

ARTICLES OF RESTATEMENT
OF
ALVEOLUS, INC.

In accordance with Section 55-10-07 and Section 55-6-02 of the North Carolina Business Corporation Act (the “**Act**”), the undersigned corporation hereby submits these Articles of Restatement for the purpose of integrating into one document its original articles of incorporation and all amendments thereto, and also for the purpose of filing a new Designation of Series B Preferred Stock:

1. The name of the corporation is Alveolus, Inc (the “**Company**”).
2. Attached hereto as **Exhibit A** are the Fourth Amended and Restated Articles of Incorporation.
3. Attached hereto as **Exhibit B** is the “Fifth Amended and Restated Statement of Rights and Preferences of Preferred Stock, Designation of Series B Preferred Stock” (the “**Designation**”) which designates the rights and preferences of the Company’s Series B convertible preferred stock, par value \$0.001 per share.
4. The Designation was duly adopted by the Company’s Board of Directors, in accordance with Section 55-6-02 of the Act, as of the 25th day of June, 2004.

This the 12th day of July, 2004.

ALVEOLUS, INC.

By:

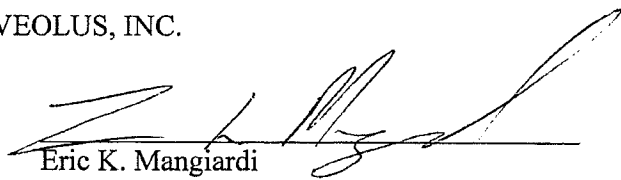

Eric K. Mangiardi
President

EXHIBIT A
FOURTH AMENDED AND RESTATED
ARTICLES OF INCORPORATION
OF
ALVEOLUS, INC.

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

2. The Corporation shall have authority to issue an aggregate of One Hundred Sixty Five Million Eight Hundred Eighty Five Thousand Nine Hundred Forty Four (165,885,944) shares of capital stock. The authorized capital stock shall consist of One Hundred Twenty-Five Million (125,000,000) shares of common stock, with a par value of \$0.001 per share (the "**Common Stock**"), and Forty Million Eight Hundred Eighty Five Thousand Nine Hundred Forty Four (40,885,944) shares of preferred stock, with a par value of \$0.001 per share (the "**Preferred Stock**"). The Common Stock and Preferred Stock shall have the powers, preferences, rights, qualifications, limitations and restrictions set forth below.

a) Common Stock

Section 1. **Dividends.** Dividends may be paid on the Common Stock as and when declared by the Board of Directors of the corporation consistent with applicable law.

Section 2. **Voting Rights.** Each share of Common Stock shall be entitled to one (1) vote and each share of Preferred Stock shall be entitled to such vote or votes as may be stated and expressed in the resolution or resolutions providing for the designation and the authority to issue such Preferred Stock adopted by the Board of Directors pursuant to the authority vested in it by these Articles of Incorporation.

Section 3. **Liquidation Rights.** Upon any voluntary or involuntary liquidation, dissolution, or winding up of affairs of the corporation, the holders of Common Stock shall be entitled to receive that portion of the funds to be distributed. Such funds shall be paid to the holders of Common Stock on the basis of the number of shares of Common Stock held by each of them.

Section 4. **Reserve Powers.** The holders of shares of Common Stock shall have all other powers, preferences and rights conferred upon owners of shares of capital stock under the laws of the state of North Carolina.

b) Preferred Stock

The Preferred Stock of the corporation shall consist of Forty Million Eight Hundred Eighty Five Thousand Nine Hundred Forty Four (40,885,944) shares of Preferred Stock, for which the Board of Directors of the corporation shall have the power to fix by resolution or resolutions the powers, preferences, and rights and the qualifications, limitations or restrictions, including dividing the Preferred Stock into one or more classes or series having the same or different powers, preferences and rights and qualifications, limitations and restrictions as the Board of Directors shall fix by resolution or resolutions.

3. The street address and county of the registered office of the Corporation in North Carolina is 401 North Tryon St., 10th Floor, Charlotte, NC 28202, Mecklenburg County, and the name of the registered agent at such address is Eric K. Mangiardi.

4. The number of directors constituting the board of directors shall be at least one (1) and no more than nine (9), as determined from time to time by the Board of Directors, and the names and addresses of the persons who are serving as directors as of the date hereof and until their successors are elected and qualified, are:

Eric K. Mangiardi	Gerard A. Silvestri	Tony D. Alexander	J. Blount Swain	David Crane
401 North Tryon St.	401 North Tryon St.	401 North Tryon St.	401 North Tryon St.	401 North Tryon St.
10 th Floor	10 th Floor	10 th Floor	10 th Floor	10 th Floor
Charlotte, NC 28202	Charlotte, NC 28202	Charlotte, NC 28202	Charlotte, NC 28202	Charlotte, NC 28202

5. A director of the Corporation shall not be personally liable for monetary damages for breach of any duty as director except and only to the extent applicable law restricts the effectiveness of this provision. Any repeal or modification of this article shall be prospective only and shall not diminish the rights or expand the personal liability of a director of the Corporation with respect to any act or omission occurring prior to the time of such repeal or modification.

6. The Board of Directors may determine, in whole or in part, the preferences, limitations and relative rights (within the limits set forth in N.C. Gen. Stat. 55-6-01) of (a) any class of shares before the issuance of any shares of that class or (b) one or more series within a class before the issuance of any shares of that series.

7. In accordance with Section 55-7-04 of the Act, any action required or permitted to be taken at a meeting of the shareholders may be taken without a meeting upon the written consent of the shareholders having not less than the minimum number of votes that would be necessary to take the action at a meeting at which all shareholders entitled to vote were present and voted.

8. The provisions of the North Carolina Business Corporation Act entitled "The North Carolina Shareholder Protection Act" and "The North Carolina Control Share Acquisition Act" shall not be applicable to the Corporation.

EXHIBIT B

ALVEOLUS, INC.

FIFTH AMENDED AND RESTATED STATEMENT OF RIGHTS AND PREFERENCES OF PREFERRED STOCK

DESIGNATION OF SERIES B PREFERRED STOCK

This Fifth Amended and Restated Statement of Rights and Preferences of Preferred Stock (the "**Statement**") of Alveolus, Inc. (the "**Company**") amends and restates in its entirety that certain Fourth Amended Statement of Rights and Preferences of Preferred Stock of the Company filed with the North Carolina Secretary of State on March 4, 2004.

The Preferred Stock shall be divided into series, as follows:

- No shares of the authorized and unissued Preferred Stock of the Company have been designated "Series A Preferred Stock," "Series A-1 Preferred Stock," "Series A-2 Preferred Stock" and "Series A-3 Preferred Stock," and the Company shall not designate any shares "Series A Preferred Stock," "Series A-1 Preferred Stock," "Series A-2 Preferred Stock" and "Series A-3 Preferred Stock."
- Thirty Million (30,000,000) shares of the authorized Preferred Stock, \$0.001 par value per share, of the Company have been designated the "Series B Convertible Preferred Stock." The Series B Convertible Preferred Stock is referred to herein as the "***Series B Preferred.***"

The rights, preferences, powers, privileges, restrictions and other matters relating to the Series B Preferred are as follows:

1. Voting Rights.

1A. **General.** Except as may be otherwise provided in these terms of Series B Preferred or as required by law, the Series B Preferred shall vote together with the Common Stock and all other classes and series of stock of the Company as a single class on all actions to be taken by the stockholders of the Company. Each share of Series B Preferred shall entitle the holder thereof to such number of votes per share on each such action as shall equal the number of shares of Common Stock (including fractions of a share) into which each share of Series B Preferred is then convertible.

1B. Separate Vote of Series B Preferred.

(a) For so long as a majority of the shares of Series B Preferred originally issued and outstanding as of the Original Issue Date (as appropriately adjusted for stock dividends, combinations, and splits with respect to such shares) remain outstanding, in addition

to any other vote or consent required herein or by law, without the vote or written consent of the holders of at least a majority in interest of the then outstanding shares of Series B Preferred, voting together as a single class on an as-converted basis, the Company shall not, either directly or by amendment, merger, consolidation or otherwise:

(i) Consent to any liquidation, dissolution or winding up of the affairs of the Company or effect any Deemed Liquidation Event (as defined in Paragraph 3 hereof);

(ii) Amend, alter, waive or repeal any provision of the Articles of Incorporation (including any filing of a Certificate of Designation); provided, however, that the number of authorized shares of Common Stock shall be increased or decreased upon the approval of a majority of the Series B Preferred and the Common Stock voting together as a single class;

(iii) Create, or authorize the creation of, any type or class of equity security of the Company, or any type or class of security convertible into or exercisable for any equity security; provided, however, that such approval shall not be necessary for the actual issuance of any securities once such securities have been so created or authorized;

(iv) Redeem, repurchase, pay any dividends or make any other distributions with respect to the Common Stock or any series of preferred stock ranking junior to the Series B Preferred until all declared and unpaid dividends on the Series B Preferred shall have been paid or declared and set apart, except for:

(1) acquisitions of the Common Stock by the Company pursuant to employment agreements that are in place as of the Original Issue Date or pursuant to agreements entered into after the Original Issue Date that have been approved by the Board (including the affirmative vote of at least a majority of the Investor Board Designees (as defined below), which permit the Company to repurchase such shares at cost (or the lesser of cost or fair market value) from employees upon termination of services to the Company;

(2) acquisitions of the Common Stock in exercise of the Company's right of first refusal to repurchase such shares; or

(3) redemptions of Series B Preferred pursuant to Paragraph 5 hereof.

or

(v) increase the maximum number of directors constituting the Board to a number in excess of Seven (7). As of the Original Issue Date, the Board shall consist of five (5) members. Within twelve (12) months after the Original Issue Date, the Board may be increased in size by two (2) members, bringing the total number of the directors of the Board to Seven (7).

2. Dividend Rights

2A. Accruing Dividends. From and after the date of the issuance of any shares of Series B Preferred, holders of the Series B Preferred, in preference to holders of the Common Stock, shall be entitled to receive, out of funds legally available therefor, when and if declared by the Board of Directors of the Company (the "**Board**"), cash dividends at the rate of six percent (6%) of the Original Issue Price (as defined below) per annum on each outstanding share of Series B Preferred (the "**Accruing Dividends**") (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the date on which the first share of Series B Preferred is issued (the "**Original Issue Date**")). Accruing Dividends shall accrue from day to day, whether or not earned or declared, and shall be cumulative; provided, however, that except as provided in Paragraphs 3 and 5, the Company shall be under no obligation to pay such Accruing Dividends unless so declared by the Board. The original issue price of the Series B Preferred is \$0.42 per share (the "**Original Issue Price**").

2B. Other Dividends. In the event the Board shall declare a dividend (other than a dividend payable in Common Stock) payable upon the then outstanding shares of Common Stock of the Company, the Board shall declare at the same time a dividend on each share of Series B Preferred in an amount equal to the amount that would have been received by the holder of each such share of Series B Preferred had such holder held, on the record date for such dividend, the number of shares of Common Stock into which the Series B Preferred would have been convertible upon conversion of the Series B Preferred pursuant to Paragraph 4 hereof.

3. Liquidation, Dissolution and Winding-up.

3A. Liquidation. Upon any liquidation, dissolution or winding up of the Company (a "**Liquidation Event**"), whether voluntary or involuntary, before any payment shall be made to the holders of any Common Stock or any series of preferred stock ranking on liquidation junior to the Series B Preferred, the holders of the shares of Series B Preferred shall be paid out of the assets of the Company legally available for distribution, or the consideration received in such transaction, for each share of Series B Preferred held by them, an amount per share of Series B Preferred equal to the Original Issue Price (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof) plus all declared and unpaid dividends on the Series B Preferred. If, upon any such liquidation, dissolution, or winding up, the assets of the Company (or the consideration received in such transaction) shall be insufficient to make payment in full to all holders of the Series B Preferred of the liquidation preference set forth in this Paragraph 3A, then such assets (or consideration) shall be distributed among the holders of the Series B Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled.

After the payment of the full liquidation preference of the Series B Preferred as set forth in Paragraph 3A above, the assets of the Company legally available for distribution in such Liquidation Event (or the consideration received in such transaction), if any, shall be distributed ratably to the holders of the Common Stock and Series B Preferred on an as-converted basis.

Written notice of such liquidation, dissolution or winding up, stating a payment date and the place where said payments shall be made, shall be given by mail, postage prepaid, or by facsimile to non-U.S. residents, not less than ten (10) days prior to the payment date stated therein, to the holders of record of the Series B Preferred, such notice to be addressed to each such holder at its address as shown by the records of the Company.

3B. Deemed Liquidation. The (i) consolidation or merger of the Company into or with any other entity or entities (except a consolidation or merger into a Subsidiary or merger in which the Company is the surviving corporation and the holders of the Company's voting stock outstanding immediately prior to the transaction constitute the holders of a majority of the voting stock outstanding immediately following the transaction) or (ii) the sale, transfer, lease or other disposition by the Company of all or substantially all its assets, or (iii) the sale, exchange or transfer by the Company's stockholders, in a single transaction or series of related transactions, of capital stock representing a majority of the voting power at elections of directors of the Company shall be deemed to be a Liquidation Event (a "**Deemed Liquidation Event**") within the meaning of the provisions of this Paragraph 3 (subject to the provisions of this Paragraph 3 and not the provisions of subparagraph 4G hereof, unless subparagraph 4G is elected in the following proviso), provided, however, that the holders of at least a majority in interest of the then outstanding shares of Series B Preferred shall have the right to elect the benefits of the provisions of subparagraph 4G in lieu of receiving payment in liquidation, dissolution or winding up of the Company pursuant to this Paragraph 3.

3C. Payment in Kind. Whenever the distribution provided for in this Paragraph 3 shall be payable in property other than cash, the value of such distribution shall be the fair market value of such property as determined in good faith by the Board.

4. **Conversion of the Series B Preferred**. The holders of shares of Series B Preferred shall have the following conversion rights:

4A. Right to Convert. Subject to the terms and conditions of this Paragraph 4, the holder of any share or shares of Series B Preferred shall have the right, at its option at any time, to convert any such shares of Series B Preferred (except that upon any liquidation of the Company the right of conversion shall terminate at the close of business on the business day fixed for payment of the amounts distributable on the Series B Preferred) into such number of fully paid and nonassessable shares of Common Stock as is obtained by (i) multiplying the number of shares of Series B Preferred so to be converted by \$0.42 per share and (ii) dividing the result by the conversion price of \$0.42 per share or in case an adjustment of such price has taken place pursuant to the further provisions of this Paragraph 4, then by the conversion price as last adjusted and in effect at the date any share or shares of Series B Preferred are surrendered for conversion (such price, or such price as last adjusted, being referred to as the "**Series B Conversion Price**"). Such rights of conversion shall be exercised by the holder thereof by giving written notice that the holder elects to convert a stated number of shares of Series B Preferred into the Common Stock and by surrender of a certificate or certificates for the shares so to be converted to the Company at its principal office (or such other office or agency of the Company as the Company may designate by notice in writing to the holders of the Series B Preferred) at

any time during its usual business hours on the date set forth in such notice, together with a statement of the name or names (with address) in which the certificate or certificates for shares of Common Stock shall be issued. Notwithstanding any other provisions hereof, if a conversion of the Series B Preferred is to be made in connection with any transaction affecting the Company, the conversion of any shares of Series B Preferred, may, at the election of the holder thereof, be conditioned upon the consummation of such transaction, in which case such conversion shall not be deemed to be effective until such transaction has been consummated, subject in all events to the terms hereof applicable to such transaction.

4B. Issuance of Certificates; Time Conversion Effected. Promptly after the receipt of the written notice referred to in Paragraph 4A and surrender of the certificate or certificates for the share or shares of Series B Preferred to be converted, the Company shall issue and deliver, or cause to be issued and delivered, to the holder, registered in such name or names as such holder may direct, a certificate or certificates for the number of whole shares of Common Stock issuable upon the conversion of such share or shares of Series B Preferred. To the extent permitted by law, such conversion shall be deemed to have been effected and the Series B Conversion Price shall be determined as of the close of business on the date on which such written notice shall have been received by the Company and the certificate or certificates for such share or shares shall have been surrendered as aforesaid, and at such time the rights of the holder of such share or shares of Series B Preferred shall cease, and the person or persons in whose name or names any certificate or certificates for shares of Common Stock shall be issuable upon such conversion shall be deemed to have become the holder or holders of record of the shares represented thereby.

4C. Fractional Shares; Partial Conversion. No fractional shares shall be issued upon conversion of the Series B Preferred into the Common Stock and no payment or adjustment shall be made upon any such conversion with respect to any cash dividends previously payable on the Common Stock issued upon such conversion. In case the number of shares of Series B Preferred represented by the certificate or certificates surrendered pursuant to Paragraph 4A exceeds the number of shares converted, the Company shall, upon such conversion, execute and deliver to the holder, at the expense of the Company, a new certificate or certificates for the number of shares of Series B Preferred represented by the certificate or certificates surrendered which are not to be converted. If any fractional share of Common Stock would, except for the provisions of the first sentence of this Paragraph 4C, be delivered upon such conversion, the Company, in lieu of delivering such fractional share, shall pay to the holder surrendering the Series B Preferred for conversion an amount in cash equal to the current market price of such fractional share as determined in good faith by the Board, and based upon the aggregate number of shares of Series B Preferred surrendered by any one holder.

4D. Adjustment of Series B Conversion Price Upon Issuance of Common Stock Below the Series B Conversion Price. Except as provided in Paragraphs 4E and 4F, if and whenever the Company shall issue or sell, or is, in accordance with subparagraphs 4D(1) through 4D(8), deemed to have issued or sold, any shares of Common Stock for a consideration per share less than the Series B Conversion Price in effect immediately prior to the time of such issue or sale (the "*Applicable Conversion Price*") (such number being appropriately adjusted to reflect the occurrence of any event described in Paragraph 4F), then, forthwith upon such issue or sale,

the Applicable Conversion Price shall be reduced to the price (calculated to the nearest cent) determined by multiplying such Applicable Conversion Price by a (i) fraction, the numerator of which shall be an amount equal to the sum of (a) the number of shares of Common Stock outstanding immediately prior to such issue or sale (including, for this purpose, shares of Common Stock issuable upon conversion of the Series B Preferred and the exercise of outstanding Options) and (b) the number of shares of Common Stock which the aggregate consideration received by the Company for the total number of shares of Common Stock so issued (or deemed issued pursuant to this Paragraph 4) would purchase at such Applicable Conversion Price, and (ii) the denominator of which shall be an amount equal to the sum of (a) the total number of shares of Common Stock outstanding immediately prior to such issue or sale (including, for this purpose, shares of Common Stock issuable upon conversion of the Series B Preferred and the exercise of outstanding Options) and (b) the total number of shares of Common Stock issued (or deemed issued pursuant to this Paragraph 4) in such issue or sale.

For purposes of this Paragraph 4D, the following subparagraphs 4D(1) to 4D(8) shall also be applicable:

4D(1) Issuance of Rights or Options. In case at any time the Company shall in any manner grant (whether directly or by assumption in a merger or otherwise) any warrants or other rights to subscribe for or to purchase, or any options for the purchase of, Common Stock or any stock or security convertible into or exchangeable for Common Stock (such warrants, rights or options being called "*Options*" and such convertible or exchangeable stock or securities being called "*Convertible Securities*") whether or not such Options or the right to convert or exchange any such Convertible Securities are immediately exercisable, and the price per share for which Common Stock is issuable upon the exercise of such Options or upon the conversion or exchange of such Convertible Securities (determined by dividing (i) the total amount, if any, received or receivable by the Company as consideration for the granting of such Options, plus the minimum aggregate amount of additional consideration payable to the Company upon the exercise of all such Options, plus, in the case of such Options which relate to Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable upon the issue or sale of such Convertible Securities and upon the conversion or exchange thereof, by (ii) the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon the conversion or exchange of all such Convertible Securities issuable upon the exercise of such Options) shall be less than the Series B Conversion Price in effect immediately prior to the time of the granting of such Options, then the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon conversion or exchange of the total maximum amount of such Convertible Securities issuable upon the exercise of such Options shall be deemed to have been issued for such price per share as of the date of granting of such Options or the issuance of such Convertible Securities and thereafter shall be deemed to be outstanding. Except as otherwise provided in subparagraph 4D(3), no adjustment of the Series B Conversion Price shall be made upon the actual issue of such Common Stock or of such Convertible Securities upon exercise of such Options or upon the actual issue of such Common Stock upon conversion or exchange of such Convertible Securities.

4D(2) Issuance of Convertible Securities. In case the Company shall in any manner issue (whether directly or by assumption in a merger or otherwise) or sell any Convertible Securities, whether or not the rights to exchange or convert any such Convertible Securities are immediately exercisable, and the price per share for which Common Stock is issuable upon such conversion or exchange (determined by dividing (i) the total amount received or receivable by the Company as consideration for the issue or sale of such Convertible Securities, plus the minimum aggregate amount of additional consideration, if any, payable to the Company upon the conversion or exchange thereof, by (ii) the total maximum number of shares of Common Stock issuable upon the conversion or exchange of all such Convertible Securities) shall be less than the Series B Conversion Price in effect immediately prior to the time of such issue or sale, then the total maximum number of shares of Common Stock issuable upon conversion or exchange of all such Convertible Securities shall be deemed to have been issued for such price per share as of the date of the issue or sale of such Convertible Securities and thereafter shall be deemed to be outstanding, provided that (a) except as otherwise provided in subparagraph 4D(3), no adjustment of the Series B Conversion Price shall be made upon the actual issue of such Common Stock upon conversion or exchange of such Convertible Securities and (b) if any such issue or sale of such Convertible Securities is made upon exercise of any Options to purchase any such Convertible Securities for which adjustments of the Series B Conversion Price have been or are to be made pursuant to other provisions of this Paragraph 4D, no further adjustment of the Series B Conversion Price shall be made by reason of such issue or sale.

4D(3) Change in Option Price or Conversion Rate. Upon the happening of any of the following events, namely, if the purchase price provided for in any Option referred to in subparagraph 4D(1), the additional consideration, if any, payable upon the conversion or exchange of any Convertible Securities referred to in subparagraph 4D(1) or 4D(2), or the rate at which Convertible Securities referred to in subparagraph 4D(1) or 4D(2) are convertible into or exchangeable for Common Stock shall change at any time (including, but not limited to, changes under or by reason of provisions designed to protect against dilution), the Series B Conversion Price in effect at the time of such event shall forthwith be readjusted (in each case by an amount equal to not less than one cent (\$.01)) to the Series B Conversion Price which would have been in effect at such time had such Options or Convertible Securities still outstanding provided for such changed purchase price, additional consideration or conversion rate, as the case may be, at the time initially granted, issued or sold; and on the expiration of any such Option or the termination of any such right to convert or exchange such Convertible Securities, the Series B Conversion Price then in effect hereunder shall forthwith be increased to the Conversion Price which would have been in effect at the time of such expiration or termination had such Option or Convertible Securities, to the extent outstanding immediately prior to such expiration or termination, never been issued.

4D(4) Stock Dividends. In case the Company shall declare a dividend or make any other distribution upon any stock of the Company payable in Common Stock (except

for the issue of stock dividends or distributions upon the outstanding Common Stock for which adjustment is made pursuant to Paragraph 4F), Options or Convertible Securities, any Common Stock, Options or Convertible Securities, as the case may be, issuable in payment of such dividend or distribution shall be deemed to have been issued or sold without consideration.

4D(5) Consideration for Stock. In case any shares of Common Stock, Options or Convertible Securities shall be issued or sold for cash, the consideration received therefor shall be deemed to be the amount received by the Company therefor, without deduction therefrom of any expenses incurred or any underwriting commissions or concessions paid or allowed by the Company in connection therewith. In case any shares of Common Stock, Options or Convertible Securities shall be issued or sold for a consideration other than cash, the amount of the consideration other than cash received by the Company shall be deemed to be the fair value of such consideration as determined in good faith by the Board of Directors of the Company, without deduction of any expenses incurred or any underwriting commissions or concessions paid or allowed by the Company in connection therewith. In case any Options shall be issued in connection with the issue and sale of other securities of the Company, together comprising one integral transaction in which no specific consideration is allocated to such Options by the parties thereto, such Options shall be deemed to have been issued for such consideration as determined in good faith by the Board of Directors of the Company.

4D(6) Record Date. In case the Company shall take a record of the holders of its Common Stock for the purpose of entitling them (i) to receive a dividend or other distribution payable in Common Stock, Options or Convertible Securities or (ii) to subscribe for or purchase Common Stock, Options or Convertible Securities, then such record date shall be deemed to be the date of the issue or sale of the shares of Common Stock deemed to have been issued or sold upon the declaration of such dividend or the making of such other distribution or the date of the granting of such right of subscription or purchase, as the case may be.

4D(7) Treasury Shares. The number of shares of Common Stock outstanding at any given time shall not include shares owned or held by or for the account of the Company, and the disposition of any such shares shall be considered an issue or sale of Common Stock for the purpose of this Paragraph 4D.

4D(8) Adjustment of Series B Conversion Price Upon Breach of Representation.

In the event the representation set forth in Section 3.15 of that certain Series B Convertible Stock Purchase Agreement, dated as of the Original Issue Date, by and among the Company and certain purchasers named therein (the "**Purchase Agreement**"), proves to have been untrue when made, such that the Company pays any commission, fee or other compensation (such commission, fee or other compensation, a "**Finder's Fee**") to any person, other than any payment made to Dragonfly Capital pursuant to the Settlement Agreement, dated as of June 8, 2004, by and between the Company and Dragonfly Capital, as a finder or broker in connection with the transactions provided for

in the Purchase Agreement, the Series B Conversion Price shall be reduced to an amount equal to the quotient obtained by dividing (a) the difference between \$12,999,426.09 and the aggregate amount of such Finder's Fee (or its fair value if paid in property other than cash) by (b) 30,951,015.

4E. Certain Issues of Common Stock Excepted. Anything herein to the contrary notwithstanding, the Company shall not be required to make any adjustment of the Series B Conversion Price in the case of the issuance of (i) shares of Common Stock issuable upon conversion of the Series B Preferred or as a dividend or distribution on the Series B Preferred; (ii) securities issued upon the conversion of any debenture, warrant, option or other convertible security outstanding as of the Original Issue Date and disclosed to the purchasers of Series B Preferred pursuant to the Purchase Agreement (including the schedules and exhibits attached thereto), or issued pursuant to agreements entered into after the Original Issue Date that have been approved by the Board (including the affirmative vote of at least a majority of the Company's directors who were designated by the holders of the Series B Preferred (collectively, the "**Investor Board Designees**")); (iii) shares of Common Stock issuable upon a stock split, stock dividend or any subdivision of shares of Common Stock; and (iv) Reserved Employee Shares (as defined in Paragraph 6 hereof).

4F. Subdivision or Combination of Common Stock. In case the Company shall at any time subdivide (by any stock split, stock dividend or otherwise) its outstanding shares of Common Stock into a greater number of shares, the Series B Conversion Price in effect immediately prior to such subdivision shall be proportionately reduced, and, conversely, in case the outstanding shares of Common Stock shall be combined into a smaller number of shares, the Series B Conversion Price in effect immediately prior to such combination shall be proportionately increased.

4G. Reorganization or Reclassification. If any capital reorganization, reclassification, recapitalization, consolidation, merger, sale of all or substantially all of the Company's assets or other similar transaction (any such transaction being referred to herein as an "**Organic Change**") shall be effected in such a way that holders of Common Stock shall be entitled to receive (either directly or upon subsequent liquidation) stock, securities or assets with respect to or in exchange for Common Stock, then, as a condition of such Organic Change, lawful and adequate provisions shall be made whereby each holder of a share or shares of Series B Preferred shall thereupon have the right to receive, upon the basis and upon the terms and conditions specified herein and in lieu of or in addition to, as the case may be, the shares of Common Stock immediately theretofore receivable upon the conversion of such share or shares of Series B Preferred such shares of stock, securities or assets as may be issued or payable with respect to or in exchange for a number of outstanding shares of such Common Stock equal to the number of shares of such Common Stock immediately theretofore receivable upon such conversion had such Organic Change not taken place, and in any case of a reorganization or reclassification only appropriate provisions shall be made with respect to the rights and interests of such holder to the end that the provisions hereof (including without limitation provisions for adjustments of the Series B Conversion Price) shall thereafter be applicable, as nearly as may be, in relation to any shares of stock, securities or assets thereafter deliverable upon the exercise of such conversion rights.

4H. Notice of Adjustment. Upon any adjustment of the Series B Conversion Price, then and in each such case the Company shall give written notice thereof, by first class mail, postage prepaid, or by facsimile transmission to non-U.S. residents, addressed to each holder of shares of Series B Preferred at the address of such holder as shown on the books of the Company, which notice shall state the Series B Conversion Price, as applicable, resulting from such adjustment, setting forth in reasonable detail the method upon which such calculation is based.

4I. Other Notices. In case at any time:

(a) the Company shall declare any dividend upon its Common Stock payable in cash or stock or make any other distribution to the holders of its Common Stock;

(b) the Company shall offer for subscription pro rata to the holders of its Common Stock any additional shares of stock of any class or other rights;

(c) there shall be any capital reorganization or reclassification of the capital stock of the Company, or a consolidation or merger of the Company with or into, or a sale of all or substantially all its assets to, another entity or entities; or

(d) there shall be a voluntary or involuntary dissolution, liquidation or winding up of the Company;

then, in any one or more of said cases, the Company shall give, by first class mail, postage prepaid, or by facsimile transmission to non-U.S. residents, addressed to each holder of any shares of Series B Preferred at the address of such holder as shown on the books of the Company,

(a) at least 10 days' prior written notice of the date on which the books of the Company shall close or a record shall be taken for such dividend, distribution or subscription rights or for determining rights to vote in respect of any such reorganization, reclassification, consolidation, merger, sale, dissolution, liquidation or winding up and (b) in the case of any such reorganization, reclassification, consolidation, merger, sale, dissolution, liquidation or winding up, at least 10 days' prior written notice of the date when the same shall take place. Such notice in accordance with the foregoing clause (a) shall also specify, in the case of any such dividend, distribution or subscription rights, the date on which the holders of Common Stock shall be entitled thereto and such notice in accordance with the foregoing clause (b) shall also specify the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon such reorganization, reclassification, consolidation, merger, sale, dissolution, liquidation or winding up, as the case may be.

4J. Stock to be Reserved. The Company will at all times reserve and keep available out of its authorized Common Stock, solely for the purpose of issuance upon the conversion of Series B Preferred as herein provided, such number of shares of Common Stock as shall then be issuable upon the conversion of all outstanding shares of Series B Preferred. The Company covenants that all shares of Common Stock which shall be so issued shall be duly and validly issued and fully paid and nonassessable and free from all taxes, liens and charges with respect to

the issue thereof, and, without limiting the generality of the foregoing, the Company covenants that it will from time to time take all such action as may be requisite to assure that the par value per share of Common Stock is at all times equal to or less than the Series B Conversion Price in effect at the time. The Company will take all such action as may be necessary to assure that all such shares of Common Stock may be so issued without violation of any applicable law or regulation, or of any requirement of any national securities exchange upon which the Common Stock may be listed.

4K. No Reissuance of Series B Preferred. Shares of Series B Preferred which are converted into shares of Common Stock as provided herein shall not be reissued.

4L. Issue Tax. The issuance of certificates for shares of Common Stock upon conversion of Series B Preferred shall be made without charge to the holders thereof for any issuance tax in respect thereof, provided that the Company shall not be required to pay any tax which may be payable in respect of any transfer involved in the issuance and delivery of any certificate in a name other than that of the holder of the Series B Preferred which is being converted.

4M. Closing of Books. The Company will at no time close its transfer books against the transfer of any shares of Series B Preferred or of any shares of Common Stock issued or issuable upon the conversion of any shares of Series B Preferred, in any manner which interferes with the timely conversion of such Series B Preferred except as may otherwise be required to comply with applicable securities laws.

4N. Definition of Common Stock. As used in this Paragraph 4, the term "**Common Stock**" shall mean and include the Company's authorized Common Stock, par value \$0.001 per share, as constituted on the date of filing of these terms of the Series B Preferred, and shall also include any capital stock of any class of the Company thereafter authorized which shall neither be limited to a fixed sum or percentage of par value in respect of the rights of the holders thereof to participate in dividends nor entitled to a preference in the distribution of assets upon the voluntary or involuntary liquidation, dissolution or winding up of the Company; provided that the shares of Common Stock receivable upon conversion of shares of Series B Preferred shall include only shares designated as Common Stock of the Company on the date of filing of this instrument, or in case of any reorganization or reclassification of the outstanding shares thereof, the stock, securities or assets provided for in subparagraph 4G.

4O. Mandatory Conversion. All outstanding shares of Series B Preferred shall automatically convert to shares of Common Stock if at any time the Company shall effect a firm commitment underwritten public offering of shares of Common Stock in which (i) the aggregate net proceeds from such offering to the Company shall be at least \$25,000,000 and (ii) the price paid by the public for such shares shall be at least three (3) times the Original Issue Price (appropriately adjusted for stock dividends, combinations, and splits with respect to such shares) (a "**Qualified Public Offering**"), then effective upon the closing of the sale of such shares by the Company pursuant to such public offering, all outstanding shares of Series B Preferred shall automatically convert to shares of Common Stock. In addition, at any time, each share of Series

B Preferred shall automatically be converted into shares of Common Stock at the then-effective Series B Conversion Price upon the affirmative election or written consent of the holders of at least a majority in interest of the outstanding shares of Series B Preferred, voting as a separate series.

5. Redemption. The shares of Series B Preferred shall be redeemed as follows:

5A. Optional Redemption. Except as set forth herein, the Company shall not have the right to call or redeem at any time all or any shares of Series B Preferred. With the approval of the holders of a majority in interest of the then outstanding shares of Series B Preferred, one or more holders of shares of Series B Preferred may, by giving notice (the “**Redemption Request**”) to the Company at any time after July 15, 2009 require the Company to redeem all of the outstanding Series B Preferred. Upon receipt of the Redemption Request, the Company shall so notify all other persons holding Series B Preferred. The Company shall then fix the date for redemption (the “**Redemption Date**”), provided that such Redemption Date shall occur within one hundred twenty (120) days after receipt of the Redemption Request. All holders of Series B Preferred shall deliver to the Company during regular business hours, at the office of any transfer agent of the Company for the Series B Preferred or at the principal office of the Company or at such other place as may be designated by the Company, the certificate or certificates for the Series B Preferred duly endorsed for transfer to the Company (if required by it) on or before the Redemption Date.

5B. Redemption Price and Payment. The Series B Preferred to be redeemed on the Redemption Dates shall be redeemed by paying for each share in cash an amount equal to the (a) the Original Issue Price (as appropriately adjusted for stock dividends, combinations, and splits with respect to such shares), plus (b) an amount equal to all dividends (including Accruing Dividends) accrued and unpaid on each such share as of the date of the repurchase of such share, such amount being referred to as the “**Series B Redemption Price**.” Such payment shall be made in full on each of the Redemption Date to the holders entitled thereto.

5C. Redemption Mechanics. At least 20 but not more than 30 days prior to the Redemption Date, written notice (the “**Redemption Notice**”) shall be given by the Company by mail, postage prepaid, or by facsimile transmission to non-U.S. residents, to each holder of record (at the close of business on the business day next preceding the day on which the Redemption Notice is given) of shares of Series B Preferred notifying such holder of the redemption and specifying the Series B Redemption Price, the Redemption Date and the place where said Series B Redemption Price shall be payable. The Redemption Notice shall be addressed to each holder at his address as shown by the records of the Company. From and after the close of business on the Redemption Date, unless there shall have been a default in the payment of the Series B Redemption Price all rights of holders of shares of Series B Preferred (except the right to receive the Series B Redemption Price) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Company or be deemed to be outstanding for any purpose whatsoever. If the funds of the Company legally available for redemption of shares of Series B Preferred on the Redemption Date are insufficient to redeem the total number of outstanding shares of Series B Preferred to be redeemed, the

holders of shares of Series B Preferred shall share ratably in any funds legally available for redemption of such shares according to the respective amounts which would be payable with respect to the full number of shares owned by them if all such outstanding shares were redeemed in full. The shares of Series B Preferred not redeemed shall remain outstanding and entitled to all rights and preferences provided herein (including without limitation the continued accrual of its Accruing Dividends); provided, however, that in addition the holders of such unredeemed shares shall be entitled to receive interest accruing daily with respect to their unpaid Series B Redemption Price at a rate of 6% per annum. At any time thereafter when additional funds of the Company are legally available for the redemption of such shares of Series B Preferred such funds will be used, but no sooner than the next succeeding fiscal quarter, to redeem the balance of such shares, or such portion thereof for which funds are then legally available, on the basis set forth above, and upon the Company's delivery of such redemption price, the holders of the Series B Preferred shall be required to sell to the Company an appropriate number of shares of Series B Preferred.

5D. Redeemed or Otherwise Acquired Shares to be Retired. Any shares of Series B Preferred redeemed pursuant to this Paragraph 5 or otherwise acquired by the Company in any manner whatsoever shall be canceled and shall not under any circumstances be reissued; and the Company may from time to time take such appropriate corporate action as may be necessary to reduce accordingly the number of authorized shares of Series B Preferred.

6. **Definitions.** As used herein, the following terms shall have the following meanings:

(a) The term "**Reserved Employee Shares**" shall mean shares of Common Stock reserved by the Company from time to time for (i) the sale of shares of Common Stock to employees, consultants or directors of the Company pursuant to any plan approved by the Board or (ii) the issuance and/or exercise of options to purchase Common Stock granted to employees, consultants or directors of the Company pursuant to any plan approved by the Board.

(b) The term "**Subsidiary**" shall mean any corporation, partnership, trust or other entity of which the Company and/or any of its other subsidiaries directly or indirectly owns at the time a majority of the outstanding shares of every class of equity security of such corporation, partnership, trust or other entity.