

**AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
APTUS ENDOSYSTEMS, INC.**

(Pursuant to Sections 242 and 245 of the
General Corporation Law of the State of Delaware)

Aptus Endosystems, Inc., a corporation organized and existing under and by virtue of the provisions of the General Corporation Law of the State of Delaware (the "General Corporation Law" or the "DGCL"),

DOES HEREBY CERTIFY:

FIRST: That the name of this corporation is Aptus Endosystems, Inc. and that this corporation was originally incorporated pursuant to the General Corporation Law on June 27, 2002 under the name Aptus Endosystems, Inc.

SECOND: That the Board of Directors duly adopted resolutions proposing to amend and restate the Certificate of Incorporation of this corporation, declaring said amendment and restatement to be advisable and in the best interests of this corporation and its stockholders, and authorizing the appropriate officers of this corporation to solicit the consent of the stockholders therefor, which resolution setting forth the proposed amendment and restatement is as follows:

THIRD: that the Amended and Restated Certificate of Incorporation of this corporation is hereby amended and restated in its entirety as follows:

I.

The name of this corporation is **APTUS ENDOSYSTEMS, INC.** (the "Company").

II.

The address of the registered office of the corporation in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, and the name of the registered agent of the corporation in the State of Delaware at such address is The Corporation Trust Company.

III.

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

IV.

A. This corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the corporation is authorized to issue is Ninety-Two Million Eight Hundred Seventy Two Thousand Seven Hundred Thirty Seven (92,872,737). Fifty Five Million Shares (55,000,000) shares shall

be Common Stock, each having a par value of one-tenth of one cent (\$0.001). Thirty Seven Million Eight Hundred Seventy-Two Thousand Seven Hundred Thirty-Seven (37,872,737) shares shall be Preferred Stock, each having a par value of one-tenth of one cent (\$0.001).

B. Notwithstanding the provisions of 242(b)(2) of the General Corporation Law, the number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares of Common Stock then outstanding) by (in addition to the vote of the holders of the Series Preferred required by the terms of this Amended and Restated Certificate of Incorporation) the affirmative vote of the holders of a majority of the outstanding shares of Common Stock and Series Preferred (as defined below) of the Company (voting together on an as-if-converted basis).

C. One million eight hundred eighty four thousand six hundred sixteen (1,884,616) of the authorized shares of Preferred Stock shall be designated Series A1 Preferred Stock (the "Series A1 Preferred"), four million four hundred eighty-one thousand two hundred ninety-four (4,481,294) shall be designated Series A2 Preferred Stock (the "Series A2 Preferred"), eleven million five hundred six thousand eight hundred twenty-seven (11,506,827) shares shall be designated Series B Preferred Stock (the "Series B Preferred") and Twenty Million (20,000,000) shares shall be designated Series C Preferred Stock (the "Series C Preferred", and together with the Series A1 Preferred, Series A2 Preferred and Series B Preferred, the "Series Preferred").

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

1. **DIVIDEND RIGHTS.**

(a) Holders of Series Preferred, in preference to the holders of any other stock of the Company ("Junior Stock"), shall be entitled to receive, when and as declared by the Board of Directors, but only out of funds that are legally available therefor, cash dividends at the rate of eight percent (8%) of the Original Issue Price (as defined below) per annum on each outstanding share of Series Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares). The "Original Issue Price" for the Series A1 Preferred shall be sixty-five cents (\$0.65) per share, the "Original Issue Price" for the Series A2 Preferred shall be one dollar twenty-six cents (\$1.26) per share, the "Original Issue Price" for the Series B Preferred shall be one dollar eighty cents (\$1.80) per share and the "Original Issue Price" for the Series C Preferred shall be one dollar fifty-four cents (\$1.54) per share, in each case, as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof. Such dividends shall be payable only when, as and if declared by the Board of Directors and shall be non-cumulative. No dividend shall be paid or declared on any Series Preferred unless and until all Series Preferred shall be paid or declared, respectively, such dividends on a pari passu basis giving effect to the Original Issue Price for each such series of Series Preferred. The holders of the outstanding Series Preferred may waive any dividend preference with respect to any 12-month period that such holders are entitled to under this Section 1(a) upon the affirmative vote or written consent of the holders of at least sixty-two percent (62%) of the then-outstanding shares of Series A2 Preferred, Series B Preferred and Series C Preferred, voting together as a single class and on an as-converted to Common Stock basis (a "Preferred Supermajority").

(b) So long as any shares of Series Preferred shall be outstanding, no dividend, whether in cash or property, shall be paid or declared, nor shall any other distribution be made, on any Junior Stock, nor shall any shares of any Junior Stock of the Company be purchased, redeemed, or otherwise acquired for value by the Company (except for acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares upon termination of services to the Company or in exercise of the Company's right of first refusal upon a proposed transfer) until all dividends (set forth in Section 1(a) above) on the Series Preferred shall have been paid or declared and set apart. In the event dividends are paid on any share of Junior Stock, an additional dividend shall be paid with respect to all outstanding shares of Series Preferred in an amount equal per share (on an as-if-converted to Common Stock basis) to the amount paid or set aside for each share of Junior Stock. The provisions of this Section 1(b) shall not, however, apply to (i) a dividend payable solely in Common Stock, (ii) the acquisition of shares of any Junior Stock in exchange for shares of any other Junior Stock, or (iii) any repurchase of any outstanding securities of the Company that is approved by the Company's Board of Directors.

2. VOTING RIGHTS.

(a) **General Rights.** Except as otherwise provided herein or as required by law, the Series Preferred shall vote equally with the shares of the Common Stock of the Company and not as a separate class, at any annual or special meeting of stockholders of the Company, and may act by written consent in the same manner as the Common Stock, in either case upon the following basis: each holder of shares of Series Preferred shall be entitled to such number of votes as shall be equal to the whole number of shares of Common Stock into which such holder's aggregate number of shares of Series Preferred are convertible (pursuant to Section 4 hereof) immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent.

(b) **Separate Vote of Series A2 Preferred, Series B Preferred and Series C Preferred.** For so long as any shares of Series A2 Preferred, Series B Preferred or Series C Preferred remain outstanding other than treasury shares, in addition to any other vote or consent required herein or by law, the Company shall not effect or validate any of the following actions (in any case, by merger, consolidation, reorganization, operation of law or otherwise) without first having obtained the vote or written consent of the holders of a Preferred Supermajority:

(i) Any amendment, alteration, repeal or waiver of any provision of, or addition of any provision to, the Certificate of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Designation);

(ii) Any increase or decrease in the authorized number of shares of Series Preferred or Common Stock;

(iii) Any authorization, issuance or any designation, whether by reclassification or otherwise, of any new class or series of stock or any other securities convertible into or exercisable or exchangeable for equity securities of the Company ranking on parity with or senior to the Series Preferred in right of redemption, liquidation preference, voting

or dividends or any increase in the authorized or designated number of any such new class or series, or with any special voting rights;

(iv) Any redemption, repurchase, declaration or payment of dividends (whether payable in cash or in kind) or other distributions with respect to Junior Stock or Series Preferred (except for (i) acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares upon termination of services to the Company or in exercise of the Company's right of first refusal upon a proposed transfer, or (ii) redemption of any shares of Series Preferred in accordance with Section 5 hereof);

(v) Any agreement by the Company regarding an Asset Transfer or Acquisition (each as defined in Section 3(c)), or the effectiveness of any Asset Transfer or Acquisition;

(vi) Any voluntary dissolution, liquidation or winding up of the Company;

(vii) Any increase or decrease in the authorized number of members of the Company's Board of Directors from the size of the Board of Directors on the date that the first share of Series C Preferred is first issued;

(viii) Any creation of a debt security if the Company's aggregate indebtedness would exceed \$500,000, unless such debt security has received the prior approval of the Company's Board of Directors; and

(ix) Any entry into any agreement to do any of the foregoing that is not expressly made conditional on obtaining the affirmative vote or written consent of such majority unless such consent has already been obtained.

(c) Separate Vote of Series A1 Preferred and Series A2 Preferred. For so long as any shares of Series A1 Preferred or Series A2 Preferred remain outstanding, in addition to any other vote or consent required herein or by law, the Company shall not effect or validate any of the following actions (in any case, by merger, consolidation, reorganization, operation of law or otherwise) without first having obtained the vote or written consent of the holders of at least sixty-six and two-third percent (66⅔%) of the then-outstanding shares of Series A1 Preferred and Series A2 Preferred, voting together as a single class:

(i) Any amendment, alteration, or repeal of any provision of, or addition of any provision to, the Certificate of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Designation), that alters or changes the voting or other powers, preferences, or other special rights or privileges, or restrictions of the Series A1 Preferred or the Series A2 Preferred so as to affect them adversely; and

(ii) Any increase or decrease in the authorized number of shares of Series A1 Preferred or Series A2 Preferred.

(d) Separate Vote of Series B Preferred. For so long as any shares of Series B Preferred remain outstanding, in addition to any other vote or consent required herein

or by law, the Company shall not effect or validate any of the following actions (in any case, by merger, consolidation, reorganization, operation of law or otherwise) without first having obtained the vote or written consent of the holders of at least seventy-five percent (75%) of the then-outstanding shares of Series B Preferred, voting as a separate class:

(i) Any amendment, alteration, or repeal of any provision of, or addition of any provision to, the Certificate of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Designation), that alters or changes the voting or other powers, preferences, or other special rights or privileges, or restrictions of the Series B Preferred so as to affect them adversely; and

(ii) Any increase or decrease in the authorized number of shares of Series B Preferred.

(e) **Separate Vote of Series C Preferred.** For so long as any shares of Series C Preferred remain outstanding, in addition to any other vote or consent required herein or by law, the Company shall not effect or validate any of the following actions (in any case, by merger, consolidation, reorganization, operation of law or otherwise) without first having obtained the vote or written consent of the holders of at least sixty-five percent (65%) of the then-outstanding shares of Series C Preferred, voting as a separate class:

(i) Any amendment, alteration, or repeal of any provision of, or addition of any provision to, the Certificate of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Designation), that alters or changes the voting or other powers, preferences, or other special rights or privileges, or restrictions of the Series C Preferred so as to affect them adversely; and

(ii) Any increase or decrease in the authorized number of shares of Series C Preferred.

(f) Election of Board of Directors.

(i) for so long as one million (1,000,000) shares of the Series A1 Preferred and Series A2 Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series A1 Preferred and Series A2 Preferred), the holders of Series A1 Preferred and Series A2 Preferred, voting together as a separate class on an as-converted basis, shall be entitled to elect two (2) members (the "Series A Directors") of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors;

(ii) for so long as one million (1,000,000) shares of the Series B Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series B Preferred), the holders of Series B Preferred, voting as a separate class, shall be entitled to elect one (1) member (the "Series B Director") of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director;

(iii) for so long as one million (1,000,000) shares of the Series C Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series C Preferred), the holders of Series C Preferred, voting as a separate class, shall be entitled to elect one (1) member (the "Series C Director" and together with the Series A Directors and Series B Director, the "Series Preferred Directors") of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director;

(iv) the holders of Common Stock, voting together as a separate class, shall be entitled to elect one (1) member of the Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director; and

(v) the holders of the Common Stock and Series Preferred, voting together as a single class on an as-converted basis, shall be entitled to elect all remaining members of the Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director.

(vi) Each of the foregoing directors may be removed during his or her term of office, either with or without cause, by, and only by, the affirmative vote of the holders of the shares of the class or series of stock entitled to elect such director, given either at a special meeting of such stockholders duly called for that purpose or pursuant to the written consent of such stockholders, and any vacancy in any of the seats held by the foregoing directors may be filled by, and only by, the affirmative vote of the holders of the shares of the class or series of stock with the express right to elect the applicable director.

(vii) No person entitled to vote at an election for directors may cumulate votes to which such person is entitled, unless, at the time of such election, the Company is subject to Section 2115 of the California Corporations Code ("CGCL"). During such time or times that the Company is subject to Section 2115(b) of the CGCL, every stockholder entitled to vote at an election for directors may cumulate such stockholder's votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which such stockholder's shares are otherwise entitled, or distribute the stockholder's votes on the same principle among as many candidates as such stockholder desires. No stockholder, however, shall be entitled to so cumulate such stockholder's votes unless (i) the names of such candidate or candidates have been placed in nomination prior to the voting and (ii) the stockholder has given notice at the meeting, prior to the voting, of such stockholder's intention to cumulate such stockholder's votes. If any stockholder has given proper notice to cumulate votes, all stockholders may cumulate their votes for any candidates who have been properly placed in nomination. Under cumulative voting, the candidates receiving the highest number of votes, up to the number of directors to be elected, are elected.

(g) During such time or times that the Company is subject to Section 2115(b) of the CGCL, one or more directors may be removed from office at any time without cause by the affirmative vote of the holders of at least a majority of the outstanding shares entitled to vote separately for that director as provided above; *provided, however*, that unless the entire Board is removed, no individual director may be removed when the votes cast against such director's removal, or not consenting in writing to such removal, would be sufficient to elect that director if voted cumulatively at an election which the same total number of votes were cast (or, if such action is taken by written consent, all shares entitled to vote were voted) and the entire number of directors authorized at the time of such director's most recent election were then being elected.

3. LIQUIDATION RIGHTS.

(a) Series C Liquidation Preference.

(i) Upon any liquidation, dissolution, or winding up of the Company, whether voluntary or involuntary (a "Liquidation"), before any distribution or payment shall be made to the holders of any Series A1 Preferred, Series A2 Preferred, Series B Preferred or Junior Stock, the holders of Series C Preferred shall be entitled to be paid out of the Net Proceeds (as defined below) received or to be received in respect of a Liquidation, an amount per share equal to the Series C Liquidation Preference Amount (as defined below) for each share of Series C Preferred held by them. If, upon any Liquidation, the Net Proceeds shall be insufficient to make payment in full to all holders of Series C Preferred of the liquidation preference set forth in this Section 3(a), then such Net Proceeds legally available for distribution shall be distributed among the holders of Series C Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled. The "Series C Liquidation Preference Amount" shall mean (1) 2.5 times the Original Issue Price of the Series C Preferred plus any declared but unpaid dividends on each share of Series C Preferred when the Net Proceeds received or to be received in respect of a Liquidation are equal to or less than \$100,000,000, (2) 1.0 times the Original Issue Price of the Series C Preferred plus any declared but unpaid dividends on each share of Series C Preferred when the Net Proceeds received or to be received in respect of a Liquidation are equal to or greater than \$300,000,000 and (3) "X" times the Original Issue Price of the Series C Preferred plus any declared but unpaid dividends on each share of Series C Preferred when the Net Proceeds received or to be received in respect of a Liquidation are less than \$300,000,000 but greater than \$100,000,000, where "X" equals a fraction, the numerator of which shall be \$433,333,333 minus the amount of Net Proceeds and the denominator of which shall be \$133,333,333. For sake of example and the avoidance of doubt, if the Net Proceeds from a Liquidation equal \$200,000,000 then the resulting equation would be $X = (433,333,333 - 200,000,000) / 133,333,333$ with the result in this example being that $X = 1.75$ times the Original Issue Price of the Series C Preferred.

(ii) "Net Proceeds" shall mean the amount of actual gross consideration received or to be received by the Company or its stockholders in respect of a Liquidation, including, but not limited to, all cash, securities, earnout payments, escrow amounts or other contingent payments, reduced by all (i) costs, fees and expenses incurred in connection with such Liquidation, (ii) indebtedness prepaid, repaid or required to be prepaid or repaid, and (iii) all taxes paid or payable by the Company in respect thereof.

(iii) For purposes of determining whether the aggregate Net Proceeds are equal to or less than \$100,000,000, greater than \$100,000,000 but less than \$300,000,000, or equal to or greater than \$300,000,000 (each, a "Liquidation Threshold") in connection with any event of Liquidation that includes contingent consideration, earnout, deferred or similar potential future consideration (a "Staged Payment Liquidation"), Net Proceeds shall be the final aggregate Net Proceeds after all such contingencies have been fulfilled or removed, as appropriate (the "Aggregate Net Proceeds"). To the extent that a portion of the Net Proceeds from a Staged Payment Liquidation ("Partial Liquidation Amounts") is available for distribution prior to being able to calculate the Aggregate Net Proceeds and there exists the possibility that if 100% of the potential Net Proceeds from such Staged Payment Liquidation (the "Complete Net Proceeds") were received, the Liquidation Threshold based on all Partial Liquidation Amounts available to date could be different than the Liquidation Threshold if the Complete Net Proceeds were received, then prior to the distribution of each Partial Liquidation Amount, the Company shall place into an escrow account for later distribution to the Company's stockholders pursuant to this Section 3 that amount of such Partial Liquidation Amount which allows the Company to distribute the appropriate amount of Net Proceeds to each Company stockholder when the Aggregate Net Proceeds is finally determined and available for distribution.

(b) After the payment of the full liquidation preference of the Series C Preferred as set forth in Section 3(a) above, before any distribution or payment shall be made to the holders of any Junior Stock, the holders of Series A1 Preferred, Series A2 Preferred and Series B Preferred shall be entitled to be paid out of the Net Proceeds, an amount per share equal to the sum of the respective Original Issue Price applicable to such share of Series Preferred plus all declared and unpaid dividends on such share of Series Preferred for each share of Series Preferred held by them. If, upon any Liquidation, the Net Proceeds shall be insufficient to make payment in full to all holders of Series A1 Preferred, Series A2 Preferred and Series B Preferred of the liquidation preference set forth in this Section 3(b), then such Net Proceeds legally available for distribution shall be distributed among the holders of Series A1 Preferred, Series A2 Preferred and Series B Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled.

(c) After the payment of the full liquidation preferences of the Series Preferred as set forth in Sections 3(a) and 3(b) above, the remaining Net Proceeds legally available for distribution, if any, shall be distributed ratably to the holders of Series Preferred and Common Stock, on an as-if-converted to Common Stock basis.

(d) Unless otherwise determined by the Preferred Supermajority, the following events shall be considered a "Liquidation" under this Section 3:

(i) any consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, in which the stockholders of the Company immediately prior to such consolidation, merger or reorganization, own less than 50% of the Company's voting power immediately after such consolidation, merger or reorganization, or any transaction or series of related transactions to which the Company is a party in which in excess of fifty percent (50%) of the Company's voting power is transferred (an "Acquisition"); *provided, however*, that an Acquisition shall not include

any consolidation or merger effected exclusively to change the domicile of the Company, any transactions or series of transactions principally for bona fide equity financing purposes in which cash is received by the Company or indebtedness of the Company is cancelled or converted, or a combination thereof; or

(ii) a sale, lease, transfer, exclusive license or other disposition of all or substantially all of the assets of the Company (an "Asset Transfer").

In the event of an Acquisition or Asset Transfer that is considered a Liquidation, all consideration payable to the stockholders of the Company in connection with any Acquisition, or all consideration payable to the Company and distributable to its stockholders, together with all other available assets of the Company (net of obligations owed by the Company that are senior to the Series Preferred), in connection with any Asset Transfer, shall be, as applicable, paid by the purchaser to the holders of, or distributed by the Company in redemption (out of funds legally available therefor) of, the Series Preferred and any Junior Stock in accordance with the preferences and priorities set forth in this Section 3, with such preferences and priorities specifically intended to be applicable in any such Acquisition or Asset Transfer, as if such transaction were a Liquidation. In furtherance of the foregoing, the Company shall take such actions as are necessary to give effect to the provisions of this Section 3, including without limitation, (i) in the case of an Acquisition, causing the definitive agreement relating to such Acquisition to provide for a rate at which the shares of Series Preferred are converted into or exchanged for cash, new securities or other property which gives effect to the preferences and priorities set forth in this Section 3, or (ii) in the case of an Asset Transfer, redeeming the Series Preferred. The Company shall promptly provide to the holders of shares of Series Preferred such information concerning the terms of such Acquisition or Asset Transfer, and the value of the assets of the Company as may reasonably be requested by the holders of Series Preferred. The amount deemed distributed to the holders of Series Preferred upon any such transaction shall be the cash or the value of the property, rights or securities distributed to such holders by the Company or the acquiring person, firm or other entity, as applicable. Any determination by such Preferred Supermajority pursuant to this Section 3(d) shall be made by written notice to the Company and the other holders of Series Preferred promptly after the closing of such relevant transaction. Upon the determination by such Preferred Supermajority, all holders of Series Preferred shall be deemed to have made such election and such election shall bind all holders of the Series Preferred.

(e) In any of such events, if the consideration received by the Company is other than cash, its value will be deemed to be its fair market value as determined in good faith by the Board of Directors. Any securities shall be valued as follows:

(i) Securities not subject to investment letter or other similar restrictions on free marketability covered by (ii) below:

(A) If traded on a securities exchange or through the Nasdaq Stock Market, the value shall be deemed to be the average of the closing prices of the securities on such quotation system over the thirty (30) day period ending three (3) days prior to the closing of such transaction;

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

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

(ii) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a shareholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in (i) (A), (B) or (C) to reflect the approximate fair market value thereof, as determined in good faith by the Board of Directors.

4. CONVERSION RIGHTS.

The holders of the Series Preferred shall have the following rights with respect to the conversion of the Series Preferred into shares of Common Stock (the "Conversion Rights"):

(a) **Optional Conversion.** Subject to and in compliance with the provisions of this Section 4, any shares of Series Preferred may, at the option of the holder, be converted at any time, and without the payment of additional consideration by the holder thereof, into fully-paid and nonassessable shares of Common Stock. The number of shares of Common Stock to which a holder of Series Preferred shall be entitled upon conversion shall be the product obtained by multiplying the applicable Series Preferred Conversion Rate then in effect and applicable to such shares (determined as provided in Section 4(b)) by the number of shares of Series Preferred being converted. Any conversion required under Section 2.3(b) of the Series C Preferred Stock Purchase Agreement dated on or around December 22, 2008 (the "Purchase Agreement"), shall be deemed to be an optional conversion pursuant to this Section 4(a) with respect to each Non-Participating Purchaser (as defined in the Purchase Agreement) and with respect to such shares of Series Preferred required to be converted under said Section 2.3(b).

(b) **Series Preferred Conversion Rate.** The conversion rate in effect at any time for conversion of the Series A1 Preferred (the "Series A1 Conversion Rate") shall be the quotient obtained by dividing the Original Issue Price of the Series A1 Preferred by the Series A1 Conversion Price, calculated as provided in Section 4(c). The conversion rate in effect at any time for conversion of the Series A2 Preferred (the "Series A2 Conversion Rate") shall be the quotient obtained by dividing the Original Issue Price of the Series A2 Preferred by the Series A2 Conversion Price, calculated as provided in Section 4(c). The conversion rate in effect at any time for conversion of the Series B Preferred (the "Series B Conversion Rate") shall be the quotient obtained by dividing the Original Issue Price of the Series B Preferred by the Series B Conversion Price, calculated as provided in Section 4(c). The conversion rate in effect at any time for conversion of the Series C Preferred (the "Series C Conversion Rate") shall be the quotient obtained by dividing the Original Issue Price of the Series C Preferred by the Series C Conversion Price, calculated as provided in Section 4(c). Such Series A1 Conversion Rate, Series A2 Conversion Rate, Series B Conversion Rate and Series C Conversion Rate as the case may be, is referred to as the Series Preferred Conversion Rate.

(c) **Series Preferred Conversion Price.** The conversion price for the Series A1 Preferred shall initially be the Original Issue Price of the Series A1 Preferred (the "Series A1 Preferred Conversion Price"). The conversion price for the Series A2 Preferred shall initially be the Original Issue Price of the Series A2 Preferred (the "Series A2 Preferred Conversion Price"). The conversion price for the Series B Preferred shall initially be the Original Issue Price of the Series B Preferred (the "Series B Preferred Conversion Price"). The conversion price for the Series C Preferred shall initially be the Original Issue Price of the Series C Preferred (the "Series C Preferred Conversion Price"). Such initial Series A1 Preferred Conversion Price, Series A2 Preferred Conversion Price, Series B Preferred Conversion Price and Series C Preferred Conversion Price, as the case may be, shall be referred to as the "Series Preferred Conversion Price" and shall be adjusted from time to time in accordance with this Section 4. All references to the Series Preferred Conversion Price herein shall mean the Series Preferred Conversion Price as so adjusted.

(d) **Mechanics of Conversion.** Each holder of Series Preferred who desires to convert the same into shares of Common Stock pursuant to this Section 4 (other than pursuant to Section 4(l)) shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Series Preferred (or such holder shall notify the Company or any transfer agent that such certificates have been lost, stolen or destroyed and shall execute an agreement reasonably satisfactory to the Company to indemnify the Company from any loss incurred by it in connection therewith), and shall give written notice to the Company at such office that such holder elects to convert the same. Such notice shall state the number of shares of Series Preferred being converted. Thereupon, the Company shall promptly issue and deliver at such office to such holder a certificate or certificates for the number of shares of Common Stock to which such holder is entitled and shall promptly pay in cash or, to the extent sufficient funds are not then legally available therefor, in Common Stock (at the Common Stock's fair market value determined in good faith by the Board of Directors as of the date of such conversion), any declared and unpaid dividends on the shares of Series Preferred being converted. Such conversion shall be deemed to have been made at the close of business on the date of such surrender of the certificates representing the shares of Series Preferred to be converted, and the person entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Common Stock on such date.

(e) **Adjustment for Stock Splits and Combinations.** If the Company shall at any time or from time to time after the date that the first share of Series Preferred is issued (the "Original Issue Date") (as applicable to each series of Series Preferred) effect a subdivision of the outstanding Common Stock without a corresponding subdivision of the Series Preferred, the Series Preferred Conversion Price in effect immediately before that subdivision shall be proportionately decreased. Conversely, if the Company shall at any time or from time to time after the Original Issue Date (as applicable to each series of Series Preferred) combine the outstanding shares of Common Stock into a smaller number of shares without a corresponding combination of the Series Preferred, the Series Preferred Conversion Price in effect immediately before the combination shall be proportionately increased. Any adjustment under this Section 4(e) shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) Adjustment for Common Stock Dividends and Distributions.

If the Company at any time or from time to time after the Original Issue Date (as applicable to each series of Series Preferred) makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable solely in additional shares of Common Stock, in each such event the Series Preferred Conversion Price that is then in effect shall be decreased as of the time of such issuance or, in the event such record date is fixed, as of the close of business on such record date, by multiplying the Series Preferred Conversion Price then in effect by a fraction (i) the numerator of which is 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 (ii) the denominator of which is 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*, that if such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series Preferred Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series Preferred Conversion Price shall be adjusted pursuant to this Section 4(f) to reflect the actual payment of such dividend or distribution.

(g) Adjustment for Reclassification, Exchange and Substitution. If at any time or from time to time after the Original Issue Date (as applicable to each series of Series Preferred), the Common Stock issuable upon the conversion of the Series Preferred is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification or otherwise (other than an Acquisition or Asset Transfer as defined in Section 3(d) or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 4), in any such event each holder of Series Preferred shall have the right thereafter to convert such stock into the kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification or other change by holders of the maximum number of shares of Common Stock into which such shares of Series Preferred could have been converted immediately prior to such recapitalization, reclassification or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

(h) Reorganizations, Mergers or Consolidations. If at any time or from time to time after the Original Issue Date (as applicable to each series of Series Preferred), there is a capital reorganization of the Common Stock or the merger or consolidation of the Company with or into another corporation or another entity or person (other than an Acquisition or Asset Transfer as defined in Section 3(d) or a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section 4), as a part of such capital reorganization, provision shall be made so that the holders of the Series Preferred shall thereafter be entitled to receive upon conversion of the Series Preferred the number of shares of stock or other securities or property of the Company to which a holder of the number of shares of Common Stock deliverable upon conversion would have been entitled on such event, subject to adjustment in respect of such stock or securities by the terms thereof. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4 with respect to the rights of the holders of Series Preferred after such event to the end

that the provisions of this Section 4 (including adjustment of the Series Preferred Conversion Price then in effect and the number of shares issuable upon conversion of the Series Preferred) shall be applicable after that event and be as nearly equivalent as practicable.

(i) Sale of Shares Below Series Preferred Conversion Price.

(i) If at any time or from time to time after the Original Issue Date (as applicable to each series of Series Preferred), the Company issues or sells, or is deemed by the express provisions of this Section 4(i) to have issued or sold, Additional Shares of Common Stock (as defined in subsection (i)(iv) below), other than for any transaction addressed by Section 4(e), 4(f) or 4(g) above, for an Effective Price (as defined in subsection (i)(iv) below) less than the then effective Series Preferred Conversion Price, then, and in each such case, the then existing Series Preferred Conversion Price shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying the Series Preferred Conversion Price by a fraction (i) the numerator of which shall be (A) the number of shares of Common Stock deemed outstanding (as defined below) immediately prior to such issue or sale, plus (B) the number of shares of Common Stock which the aggregate consideration received (as defined in subsection (i)(ii)) by the Company for the total number of Additional Shares of Common Stock so issued would purchase at such then effective Series Preferred Conversion Price, and (ii) the denominator of which shall be (A) the number of shares of Common Stock deemed outstanding (as defined below) immediately prior to such issue or sale plus (B) the total number of Additional Shares of Common Stock so issued. For the purposes of the preceding sentence, the number of shares of Common Stock deemed to be outstanding as of a given date shall be the sum of (A) the number of shares of Common Stock actually outstanding, (B) the number of shares of Common Stock into which the then outstanding shares of Series Preferred could be converted if fully converted on the day immediately preceding the given date, and (C) the number of shares of Common Stock which could be obtained through the exercise or conversion of all other rights, options, warrants and convertible securities outstanding on the day immediately preceding the given date, whether or not then exercised or converted.

(ii) For the purpose of making any adjustment required under this Section 4(i), the consideration received by the Company for any issue or sale of securities shall (A) to the extent it consists of cash, be computed at the net amount of cash received by the Company after deduction of any underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale but without deduction of any expenses payable by the Company, (B) to the extent it consists of property other than cash, be computed at the fair value of that property as determined in good faith by the Board of Directors, and (C) if Additional Shares of Common Stock, Convertible Securities (as defined in subsection (i)(iii)) or rights or options to purchase either Additional Shares of Common Stock or Convertible Securities are issued or sold together with other stock or securities or other assets of the Company for a consideration which covers both, be computed as the portion of the consideration so received that may be reasonably determined in good faith by the Board of Directors to be allocable to such Additional Shares of Common Stock, Convertible Securities or rights or options.

(iii) For the purpose of the adjustment required under this Section 4(i), if the Company issues or sells (i) stock or other securities convertible into,

Additional Shares of Common Stock (such convertible stock or securities being herein referred to as "Convertible Securities") or (ii) rights, options or warrants for the purchase of Additional Shares of Common Stock or Convertible Securities and if the Effective Price of such Additional Shares of Common Stock is less than the Series Preferred Conversion Price, then in each case the Company shall be deemed to have issued at the time of the issuance of such rights, options, warrants or Convertible Securities the maximum number of Additional Shares of Common Stock issuable upon exercise or conversion thereof and to have received as consideration for the issuance of such shares an amount equal to the total amount of the consideration, if any, received by the Company for the issuance of such rights, options, warrants or Convertible Securities, plus, in the case of such rights, options or warrants, the minimum amounts of consideration, if any, payable to the Company upon the exercise of such rights or options, plus, in the case of Convertible Securities, the minimum amounts of consideration, if any, payable to the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) upon the conversion thereof; *provided* that if in the case of Convertible Securities the minimum amounts of such consideration cannot be ascertained, but are a function of antidilution or similar protective clauses, the Company shall be deemed to have received the minimum amounts of consideration without reference to such clauses; *provided further* that if the minimum amount of consideration payable to the Company upon the exercise or conversion of rights, options, warrants or Convertible Securities is reduced over time or on the occurrence or non-occurrence of specified events other than by reason of antidilution adjustments, the Effective Price shall be recalculated using the figure to which such minimum amount of consideration is reduced; *provided further* that if the minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options, warrants or Convertible Securities is subsequently increased, the Effective Price shall be again recalculated using the increased minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options, warrants or Convertible Securities. No further adjustment of the Series Preferred Conversion Price, as adjusted upon the issuance of such rights, options, warrants or Convertible Securities, shall be made as a result of the actual issuance of Additional Shares of Common Stock on the exercise of any such rights, options or warrants or the conversion of any such Convertible Securities. If any such rights or options or the conversion privilege represented by any such Convertible Securities shall expire without having been exercised, the Series Preferred Conversion Price as adjusted upon the issuance of such rights, options or Convertible Securities shall be readjusted to the Series Preferred Conversion Price which would have been in effect had an adjustment been made on the basis that the only Additional Shares of Common Stock so issued were the Additional Shares of Common Stock, if any, actually issued or sold on the exercise of such rights or options or rights of conversion of such Convertible Securities, and such Additional Shares of Common Stock, if any, were issued or sold for the consideration actually received by the Company upon such exercise, plus the consideration, if any, actually received by the Company for the granting of all such rights or options, whether or not exercised, plus the consideration received for issuing or selling the Convertible Securities actually converted, plus the consideration, if any, actually received by the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) on the conversion of such Convertible Securities, *provided* that such readjustment shall not retroactively apply to prior conversions of Series Preferred.

(iv) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this

Section 4(i) whether or not subsequently reacquired or retired by the Company, other than (A) shares of Common Stock issued upon conversion of the Series Preferred, provided, however, that "Additional Shares of Common Stock" shall include the shares of Common Stock deemed to be issued upon the original issuance of the Series C Preferred; (B) shares of Common Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or other rights after the Original Issue Date of the Series C Preferred to employees, officers or directors of, or consultants or advisors to, the Company or any subsidiary pursuant to stock purchase, stock option plans or other arrangements that are approved by the Board of Directors, including at least two (2) of the Series Preferred Directors; (C) shares of Common Stock issued pursuant to the exercise of options, warrants or convertible securities outstanding as of the Original Issue Date of the Series C Preferred; (D) shares of Common Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or other rights issued for consideration other than cash pursuant to a merger, consolidation, strategic alliance, acquisition or similar business combination approved by the Board of Directors, including at least two (2) of the Series Preferred Directors; (E) shares of Common Stock issued pursuant to any equipment loan or leasing arrangement, real property leasing arrangement, or debt financing from a bank or similar financial or lending institution approved by the Board of Directors, including at least two (2) of the Series Preferred Directors; (F) shares of Common Stock issued pursuant to stock split or stock dividend approved by the Board of Directors as adjusted for by Section 4(e) or 4(f); and (G) shares of Common Stock issued which results in conversion of Series Preferred into Common Stock pursuant to Section 4(l)(i). References to Common Stock in the subsections of this clause (iv) above shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 4(i). The "Effective Price" of Additional Shares of Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Common Stock issued or sold, or deemed to have been issued or sold by the Company under this Section 4(i), into the aggregate consideration received, or deemed to have been received by the Company for such issue under this Section 4(i), for such Additional Shares of Common Stock.

(j) **Certificate of Adjustment.** In each case of an adjustment or readjustment of the Series Preferred Conversion Price for the number of shares of Common Stock or other securities issuable upon conversion of the Series Preferred, if the Series Preferred is then convertible pursuant to this Section 4, the Company, at its expense, shall compute such adjustment or readjustment in accordance with the provisions hereof and prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage prepaid, to each registered holder of Series Preferred at the holder's address as shown in the Company's books. The certificate shall set forth such adjustment or readjustment, showing in detail the facts upon which such adjustment or readjustment is based, including a statement of (i) the consideration received or deemed to be received by the Company for any Additional Shares of Common Stock issued or sold or deemed to have been issued or sold, (ii) the Series Preferred Conversion Price at the time in effect, (iii) the number of Additional Shares of Common Stock and (iv) the type and amount, if any, of other property which at the time would be received upon conversion of the Series Preferred.

(k) **Notices of Record Date.** Upon (i) any taking by the Company of a record of the holders of any class of securities for the purpose of determining the holders

thereof who are entitled to receive any dividend or other distribution, or (ii) any Acquisition (as defined in Section 3(d)) or other capital reorganization of the Company, any reclassification or recapitalization of the capital stock of the Company, any merger or consolidation of the Company with or into any other corporation, or any Asset Transfer (as defined in Section 3(d)), or any voluntary or involuntary dissolution, liquidation or winding up of the Company, the Company shall give notice to each holder of Series Preferred at least fifteen (15) days prior to the record date specified therein (or such shorter period approved by a majority of the outstanding Series Preferred) a notice specifying (A) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (B) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective, and (C) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

(l) Automatic Conversion.

(i) Each share of Series Preferred shall automatically be converted into shares of Common Stock without the payment of additional consideration by the holder thereof, based on the then-effective Series Preferred Conversion Price (A) upon the affirmative election of the Preferred Supermajority, or (B) immediately upon the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Company in which the net cash proceeds to the Company, after the payment of underwriting discounts and commissions and offering expenses, are at least thirty million dollars (\$30,000,000), and where the per share price is not less than four dollars and sixty-two cents (\$4.62) per share (as adjusted for any stock splits, stock dividends, combinations, recapitalizations or like events) (a "Qualified IPO"). Upon such automatic conversion, any declared and unpaid dividends shall be paid in accordance with the provisions of Section 4(d).

(ii) Upon the occurrence of either of the events specified in Section 4(l)(i) above, the outstanding shares of Series Preferred shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Company or its transfer agent; *provided, however*, that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion unless the certificates evidencing such shares of Series Preferred are either delivered to the Company or its transfer agent as provided below, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of the Series Preferred, the holders of Series Preferred shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Series Preferred. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock into which the shares of Series Preferred

surrendered were convertible on the date on which such automatic conversion occurred, and any declared and unpaid dividends shall be paid in accordance with the provisions of Section 4(d).

(m) **Fractional Shares.** No fractional shares of Common Stock shall be issued upon conversion of Series Preferred. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series Preferred by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Company shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Common Stock's fair market value (as determined in good faith by the Board of Directors) on the date of conversion.

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

(o) **Notices.** Any notice required by the provisions of this Section 4 shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with verification of receipt. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Company.

(p) **Payment of Taxes.** The Company will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to the issue or delivery of shares of Common Stock upon conversion of shares of Series Preferred, excluding any tax or other charge imposed in connection with any transfer involved in the issue and delivery of shares of Common Stock in a name other than that in which the shares of Series Preferred so converted were registered.

5. REDEMPTION.

(a) The Company shall be obligated to redeem the Series Preferred as follows:

(i) The Preferred Supermajority may require the Company, to the extent it may lawfully do so, to redeem all of the then outstanding Series Preferred in three (3) annual installments beginning at any time on or after the fifth anniversary of the Original Issue Date applicable to the Series C Preferred (the date of the first installment of the

redemption being referred to as the "First Redemption Date"), and ending on the date two (2) years from such First Redemption Date (each, a "Redemption Date"); *provided*, that the Company shall receive at least sixty (60) days prior to the First Redemption Date written notice of such required redemption by the Preferred Supermajority. The Company shall effect such redemptions on each Redemption Date by paying in cash in exchange for the shares of Series Preferred to be redeemed (excluding "Excluded Shares" as defined below) on such Redemption Date a sum equal to the Original Issue Price per share applicable to a series of Series Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like after the filing date hereof) plus declared and unpaid dividends with respect to such shares. The total amount to be paid for the Series Preferred is hereinafter referred to as the "Redemption Price." The number of shares of Series Preferred that the Company shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Series Preferred outstanding immediately prior to the Redemption Date (excluding Excluded Shares) by (B) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). Shares subject to redemption pursuant to this Section 5(a) shall be redeemed from each holder of Series Preferred on a pro rata basis, based on the number of shares of Series Preferred then held.

(ii) At least thirty (30) days but no more than sixty (60) days prior to the First Redemption Date, the Company shall send a notice (a "Redemption Notice") to all holders of Series Preferred to be redeemed setting forth (A) the Redemption Price for the shares to be redeemed; and (B) the place at which such holders may obtain payment of the Redemption Price upon surrender of their share certificates. If the Company does not have sufficient funds legally available to redeem all shares to be redeemed at the Redemption Date (including, if applicable, those to be redeemed at the option of the Company), then it shall so notify such holders and shall redeem such shares pro rata (based on the portion of the aggregate Redemption Price payable to them) to the extent possible and shall redeem the remaining shares to be redeemed as soon as sufficient funds are legally available.

(b) On or prior to each Redemption Date, the Company shall deposit the Redemption Price of all shares to be redeemed with a bank or trust company having aggregate capital and surplus in excess of \$100,000,000, as a trust fund, with irrevocable instructions and authority to the bank or trust company to pay, on and after such Redemption Date, the Redemption Price of the shares to their respective holders upon the surrender of their share certificates. Any moneys deposited by the Company pursuant to this Section 5(b) for the redemption of shares thereafter converted into shares of Common Stock pursuant to Section 4 hereof no later than the fifth (5th) day preceding the applicable Redemption Date, along with any earnings thereon, shall be returned to the Company forthwith upon such conversion. The balance of any funds deposited by the Company pursuant to this Section 5(b) remaining unclaimed at the expiration of one (1) year following such Redemption Date, along with any earnings thereon, shall be returned to the Company promptly upon its written request.

(c) On or after each such Redemption Date, each holder of shares of Series Preferred to be redeemed shall surrender such holder's certificates representing such shares to the Company in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered

certificate shall be canceled. In the event less than all the shares represented by such certificates are redeemed, a new certificate shall be issued representing the unredeemed shares. From and after such Redemption Date, unless there shall have been a default in payment of the Redemption Price or the Company is unable to pay the Redemption Price due to not having sufficient legally available funds, all rights of the holder of such shares as holder of Series Preferred (except the right to receive the Redemption Price without interest upon surrender of their certificates), shall cease and terminate with respect to such shares; *provided* that in the event that shares of Series Preferred are not redeemed due to a default in payment by the Company or because the Company does not have sufficient legally available funds, such shares of Series Preferred shall remain outstanding and shall be entitled to all of the rights and preferences provided herein until redeemed.

(d) In the event of a call for redemption by a Preferred Supermajority, the Conversion Rights (as defined in Section 4) for such Series Preferred shall terminate as to the shares designated for redemption at the close of business on the fifth (5th) business day preceding the applicable Redemption Date, unless default is made in payment of the Redemption Price.

(e) If the Company receives, on or prior to the 20th day after the date of delivery of the Redemption Notice to a holder of Series Preferred, written notice from such holder that such holder elects to be excluded from the redemption provided in this Section 5, then the shares of Series Preferred registered on the books of the Company in the name of such holder at the time of the Company's receipt of such notice shall thereafter be "Excluded Shares." Excluded Shares shall not be redeemed or redeemable pursuant to this Section 5, whether on such Redemption Date or thereafter. Excluded Shares shall remain outstanding and entitled to all the rights and preferences provided herein.

V.

A. The liability of the directors of the Company for monetary damages and breach of fiduciary duty shall be eliminated to the fullest extent under applicable law. If the General Corporation Law of the State of Delaware or any other law of the State of Delaware is amended after approval by the stockholders of this Article V to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Company shall be eliminated or limited to the fullest extent permitted by the General Corporation Law of the State of Delaware or any other law of the State of Delaware as so amended.

B. This Company is authorized to the fullest extent permitted by law to provide indemnification of (and advancement of expenses to) directors, officers and agents (as defined in Section 317 of the CGCL) (and any other persons to which applicable law permits the Company to provide indemnification) for breach of duty to the Company and its stockholders through bylaw provisions or through agreements with the directors, officers or agents, or through stockholder resolutions, or otherwise, in excess of the indemnification otherwise permitted by (i) Section 317 of the CGCL, subject, at any time or times that the corporation is subject to Section 2115(b) of the CGCL, to the limits on such excess indemnification set forth in Section 204 of the CGCL, or (ii) Section 145 of the DGCL.

C. Any repeal or modification of this Article V shall only be prospective and shall not effect the rights under this Article V in effect at the time of the alleged occurrence of any action or omission to act giving rise to liability.

VI.

For the management of the business and for the conduct of the affairs of the Company, and in further definition, limitation and regulation of the powers of the Company, of its directors and of its stockholders or any class thereof, as the case may be, it is further *provided* that:

A. The management of the business and the conduct of the affairs of the Company shall be vested in its Board of Directors. The number of directors which shall constitute the whole Board of Directors shall be fixed by the Board of Directors in the manner provided in the Bylaws, subject to any restrictions which may be set forth in this Amended and Restated Certificate of Incorporation.

B. The Board of Directors is expressly empowered to adopt, amend or repeal the Bylaws of the Company. The stockholders shall also have the power to adopt, amend or repeal the Bylaws of the Company; *provided, however*, that, in addition to any vote of the holders of any class or series of stock of the Company required by law or by this Amended and Restated Certificate of Incorporation, the affirmative vote of the holders of at least a majority of the voting power of all of the then-outstanding shares of the capital stock of the Company entitled to vote generally in the election of directors, voting together as a single class, shall be required to adopt, amend or repeal any provision of the Bylaws of the Company.

C. The directors of the Company need not be elected by written ballot unless the Bylaws so provide.

VII.

In connection with repurchases by the Company of its Common Stock from employees, officers, directors, advisors, consultants or other persons performing services for the Company or any subsidiary pursuant to agreements under which the Company has the option to repurchase such shares at cost upon the occurrence of certain events, such as the termination of employment, Sections 502 and 503 of the CGCL shall not apply in all or in part with respect to such repurchases.

VIII.

The Company renounces any interest or expectancy of the Company in, or in being offered an opportunity to participate in, any Excluded Opportunity. An "Excluded Opportunity" is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of, (i) any director of the Company who is not an employee of the Company or any of its subsidiaries, or (ii) any holder of Series Preferred of the Company or any partner, member, director, stockholder, employee or agent of any such holder, other than someone who is an employee of the Company or any of its subsidiaries (collectively, "Covered Persons"), unless such matter, transaction or interest is presented to, or acquired,

created or developed by, or otherwise comes into the possession of, a Covered Person expressly and solely in such Covered Person's capacity as a director of the Company.

IX.

Meetings of the stockholders may be held within or without the State of Delaware, as the Bylaws of the Company may provide. The books of the Company may be kept outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Company.

* * * *

FOURTH: This Amended and Restated Certificate of Incorporation has been duly approved by the Board of Directors of the Company.

FIFTH: This Amended and Restated Certificate of Incorporation was approved by the holders of the requisite number of shares of said corporation in accordance with Section 228 of the General Corporation Law. This Amended and Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Sections 242 and 245 of the DGCL by the stockholders of the Company.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been executed by a duly authorized officer of this corporation on this 21st day of December, 2008.

/s/ Bob Katz
Bob Katz, President