

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
AEROVANCE INC.

The undersigned, William J. Newell, hereby certifies that:

1. He is the duly elected and acting President of Aerovance Inc., a Delaware corporation.
2. The Certificate of Incorporation of this corporation was originally filed with the Secretary of State of Delaware on July 14, 2004.
3. The Amended and Restated Certificate of Incorporation of this corporation shall be amended and restated in its entirety to read in full as follows:

ARTICLE I

The name of this corporation is Aerovance Inc. (the "Corporation").

ARTICLE II

The address of the registered office of the corporation in the State of Delaware is 615 South DuPont Highway, City of Dover, County of Kent, and the name of the registered agent of the corporation in the State of Delaware at such address is National Corporate Research.

ARTICLE III

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

ARTICLE IV

(A) **Classes of Stock.** The 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 340,000,000 shares, each with a par value of \$0.0001 per share. 199,958,988 shares of the total number of authorized shares shall be Common Stock and 140,041,012 shares shall be Preferred Stock.

(B) **Rights, Preferences and Restrictions of Preferred Stock.** The Preferred Stock authorized by this Amended and Restated Certificate of Incorporation (the "Restated Certificate") may be issued from time to time in one or more series. The first series of Preferred Stock shall be designated "Series A Preferred Stock" and shall consist of six million seven hundred fifty thousand (6,750,000) shares. The second series of Preferred Stock shall be designated "Series A-1 Preferred Stock" and shall consist of one million three hundred forty five thousand (1,345,000) shares. The third series of Preferred Stock shall be designated "Series B"

Preferred Stock" and shall consist of sixteen million twenty-five thousand (16,025,000) shares. The fourth series of Preferred Stock shall be designated "Series C Preferred Stock" and shall consist of one hundred fifteen million nine hundred twenty-one thousand twelve (115,921,012) shares. The rights, preferences, privileges, and restrictions granted to and imposed on the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock are as set forth below in this Article IV(B).

1. **Dividend Provisions.**

(a) The holders of the Series C Preferred shall be entitled to receive, prior and in preference to the holders of the Common Stock, the Series A Preferred Stock, the Series A-1 Preferred Stock and the Series B Preferred Stock, when and as declared by the Board of Directors, but only out of funds that are legally available therefor, non-cumulative cash dividends at the rate of eight percent (8%) of the applicable Original Issue Price (as defined below) per annum on each outstanding share of Series C Preferred Stock (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) held by them. No dividends or distributions shall be declared or paid on any shares of Common Stock, Series A Preferred Stock, Series A-1 Preferred Stock or Series B Preferred Stock during any fiscal year of the Corporation until dividends in the total amount set forth above shall have been paid during that fiscal year. The "Original Issue Price" of the Series C Preferred shall be \$0.5260134657 per share. The holders of Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock, prior to and in preference to the holders of Common Stock, shall be entitled to receive, on a *pari passu* basis, when and as declared by the Board of Directors, but only out of funds that are legally available therefor, non-cumulative cash dividends at the rate of eight percent (8%) of the applicable Original Issue Price (as defined below) per annum on each outstanding share of Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) held by them. The "Original Issue Price" of the Series A Preferred Stock shall be \$2.00 per share. The "Original Issue Price" of the Series A-1 Preferred Stock shall be \$2.00 per share. The "Original Issue Price" of the Series B Preferred Stock shall be \$2.00 per share.

(b) So long as any shares of Preferred Stock are outstanding, the Corporation shall not pay or declare any dividend, whether in cash or property, or make any other distribution on the Common Stock, or purchase, redeem or otherwise acquire for value any shares of Common Stock until all dividends as set forth in Section 1(a) above on the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall have been paid or declared and set apart, except for:

(i) acquisitions of Common Stock by the Corporation pursuant to agreements which permit the Corporation to repurchase such shares at cost (or the lesser of cost or fair market value) from an employee, consultant or director of the Corporation upon termination of employment or provision of services to the Corporation; or

(ii) acquisitions of Common Stock in exercise of the Corporation's right of first refusal to repurchase such shares provided such repurchase is approved by a majority of the Board of Directors of the Corporation, including one of the

directors elected by the holders of Series C Preferred Stock and including one of the directors elected by the holders of the Series B Preferred Stock.

The holders of the Preferred Stock expressly waive their rights, if any, as described in California Code Sections 502, 503 and 506 as they relate to repurchases of shares of Common Stock by the Corporation upon termination of employment or service of an employee, consultant or director of the Corporation.

2. **Liquidation.**

(a) **Preference.** In the event of any Liquidation Transaction (as defined below), liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, (a "Liquidation Event") the holders of the Series C Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the holders of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Common Stock by reason of their ownership thereof, an amount per share equal to the Original Issue Price per share (as adjusted for stock splits, stock dividends, reclassifications and the like) for each share of Series C Preferred Stock plus all declared but unpaid dividends thereon. If, upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series C Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series C Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive pursuant to this Section 2(a).

(b) Upon the completion of the distribution required by Section 2(a) above if assets remain in the Corporation, the holders of Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the holders of Common Stock by reason of their ownership thereof, an amount per share equal to their respective Original Issue Prices (as adjusted for stock splits, stock dividends, reclassifications and the like) for each share then held by them, on a *pari passu* basis, plus all declared but unpaid dividends. If, upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock, Series A-1 Preferred Stock and Series B Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

(c) **Remaining Assets.** Upon the completion of the distribution required by Sections 2(a) and (b) above if assets remain in the Corporation, the holders of the Common Stock of the Corporation shall receive all of the remaining assets of the Corporation pro rata based on the number of shares of Common Stock held by each such holder.

(d) Notwithstanding paragraphs (a), (b) and (c) above, solely for purposes of determining the amount each holder of shares of Preferred Stock is entitled to receive with respect to a Liquidation Event, the holder of each share of each series of Preferred Stock

shall be treated as if such holder had converted such holder's shares of such series into shares of Common Stock immediately prior to the Liquidation Event if, as a result of an actual conversion of any series of Preferred Stock (including taking into account the operation of this paragraph (d) with respect to all series of Preferred Stock), each holder of such series would receive (with respect to the shares of such series), in the aggregate, an amount greater than the amount that would be distributed to holders of such series (with respect to the shares of such series) if such holders had not converted such series of Preferred Stock into shares of Common Stock. If holders of any series are treated as if they had converted shares of Preferred Stock into Common Stock pursuant to this paragraph (d), then such holders shall not be entitled to receive any distribution pursuant to Section 2(a) or (b), as applicable, that would otherwise be made to holders of such series of Preferred Stock.

(e) **Certain Acquisitions.**

(i) **Deemed Liquidation.** For purposes of this Section 2, a Liquidation Event shall be deemed to occur if the Corporation shall, in a transaction or series of related transactions: (A) sell, convey, license, or otherwise dispose of all or substantially all of its assets or business or (B) by means of a merger, consolidation or other acquisition with any other corporation, limited liability company or other entity (other than a wholly-owned subsidiary of the Corporation) or the sale of the securities of the Corporation, cause the transfer of in excess of 50% of the voting power of the Corporation (any such transaction, a "Liquidation Transaction"), provided that none of the following shall be deemed a Liquidation Transaction: (i) a merger effected exclusively for the purpose of changing the domicile of the Corporation, (ii) a bona fide equity financing for working capital raising purposes in which the Corporation is the surviving corporation, or (iii) a transaction in which the stockholders of the Corporation immediately prior to the transaction own 50% or more of the voting power of the surviving corporation following the transaction. In the event that the Corporation is a party to Liquidation Transaction, then each holder of Preferred Stock shall be entitled to receive, for each share of Preferred Stock then held, out of the proceeds of such Liquidation Transaction, the greater of the amount of cash, securities or other property to which such holder would be entitled to receive in a Liquidation Event pursuant to (i) Section 2(a) or (b) above or (ii) Section 2(d) above, as applicable.

(ii) **Valuation of Consideration.** In the event of a deemed liquidation as described in Section 2(e)(i) above, if the consideration received by the Corporation is other than cash, its value will be deemed its fair market value, as determined in good faith by the Board of Directors. Any securities shall be valued as follows:

(A) Securities not subject to investment letter or other similar restrictions on free marketability:

(1) If traded on a securities exchange or The Nasdaq Stock Market ("Nasdaq"), the value shall be the average of the closing prices over a thirty (30) day period ending three days before the date of calculation on such exchange or Nasdaq over a specified time period;

(2) If actively traded over-the-counter, the value shall be the average of the closing bid or sales price (whichever is applicable) over the thirty (30) day period ending three days before the date of calculation; and

(3) 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.

(B) 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 stockholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as specified above in Section 2(e)(ii)(A) to reflect the approximate fair market value thereof, as determined in good faith by the Board of Directors.

(iii) **Notice of Liquidation Event.** The Corporation shall give each holder of record of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock written notice of any impending Liquidation Event not later than ten (10) calendar days prior to the stockholders' meeting called to approve such Liquidation Event, or ten (10) calendar days prior to the closing of such Liquidation Event, whichever is earlier, and shall also notify such holders in writing of the final approval of such Liquidation Event. The first of such notices shall describe the material terms and conditions of the impending Liquidation Event and the provisions of this Section 2, and the Corporation shall thereafter give such holders prompt notice of any material changes. Unless such notice requirements are waived in writing by both (i) the holders of at least a majority of the then outstanding shares of Preferred Stock, voting together as a single class and (ii) the holders of at least 55% of the then outstanding shares of Series C Preferred Stock voting separately as a single class, the Liquidation Event shall not take place sooner than ten (10) calendar days after the Corporation has given the first notice provided for herein or sooner than ten (10) calendar days after the Corporation has given notice of any material changes provided for herein. Notwithstanding the other provisions of this Restated Certificate, all notice periods or requirements in this Restated Certificate may be shortened or waived, either before or after the action for which notice is required, upon the written consent of the holders of a majority of the voting power of the outstanding shares of Preferred Stock that are entitled to such notice rights.

(iv) **Effect of Noncompliance.** In the event the requirements of this Section 2(e) are not complied with, the Corporation shall forthwith either cause the closing of the Liquidation Event to be postponed until the requirements of this Section 2(e) have been complied with, or cancel such Liquidation Event, in which event the rights, preferences, privileges and restrictions of the holders of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall revert to and be the same as such rights, preferences, privileges and restrictions existing immediately prior to the date of the first notice referred to in Section 2(e)(iii).

3. **Conversion.** The holders of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall have conversion rights as follows (the "**Conversion Rights**"):

(a) **Right to Convert to Common Stock.** Subject to Section 3(d), each share of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C 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 such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Original Issue Price of each such share of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock by the Conversion Price applicable to such share, determined as hereafter provided, in effect on the date the certificate is surrendered for conversion. The Conversion Price for shares of Series A Preferred Stock and Series A-1 Preferred Stock shall be equal to the Original Issue Price for shares of Series A Preferred Stock and Series A-1 Preferred Stock as set forth in Article IV(B), Section 1(a). The Conversion Price for shares of Series B Preferred Stock shall be equal to the Original Issue Price, provided, however, that upon the initial issuance of the Series C Preferred Stock, the Conversion Price of the Series B Preferred Stock shall be equal to \$1.0065513064. The Conversion Price for shares of Series C Preferred Stock shall be equal to the Original Issue Price as set forth in Article IV(B), Section 1(a). The Conversion Price for each share of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be subject to adjustment as set forth in Section 3(e) below.

(b) **Automatic Conversion to Common Stock.** Each share of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall automatically be converted into shares of Common Stock at the Conversion Price at the time in effect for such share immediately upon the earlier of (i) except as provided below in Section 3(d), the Corporation's sale of its Common Stock in a firm commitment underwritten public offering pursuant to a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), in which the per share price to the public would represent a pre-money valuation of the Corporation of at least \$200 million (calculated on a fully-diluted basis) and which results in gross cash proceeds to the Corporation of at least \$50 million (prior to underwriting discounts and commissions) or (ii) the date specified by written consent or agreement of both (A) the holders of a majority of the then outstanding shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock, voting together as a single class and (B) the holders of at least 55% of the then outstanding shares of Series C Preferred Stock voting separately as a single class.

(c) **Right to Convert Series A-1 Preferred Stock to Series A Preferred Stock.** Subject to Section 3(d), each share of Series A-1 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 such stock, into one (1) fully paid and nonassessable share of Series A Preferred Stock (as adjusted for stock splits, stock dividends, reclassifications and the like affecting the Series A Preferred Stock in a manner different from the Series A-1 Preferred Stock).

(d) **Mechanics of Conversion.** Before any holder of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock shall be entitled to convert such Preferred Stock into shares of Common Stock, the holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such series of Preferred Stock, and shall give written notice to the

Corporation at its principal corporate office, of the election to convert the same and shall state therein the name or names in which the certificate or certificates for shares of Common Stock are to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Preferred Stock, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of such series 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 as of such date. If the conversion is in connection with an underwritten public offering of securities registered pursuant to the Securities Act the conversion may, at the option of any holder tendering such Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event any persons entitled to receive Common Stock upon conversion of such Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities. The above described mechanics applicable to the conversion of shares of Preferred Stock to Common Stock shall apply equally to the conversion of shares of Series A-1 Preferred Stock to Series A Preferred Stock.

(e) **Conversion Price Adjustments of Preferred Stock for Certain Dilutive Issuances, Splits and Combinations.** The Conversion Price of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be subject to adjustment from time to time as follows:

(i) **Issuance of Additional Stock below Purchase Price.** If the Corporation should issue, at any time after the date upon which any shares of Series C Preferred Stock were first issued (the "Purchase Date"), any Additional Stock (as defined below) without consideration or for a consideration per share less than the respective Conversion Prices for the Series B Preferred Stock and Series C Preferred Stock in effect immediately prior to the issuance of such Additional Stock (a "Qualifying Dilutive Issuance"), the respective Conversion Prices for the Series B Preferred Stock and Series C Preferred Stock in effect immediately prior to each such issuance shall automatically be adjusted as set forth in this Section 3(e)(i), unless otherwise provided in this Section 3(e)(i).

(A) **Adjustment Formula.** Whenever the Conversion Price is adjusted pursuant to this Section 3(e)(i), the new Conversion Price shall be determined by multiplying the Conversion Price then in effect by a fraction, (x) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (the "Outstanding Common") plus the number of shares of Common Stock that the aggregate consideration received by the Corporation for such issuance would purchase at such Conversion Price; and (y) the denominator of which shall be the number of shares of Outstanding Common plus the number of shares of such Additional Stock. For purposes of the foregoing calculation, the term "Outstanding Common" shall include shares of Common Stock deemed issued pursuant to Section 3(e)(i)(E) below, but only to the extent the consideration to be paid upon the exercise, conversion or exchange per share of underlying Common Stock is less than or equal to the per share consideration for the Additional Stock which has given rise to the Conversion Price adjustment being calculated.

(B) **Definition of "Additional Stock"**. For purposes of adjustment of the Conversion Price for the Series B Preferred Stock and Series C Preferred Stock under Section 3(e)(i), "**Additional Stock**" shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to Section 3(e)(i)(E)) by the Corporation after the Purchase Date) other than:

(1) Common Stock issued pursuant to stock dividends, stock splits or similar transactions, as described in Section 3(e)(ii) hereof;

(2) As of the "First Closing" as defined in that certain Series C Preferred Stock Purchase Agreement by and between the Corporation and the Purchasers named therein, dated on or about the date hereof (the "**Purchase Agreement**"), up to 13,839,950 shares of Common Stock issued or issuable to employees, consultants or directors of the Corporation directly or pursuant to a stock option plan or restricted stock plan approved by the Board of Directors of the Corporation, including at least one of the directors elected by the holders of the Series C Preferred Stock and including at least one of the directors elected by the holders of the Series B Preferred Stock (provided, however, that such amount shall be increased to reflect any shares of Common Stock (i) not issued pursuant to the rights, agreements, option or warrants ("**Unexercised Options**") as a result of the termination of such Unexercised Options or (ii) reacquired by the Corporation from employees, directors or consultants at cost (or the lesser of cost or fair market value) pursuant to agreements which permit the Corporation to repurchase such shares upon termination of services to the Corporation) and from and after the "Call Closing," as defined in the Purchase Agreement up to an additional 10,416,418 shares of Common Stock issued or issuable to employees, consultants or directors of the Corporation directly or pursuant to a stock option plan or restricted stock plan approved by the Board of Directors of the Corporation, including at least one of the directors elected by the holders of the Series C Preferred Stock (provided, however, that such amount shall be increased to reflect any shares of Common Stock (i) not issued pursuant to the rights, agreements, option or warrants ("**Unexercised Options**") as a result of the termination of such Unexercised Options or (ii) reacquired by the Corporation from employees, directors or consultants at cost (or the lesser of cost or fair market value) pursuant to agreements which permit the Corporation to repurchase such shares upon termination of services to the Corporation);

(3) Capital stock, or options or warrants to purchase capital stock, issued to financial institutions or lessors in connection with commercial credit arrangements, equipment financings, commercial property lease transactions or similar transactions approved by the Board of Directors of the Corporation including at least one of the directors elected by the holders of the Series C Preferred Stock and including at least one of the directors elected by the holders of the Series B Preferred Stock;

(4) Shares of Common Stock or Preferred Stock issuable upon exercise of warrants outstanding as of the date this Amended and Restated Certificate of Incorporation becomes effective;

(5) Capital stock, or warrants or options to purchase capital stock, issued in connection with bona fide acquisitions, mergers or similar transactions, the terms of which are approved by the Board of Directors of the Corporation,

including at least one of the directors elected by the holders of the Series C Preferred Stock and including at least one of the directors elected by the holders of the Series B Preferred Stock;

(6) Shares of Common Stock issued or issuable upon conversion of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock, which, for purposes of clarity, includes the shares of Common Stock issued or issuable upon conversion of the Series B Preferred Stock as a result of the issuance of Series C Preferred Stock at a price of \$0.5260134657 per share;

(7) Shares of Common Stock issued or issuable in a public offering prior to or in connection with which all outstanding shares of Series A, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock will be converted to Common Stock;

(8) Capital stock issued or issuable to an entity as a component of any business relationship with such entity for the purpose of (A) joint venture, technology licensing or development activities, (B) distribution, supply or manufacture of the Corporation's products or services or (C) any other arrangements involving corporate partners that are primarily for purposes other than raising capital, in each case, as approved by the Board of Directors of the Corporation including at least one of the directors elected by the holders of the Series C Preferred Stock and including at least one of the directors elected by the holders of the Series B Preferred Stock;

(9) Up to 1,300,000 shares of Series A Preferred Stock (as adjusted for stock splits, stock dividends, reclassifications and the like) issuable pursuant to that certain Series A Preferred Stock Purchase Warrant issued to Bayer Pharmaceuticals Corporation on August 10, 2004;

(10) Up to 53,230,577 shares of Series C Preferred Stock (as adjusted for stock splits, stock dividends, reclassifications and the like) issued at a price of \$0.5260134657;

(11) Up to 399,229 shares of Series C Preferred Stock (as adjusted for stock splits, stock dividends, reclassifications and the like) issuable pursuant to that certain Series C Preferred Stock Purchase Warrant issued to Aquilo Partners on April 28, 2006.

(C) **No Fractional Adjustments.** No adjustment of the Conversion Price for any series of Preferred Stock shall be made in an amount less than one cent per share, provided that any adjustments which are not required to be made by reason of this sentence shall be carried forward and shall be either taken into account in any subsequent adjustment made prior to three years from the date of the event giving rise to the adjustment being carried forward, or shall be made at the end of three years from the date of the event giving rise to the adjustment being carried forward.

(D) **Determination of Consideration.** In the case of the issuance of Common Stock for cash, the consideration shall be deemed to be the amount of cash paid therefor before deducting any reasonable discounts, commissions or other expenses

allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with the issuance and sale thereof. In the case of the issuance of the Common Stock for consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined by in good faith by the Board of Directors of the Corporation.

(E) **Deemed Issuances of Common Stock.** In the case of the issuance (whether before, on or after the applicable Purchase Date) of securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock (the "Common Stock Equivalents"), the following provisions shall apply for all purposes of this Section 3(e)(i):

(1) The aggregate maximum number of shares of Common Stock deliverable upon conversion, exchange or exercise (assuming the satisfaction of any conditions to convertibility, exchangeability or exercisability, including, without limitation, the passage of time, but without taking into account potential antidilution adjustments) of any Common Stock Equivalents and subsequent conversion, exchange or exercise thereof shall be deemed to have been issued at the time such Common Stock Equivalents were issued and for a consideration equal to the consideration, if any, received by the Corporation for any such Common Stock Equivalents (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by the Corporation (without taking into account potential antidilution adjustments) upon the conversion, exchange or exercise of any Common Stock Equivalents (the consideration in each case to be determined in the manner provided in Section 3(e)(i)(D)).

(2) In the event of any change in the number of shares of Common Stock deliverable or in the consideration payable to the Corporation upon conversion, exchange or exercise of any Common Stock Equivalents, other than a change resulting from the antidilution provisions thereof, the Conversion Price of any series of Preferred Stock, to the extent in any way affected by or computed using such Common Stock Equivalents, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Common Stock or any payment of such consideration upon the conversion, exchange or exercise of such Common Stock Equivalents.

(3) Upon the termination or expiration of the convertibility, exchangeability or exercisability of any Common Stock Equivalents, the Conversion Price of any series of Preferred Stock, to the extent in any way affected by or computed using such Common Stock Equivalents, shall be recomputed to reflect the issuance of only the number of shares of Common Stock (and Common Stock Equivalents that remain convertible, exchangeable or exercisable) actually issued upon the conversion, exchange or exercise of such Common Stock Equivalents.

(4) The number of shares of Common Stock deemed issued and the consideration deemed paid therefor pursuant to Section 3(e)(i)(E)(1) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either Section 3(e)(i)(E)(2) or 3(e)(i)(E)(3).

(F) **No Increased Conversion Price.** Notwithstanding any other provisions of this Section 3(e)(i), except to the limited extent provided for in Sections 3(e)(i)(E)(2) and 3(e)(i)(E)(3), no adjustment of the Conversion Price pursuant to this Section 3(e)(i) shall have the effect of increasing the Conversion Price above the Conversion Price in effect immediately prior to such adjustment.

(G) **Multiple Dilutive Issuances.** In the event that the Corporation issues or sells, or is deemed to have issued or sold, Additional Shares of Common Stock in a Qualifying Dilutive Issuance (the "**First Dilutive Issuance**"), then in the event that the Corporation issues or sells, or is deemed to have issued or sold, Additional Shares of Common Stock in a Qualifying Dilutive Issuance other than the First Dilutive Issuance as a part of the same transaction or series of related transactions as the First Dilutive Issuance (a "**Subsequent Dilutive Issuance**"), then and in each such case upon a Subsequent Dilutive Issuance the Conversion Price for the Series B Preferred and Series C Stock shall be reduced to the Conversion Price that would have been in effect had the First Dilutive Issuance and each Subsequent Dilutive Issuance all occurred on the closing date of the First Dilutive Issuance.

(ii) **Stock Splits and Dividends.** In the event the Corporation should at any time after the Purchase Date fix a record date for the effectuation of a split or subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or Common Stock Equivalents without payment of any consideration by such holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date (or the date of such dividend distribution, split or subdivision if no record date is fixed), the Conversion Price of each of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase of the aggregate of shares of Common Stock outstanding and those issuable with respect to such Common Stock Equivalents with the number of shares issuable with respect to Common Stock Equivalents determined from time to time in the manner provided for deemed issuances in Section 3(e)(i)(E).

(iii) **Reverse Stock Splits.** If the number of shares of Common Stock outstanding at any time after the Purchase Date is decreased by a combination of the outstanding shares of Common Stock, then, following the record date of such combination, the Conversion Price for each of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in outstanding shares.

(f) **Other Distributions.** In the event the Corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in Section 3(e)(i) or 3(e)(ii), then, in each such case for the purpose of this Section 3(f), the holders of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be entitled to a proportionate share of any such distribution as

though they were the holders of the number of shares of Common Stock of the Corporation into which their shares of Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

(g) **Recapitalizations.** If at any time or from time to time there shall be a recapitalization of the Common Stock (other than a subdivision, combination or Liquidation Event provided for elsewhere in this Section 3 or in Section 2) provision shall be made so that the holders of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall thereafter be entitled to receive upon conversion of such Preferred Stock the number of shares of stock or other securities or property of the Corporation or otherwise, to which a holder of Common Stock deliverable upon conversion would have been entitled on such recapitalization. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 3 with respect to the rights of the holders of such Preferred Stock after the recapitalization to the end that the provisions of this Section 3 (including adjustment of the Conversion Price then in effect and the number of shares purchasable upon conversion of such Preferred Stock) shall be applicable after that event and be as nearly equivalent as practicable.

(h) **Special Mandatory Conversions.**

(i) If at any time following the Purchase Date the Corporation consummates a Future Financing (as defined below) and a holder of shares of Series B Preferred Stock or Series C Preferred Stock (each, a "Covered Holder" and collectively, the "Covered Holders") does not elect to purchase at least its Pro Rata Share (as defined below) of the securities offered by the Corporation to the Covered Holders in such Future Financing (a "Non-Participating Covered Holder"), then such Non-Participating Covered Holder's shares of Series B Preferred Stock and Series C Preferred Stock shall, immediately prior to the consummation of the Future Financing, automatically and without further action on the part of such Non-Participating Covered Holder be converted into shares of Common Stock at the Conversion Price in effect with respect to shares of Series B Preferred Stock or Series C Preferred Stock, as applicable, immediately prior to the consummation of such Future Financing.

(A) Notwithstanding the foregoing, if a Covered Holder holding Series B Preferred Stock participates in the Future Financing, but does not purchase its full Pro Rata Share (as defined below), then a number of such Covered Holder's shares of Series B Preferred Stock equal to (1) the number of shares of the Series B Preferred Stock held by such Covered Holder multiplied by (2) the percentage of such Covered Holder's Pro Rata Share that such Covered Holder did not purchase in the Future Financing (the "Refused Percentage") shall, immediately prior to the consummation of the Future Financing, automatically and without further action on the part of such Covered Holder be converted into shares of Common Stock at the Conversion Price in effect with respect to the Series B Preferred Stock immediately prior to such Future Financing. If a Covered Holder holding Series C Preferred Stock participates in the Future Financing, but does not purchase its full Pro Rata Share, then a number of such Covered Holder's shares of Series C Preferred Stock equal to (1) the number of shares of the Series C Preferred Stock held by such Covered Holder multiplied by (2) the Refused Percentage shall, immediately prior to the consummation of the Future Financing, automatically and without

further action on the part of such Covered Holder be converted into shares of Common Stock at the Conversion Price in effect with respect to the Series C Preferred Stock immediately prior to such Future Financing.

(B) **Definitions.** (1) A "Future Financing" shall mean the sale of shares of equity securities (the "Equity Securities") by the Corporation after the First Closing (as defined in the Purchase Agreement), provided, that the Corporation offers each Covered Holder the right to purchase such Covered Holder's Pro-Rata Share of such Equity Securities in a written notice given by the Corporation to each Covered Holder at least ten (10) days prior to the closing of such Future Financing. (2) Each Covered Holder's "Pro Rata Share" of the Equity Securities offered in a Future Financing is equal to: (i) the aggregate number of shares of Equity Securities allocated by the Board of Directors (including at least one Series C director and at least one Series B director) for purchase by all of the Covered Holders in the Future Financing multiplied by (ii) the quotient obtained by dividing (x) the aggregate number of shares of Common Stock issuable upon conversion of the Series B Preferred Stock and Series C Preferred Stock then held by such Covered Holder divided by (y) the aggregate number of shares of Common Stock issuable upon conversion of the Series B Preferred Stock and Series C Preferred Stock then held by all Covered Holders, each as of immediately prior to such Future Financing.

(ii) Notwithstanding the foregoing, or anything else herein to the contrary, the Call Closing (as defined the Purchase Agreement) shall be deemed to be a Future Financing and, only with respect to the Call Closing (a) a Covered Holder shall mean only a Purchaser of Series C Preferred Stock in the First Closing (as defined in the Purchase Agreement); (b) the shares deemed offered to the Covered Holders shall mean the Call Shares (as defined in the Purchase Agreement); and (c) no additional notice shall be required other than what is provided for in the Purchase Agreement with respect to the Call Closing.

(iii) For purposes of this section (h) any Future Financing (other than the Call Closing that is deemed a Future Financing under subsection h(ii) hereof) may be excluded from the terms hereof by the vote or written consent of the holders of at least seventy-five (75%) of the then outstanding shares of Series B Preferred Stock and Series C Preferred Stock voting together as a single class.

(iv) **Notices.** All written notices required by this Section 3(h) shall be given by overnight courier, freight prepaid, addressed to the holders of the Series B Preferred Stock and Series C Preferred Stock at the address for each such holder as shown on the books of the Corporation and shall be deemed given one day after the day of deposit with the overnight courier.

(v) **Termination.** The provisions of this Section 3(h) shall terminate immediately prior to the consummation of the earlier to occur of: (a) a Liquidation Event or (b) the Corporation's initial sale of its Common Stock in a firm commitment underwritten public offering pursuant to a registration statement declared effective under the Securities Act.

(i) **No Fractional Shares and Certificate as to Adjustments.**

(i) No fractional shares shall be issued upon the conversion of any share or shares of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock, and the number of shares of Common Stock to be issued shall be rounded down to the nearest whole share. The number of shares issuable upon such conversion shall be determined on the basis of the total number of shares of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock the holder is at the time converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion. If the conversion would result in any fractional share, the Corporation shall, in lieu of issuing any such fractional share, pay the holder thereof an amount in cash equal to the fair market value of such fractional share on the date of conversion, as determined in good faith by the Board of Directors.

(ii) Upon the occurrence of each adjustment or readjustment of the Conversion Prices of the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock pursuant to this Section 3, the Corporation, at its expense, shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of such 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 Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Conversion Price for such series of Preferred Stock at the time in effect, and (C) 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 a share of such series of Preferred Stock.

(j) **Notices of Record Date.** In the event of any taking by the Corporation 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 (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property, or to receive any other right, the Corporation shall mail to each holder of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock, at least ten (10) calendar days prior to the date specified therein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right.

(k) **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 Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock and Series C Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of such series of Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of such series of Preferred Stock, in addition to such other remedies as shall be available to the holder of such 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 purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this Amended and Restated Certificate of Incorporation.

(l) **Notices.** Except as expressly provided otherwise herein, any notice required by the provisions of this Section 3 to be given to the holders of shares of Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of the Corporation.

4. **Voting Rights.**

(a) **Vote other than for Directors.** Other than as set forth herein or as required by law, the holders of Series A-1 Preferred Stock shall not be entitled to vote on any matter on which the stockholders of the Corporation shall be entitled to vote, including any vote to elect directors of the Corporation, and shares of Series A-1 Preferred Stock shall not be included in determining the number of shares voting or entitled to vote on any such matters. Except as expressly provided by this Amended and Restated Certificate of Incorporation or as provided by law, the holders of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall have the same voting rights as the holders of Common Stock and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation, and the holders of Common Stock and the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall vote together as a single class on all matters. Each holder of Common Stock shall be entitled to one vote for each share of Common Stock then held by such holder, and each holder of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock then held by such holder could be converted. Fractional votes shall not, however, be permitted and any fractional voting rights available on an as-converted basis (after aggregating all shares into which shares of Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

(b) **Vote for Directors.**

The number of directors which shall constitute the entire Board of Directors of the Corporation shall be seven.

(i) The holders of the Series B Preferred Stock, voting together as a single class, shall be entitled to elect two (2) members of the Board of Directors at each meeting or pursuant to each consent of the Corporation'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) The holders of Series C Preferred Stock, voting as a separate class, shall be entitled to elect two (2) members of the Board of Directors at each meeting or pursuant to each consent of the Corporation'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. Any director elected as provided in the preceding sentence may be removed without cause by, and only by, the affirmative vote of the holders of the shares of Series C Preferred Stock.

(iii) The holders of Preferred Stock and Common Stock, voting together as a single class on an as-if-converted to Common Stock basis, shall be entitled to elect three (3) members of the Board of Directors at each meeting or pursuant to each consent of the Corporation'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.

5. Protective Provisions.

(a) So long as at least 500,000 shares of Preferred Stock are outstanding (as adjusted for stock splits, stock dividends, reclassifications and the like), the Corporation shall not (by amendment, merger, consolidation or otherwise) without first obtaining the approval (by vote or written consent, as provided by law) of both (i) the holders of at least a majority of the then outstanding shares of Preferred Stock, voting together as a single class and (ii) the holders of at least 55% of the then outstanding shares of Series C Preferred Stock voting separately as a single class:

- (1) effect a Liquidation Transaction;
- (2) alter or change the rights, preferences or privileges of the shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock so as to affect adversely the shares of such series;
- (3) increase or decrease (other than by conversion) the total number of authorized shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock;
- (4) authorize, issue or take any other action to create or issue or obligate itself to create or issue, any equity security, including any security (other than Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock) convertible into or exercisable for any equity security, having a preference over, or being on a parity with, the Series A Preferred Stock, Series A-1 Preferred Stock, Series B Preferred Stock or Series C Preferred Stock with respect to voting (other than the *pari passu* voting rights of Common Stock), dividends, redemption, conversion or upon liquidation of the Corporation;
- (5) amend, modify or repeal any provision of the Corporation's Amended and Restated Certificate of Incorporation or Bylaws;
- (6) authorize the payment of or pay any dividend;
- (7) redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purpose) any share or shares of Preferred Stock or Common Stock; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing

services for the Corporation or any subsidiary pursuant to agreements under which the Corporation has the option to repurchase such shares at no greater than cost upon the occurrence of certain events, such as the termination of employment, or through the exercise of any right of first refusal;

(8) approve or enter into any transaction, outside of the ordinary course of business of the Corporation involving the acquisition by the Corporation of any other business or material amount of assets, or the establishment of any material joint ventures by the Corporation;

(9) Increase or decrease the authorized size of the board of directors; or

(10) create or authorize the creation of any debt security or debt obligation if the Corporation's aggregate indebtedness would exceed \$1 million, other than equipment leases, bank lines of credit or other obligations which have, in each case, been approved by the Board of Directors of the Corporation, including the approval of at least one (1) director elected by the holders of Series C Preferred Stock and at least one (1) director elected by the holders of the Series B Preferred Stock.

(b) So long as shares of Series A Preferred Stock are outstanding, the Corporation shall not (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 a majority of the then outstanding shares of Series A Preferred Stock, voting together as a class:

(1) alter or change the rights, preferences or privileges of the shares of Series A Preferred Stock so as to affect adversely the shares of such series in a manner that does not so affect the entire class of Preferred Stock; or

(2) increase or decrease (other than by conversion) the total number of authorized shares of Series A Preferred Stock.

(c) So long as shares of Series A-1 Preferred Stock are outstanding, the Corporation shall not (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 a majority of the then outstanding shares of Series A-1 Preferred Stock, voting together as a class:

(1) alter or change the rights, preferences or privileges of the shares of Series A-1 Preferred Stock so as to affect adversely the shares of such series in a manner that does not so affect the entire class of Preferred Stock; or

(2) increase or decrease (other than by conversion) the total number of authorized shares of Series A-1 Preferred Stock.

(d) So long as shares of Series B Preferred Stock are outstanding, the Corporation shall not (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 sixty

percent (60%) of the then outstanding shares of Series B Preferred Stock, voting together as a class:

(1) alter or change the rights, preferences or privileges of the shares of Series B Preferred Stock so as to affect adversely the shares of such series in a manner that does not so affect the entire class of Preferred Stock; or

(2) increase or decrease (other than by conversion) the total number of authorized shares of Series B Preferred Stock.

(e) So long as shares of Series C Preferred Stock are outstanding, the Corporation shall not (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 60% of the then outstanding shares of Series C Preferred Stock, voting together as a separate class:

(1) alter or change the rights, preferences or privileges of the shares of Series C Preferred Stock so as to affect adversely the shares of such series in a manner that does not so affect the entire class of Preferred Stock; or

(2) increase or decrease (other than by conversion) the total number of authorized shares of Series C Preferred Stock; or

(3) issue or take any other action to create or issue (by reclassifications, merger or otherwise), or obligate itself to create or issue, any equity security, including any security convertible into or exercisable for any equity security, having a preference over, or being on a parity with, the Series C Preferred Stock with respect to dividends, redemption, or upon liquidation of the Corporation.

6. **Status of Converted Stock.** In the event any shares of Preferred Stock shall be converted pursuant to Section 3 hereof, the shares so converted shall be cancelled and shall not be issuable by the Corporation. This Restated Certificate shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

(C) **Common Stock.**

1. **Dividend Rights.** Subject to the prior rights of holders of all classes of stock at the time outstanding having prior rights as to dividends, the holders of the Common Stock shall be entitled to receive, when and as declared by the Board of Directors, out of any assets of the Corporation legally available therefor, such dividends as may be declared from time to time by the Board of Directors.

2. **Liquidation Rights.** Upon the liquidation, dissolution or winding up of the Corporation or the occurrence of a Liquidation Transaction, the assets of the Corporation shall be distributed as provided in Section 2 of Article IV(B).

3. **Redemption.** The Common Stock is not redeemable.

4. **Voting Rights.** Each holder of Common Stock shall have the right to one vote per share of Common Stock, and shall be entitled to notice of any stockholders' meeting in accordance with the bylaws of the Corporation, and shall be entitled to vote upon such matters and in such manner as may be provided by law. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of shares of stock of the Corporation representing a majority of the votes represented by all outstanding shares of stock of the Corporation entitled to vote, irrespective of the provisions of Section 242(b)(2) of the Delaware General Corporation Law.

ARTICLE V

The Board of Directors of the Corporation is expressly authorized to make, alter or repeal Bylaws of the Corporation.

ARTICLE VI

Elections of directors need not be by written ballot unless otherwise provided in the Bylaws of the Corporation.

ARTICLE VII

(A) 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 breach of fiduciary duty as a director.

(B) The Corporation shall 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 or officer of the Corporation or any predecessor of the Corporation, or serves or served at any other enterprise as a director or officer at the request of the Corporation or any predecessor to the Corporation.

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

* * *

The foregoing Amended and Restated Certificate of Incorporation has been duly adopted by this corporation's Board of Directors in accordance with the applicable provisions of Sections 242 and 245 of the Delaware General Corporation Law.

Executed at Berkeley, California, on May 3rd, 2006.

/s/ William J. Newell

William J. Newell, President