition of such securities pursuant to restricted stock arrangements with individuals who have terminated their relationship with the Corporation or shares subject to options granted to individuals who have terminated their relationship with the Corporation which are not exercised; (5) shares of Common Stock, or securities convertible into or exercisable for such shares, issued pursuant to an agreement solely to acquire or license technology (including without limitation sponsored research) by the Corporation or to a collaborative partner of the Corporation in connection with a corporate partnering transaction, if

such agreement is approved by the Board of Directors; (6) securities issued pursuant to any right or agreement to the extent to which an adjustment was previously made to the Conversion Price established by this Section B.5 with respect to the initial sale or grant by the Corporation of such right or agreement; (7) all securities issued or issuable pursuant to warrants or options outstanding on the Filing Date; (8) shares of Common Stock ("Option Shares") issued or issuable upon exercise of stock options ("Options") granted to directors, officers, employees and consultants of the Corporation, which are approved by the non-employee members of the Board of Directors, under the Corporation's Amended and Restated 2002 Incentive and Non-Incentive Stock Option Plan (the "Plan") approved by the Board of Directors and adopted by the stockholders, whether previously existing or granted after the Filing Date, each of which Options has a per share exercise price that is not less than the per share fair market value of the Common Stock on the date of the Option grant, and which number of Option Shares does not exceed the greater of (x) 6,960,000 or (y) such higher number approved by the Board of Directors, which approval must include the affirmative vote or consent of all of the directors elected solely by the holders of Preferred Stock; (9) securities issued in connection with any acquisition approved by the holders of fifty percent (50%) of the outstanding Preferred Stock of the Corporation; (10) shares of Series E Preferred Stock or Series F Preferred Stock issued pursuant to Section 2 of the Securities Purchase Agreement; and (11) Common Stock issued upon conversion of the Preferred Stock.

(e) Adjustment for Stock Splits and Combinations. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding Common Stock, the Conversion Price then in effect immediately before that subdivision shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the Preferred Stock, the Conversion Price with respect to the Preferred Stock then in effect immediately before that subdivision shall be proportionately increased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Common Stock, the Conversion Price then in effect immediately before the combination shall be proportionately increased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Preferred Stock, the Conversion Price with respect to the Preferred Stock then in effect immediately before the combination shall be proportionately decreased. Any adjustment under this paragraph shall become effective at the close of business on the date the subdivision or combination becomes effective.

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

(1) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

(2) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution;

provided, however, if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Conversion Price for the Preferred Stock shall be recomputed accordingly as of the close of business on such record date and thereafter the Conversion Price for the Preferred Stock shall be adjusted pursuant to this paragraph as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made if the holders of Preferred Stock simultaneously receive a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock on the date of such event.

(g) Adjustments for Other Dividends Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation other than shares of Common Stock, then, and in each such event, provision shall be made so that the holders of the Preferred Stock shall 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 the Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to, and including, the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all adjustments called for during such period under this paragraph with respect to the rights of the holders of the Preferred Stock; and provided further, however, that no such adjustment shall be made if the holders of Preferred Stock simultaneously receive a dividend or other distribution of such securities in an amount equal to the amount of such securities as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock on the date of such event.

(h) Adjustment for Reclassification, Exchange or Substitution. If the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any class or classes of stock, whether by capital reorganization, reclassification, or otherwise (other than a subdivision or combination of shares or stock dividend provided for above, or a reorganization, merger, consolidation, or sale of assets provided for below), then, and in each such event, the holder of each such share of Preferred Stock shall have the right thereafter to convert such share into the kind and amount of shares of stock and other securities and property receivable upon such reorganization, reclassification, or other change by holders of the number of shares of Common Stock into which such shares of Preferred Stock might have been converted immediately prior to such reorganization, reclassification or change, all subject to further adjustment as provided herein.

(i) No Impairment. The Corporation will not, by amendment of its Certificate 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 B.5 and in the taking of all such action as may be necessary or appropriate in order to protect the rights of the holders of the Preferred Stock pursuant to this Section B.5 against impairment.

(j) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Conversion Price pursuant to this Section B.5, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time (but not more than twice in any twelve (12) month period) of any holder of shares representing at least five percent (5%) of the authorized number of shares of Preferred Stock, furnish or cause to be furnished to such holder a similar certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price then in effect, and (iii) the number of shares of Common Stock and the amount, if any, of other property which then would be received upon the conversion of Preferred Stock.

6. Mandatory Conversion.

(a) All outstanding shares of Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Conversion Price upon the earlier to occur of (i) the closing (the "Mandatory Conversion Date") of the sale by the Corporation of shares of Common Stock in a firm commitment, underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended (the "Securities Act"), through a firm acceptable to the Board of Directors of the Corporation resulting in at least \$25,000,000 of gross proceeds to the Corporation (before deducting underwriting discounts and commissions and offering expenses) and a pre-money valuation of at least \$150,000,000 (a "Qualified Public Offering"), or (ii) upon the affirmative election of the holders of at least a majority of the outstanding shares of Preferred Stock, voting together as a single class, in connection with the closing of a firm commitment, underwritten public offering pursuant to an effective registration statement under the Securities Act, covering the offer and sale of Common Stock for the account of the Corporation which is not a Qualified Public Offering. For purposes of the preceding sentence, pre-money valuation shall be calculated by multiplying (x) the per share offering price of the Corporation's shares in the public offering (before deducting underwriting discounts and commissions and offering expenses), by (y) the total number of shares of Common Stock of the Corporation outstanding immediately before the closing of the public offering, assuming conversion of then outstanding Preferred Stock, and including all other convertible securities and Common Stock issuable upon exercise of all then outstanding options, rights, and warrants.

(b) All holders of record of shares of Preferred Stock will be given ten (10) business days prior written notice of the Mandatory Conversion Date and the place designated for mandatory conversion of all such shares of Preferred Stock pursuant to this Section B.6. Such notice shall be sent both by facsimile transmission (if a facsimile number has been provided and is operational) and by first-class or registered mail, postage prepaid, to each record holder of Preferred Stock at such holder's facsimile number and address last shown on the records of the Corporation for the Preferred Stock. Upon receipt of such notice, each holder of

shares of Preferred Stock shall surrender his, her or its certificate or certificates for all such shares to the Corporation at the place designated in such notice, and shall thereafter receive certificates for the number of shares of Common Stock to which such holder is entitled pursuant to this Section B.6. On the Mandatory Conversion Date, all rights with respect to the Preferred Stock so converted, including the rights, if any, to receive notices and vote, will terminate, except only the rights of the holders thereof, upon surrender of their certificate or certificates therefor, to receive certificates for the number of shares of Common Stock into which such Preferred Stock has been converted. If so required by the Corporation, certificates surrendered for conversion shall be endorsed or accompanied by written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or by such holder's attorney duly authorized in writing. As soon as practicable after the Mandatory Conversion Date and the surrender of the certificate or certificates for Preferred Stock, the Corporation shall cause to be issued and delivered to such holder a certificate or certificates for the number of full shares of Common Stock issuable on such conversion in accordance with the provisions hereof and cash as provided in Section B.5(b) in respect of any fraction of a share of Common Stock otherwise issuable upon such conversion.

(c) All certificates evidencing shares of Preferred Stock which are required to be surrendered for conversion in accordance with the provisions hereof shall, from and after the Mandatory Conversion Date, be deemed to have been retired and cancelled and the shares of Preferred Stock represented thereby converted into Common Stock for all purposes, notwithstanding the failure of the holder or holders thereof to surrender such certificates on or prior to such date. The Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized Preferred Stock accordingly.

7. Redemption Event.

(a) The Corporation will, subject to the conditions set forth below, including the possible extension of such date in accordance with this Section B.7(a), on December 31, 2010 and on each of the first and second anniversaries thereof (each such date being referred to hereinafter as a "Redemption Date"), upon receipt of written request(s) (an "Initial Redemption Request") for redemption not less than thirty (30) days prior to the applicable Redemption Date from holders of at least a simple majority of the shares of Series A Preferred Stock, making demand as a separate class, from holders of at least a simple majority of the combined shares of Series B Preferred Stock and Series B-1 Preferred Stock, calculated as a single class and making demand as a separate class, from holders of at least a simple majority of the shares of Series C Preferred Stock, making demand as a separate class or from holders of at least a simple majority of the combined shares of Series D Preferred Stock, Series E Preferred Stock and Series F Preferred Stock, calculated as a single class and making demand as a separate class (such demanding holders of Series A Preferred Stock, Series B Preferred Stock and Series B-1 Preferred Stock, Series C Preferred Stock, or Series D Preferred Stock, Series E Preferred Stock and Series F Preferred Stock, the "Initial Requesting Holders"), redeem from each Requesting Holder (as defined in Section B.7(c) below), at the price per share equal to the price per share paid to the Corporation for such shares by the initial holders thereof, which in the case of the Series A Preferred Stock is the Series A Original Purchase Price, in the case of the Series B Preferred Stock is the Series B Original Purchase Price, in the case of the Series B-1 Preferred Stock is the Series B-1 Original Purchase Price, in the case of the Series C Preferred Stock is the

Series C Original Purchase Price, in the case of the Series D Preferred Stock is the Series D Original Purchase Price, in the case of the Series E Preferred Stock is the Series E Original Purchase Price and in the case of the Series F Preferred Stock is the Series F Original Purchase Price, subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization affecting such shares, plus any dividends declared or accrued but unpaid thereon (the "Redemption Price"), the following respective portions of the number of shares of Preferred Stock held by such holder on the applicable Redemption Date:

<u>Redemption Date</u>	<u>Portion of Shares of Preferred Stock to be Redeemed</u>
December 31, 2010	33 1/3%
December 31, 2011	66 2/3%
December 31, 2012	100%

Notwithstanding the foregoing, (x) in no event shall the holders of any series of Preferred Stock be entitled to have such shares redeemed by the Corporation pursuant to this Section B.7(a), unless the approval of the holders of Preferred Stock under section B.8(a) is obtained, and (y) in the event that the initial Redemption Date set forth above would fall during the Option Period (as defined in the Option Agreement), or during the one year period following the expiration or termination of such Option Period, then such initial Redemption Date shall be adjusted to the date which falls on the first anniversary of such expiration or termination of the Option Period, and the subsequent Redemption Dates shall fall on the first and second anniversary dates of the initial Redemption Date.

(b) If the funds of the Corporation legally available for redemption of Preferred Stock on any Redemption Date are insufficient to redeem all of the number of shares of Preferred Stock required under Section B.7(a) to be redeemed on such date, those funds which are legally available will be used to redeem the maximum possible number of such shares of Preferred Stock ratably among the holders of such shares to be redeemed such that (x) of the total funds legally available for redemption, the Corporation shall apply to redeem the Preferred Stock held by the holders of each series an amount equal to the total amount available for redemption multiplied by a fraction, the numerator of which is the amount originally paid to the Corporation by the holders of such series for the Preferred Stock of that series they are seeking to have redeemed, and the denominator of which is the amount originally paid to the Corporation for all shares of Preferred Stock for which redemption is sought, and (y) each holder of a share of a particular series of Preferred Stock will receive the same percentage of the applicable Redemption Price for each share of such series. At any time thereafter when additional funds of the Corporation become legally available for the redemption of Preferred Stock, such funds will be used, at the end of the next succeeding fiscal quarter, to redeem the balance of the shares which the Corporation was theretofore obligated to redeem, ratably on the basis set forth in the preceding sentence.

(c) The Corporation shall provide notice of its receipt of an Initial Redemption Request, specifying the time, manner and place of redemption and the Redemption Price (a "Redemption Notice"), by first-class or registered mail, postage prepaid, to each holder

of record of all series of Preferred Stock, at the address for such holders last shown on the records of the transfer agent therefor (or the records of the Corporation, if it serves as its own transfer agent), not less than twenty (20) days prior to the applicable Redemption Date. Each holder of record of Preferred Stock may elect to become, together with each of the Initial Requesting Holders, one of the "Requesting Holders" on such Redemption Date by so indicating in a written notice mailed to the Corporation, by first-class or registered mail, postage prepaid, at least ten (10) days prior to the applicable Redemption Date. The Corporation will not redeem shares of Preferred Stock held by any Requesting Holder unless it redeems shares of Preferred Stock held by all Requesting Holders, with the allocation of available funds made in accordance with Section B.7(b) above if the funds are not sufficient to redeem all shares. Each Requesting Holder shall surrender to the Corporation on the applicable Redemption Date the certificate(s) representing the shares to be redeemed on such date, in the manner and at the place designated in the Redemption Notice. Thereupon, the Redemption Price shall be paid to the order of each such Requesting Holder and each certificate surrendered for redemption shall be canceled. In case less than all Preferred Stock represented by any certificate is redeemed in any redemption pursuant to this Section B.7, a new certificate will be issued representing the unredeemed Preferred Stock without cost to the holder thereof.

(d) Unless there shall have been a default in payment of the applicable Redemption Price, no share of Preferred Stock shall be entitled to any dividends declared after its Redemption Date, and on such Redemption Date all rights of the holder of such share as a stockholder of the Corporation by reason of the ownership of such share will cease, except the right to receive the applicable Redemption Price of such share, without interest, upon presentation and surrender of the certificate representing such share, and such share will not from and after such Redemption Date be deemed to be outstanding.

8. Substantial Transactions Requiring Consent of Holders of Preferred Stock. In addition to Section B.4 and any vote which any series of preferred stock may have under Delaware law, so long as any shares of Preferred Stock shall be outstanding, the Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of not less than fifty percent (50%) of the outstanding shares of Preferred Stock, voting together as a single class, on an as-converted to Common Stock basis (whether by merger, recapitalization or otherwise):

(a) Redeem, purchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purposes) any shares of Preferred Stock, including, but not limited to, a redemption in accordance with Section B.7 hereof;

(b) Redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purposes) any shares of Common Stock; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for the Corporation or any subsidiary pursuant to agreements under which the Corporation has the option to repurchase such shares at cost or at cost plus interest at a rate not to exceed nine percent (9%) per annum upon the occurrence of certain events, such as the termination of employment, provided further, however, that the total amount applied to the repurchase of shares of Common Stock shall not exceed \$100,000 during any twelve (12) month period;

(c) Authorize any amendment of the Certificate of Incorporation or Bylaws that would adversely affect the rights of the holders of Preferred Stock;

(d) Authorize, create, or issue securities superior to, or on a parity with the Preferred Stock;

(e) Authorize or effect any reclassification or other change of any stock or any recapitalization of the Corporation;

(f) Authorize any merger or consolidation of the Corporation with or into any other corporation or entity or the sale of all of the outstanding capital stock of the Corporation to a single entity or group of related entities in one transaction or a series of transactions, other than a Series D Acquisition;

(g) Authorize or effect the sale, lease, assignment, transfer or other conveyance of all or substantially all of the assets or equity of the Corporation;

(h) Declare or pay dividends on or make other distributions with respect to any securities other than Preferred Stock;

(i) Increase or decrease the number of directors that may constitute the Board of Directors;

(j) Amend, alter or repeal the preferences, special rights or other powers of the Preferred Stock so as to affect adversely the Preferred Stock;

(k) Increase the number of authorized shares of Preferred Stock;

(l) Incur any debt for borrowed money, except for bank loans, loans from institutional or other third party lenders, equipment leases and similar agreements in the ordinary and usual course of business not exceeding \$250,000 in the aggregate;

(m) Make any loans to or investments in, or guaranteeing the indebtedness of any partially owned subsidiaries, joint ventures, or partnerships; and

(n) Effect any Liquidation Event.

9. Certain Matters Requiring Consent of Holders of Series C Preferred Stock.

So long as any shares of Series C Preferred Stock shall be outstanding, the Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of not less than seventy percent (70%) of the outstanding shares of Series C Preferred Stock, voting as a separate class, reduce (whether by merger, recapitalization or otherwise) the original per share price of Series C Preferred Stock below \$3.066 (except for a reduction in such amount that results from a stock dividend, stock split, combination or other similar recapitalization which stock dividend, stock split, combination or other similar recapitalization shall only require such approval otherwise necessary at law and under the provisions of this Amended and Restated Certificate of Incorporation other than this Section B.9) and reduce the Series C Distribution Amount that a holder of Series C Preferred Stock is otherwise entitled to under Section B.2 and B.3 below what it was immediately prior to such corporate action.

10. Certain Preemptive Rights. Pursuant to the terms and conditions of a certain Amended and Restated Investors' Rights Agreement between the Corporation and certain of its stockholders, dated as of December 29, 2006, as it may be amended from time to time, certain holders of Preferred Stock are each granted a right of first refusal to purchase its *pro rata* share of any new securities (subject to certain exceptions) that the Corporation may, from time to time, propose to issue or sell. Such right of first refusal shall terminate and be of no further force or effect: (a) as to all such holders, upon the closing of the Corporation's initial public offering pursuant to an effective registration statement filed by the Corporation under the Securities Act that results in the conversion of the Preferred Stock into Common Stock and (b) as to each such holder, upon and following the date on which such holder no longer holds at least sixty-six and two-thirds percent (66 2/3%) of the shares of Preferred Stock (including the shares of Common Stock issuable upon conversion thereof) initially purchased by such holder from the Corporation. In addition, the Series D Holder has been granted certain rights of first negotiation with respect to certain new securities of the Corporation that may be issued during the Option Period (as defined in the Securities Purchase Agreement), which rights shall terminate upon the expiration or termination of such Option Period.

FIFTH: Subject to the provisions of Article Fourth, Sections B.8 and B.9, the Board of Directors shall have the power to adopt, amend or repeal the Bylaws.

SIXTH: Any action which may be taken at an annual or special meeting of the stockholders of the Corporation may be taken without a meeting, without prior notice, and without a vote if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of not less than a majority of the outstanding stock of the Corporation entitled to be voted at a meeting at which all shares entitled to vote thereon are present and voted and shall be delivered to the Corporation by delivery to its registered office, its principal place of business, or an officer or agent of the Corporation having custody of the book in which proceedings of meetings of stockholders are recorded. Delivery made to the Corporation's registered office shall be by hand or by certified or registered mail, return receipt requested. This Article Sixth may only be altered, amended, or repealed by the affirmative vote of the holders of a majority or more of the outstanding shares of capital stock entitled to vote generally with respect to a resolution to amend the Certificate of Incorporation.

SEVENTH: The Corporation shall to the fullest extent permitted by Section 145 of the General Corporation Law of the State of Delaware, as the same may be amended and supplemented, or by any successor thereto, indemnify any and all persons whom it shall have power to indemnify under said Section from and against any and all of the expenses, liabilities or other matters referred to in or covered by said Section. The Corporation shall advance expenses to the fullest extent permitted by said Section. Such right to indemnification and advancement of expenses shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person. The indemnification and advancement of expenses provided for herein shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any Bylaw, agreement, vote or stockholders or disinterested directors or otherwise.

EIGHTH: To the fullest extent that the General Corporation Law of the State of Delaware, as it exists on the date hereof or as it may hereafter be amended, permits the limitation or elimination of the liability of directors, no person serving as a director of the Corporation shall

be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided, however, that the foregoing shall not eliminate or limit the liability of a director (i) for any breach of the director's 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 law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit. Neither the amendment or repeal of this Article Eighth nor the adoption of any provision of this Certification of Incorporation inconsistent with this Article Eighth shall adversely affect any right or protection existing under this Article Eighth at the time of such amendment or repeal.

IN WITNESS WHEREOF, the Corporation caused this Amended and Restated Certificate of Incorporation to be duly executed by its duly authorized officer as of the 2nd day of April, 2008.

ACUFOCUS, INC.



By: _____

Edward Peterson
Chief Executive Officer and President