

**AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION OF  
AUTOMATTIC INC.**

Automattic Inc., a corporation organized and existing under the laws of the State of Delaware (the "Corporation"), certifies that:

A. The name of the Corporation is Automattic Inc. The Corporation's original Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on March 28, 2005.

B. This Amended and Restated Certificate of Incorporation was duly adopted in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware, and restates, integrates and further amends the provisions of the Corporation's Certificate of Incorporation.

C. The text of the Certificate of Incorporation is amended and restated to read as set forth in Exhibit A attached hereto.

IN WITNESS WHEREOF, Automattic Inc. has caused this Amended and Restated Certificate of Incorporation to be signed by Toni Schneider, a duly authorized officer of the Corporation, on January 22, 2008.

/s/ Toni Schneider

Toni Schneider

Chief Executive Officer

## **EXHIBIT A**

### **ARTICLE I**

The name of the Corporation is Automattic Inc.

### **ARTICLE II**

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

### **ARTICLE III**

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

### **ARTICLE IV**

The total number of shares of stock that the corporation shall have authority to issue is 79,000,000 consisting of 59,000,000 shares of Common Stock, \$0.0001 par value per share (the "Common Stock"), and 20,000,000 shares of Preferred Stock, \$0.0001 par value per share (the "Preferred Stock"). The first Series of Preferred Stock shall be designated "Series A Preferred Stock" and shall consist of 12,500,000 shares. The second series of Preferred Stock shall be designated as "Series B Preferred Stock" and shall consist of 7,500,000 shares.

Upon the filing of this Amended and Restated Certificate of Incorporation, (i) each share of this Corporation's Common Stock outstanding immediately prior to the filing hereof shall be automatically split into 10 shares of Common Stock, without any further action by the holder thereof; and (ii) each share of this Corporation's Series A Preferred Stock outstanding immediately prior to the filing hereof shall be automatically split into 10 shares of this Series A Preferred Stock without any further action by the holder thereof (the "Stock Split"). All numerical references in this Amended and Restated Certificate of Incorporation have been appropriately adjusted to reflect the Stock Split.

### **ARTICLE V**

The terms and provisions of the Common Stock and Preferred Stock are as follows:

1. Definitions. For purposes of this ARTICLE V, the following definitions shall apply:

(a) "Conversion Price" shall mean \$0.10 per share for the Series A Preferred Stock and \$4.06 per share for the Series B Preferred Stock (subject to appropriate adjustment from time to time for Recapitalizations).

(b) “Convertible Securities” shall mean any evidences of indebtedness, shares or other securities that are by their terms convertible into or exchangeable for, directly or indirectly, Common Stock.

(c) “Corporation” shall mean Automattic Inc.

(d) “Distribution” shall mean the transfer of cash or other property without consideration whether by way of dividend or otherwise, other than dividends on Common Stock payable in Common Stock, or the purchase or redemption of shares of the Corporation for cash or property other than: (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment of services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, or (iii) repurchase of capital stock of the Corporation in connection with the settlement of disputes with any stockholder, as authorized by the Board of Directors (including the Preferred Directors).

(e) “Dividend Rate” shall mean an annual rate of \$0.006 per share for the Series A Preferred Stock and \$0.244 per share for the Series B Preferred Stock (subject to appropriate adjustment from time to time for Recapitalizations).

(f) “Liquidation Preference” shall mean \$0.10 per share for the Series A Preferred Stock and \$8.12 per share for the Series B Preferred Stock (subject to appropriate adjustment from time to time for Recapitalizations).

(g) “Options” shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.

(h) “Original Issue Date” shall mean January 22, 2008.

(i) “Original Issue Price” shall mean \$0.10 per share for the Series A Preferred Stock and \$4.06 per share for the Series B Preferred Stock (subject to appropriate adjustment from time to time for Recapitalizations).

(j) “Recapitalization” shall mean, with respect to a particular class or Series of shares of the Corporation’s capital stock, any stock dividend, stock split, combination of shares, reorganization, recapitalization, reclassification or the like with respect to such Series or class of stock, in each case, effective after the date of the filing of this Amended and Restated Certificate of Incorporation.

## 2. Distributions.

(a) Preferred Stock. In any calendar year, the holders of outstanding shares of Preferred Stock shall be entitled to receive Distributions, when, as and if declared by the Board of Directors, out of any assets at the time legally available therefor, at the Dividend Rate specified for such shares of Preferred Stock payable in preference and priority to any declaration or payment of any Distribution on Common Stock of the Corporation in such calendar year. No

Distributions shall be made with respect to the Common Stock (other than Distributions pursuant to Section 3(a)(iii) of this Article V) until all Distributions on the Preferred Stock under this Section 2(a) have been declared and paid or set aside for payment to the holders of Preferred Stock. In the event Distributions are set aside or paid on any share of Common Stock (other than Distributions pursuant to Section 3(a)(iii) of this Article V), the Company shall pay an additional Distribution on all outstanding shares of Preferred Stock in a per share amount equal (on an as-if-converted to Common Stock basis) to the amount paid or set aside for each share of Common Stock. Except as otherwise provided in Section 3 and Section 6 of this Article V, payment of any Distributions to the holders of shares of Preferred Stock shall be on a pro rata, pari passu basis in proportion to the Dividend Rates applicable to such shares. The right to receive Distributions on shares of Preferred Stock shall not be cumulative, and no right to such Distributions shall accrue to holders of Preferred Stock by reason of the fact that Distributions under this Section 2(a) on said shares are not declared or paid in any calendar year.

(b) Common Stock. Distributions may be paid on the Common Stock when, as and if declared by the Board of Directors, subject to the prior Distributions rights of the Preferred Stock and to Section 7 below.

(c) Non-Cash Distributions. Whenever a Distribution provided for in this Section 2 shall be payable in property other than cash, the value of such Distribution shall be deemed to be the fair market value of such property as determined in good faith by the Board of Directors.

(d) Consent to Certain Distributions. As authorized by Section 402.5(c) of the California Corporations Code, if Section 502 or Section 503 of the California Corporations Code is applicable to a payment made by the Corporation then such applicable section or sections shall not apply if such payment is a payment made by the Corporation in connection with (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, (iii) repurchases of Common Stock or Preferred Stock in connection with the settlement of disputes with any stockholder, as authorized by the Board of Directors (including the Preferred Directors), (iv) any other repurchase or redemption of Common Stock or Preferred Stock approved by the holders of at least fifty-one (51%) percent of the then outstanding Preferred Stock of the Corporation (voting together as a single class and on an as-converted to Common Stock basis).

### 3. Liquidation Rights.

(a) Liquidation Preference. In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the assets and funds of the Corporation shall be distributed as follows:

(i) The holders of the Series B Preferred Stock shall be entitled to receive, prior and in preference to any Distribution to the holders of the Series A Preferred Stock

or the Common Stock by reason of their ownership of such stock, an amount per share for each share of Series B Preferred Stock held by them equal to the sum of (i) the Liquidation Preference specified for such share of Series B Preferred Stock and (ii) all declared but unpaid dividends (if any) on such share of Series B Preferred Stock. If upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation legally available for distribution to the holders of the Series B Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(a)(i), then the entire assets of the Corporation legally available for distribution shall be distributed with equal priority and pro rata among the holders of the Series B Preferred Stock in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(a)(i).

(ii) Following payment of the full amounts due pursuant to Section 3(a)(i) of this Article V, the holders of Series A Preferred Stock shall be entitled to receive, prior and in preference to any Distribution to the holders of the Common Stock by reason of their ownership of such stock, an amount per share for each share of Series A Preferred Stock held by them equal to the sum of (i) the Liquidation Preference specified for such share of Series A Preferred Stock and (ii) all declared but unpaid dividends (if any) on such share of Series A Preferred Stock. If upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation legally available for distribution to the holders of the Series A Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(a)(ii), then the assets of the Corporation legally available for distribution following payment of the full amounts due pursuant to Section 3(a)(i) of this Article V shall be distributed with equal priority and pro rata among the holders of the Series A Preferred Stock in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(a)(ii).

(iii) Remaining Assets. After the payment or setting aside for payment to the holders of Preferred Stock of the full amounts specified in Sections 3(a)(i) and 3(a)(ii) above, the entire remaining assets of the Corporation legally available for distribution shall be distributed pro rata to holders of the Common Stock of the Corporation in proportion to the number of shares of Common Stock held by them.

(b) Deemed Conversion to Common Stock. Notwithstanding the provisions set forth in Sections 3(a)(i) and 3(a)(ii) hereof, in determining the amount that each holder of each Series of Preferred Stock is entitled to receive upon a voluntary or involuntary liquidation, dissolution or winding up of the Corporation, each holder of such Series shall be deemed to have converted all shares of such Series into shares of Common Stock, effective immediately prior to such voluntary or involuntary liquidation, dissolution, or winding up of the Corporation (regardless of whether such holder actually converted such shares) and at the Conversion Price then applicable to such Series, if and to the extent that, as a result of an actual conversion of the shares of such Series (as well as the assumed conversion of shares of any other Series that such holder would be deemed to have converted pursuant to this Section 3(b)), the such holder would receive an aggregate amount greater than the aggregate amount that would be distributed to such holder in respect of such Series pursuant to Sections 3(a)(i) or 3(a)(ii) hereof, as applicable, if such holder did not convert shares of such Series into shares of Common Stock. If any such holder shall be deemed to have converted any of its shares of Preferred Stock into Common Stock pursuant to this paragraph, such holder shall be entitled to share ratably in the distribution

of assets to the holders of Common Stock in respect of such shares upon such voluntary or involuntary liquidation, dissolution or winding up, and shall not be entitled to receive a Distribution that would otherwise be made to such holder in respect of such shares pursuant to Section 3(a)(i) or 3(a)(ii) hereof.

(c) Reorganization. For purposes of this Section 3, a liquidation, dissolution or winding up of the Corporation shall be deemed to be occasioned by and to include a "Change of Control." A "Change of Control" shall mean (A) a liquidation, dissolution or winding up of the Corporation at law, whether voluntary or involuntary, (B) the consummation of the merger, combination or consolidation of the Corporation with or into any other corporation, limited liability company or other entity (or a group of corporations, limited liability companies or other entities) (except a merger or consolidation in which the holders of capital stock of the Corporation immediately prior to such merger or consolidation continue to hold (solely in respect of their interests in the Corporation's capital stock immediately prior to such merger, combination or consolidation) a majority of the voting power of the capital stock of the Corporation or the surviving or acquiring entity); (C) the closing of the transfer or issuance (whether by merger, combination, consolidation or otherwise), in one transaction or a Series of related transactions to which the Corporation is a party, to a corporation, person or group of affiliated persons (other than an underwriter of the Corporation's securities), of the Corporation's securities if, after such closing, such person or group of affiliated persons would hold 50% or more in voting interest of the outstanding voting stock of the Corporation (other than a transfer or issuance effected primarily for purposes of raising capital for the Corporation or its subsidiaries) or (D) a sale, lease, exclusive license, assignment, transfer or disposal of all or substantially all of the assets or intellectual property of the Corporation (other than (1) a pledge of assets or grant of a security interest therein to a commercial lender in connection with a commercial lending or similar transaction and (2) a sale, lease, exclusive license, assignment, transfer or disposal to a corporation, limited liability company or other entity (or a group of corporations, limited liability companies or other entities) in which the holders of capital stock of the Corporation immediately prior to such sale, lease, exclusive license, assignment, transfer or disposal continue to hold (solely in respect of their interests in the Corporation's capital stock immediately prior to such transaction) a majority of the aggregate voting power of the capital stock of the acquiring entity or entities)). Notwithstanding the foregoing, the treatment of any particular transaction or series of related transactions as a liquidation, dissolution or winding up of the Corporation may be waived by the vote or written consent of the holders of at least fifty-one percent (51%) of the then outstanding Preferred Stock (voting together as a single class and on an as-converted to Common Stock basis).

(d) Valuation of Non-Cash Consideration. If any assets of the Corporation distributed to stockholders in connection with any liquidation, dissolution, or winding up of the Corporation are other than cash, then the value of such assets shall be their fair market value as determined in good faith by the Board of Directors, except that any publicly traded securities to be distributed to stockholders in a liquidation, dissolution, or winding up of the Corporation shall be valued as follows:

(i) If the securities are then traded on a national securities exchange or the Nasdaq Stock Market (or a similar national quotation system), then the value of the securities

shall be deemed to be the average of the closing prices of the securities on such exchange or system over the ten (10) trading day period ending five (5) trading days prior to the Distribution;

(ii) if the securities are actively traded over-the-counter, then the value of the securities shall be deemed to be the average of the closing bid prices of the securities over the ten (10) trading day period ending five (5) trading days prior to the Distribution.

In the event of a merger or other acquisition of the Corporation by another entity, the Distribution date shall be deemed to be the date such transaction closes.

For the purposes of this subsection 3(e), "trading day" shall mean any day which the exchange or system on which the securities to be distributed are traded is open and "closing prices" or "closing bid prices" shall be deemed to be: (i) for securities traded primarily on the New York Stock Exchange, the American Stock Exchange or Nasdaq, the last reported trade price or sale price, as the case may be, at 4:00 p.m., New York time, on that day and (ii) for securities listed or traded on other exchanges, markets and systems, the market price as of the end of the regular hours trading period that is generally accepted as such for such exchange, market or system. If, after the date hereof, the benchmark times generally accepted in the securities industry for determining the market price of a stock as of a given trading day shall change from those set forth above, the fair market value shall be determined as of such other generally accepted benchmark times. Notwithstanding the foregoing, if the consideration received by the Corporation or the proceeds to be distributed to holders of shares of the Corporation's capital stock is other than cash and the definitive merger agreement, asset purchase agreement or other definitive transaction document entered into with respect to a transaction or transactions constituting a Change of Control specifies an alternative method of determining the value of such consideration or proceeds, then, for the purpose of this Section 3(e), the value of such consideration or proceeds shall be determined in accordance with the method set forth in such merger agreement, asset purchase agreement or other definitive transaction document, as applicable.

4. Conversion. The holders of the Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert. Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the Preferred Stock, into that number of fully-paid, nonassessable shares of Common Stock determined by dividing the Original Issue Price for the relevant Series by the Conversion Price for such series. (The number of shares of Common Stock into which each share of a Series of Preferred Stock may be converted is hereinafter referred to as the "Conversion Rate" for each such Series.) Upon any decrease or increase in the Conversion Price for any Series of Preferred Stock, as described in this Section 4, the Conversion Rate for such Series shall be appropriately increased or decreased.

(b) Automatic Conversion. Each share of Preferred Stock shall automatically be converted into fully-paid, non-assessable shares of Common Stock at the then effective Conversion Rate for such share (i) immediately prior to the closing of a firm commitment underwritten initial public offering pursuant to an effective registration statement filed under the

Securities Act of 1933, as amended (the "Securities Act"), covering the offer and sale of the Common Stock, provided that the offering price per share is not less than \$8.12 (as appropriately adjusted for Recapitalizations) and the aggregate offering price is not less than \$25,000,000 or (ii) upon the receipt by the Corporation of a written request for such conversion from the holders of at least fifty-one percent (51%) of the Preferred Stock then outstanding (voting together as a single class and on an as-converted to Common Stock basis), or, if later, the effective date for conversion specified in such requests (each of the events referred to in (i) and (ii) are referred to herein as an "Automatic Conversion Event").

(c) Mechanics of Conversion. No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the then fair market value of a share of Common Stock as determined by the Board of Directors. For such purpose, all shares of Preferred Stock held by each holder of Preferred Stock shall be aggregated, and any resulting fractional share of Common Stock shall be paid in cash. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock, and to receive certificates therefor, he shall either (A) surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Preferred Stock or (B) notify the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and execute an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates, and shall give written notice to the Corporation at such office that he elects to convert the same; provided, however, that on the date of an Automatic Conversion Event, the outstanding shares of Preferred Stock shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; provided further, however, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion Event unless either the certificates evidencing such shares of Preferred Stock are delivered to the Corporation or its transfer agent as provided above, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. On the date of the occurrence of an Automatic Conversion Event, each holder of record of shares of Preferred Stock shall be deemed to be the holder of record of the Common Stock issuable upon such conversion, notwithstanding that the certificates representing such shares of Preferred Stock shall not have been surrendered at the office of the Corporation, that notice from the Corporation shall not have been received by any holder of record of shares of Preferred Stock, or that the certificates evidencing such shares of Common Stock shall not then be actually delivered to such holder.

The Corporation shall, as soon as practicable after such delivery, or after such agreement and indemnification, issue and deliver at such office to such holder of Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid and a check payable to such holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock, plus any declared and unpaid dividends on the converted Preferred Stock. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the



shares of Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date; provided, however, that if the conversion is in connection with an underwritten offer of securities registered pursuant to the Securities Act or a merger, sale, financing, or liquidation of the Corporation or other event, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing of such transaction or upon the occurrence of such event, in which case the person(s) entitled to receive the Common Stock issuable upon such conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such transaction or the occurrence of such event.

(d) Adjustments to Conversion Price for Diluting Issues.

(i) Special Definition. For purposes of this paragraph 4(d), "Additional Shares of Common" shall mean all shares of Common Stock issued (or, pursuant to paragraph 4(d)(iii), deemed to be issued) by the Corporation after the filing of this Amended and Restated Certificate of Incorporation, other than the issuances or deemed issuances (such issuances or deemed issuances, "Excluded Securities") of:

(1) shares of Common Stock and options, warrants or other rights to purchase Common Stock issued to employees, officers or directors of, or consultant or advisors to the Corporation or any subsidiary pursuant to restricted stock purchase agreements, stock option plans or similar arrangements not to exceed 6,270,000 (as appropriately adjusted for Recapitalizations), net of any stock repurchases or expired or terminated options pursuant to the terms of any option plan, restricted stock purchase agreement or similar arrangement, or such greater number as may be unanimously approved by the Board of Directors;

(2) shares of Common Stock issued upon the exercise or conversion of Options or Convertible Securities outstanding as of the date of the filing of this Amended and Restated Certificate of Incorporation or upon the exercise or conversion of Options or Convertible Securities counted against the limits set forth in subparagraph 4(d)(i)(1) above;

(3) shares of Common Stock issued or issuable as a dividend or distribution on Preferred Stock or pursuant to any event for which adjustment is made pursuant to paragraph 4(e), 4(f) or 4(g) hereof;

(4) shares of Common Stock issued in a registered public offering under the Securities Act;

(5) shares of Common Stock issued or issuable pursuant to the acquisition of another corporation by the Corporation by merger; purchase of substantially all of the assets or other reorganization or to a joint venture agreement, provided, that such issuances are approved by the Board of Directors (including the Preferred Directors) (as defined below));

(6) shares of Common Stock issued or issuable to banks, equipment lessors or other financial institutions pursuant to a debt financing or commercial leasing transaction approved by the Board of Directors (including the Preferred Directors);

(7) shares of Common Stock issued or issuable in connection with sponsored research, collaboration, technology license, development, OEM, marketing or other similar agreements or strategic partnerships approved by the Board of Directors (including the Preferred Directors); and

(8) shares of Common Stock issued or issuable to suppliers or third party service providers in connection with the provision of goods or services pursuant to transactions approved by the Board of Directors (including the Preferred Directors);

(ii) No Adjustment of Conversion Price. No adjustment in the Conversion Price of a particular Series of Preferred Stock shall be made in respect of the issuance of Additional Shares of Common unless the consideration per share (as determined pursuant to paragraph 4(d)(v)) for an Additional Share of Common issued or deemed to be issued by the Corporation is less than the Conversion Price in effect on the date of, and immediately prior to, such issue, for such Series of Preferred Stock.

(iii) Deemed Issue of Additional Shares of Common. In the event the Corporation at any time or from time to time after the date of the filing of this Amended and Restated Certificate of Incorporation shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities, the conversion or exchange of such Convertible Securities or, in the case of Options for Convertible Securities, the exercise of such Options and the conversion or exchange of the underlying securities, shall be deemed to have been issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that in any such case in which shares are deemed to be issued:

(1) no further adjustment in the Conversion Price of any Series of Preferred Stock shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock in connection with the exercise of such Options or conversion or exchange of such Convertible Securities;

(2) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any change in the consideration payable to the Corporation or in the number of shares of Common Stock issuable upon the exercise, conversion or exchange thereof (other than a change pursuant to the anti-dilution provisions of such Options or Convertible Securities such as this Section 4(d) or pursuant to Recapitalization provisions of such Options or Convertible Securities such as Sections 4(e), 4(f) and 4(g) hereof), the Conversion Price of each Series of Preferred Stock and any subsequent adjustments based thereon shall be recomputed to reflect such change as if such change had been in effect as of the original issue thereof (or upon the occurrence of the record date with respect thereto);

(3) no readjustment pursuant to clause (2) above shall have the effect of increasing the Conversion Price of a Series of Preferred Stock to an amount above the Conversion Price that would have resulted from any other issuances of Additional Shares of

Common and any other adjustments provided for herein between the original adjustment date and such readjustment date;

(4) upon the expiration of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised, the Conversion Price of each Series of Preferred Stock computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto) and any subsequent adjustments based thereon shall, upon such expiration, be recomputed as if:

(a) in the case of Convertible Securities or Options for Common Stock, the only Additional Shares of Common issued were the shares of Common Stock, if any, actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities and the consideration received therefor was the consideration actually received by the Corporation for the issue of such exercised Options plus the consideration actually received by the Corporation upon such exercise or for the issue of all such Convertible Securities which were actually converted or exchanged, plus the additional consideration, if any, actually received by the Corporation upon such conversion or exchange, and

(b) in the case of Options for Convertible Securities, only the Convertible Securities, if any, actually issued upon the exercise thereof were issued at the time of issue of such Options, and the consideration received by the Corporation for the Additional Shares of Common deemed to have been then issued was the consideration actually received by the Corporation for the issue of such exercised Options, plus the consideration deemed to have been received by the Corporation (determined pursuant to Section 4(d)(v)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised; and

(5) if such record date shall have been fixed and such Options or Convertible Securities are not issued on the date fixed therefor, the adjustment previously made in the Conversion Price which became effective on such record date shall be canceled as of the close of business on such record date, and thereafter the Conversion Price shall be adjusted pursuant to this paragraph 4(d)(iii) as of the actual date of their issuance.

(iv) Adjustment of Conversion Price Upon Issuance of Additional Shares of Common. In the event this Corporation shall issue Additional shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to paragraph 4(d)(iii)) without consideration or for a price per share less than the applicable Conversion Price of a Series of Preferred Stock in effect on the date of and immediately prior to such issue, then, the Conversion Price of the affected Series of Preferred Stock shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying such Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common so issued would purchase at such Conversion Price, and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such Additional Shares of Common so issued. Notwithstanding the foregoing, the

Conversion Price shall not be reduced at such time if the amount of such reduction would be less than \$0.01, but any such amount shall be carried forward, and a reduction will be made with respect to such amount at the time of, and together with, any subsequent reduction which, together with such amount and any other amounts so carried forward, equal \$0.01 or more in the aggregate. For the purposes of this Subsection 4(d)(iv), all shares of Common Stock issuable upon conversion of all outstanding shares of Preferred Stock and the exercise and/or conversion of any other outstanding Convertible Securities and all outstanding Options shall be deemed to be outstanding.

(v) Determination of Consideration. For purposes of this subsection 4(d), the consideration received by the Corporation for the issue (or deemed issue) of any Additional Shares of Common shall be computed as follows:

(1) Cash and Property. Such consideration shall:

(a) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with such issuance;

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

(c) in the event Additional Shares of Common are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (a) and (b) above, as reasonably determined in good faith by the Board of Directors.

(2) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common deemed to have been issued pursuant to paragraph 4(d)(iii) shall be determined by dividing:

(x) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

(y) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(e) Adjustments for Subdivisions or Combinations of Common Stock. In the event the outstanding shares of Common Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise occurring after the date of the filing of this Amended and Restated Certificate of Incorporation) into a greater number of shares of Common Stock, the Conversion Price of each Series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Common Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Common Stock, the Conversion Prices in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(f) Adjustments for Subdivisions or Combinations of Preferred Stock. In the event the outstanding shares of Preferred Stock or a Series of Preferred Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise occurring after the date of the filing of this Amended and Restated Certificate of Incorporation) into a greater number of shares of Preferred Stock, the Dividend Rate, Original Issue Price and Liquidation Preference of the affected Series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Preferred Stock or a Series of Preferred Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Preferred Stock, the Dividend Rate, Original Issue Price and Liquidation Preference of the affected Series of Preferred Stock in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(g) Adjustments for Reclassification, Exchange and Substitution. Subject to Section 3 above ("Liquidation Rights"), if the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification or otherwise (other than a subdivision or combination of shares provided for above), then, in any such event, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, each holder of such Preferred Stock shall have the right thereafter to convert such shares of Preferred Stock into a number of shares of such other class or classes of stock which a holder of the number of shares of Common Stock deliverable upon conversion of such Series of Preferred Stock immediately before that change would have been entitled to receive in such reorganization or reclassification, all subject to further adjustment as provided herein with respect to such other shares.

(h) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Conversion Price pursuant to this Section 4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price at the time in effect and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of Preferred Stock.

(i) Waiver of Adjustment of Conversion Price. Notwithstanding anything herein to the contrary, any downward adjustment of the Conversion Price of any Series of Preferred Stock may be waived by the consent or vote of the holders of at least fifty-one percent (51%) of the outstanding shares of such Series either before or after the issuance causing the adjustment.

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

5. Voting.

(a) Restricted Class Voting. Except as otherwise expressly provided herein or as required by law, the holders of Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

(b) No Series Voting. Other than as provided herein or required by law, there shall be no Series voting.

(c) Preferred Stock. Each holder of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares of Preferred Stock held by such holder could be converted as of the record date. The holders of shares of the Preferred Stock shall be entitled to vote on all matters on which the Common Stock shall be entitled to vote. Holders of Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted), shall be disregarded.

(d) Election of Directors. The Board of Directors shall consist of five authorized members. So long as at least 2,750,000 shares (as appropriately adjusted for Recapitalizations) of Preferred Stock remain outstanding, the holders of Preferred Stock, voting as a separate class, shall be entitled to elect two (2) members of the Corporation's Board of Directors (such directors, the "Preferred Directors") at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors. The holders of Common Stock, voting as a separate class, shall be entitled to elect one member of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors (such directors, the "Common Director"). Any additional members of the Corporation's Board of Directors shall be elected by the holders of Common Stock and Preferred Stock, voting together as a single class. If a vacancy on the Board of Directors is to be filled by

the Board of Directors, only directors elected by the same class or classes of stockholders as those who would be entitled to vote to fill such vacancy shall vote to fill such vacancy.

(e) Adjustment in Authorized Common Stock. Subject to Section 7 below, 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 or reserved for issuance) by an affirmative vote of the holders of a majority in voting interest of the capital stock of the Corporation.

(f) Common Stock. Each holder of shares of Common Stock shall be entitled to one vote for each share thereof held.

6. Redemption.

(a) At any time after the fifth anniversary of the Original Issue Date, and at the election of the holders of at least fifty-one percent (51%) of the then outstanding shares of Preferred Stock (voting together as a single class and on an as-converted to Common Stock basis), this Corporation shall redeem, out of funds legally available therefor, all (but not less than all) outstanding shares of Preferred Stock which have not been converted into Common Stock pursuant to Section 4 hereof, in three (3) equal annual installments (each a "Redemption Date"). The Corporation shall redeem the shares of Preferred Stock by paying in cash an amount per share equal to the Original Issue Price applicable to each such Series of Preferred Stock, plus an amount equal to all declared and unpaid dividends thereon (as to each such Series, the "Redemption Price"). The number of shares of Preferred Stock that the Corporation shall be required under this Section 6 to redeem on any one (1) Redemption Date shall be equal to the amount determined by dividing: (a) the aggregate number of shares of Preferred Stock outstanding immediately prior to the Redemption Date by (b) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). If the funds of the Corporation legally available for redemption of shares of Preferred Stock on a Redemption Date are insufficient to redeem the total number of shares of Preferred Stock to be redeemed on such date, those funds that are legally available will be used first to redeem the maximum possible number of share of Series B Preferred Stock ratably among the holders of such shares of Series B Preferred Stock to be redeemed such that each holder of a share of Series B Preferred Stock receives the same percentage of its applicable Redemption Price. After the Corporation has redeemed all shares of Series B Preferred Stock to be redeemed on a Redemption Date, those remaining funds that are legally available will be used to redeem the maximum possible number of shares of Series A Preferred Stock ratably among the holders of such shares of Series A Preferred Stock to be redeemed such that each holder of shares of Series A Preferred Stock receives the same percentage of its applicable Redemption Price.

(b) Any redemption effected pursuant to Section 6(a) shall be made on a pro rata basis among the holders of each Series of Preferred Stock in proportion to the shares of each such Series of Preferred Stock then held by them.

(c) At least fifteen (15) but no more than thirty (30) days prior to each Redemption Date, written notice shall be mailed, first class postage prepaid, to each holder of record (at the close of business on the business day next preceding the day on which notice is

given) of the Preferred Stock to be redeemed, at the address last shown on the records of the Corporation for such holder, notifying such holder of the redemption to be effected, specifying the number of shares to be redeemed from such holder, the Redemption Date, the Redemption Price, the place at which payment may be obtained and calling upon such holder to surrender to the Corporation, in the manner and at the place designated, the holder's certificate or certificates representing the shares to be redeemed (the "Redemption Notice"). Except as provided herein, on or after the Redemption Date each holder of Preferred Stock to be redeemed shall surrender to this Corporation the certificate or certificates representing such shares, 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 cancelled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

(d) From and after the applicable Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of shares of Preferred Stock designated for redemption in the Redemption Notice as holders of Preferred Stock (except the right to receive the Redemption Price upon surrender of their certificate or certificates) shall cease with respect to the shares designated for redemption on such date, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever. If the funds of the Corporation legally available for redemption of shares of Preferred Stock on any Redemption Date are insufficient to redeem the total number of shares of Preferred Stock to be redeemed on such date, the unpaid amount of any past due Redemption Amounts shall accrue interest at a rate of one (1) percent per month until paid. The shares of Preferred Stock not redeemed shall remain outstanding and entitled to all the rights and preferences provided herein. At any time thereafter when additional funds of the Corporation are legally available for the redemption of shares of Preferred Stock, such funds will immediately be used to redeem the balance of the shares which the Corporation has become obliged to redeem on any Redemption Date, but which it has not redeemed.

(e) On or prior to each Redemption Date, the Corporation may deposit the Redemption Price of all shares of Preferred Stock designated for redemption in the Redemption Notice and not yet redeemed with a bank or trust corporation having aggregate capital and surplus in excess of \$100,000,000, as a trust fund for the benefit of the respective holders of the shares designated for redemption and not yet redeemed, with irrevocable instructions and authority to the bank or trust corporation to pay the Redemption Price for such shares to their respective holders on or after the Redemption Date upon receipt of notification from the Corporation that such holder has surrendered a share certificate to the Corporation pursuant to Section 6(c) above. As of the Redemption Date, the deposit shall constitute full payment of the shares to their holders, and from and after the Redemption Date the shares so called for redemption shall be redeemed and shall be deemed to be no longer outstanding, and the holders thereof shall cease to be stockholders with respect to such shares and shall have no rights with respect thereto except the right to receive from the bank or trust corporation payment of the Redemption Price of the shares, without interest (except as provided in Section 6(d) above, if applicable), upon surrender of their certificates therefor. Such instructions shall also provide that any moneys deposited by the Corporation pursuant to this Section 6(e) for the redemption of shares thereafter converted into shares of the Common Stock pursuant to Section 4 hereof prior



to the Redemption Date shall be returned to the Corporation forthwith upon such conversion. The balance of any moneys deposited by the Corporation pursuant to this Section 6(e) remaining unclaimed at the expiration of two (2) years following the Redemption Date shall thereafter be returned to the Corporation upon its request expressed in a resolution of its Board of Directors.

7. Amendments and Changes. As long as 2,750,000 shares of the Preferred Stock shall be issued and outstanding (as appropriately adjusted for Recapitalizations), the Corporation shall not, either directly or indirectly by amendment, merger, consolidation or otherwise, without first obtaining the approval (by vote or written consent as provided by law) of the holders of at least fifty-one percent (51%) of the then outstanding shares of the Preferred Stock (voting together as a single class and on an as-converted to Common Stock basis):

(a) amend, alter or repeal any provision of the Certificate of Incorporation or bylaws of the Corporation;

(b) increase or decrease (other than for decreases resulting from conversion or redemption of the Preferred Stock) the authorized number of shares of Preferred Stock or any Series thereof;

(c) authorize or create (by reclassification or otherwise) any new class or Series of shares having rights, preferences or privileges with respect to dividends, redemption or payments upon liquidation senior to or on a parity with any Series of Preferred Stock or having voting rights other than those granted to the Preferred Stock generally;

(d) pay or declare any Distribution;

(e) enter into any transaction or series of related transactions deemed to be a liquidation, dissolution or winding up of the Corporation pursuant to Section 3(d) above;

(f) increase or decrease the size of the Board of Directors;

(g) effect any acquisition of the capital stock of another entity which results in the consolidation of that entity into the results of operations of the Company under United States generally accepted accounting principles or the acquisition of all or substantially all of the assets of another entity, except as approved by the Board of Directors (including the Preferred Directors);

(h) create indebtedness for borrowed money, in a single or related series of transactions, in an amount in excess of \$500,000, except as approved by the Board of Directors (including the Preferred Directors);

(i) create a new plan or arrangement for the grant of stock options or the issuance of restricted stock or increase the number of shares available under such a plan or arrangement, except as approved by the Board of Directors (including the Preferred Directors);

(j) amend or alter the rights, preferences or privileges of any Series of Preferred Stock; or

(k) amend this Section 7.

8. Reissuance of Preferred Stock. In the event that any shares of Preferred Stock shall be converted pursuant to Section 4, redeemed pursuant to Section 6 or otherwise repurchased by the Corporation, the shares so converted, redeemed or repurchased shall be cancelled and shall not be issuable by this Corporation.

9. Notices. Any notice required by the provisions of this Section 9 to be given to the holders of Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at such holder's address appearing on the books of the Corporation.

## **ARTICLE VI**

The Corporation is to have perpetual existence.

## **ARTICLE VII**

Elections of directors need not be by written ballot unless a stockholder demands election by written ballot at the meeting and before voting begins or unless the Bylaws of the Corporation shall so provide.

## **ARTICLE VIII**

Unless otherwise set forth herein, the number of directors which constitute the Board of Directors of the Corporation shall be designated in the Bylaws of the Corporation.

## **ARTICLE IX**

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors of the Corporation is expressly authorized to make, alter, amend or repeal the Bylaws of the Corporation.

## **ARTICLE X**

1. To the fullest extent permitted by the Delaware General Corporation Law as the same exists or as may hereafter be amended, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for a breach of fiduciary duty as a director.

2. The Corporation may indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he, his testator or intestate is or was a director, officer or employee of the Corporation or any predecessor of the Corporation or serves or served at any other enterprise as a director, officer or employee at the request of the Corporation or any predecessor to the Corporation.

3. Neither any amendment nor repeal of this ARTICLE X, nor the adoption of any provision of this Corporation's Certificate of Incorporation inconsistent with this ARTICLE X, shall eliminate or reduce the effect of this ARTICLE X, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this ARTICLE X, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

## **ARTICLE XI**

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the statutes) outside of 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 Corporation.