

State of Delaware
Secretary of State
Division of Corporations
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FOURTH AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
ADSPACE NETWORKS, INC.,
a Delaware Corporation

NY-1

The undersigned does hereby certify on behalf of AdSpace Networks, Inc. (the "**Corporation**"), a corporation organized and existing under the Delaware General Corporation Law, as follows:

FIRST: That the undersigned is the duly elected and acting Chief Executive Officer of the Corporation.

SECOND: That the Certificate of Incorporation of the Corporation was originally filed with the Secretary of State of the State of Delaware on January 11, 2001 under the name "AdSpace Networks, Inc."

THIRD: That pursuant to Sections 242 and 245 of the General Corporation Law of the State of Delaware, the Certificate of Incorporation of the Corporation, as amended to the date of the filing of this certificate, is hereby amended and restated in its entirety as set forth in **Exhibit A** hereto.

FOURTH: That the Amendment and Restatement of the Certificate of Incorporation of the Corporation as set forth in **Exhibit A** hereto has been duly adopted and approved by the board of directors and stockholders of the Corporation in accordance with the applicable provisions of Sections 141, 228, 242 and 245 of the Delaware General Corporation Law.

The undersigned hereby further declares and certifies under penalty of perjury that the facts set forth in the foregoing certificate are true and correct to the knowledge of the undersigned, and that this certificate is the act and deed of the undersigned.

Executed in New York, New York on this 20th day of December, 2005.

By: /s/ L. Jeffrey Jensen
L. Jeffrey Jensen, President

EXHIBIT A

ARTICLE I

The name of the Corporation is AdSpace Networks, Inc.

ARTICLE II

The address of the registered office of the Corporation in the State of Delaware is 2711 Centerville Road, Suite 400, City of Wilmington, County of New Castle, 19808. The name of its registered agent at such address is Corporation Service Company.

ARTICLE III

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

ARTICLE IV

(A) Classes of Capital Stock

The Corporation is authorized to issue 302,300,000 shares of capital stock in the aggregate. The capital stock of the Corporation shall be divided into two classes, designated "Common Stock" and "Preferred Stock." The number of shares of Common Stock that the Corporation is authorized to issue is 170,000,000. The number of shares of Preferred Stock that the Corporation is authorized to issue is 132,300,000, 300,000 of which shall be designated as Series A Preferred Stock ("*Series A Preferred*"), 20,000,000 of which shall be designated as Series B Preferred Stock ("*Series B Preferred*"), 42,000,000 of which shall be designated as Series C Preferred Stock ("*Series C Preferred*") and 70,000,000 of which shall be designated as Series D Preferred Stock ("*Series D Preferred*"). The Common Stock and Preferred Stock shall each have a par value of \$0.00001 per share. The Corporation shall from time to time in accordance with the laws of the State of Delaware increase the authorized amount of its Common Stock if at any time the number of shares of Common Stock remaining unissued and available for issuance shall not be sufficient to permit the conversion of the Preferred Stock in accordance with Section 4 of Division (B) below. Subject to Section 6 of Division (B) 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 the exercise of options or warrants or conversion of the Preferred Stock) by the affirmative vote of the holders of a majority of the stock of the Corporation entitled to vote thereon, voting as a single class (and not as a separate individual class of solely holders of Common Stock, excluding those holders of equity securities who may be entitled to vote thereon as provided in this Fourth Amended and Restated Certificate of Incorporation (this "*Fourth Restated Certificate*")), as provided by Section 242(b)(2) of the Delaware General Corporation Law.

(B) Rights, Preferences, Privileges and Restrictions of Preferred Stock

The relative rights, preferences, privileges and restrictions granted to or imposed upon the respective series of Preferred Stock or the holders thereof are as follows:

1. **Dividends**

(a) The holders of Series A Preferred, Series B Preferred, Series C Preferred and Series D Preferred shall be entitled to receive dividends at the rate of \$0.266 per share, \$0.0702 per share, \$0.0450 per share and \$0.0233 per share, respectively (as adjusted for any stock dividends, combinations or splits with respect to such shares) per annum, payable out of funds legally available therefore. Such dividends shall be payable when, as, and if declared by the board of directors, acting in its sole discretion. No dividend shall be paid to the holders of Series A Preferred, Series B Preferred, Series C Preferred or Common Stock unless all accrued but unpaid dividends on shares of the Series D Preferred shall have been paid. No dividend shall be paid to the holders of Common Stock, Series A Preferred or Series B Preferred unless all accrued but unpaid dividends on shares of the Series C Preferred shall have been paid. No dividend shall be paid to the holders of Common Stock or Series A Preferred unless all accrued but unpaid dividends on shares of the Series B Preferred shall have been paid. No dividend shall be paid to the holders of the Common Stock unless all accrued but unpaid dividends on shares of the Series A Preferred shall have been paid. The right to receive dividends shall not be cumulative, and no right shall accrue to holders of any shares by reason of the fact that dividends on such shares are not declared and paid in any prior year. No dividends shall be paid to the holders of any series of Preferred Stock at a rate greater than eight percent (8%) of the Original Issue Price (as defined below) per share of such series of Preferred Stock.

(b) After payment of dividends at the annual rates set forth above, any additional dividends declared shall be distributed among all holders of Preferred Stock and Common Stock in proportion to the number of shares of Common Stock that would be held by each such holder if all shares of Preferred Stock were converted into Common Stock pursuant to Section 4 hereof.

(c) If at the time any shares of Preferred Stock are converted into Common Stock there are any declared but unpaid dividends on such shares, then the Corporation at its option shall either pay the unpaid dividends or issue additional shares of Common Stock in the amount of the unpaid dividends at the applicable fair market value for such shares as then in effect.

(d) All or a portion of any accumulated but unpaid dividends on the Series A Preferred, the Series B Preferred, and the Series C Preferred may be waived by the affirmative vote of the holders of a majority of the shares of such series of Preferred Stock. All or a portion of any accumulated but unpaid dividends on the Series D Preferred may be waived by the affirmative vote of the holders of sixty-six and two-thirds percent (66 2/3%) of the shares of such series D Preferred Stock.

2. **Liquidation**

(a) In the event of any Deemed Liquidation (as defined below) of the Corporation, either voluntary or involuntary, the holders of the Series D Preferred shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Series A Preferred, Series B Preferred, Series C Preferred and Common Stock, the amount of \$.2918 per share (as adjusted for any stock dividends,

combinations or splits with respect to such shares, the "*Series D Original Issue Price*" following the date of this Fourth Restated Certificate, plus all declared but unpaid dividends on such shares. If the assets and funds available for distribution to the holders of the Series D Preferred shall be insufficient to pay the stated preferential amounts in full, then the entire assets and funds of the Corporation legally available for distribution shall be distributed with equal priority and pro rata among the holders of the Series D Preferred in proportion to the preferential amount each such holder would otherwise be entitled to receive.

(b) After payment in full of the preferential amounts required in subsection (a) of this Section 2, the holders of the Series C Preferred shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Series A Preferred, Series B Preferred and Common Stock, the amount of \$0.5623 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares, the "*Series C Original Issue Price*" following the date of this Fourth Restated Certificate), plus all declared but unpaid dividends on such shares. If the remaining assets and funds available for distribution to the holders of the Series C Preferred following the distribution required in subsection (a) above shall be insufficient to pay the stated preferential amounts required in this subsection (b) in full, then the entire remaining assets and funds of the Corporation legally available for distribution shall be distributed with equal priority and pro rata among the holders of the Series C Preferred in proportion to the preferential amount each such holder would otherwise be entitled to receive.

(c) After payment in full of the preferential amounts required in subsections (a) and (b) of this Section 2, the holders of the Series B Preferred shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Series A Preferred and Common Stock, the amount of \$0.8773 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares, the "*Series B Original Issue Price*" following the date of this Fourth Restated Certificate), plus all declared but unpaid dividends on such shares. If the remaining assets and funds available for distribution to the holders of the Series B Preferred following the distribution required in subsections (a) and (b) above shall be insufficient to pay the stated preferential amounts required in this subsection (c) in full, then the entire remaining assets and funds of the Corporation legally available for distribution shall be distributed with equal priority and pro rata among the holders of the Series B Preferred in proportion to the preferential amount each such holder would otherwise be entitled to receive.

(d) After payment in full of the preferential amounts required in subsections (a), (b) and (c) of this Section 2, the holders of the Series A Preferred shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Common Stock, the amount of \$3.3250 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares, the "*Series A Original Issue Price*" following the date of this Fourth Restated Certificate) for each share of Series A Preferred then outstanding. If the remaining assets and funds available for distribution to the holders of the Series A Preferred following the distributions required in subsections (a), (b) and (c) above shall be insufficient to pay the stated preferential amounts required in this subsection (d) in full, then the entire remaining assets and funds of the Corporation legally available for distribution shall be

distributed with equal priority and pro rata among the holders of the Series A Preferred in proportion to the preferential amount each such holder would otherwise be entitled to receive.

(c) After payment in full of the preferential amounts required in subsections (a), (b), (c) and (d) of this Section 2 has been made, all remaining assets of the Corporation legally available for distribution shall be distributed with equal priority and pro rata among the holders of the Common Stock, the Series B Preferred, the Series C Preferred and Series D Preferred in proportion to the number of shares of Common Stock that would be held by each such holder if all shares of Series B Preferred, Series C Preferred and Series D Preferred were converted into Common Stock pursuant to Section 4 hereof.

(f) For purposes of this Section 2, a "*Deemed Liquidation*" shall mean a liquidation, dissolution or winding up of the Corporation and: (i) the Corporation's sale of all or substantially all of its assets, (ii) the acquisition of the Corporation by another entity (other than a reincorporation for the purpose of changing the Corporation's domicile) by means of merger, reorganization, sale, change of control, business combination or other form of corporate reorganization in which the outstanding shares of the Corporation are exchanged for securities or other consideration issued by or on behalf of the acquiring entity and, as a result, of which the stockholders of the Corporation immediately prior to such transaction hold less than fifty percent (50%) of the voting power of the surviving or resulting entity, and (iii) the transfer to a person or group of affiliated persons (other than an underwriter of the Corporation's securities), of the Corporation's securities if, as a result of such transfer the stockholders of the Corporation immediately prior to such transaction hold less than fifty percent (50%) of the voting power of the Corporation.

(g) Unless otherwise specified in a definitive agreement approved by the stockholders of the Corporation in accordance with the Delaware General Corporation Law the Corporation's Certificate of Incorporation and bylaws as then in effect, the value of any securities to be delivered to the stockholders pursuant to this Section 2 shall be determined as follows:

(i) If listed on a national securities exchange or quoted on the National Market System of the National Association of Securities Dealers, Inc. (the "*Nasdaq NMS*"), then the value shall be deemed to be the average of the closing prices of the securities on such exchange over the thirty (30) day period ending three (3) days prior to the closing of such transaction;

(ii) If actively traded over the counter or through an automated dealer quotation system (other than Nasdaq NMS), then the value shall be deemed to be the average of the closing bid or sale prices (whichever are higher) over the thirty (30) day period ending three (3) days prior to the closing of such transaction; and

(iii) If there is no active public market, then the value shall be the fair market value thereof as determined in good faith by the Corporation's board of directors.

(h) Notwithstanding Section 1 above, this Section 2 and Section 3 below, the Corporation may at any time, out of funds legally available for such purpose, repurchase shares of Common Stock issued to or held by officers, directors, employees or other service providers

upon termination of their employment or services pursuant to agreements providing the Corporation with such a right of repurchase, whether or not all declared dividends have been paid or set aside for payment and whether or not all Preferred Stock required to be redeemed by the Corporation has been redeemed or funds have been set aside for such purpose.

3. Redemption

(a) If requested by the holders of not less than the majority of the outstanding shares of Series D Preferred at any time after December 21, 2010, the Corporation shall redeem all of the outstanding shares of Series D Preferred in three equal installments from any funds legally available for such purpose (the "*Series D Redemption*"). If requested by the holders of not less than sixty-six and two thirds percent (66 2/3%) of the then outstanding shares of Series C Preferred at any time after both (i) December 21, 2010, and (ii) (y) the completion of all payments to the holders of Series D Preferred pursuant to the Series D Redemption, or (z) obtaining the prior written consent of not less than sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Series D Preferred, the Corporation shall redeem all of the outstanding shares of Series C Preferred in three equal installments from any funds legally available for such purpose (the "*Series C Redemption*"). If requested by the holders of not less than sixty-six and two-thirds percent (66-2/3%) of the then outstanding shares of Series B Preferred at any time after both (i) December 21, 2010, and (ii) (y) the completion of all payments to the holders of Series D Preferred pursuant to the Series D Redemption, and the completion of all payments to the holders of Series C Preferred pursuant to the Series C Redemption, or (z) obtaining the prior written consent of not less than sixty-six and two-thirds (66 2/3%) of the then outstanding shares of the Series C Preferred and the Series D Preferred, each voting separately as a single class, the Corporation shall redeem all of the outstanding Series B Preferred in three equal installments from any funds legally available for such purpose (the "*Series B Redemption*"). In the case of any of the Series D Redemption, Series C Redemption or the Series B Redemption, the first redemption shall occur on the date that is forty-five (45) days after the Corporation receives the redemption request (the "*First Redemption Date*"), the second redemption shall occur on the one year anniversary of the First Redemption Date (the "*Second Redemption Date*"), and the third redemption shall occur on the second year anniversary of the first redemption date (the "*Third Redemption Date*") (each a "*Redemption Date*"). The number of shares to be redeemed from each holder on each Redemption Date shall equal the total number of shares of the Series D Preferred, Series C Preferred or Series B Preferred, as applicable, held by such holder on the date of the Redemption Notice (as defined below), divided by the number of Redemption Dates remaining as of the date of the Redemption Notice, minus the number of shares of Series D Preferred, Series C Preferred or Series B Preferred, as applicable, that such holder converts into Common Stock after the date of the Redemption Notice and prior to such Redemption Date. The Corporation shall effect redemptions by paying cash in an amount equal to the Series D Original Issue Price, the Series C Original Issue Price or the Series B Original Issue Price, as applicable (as adjusted for any stock dividends, combinations, recapitalizations or splits with respect to such shares following the date of this Fourth Restated Certificate), plus all declared but unpaid dividends on such shares computed to the applicable Redemption Date for each share of Series D Preferred, Series C Preferred or Series B Preferred, as applicable, then outstanding ("*Redemption Price*"). For the remainder of this Section 3, shares of the "*Redeemed Preferred*" shall refer to the shares of Series D Preferred in the case of the Series D Redemption, Series C Preferred in the case of the

Series C Redemption, or alternatively, to the shares of Series B Preferred in the case of the Series B Redemption.

(b) If the funds of the Corporation legally available for redemption of shares of Redeemed Preferred on any Redemption Date are insufficient to redeem the total number of shares of Redeemed Preferred to be redeemed on such date, those funds that are legally available will be used to redeem shares from the holders of Redeemed Preferred ratably in proportion to the number of shares of Redeemed Preferred held by each holder as of such Redemption Date. The shares of Redeemed Preferred not redeemed shall remain outstanding and entitle the holder thereof to all the rights and preferences provided herein, including the rights of conversion set forth in Section 4 below. If any time thereafter, additional funds become legally available for the redemption, such funds will immediately be used to redeem the balance of the shares that the Corporation has become obliged to redeem on any Redemption Date but which it has not redeemed.

(c) At least thirty (30) but no more than sixty (60) days prior to each Redemption Date, the Corporation shall mail a redemption notice (the "*Redemption Notice*"), first class postage prepaid, to each holder of record of Redeemed Preferred as of the close of business two (2) business days preceding the mailing date, at the address last shown on the records of the Corporation for such holder. The Redemption Notice shall specify the number of shares to be redeemed from such holder, the Redemption Date, the Redemption Price and the place at which payment may be obtained, and shall call upon such holder to surrender to the Corporation, in the manner and at the place designated, the certificate or certificates representing the shares to be redeemed. On or after the Redemption Date, each holder of Redeemed Preferred to be redeemed shall surrender to the Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice. Each surrendered certificate shall be cancelled, and the Redemption Price for such shares shall then be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof. If less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares. Nothing herein shall be deemed to prevent a holder of Redeemed Preferred from converting all or part of such holder's shares into Common Stock in accordance with the terms of Section 4 hereof at any time prior to a Redemption Date covering such shares, and the provisions of this Section 3 shall not apply to any shares so converted.

(d) From and after each Redemption Date, unless there has been a default in payment of the Redemption Price, the shares of Redeemed Preferred designated for redemption in the Redemption Notice for such Redemption Date shall cease to be outstanding and shall no longer be transferred on the books of the Corporation, and all rights of the holders with respect to such shares shall cease, except the right to receive the Redemption Price without additional interest upon surrender of their certificate or certificates.

(e) On or prior to each Redemption Date, the Corporation shall deposit the Redemption Price of all shares of Preferred Stock designated for redemption on such Redemption Date in the Redemption Notice, and not yet redeemed or converted, 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 publish the notice of redemption thereof and 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 his, her or its share certificate to the Corporation pursuant to subsection (3)(c) above. As of the date of such deposit (even if prior to the Redemption Date), the deposit shall constitute full payment of the shares to their holders, and from and after the date of the deposit 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 rights to receive from the bank or trust corporation payment of the Redemption Price of the shares, without interest, upon surrender of their certificates therefor, and the right to convert such shares as provided in Section 4 hereof. Such instructions shall also provide that any monies deposited by the Corporation pursuant to this subsection (3)(e) for the redemption of shares thereafter converted into shares of the Corporation's 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 this corporation pursuant to this subsection (3)(e) remaining unclaimed at the expiration of one (1) year following the Redemption Date shall thereafter be returned to the Corporation upon its request expressed in a resolution of its board of directors.

(f) At no time shall the Corporation redeem any outstanding share of Series A Preferred Stock so long as any Series D Preferred, Series C Preferred or Series B Preferred remains issued and outstanding.

4. Conversion

(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 such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing (i) the Original Issue Price for such series of Preferred Stock by (ii) the then effective Conversion Price for such series of Preferred Stock (such quotient, the "*Conversion Rate*"). The initial Series A Conversion Price, the initial Series B Conversion Price, the initial Series C Conversion Price and the initial Series D Conversion Price shall be \$3.3250, \$0.8773, \$0.5623, \$0.2918 respectively. The Conversion Prices for all series of Preferred Stock are subject to adjustment as provided in this Section 4.

(b) Automatic Conversion. Each share of Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Conversion Rate for such series (i) with the approval, by affirmative vote, written consent or other agreement of the holders of not less than (w) fifty percent (50%) of the outstanding Series A Preferred, Series B Preferred and Series C Preferred (in the case of the automatic conversion of the Series A Preferred, Series B Preferred and Series C Preferred) voting together as a single class on an as-converted basis, or (x) fifty-five percent (55%) of the outstanding Series D Preferred (in the case of the automatic conversion of the Series D Preferred) voting as a separate class on an as-converted basis, (ii) upon the voluntary conversion by the holders of (y) not less than fifty percent (50%) of the outstanding Series A Preferred, Series B Preferred and Series C Preferred (in the case of the automatic conversion of the Series A Preferred, Series B Preferred and Series

C Preferred), or (z) at least fifty-five percent (55%) of the outstanding Series D Preferred (in the case of the automatic conversion of the Series D Preferred), or (iii) upon the closing of a firm commitment underwritten public offering of Common Stock for the account of the Corporation to the public pursuant to an effective registration statement under the Securities Act of 1933 at a price per share (prior to underwriter commissions and offering expenses) of not less than five (5) times the Series D Original Issue Price per share (as adjusted for any stock dividends, combinations, recapitalizations or splits with respect to such shares) and an aggregate offering price to the public of not less than \$50,000,000 (prior to deduction of underwriter commissions and offering expenses) (a "*Qualified IPO*").

(c) **Mechanics of Conversion.** No fractional shares of Common Stock shall be issued upon conversion of the Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the then effective Conversion Price for such series of Preferred Stock. Conversion of shares of Preferred Stock at the option of the holder thereof shall be effected by delivery, to the office of the Corporation or to any transfer agent for such shares, of duly endorsed certificates for the shares being converted and of written notice to the Corporation that the holder elects to convert such shares. Conversion shall be deemed to occur immediately prior to the close of business on the date the shares and notice are delivered. Automatic conversion of the Preferred Stock pursuant to Section 4(b) shall be effective without any further action on the part of the holders of such shares and shall be effective whether or not the certificates for such shares are surrendered to the Corporation or its transfer agent. Holders entitled to receive Common Stock upon conversion of Preferred Stock shall be treated for all purposes as the record holders of such shares of Common Stock on the date conversion is deemed to occur. The Corporation shall not be obligated to issue certificates evidencing shares of Common Stock issuable upon conversion of Preferred Stock unless either (i) the certificates evidencing such shares being converted are delivered to the Corporation or its transfer agent as provided above, or (ii) the holder (A) notifies the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and (B) executes an agreement, and at the Corporation's election provides a surety bond or other security, satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. The Corporation shall, as soon as practicable after the delivery of such certificates, or the agreement to indemnify in the case of a lost certificate, issue and deliver to the holder of the shares of Preferred Stock being converted, a certificate or certificates for the number of shares of Common Stock to which the holder is entitled and a check payable to the holder for any cash due with respect to fractional shares.

(d) **Adjustments of Conversion Price for Certain Diluting Issuances, Splits and Combinations.** The applicable Conversion Price for each series of Preferred Stock shall be subject to adjustment from time to time as follows (provided, however, that the Conversion Price applicable to the Series A Preferred shall not be subject to adjustment pursuant to subsection (i) of this Section 4(d)):

(i) **Adjustment of Conversion Price upon Issuance of Additional Shares of Common Stock below the Conversion Price.** If the Corporation issues Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section 4(d)(i)(D)) without consideration or for a consideration per share less than the Conversion Price for the Series D Preferred in effect immediately prior to such issue, then

and in such event, such Conversion Price for Series B Preferred, Series C Preferred and Series D Preferred, as applicable, shall be reduced, concurrently with such issue, to a price (calculated to the nearest hundredth of a cent) as set forth herein, unless otherwise provided in this Section 4.

(A) Adjustment Formula.

(1) With respect to any adjustment occurring after the date hereof and prior to the fifteen (15) month anniversary of the date hereof, the new Series D Conversion Price shall be determined by reducing the Series D Conversion Price in effect immediately prior to such adjustment, concurrently with such issue, to a price equal to the Effective Price of such Additional Shares of Common Stock. The "*Effective Price*" of Additional Shares of Common Stock shall mean the quotient determined by dividing (i) the aggregate consideration received, or under Section 4(d)(i)(E) deemed to have been received, by the Corporation for such Additional Shares of Common Stock, by (ii) the total number of Additional Shares of Common Stock issued or sold, or under Section 4(d)(i)(D) deemed to have been issued or sold.

(2) With respect to any adjustment occurring on or following the fifteen (15) month anniversary of the date hereof, the new Series D Conversion Price shall be adjusted to the price determined by multiplying the Series D Conversion Price in effect immediately prior to such adjustment by a fraction (the "*Weighted Average*"), the numerator of which shall be the number of shares of "Common Stock Outstanding" immediately prior to such issuance (including shares of Common Stock deemed to be issued pursuant to Section 4(d)(i)(E)) plus the number of shares of Common Stock that the aggregate consideration received by the Corporation for such issuance would purchase at such Series D Conversion Price in effect immediately prior to such issue; and the denominator of which shall be the number of shares of "Common Stock Outstanding" immediately prior to such issuance (including shares of Common Stock deemed to be issued pursuant to Section 4(d)(i)(E)) plus the number of shares of such Additional Shares of Common Stock so issued. For the purpose of this paragraph, the number of shares of "*Common Stock Outstanding*" shall be deemed to include all Common Stock issued and outstanding, any Common Stock issuable upon conversion of issued and outstanding Preferred Stock, and any Common Stock issuable upon exercise or conversion of all other outstanding Convertible Securities and Options whether vested or unvested and whether or not immediately exercisable (assuming conversion of Convertible Securities issuable upon exercise of Options therefor).

(3) Whenever the Conversion Price for Series B Preferred or Series C Preferred is adjusted pursuant to this Section 4(d)(i), the new Series B Conversion Price and/or Series C Conversion Price, as the case may be, shall be adjusted to a price determined by multiplying the Series B Conversion Price and/or Series C Conversion Price, as the case may be, in effect immediately prior to such adjustment by the Weighted Average.

(B) Special Definitions. For purposes of this Section 4, the following definitions shall apply:

(1) "*Options*" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.

(2) "*Original Issue Date*" shall mean the date on which the first share of Series D Preferred was issued by the Corporation.

(3) "*Convertible Securities*" shall mean instruments of indebtedness or securities convertible into or exchangeable for Common Stock, including without limitation, the Preferred Stock.

(4) "*Additional Shares of Common Stock*" shall mean all shares of Common Stock issued (or deemed to be issued, pursuant to Section 4(d)(i)(D) below) by the Corporation after the Original Issue Date, other than as follows:

(I) Common Stock issuable or issued upon conversion of shares of Preferred Stock;

(II) up to 30,119,267 shares of capital stock, or Options to purchase capital stock issued to officers, directors, employees of and service providers to the Corporation pursuant to plans or arrangements approved by the board of directors, unless approved by a majority of the members of the Board of Directors, including the Series D Director.

(III) capital stock issuable or issued as a dividend or other distribution on the Preferred Stock, or any other event for which adjustment is made pursuant to Section 4(d)(ii), (e) or (f);

(IV) capital stock issuable or issued upon the exercise or conversion of Options or Convertible Securities that were outstanding prior to the Original Issue Date;

(V) capital stock, or Options to purchase capital stock, issued to financial institutions, lenders or lessors in connection with bona fide commercial credit arrangements, equipment financings, commercial property leases, or similar transactions, the terms of which have been approved by the board of directors;

(VI) capital stock, or Options to purchase capital stock, issued in connection with strategic collaborations, development agreement or licensing transactions, the terms of which have been approved by the board of directors;

(VII) capital stock or Options to purchase capital stock issued in connection with bona fide acquisitions, mergers, strategic partnership transactions or similar transactions, the terms of which have been approved by the board of directors;

(VIII) shares of capital stock issued or issuable in an initial public offering that does not qualify as a Qualified IPO;

(IX) Series D Preferred (i) sold pursuant to the terms of that certain Series D Preferred Stock Purchase Agreement by and among the Corporation and certain purchasers of Series D Preferred dated on or about the date hereof, and

(ii) issued upon exercise of that certain Warrant to Purchase Shares of Series D Preferred Stock issued to The Jordan Edmiston Group, Inc. on or about the date hereof;

(X) capital stock issued upon conversion of convertible promissory notes issued pursuant to that certain Note Purchase Agreement dated November 24, 2004, as amended; or

(XI) Common Stock issuable or issued by way of dividend or other distributions on securities referred to in subsections (I) through (XI) above.

(C) **No Adjustment of Conversion Price; Pro-Rata Offering of Additional Shares.** No adjustment in the Conversion Price for Series B Preferred, Series C Preferred or Series D Preferred shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the Conversion Price in effect for Series D Preferred immediately prior to such issue.

(D) **Deemed Issue of Additional Shares of Common Stock.** If the Corporation at any time after the Original Issue Date of the Series D Preferred shall issue any Options or Convertible Securities or shall fix a record date for the determination of any 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 and Options for Convertible Securities, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issuance 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 Additional Shares of Common Stock are deemed to be issued:

(1) no further adjustment to the Conversion Price for any series of Preferred Stock shall be made upon the subsequent issue of Convertible Securities, or Common Stock issued upon 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 increase or decrease in the consideration payable to the Corporation, or increase or decrease in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, then the Conversion Price for each affected series of Preferred Stock computed upon the original issuance thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities;

(3) upon the expiration of any such Options or any rights of conversion or exchange under such Convertible Securities that have not been exercised,

the Conversion Price for each affected 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:

(I) in the case of Convertible Securities or Options for Common Stock, the only additional shares of Common Stock issued were 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 issuance of all such Options, whether or not exercised, plus the consideration actually received by the Corporation upon such exercise, or for the issuance of all such Convertible Securities that were actually converted or exchanged, plus the additional consideration, if any, actually received by the Corporation upon such conversion or exchange, and

(II) 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 Stock deemed to have been then issued was the consideration actually received by the Corporation for the issuance of all such Options, whether or not exercised, plus the consideration deemed to have been received by the Corporation upon the issuance of the Convertible Securities with respect to which such Options were actually exercised;

(4) no readjustment pursuant to subsections (2) or (3) above shall have the effect of increasing the Conversion Price for any series of Preferred Stock to an amount which exceeds the lesser of (x) the Conversion Price for such series of Preferred Stock, on the original adjustment date, or (y) the Conversion Price for such series of Preferred Stock that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date, and no readjustment shall affect Common Stock issued on conversion of Preferred Stock prior to such readjustment; and

(5) in the case of any Options that expire by their terms not more than ninety (90) days after the date of issue thereof, no adjustment of the Conversion Price for any series of Preferred Stock shall be made until the expiration or exercise of all such Options.

(E) **Determination of Consideration.** For purposes of this Section 4(d), the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(1) **Cash and Property.** Such consideration shall:

(I) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation prior to amounts paid or payable for accrued interest or accrued dividends and prior to any commissions or expenses paid by the Corporation;

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

(III) if Additional Shares of Common Stock 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 for the Additional Shares of Common Stock, computed as provided in subsections (I) and (II) above, as 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 Stock deemed to have been issued pursuant to Section 4(d)(i)(D), in respect of Options and Convertible Securities, shall be determined by dividing:

(I) the total amount, if any, received or receivable by the Corporation as consideration for the issuance 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 Option 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

(II) 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.

(ii) **Adjustments for Stock Dividends, Combinations or Splits.** If, after the date of this Fourth Restated Certificate, the outstanding shares of Common Stock are subdivided, by stock split or otherwise, into a greater number of shares of Common Stock, or if the Corporation shall declare or pay any dividend on the Common Stock payable in shares of Common Stock, then the Conversion Prices in effect prior to such event shall be proportionately decreased upon the occurrence of such event. If, after the date of this Fourth Restated Certificate, the outstanding shares of Common Stock are combined or consolidated, by reclassification, reverse stock split or otherwise, into a lesser number of shares of Common Stock, then the Conversion Price for each series of Preferred Stock in effect prior to such event shall be proportionately increased upon the occurrence of such event.

(e) **Adjustments for Other Distributions.** If, after the date of this Fourth Restated Certificate, the Corporation fixes a record date for the determination of holders of Common Stock entitled to receive any distribution payable in securities of the Corporation other than shares of Common Stock (excluding any distribution in which the Preferred Stock participates on an as-converted basis, and any distribution for which adjustment is otherwise made pursuant to this Section 4), then in each such case provision shall be made so that the holders of Preferred Stock receive upon conversion, in addition to the Common Stock issuable

upon conversion of their shares, the property or other securities of the Corporation that they would otherwise have received had their shares of Preferred Stock been converted into Common Stock immediately prior to such event and had they thereafter retained such securities, subject to all other adjustments called for during such period under this Section 4.

(f) **Adjustments for Reclassification, Exchange and Substitution.** If, after the date of this Fourth Restated Certificate, the Common Stock is changed into the same or a different number of shares of any other class or series of stock, whether by capital reorganization, reclassification or otherwise (other than a Deemed Liquidation under Section 2, and events for which adjustment is made pursuant to Sections 4(d)(ii) or 4(e) above), the Conversion Price for each series of Preferred Stock then in effect shall, concurrently with the effectiveness of such reorganization, reclassification or change, be adjusted such that the Preferred Stock shall be convertible into, in lieu of the Common Stock which the holders thereof would otherwise have been entitled to receive, a number of shares of such other class or series of capital stock equivalent to the number of shares of such other class or series of capital stock that such holders would have been entitled to receive in such reclassification, capital reorganization or change for the number of shares of Common Stock that the holders would have been entitled to receive upon conversion of their Preferred Stock immediately prior to such reclassification, capital reorganization or change.

(g) **No Impairment.** The Corporation will not without first obtaining the consent of the holders of at least a majority of the outstanding shares of each affected series of Preferred Stock, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed under this Section 4 by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of the Preferred Stock under this Section 4 against impairment.

(h) **Certificate as to Adjustments.** The Corporation shall promptly compute any Conversion Price adjustments and provide each holder of Preferred Stock a certificate describing such adjustment and showing in detail the facts upon which such adjustment is based. If requested in writing by any holder of Preferred Stock, the Corporation shall provide such holder a certificate describing any Conversion Price adjustments, the current Conversion Price and the amount of Common Stock or other property issuable upon conversion of the shares of Preferred Stock held by such holder.

(i) **Notices of Record Date.** If the Corporation shall propose at any time:

(A) to declare any dividend or distribution upon its Common Stock other than a distribution payable solely in Common Stock;

(B) to offer for subscription pro rata to the holders of any class or series of its capital stock any additional shares of capital stock of any class or series or other rights;

(C) to effect any reclassification or recapitalization of its Common Stock; or

(D) to merge or consolidate with or into any other corporation, or sell, lease or convey all or substantially all its property or business, or to liquidate, dissolve or wind up;

Then, in connection with each such event, the Corporation shall send to the holders of the Preferred Stock:

(1) at least twenty (20) days' prior written notice of the date on which a record shall be taken for such dividend, distribution or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote in respect of the matters referred to in (C) and (D) above; and

(2) in the case of the matters referred to in (C) and (D) above, at least twenty (20) days' prior written notice of the date when the same shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event).

Each such written notice shall be delivered personally or given by first class mail, postage prepaid, addressed to the holders of Preferred Stock at the addresses for such stockholders as shown on the books of the Corporation.

(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 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, 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 Fourth Restated Certificate.

5. **Voting**

(a) **General Voting Rights.** The holders of Series A Preferred shall not be entitled to vote at any meeting of the stockholders for the election of directors or for any other purpose or otherwise to participate in any action taken by the Corporation or its stockholders, other than as expressly provided in this Fourth Restated Certificate, or as required by law. The holders of Series B Preferred, the holders of Series C Preferred and the holders of Series D Preferred shall have the same voting rights as the holders of the 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, the Series B Preferred, the Series C Preferred and Series D Preferred shall vote together as a single class on all matters, other than as set forth in Section 5(b) below, and except as required by law. Each holder of Common Stock shall be

entitled to one vote for each share of Common Stock held, each holder of Series B Preferred, Series C Preferred and Series D Preferred shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Preferred Stock could then be converted. Fractional votes shall not be permitted. Any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Series B Preferred Series C Preferred or Series D Preferred held by each holder could be converted) shall be rounded to the nearest whole number of votes (with one-half being rounded upward).

(b) **Election of Directors.** Until the date upon which the Preferred Stock is automatically converted in accordance with Section 4(b) above: (w) the holders of the Series D Preferred, voting as a separate class on an as-converted basis, shall be entitled to elect one (1) member of the board of directors (the "*Series D Director*"), (x) the holders of the Series C Preferred, voting as a separate class on an as-converted basis, shall be entitled to elect two (2) members of the board of directors (the "*Series C Directors*"), (y) the holders of the Series B Preferred, voting as a separate class on an as-converted basis, shall be entitled to elect two (2) members of the board of directors (the "*Series B Directors*" and together with the Series D Director and Series C Directors, the "*Preferred Directors*") and (z) the holders of the Series D Preferred, Series C Preferred, Series B Preferred and Common Stock, voting together as a single class on an as-converted basis, shall be entitled to elect two (2) members of the board of directors (the "*At-Large Directors*").

6. **Protective Provisions**

(a) Until the earlier of (x) the date upon which the Series B Preferred, the Series C Preferred and the Series D Preferred is automatically converted in accordance with Section 4(b) above, or (y) the date upon which fewer than 12,000,000 shares of Series B Preferred, Series C Preferred or Series D Preferred remain outstanding (as adjusted for stock dividends, combinations, recapitalizations and splits), the Corporation shall not, without the approval of the holders of at least a majority of the then outstanding Series B Preferred, Series C Preferred and Series D Preferred, voting together as a single class on an as-converted basis take any action (by amendment, merger, consolidation or otherwise) that:

(i) increases or decreases the number of authorized shares Preferred Stock;

(ii) amends the Corporation's certificate of incorporation or bylaws;

(iii) authorizes or obligates the Corporation to pay any dividend or make any other distribution in respect to any class or series of the Corporation's capital stock;

(iv) borrows or guarantees any indebtedness or obligation of any other party in excess of \$250,000, individually or in the aggregate for transactions that are related to each other or are part of a common scheme or plan, other than (x) the indebtedness or obligations of a subsidiary controlled by the Corporation in a transaction approved by the board of directors of the Corporation;

(v) creates or voluntarily submits to the imposition of any lien, mortgage, security interest or other charge on or against all or substantially all of the assets of the Corporation or any subsidiaries controlled by the Corporation; or

(vi) acquires or permits any subsidiary controlled by the Corporation to acquire, any stock or other securities of any entity for a purchase price in excess of \$500,000;

(vii) sells or transfers, via an exclusive license or otherwise, any of the Corporation's material intellectual property rights;

(viii) applies for listing on any exchange, or quotation on trading system, of any of the Corporation's securities;

(ix) makes or modifies any election regarding the Corporation's tax status; or

(x) changes its designated independent auditors.

(b) The Corporation shall not, without the approval of the holders of a majority of the then outstanding shares of Series B Preferred, Series C Preferred and/or Series D Preferred, as applicable, each voting separately as a single class and on an as-converted basis, take any action (by amendment, merger, consolidation or otherwise) that:

(i) alters or changes the rights, preferences or privileges of the Series B Preferred, Series C Preferred, and/or Series D Preferred so as to adversely affect such shares;

(ii) authorizes the Corporation to sell or issue (by reclassification or otherwise) any equity security having rights, preferences or privileges senior or pari passu with the Series D Preferred;

(iii) effects a Deemed Liquidation;

(iv) redeems or repurchases shares of capital stock (excluding repurchases at cost of Common Stock upon termination of an officer, employee, director, consultant or service provider pursuant to a right of repurchase that arises on termination of services to the Corporation);

(v) changes the authorized number of directors;

(vi) amends the Corporation's Certificate of Incorporation or bylaws in a manner that materially and adversely affects the holders of such respective Series B Preferred, Series C Preferred and/or Series D Preferred;

(vii) makes any loans or advances to its employees or any members of their families, other than (x) advances for expenses to be incurred for and on behalf of the Corporation in the ordinary course of business, and (y) cashless loans to employees pursuant to

promissory notes made in connection with purchases of capital stock of the Corporation under a stock option plan or restricted stock plan approved by the Board of Directors;

(viii) causes the Corporation to enter into any transaction with persons deemed to be "affiliates" of the Corporation, as such term is used in the context of Rule 144 promulgated under the Securities Act of 1933; or

(ix) grants or awards any demand registration rights that are senior to or pari passu with the demand rights of the holders of the Series D Preferred.

7. Status of Redeemed or Converted Shares

In the event any shares of Preferred Stock shall be redeemed or converted pursuant to Section 3 or Section 4 hereof, the shares so redeemed or converted shall be canceled and shall not be issuable by the Corporation. The Certificate of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

(C) Rights, Preferences, Privileges and Restrictions of Common Stock

The relative rights, preferences, privileges and restrictions granted to or imposed upon the Common Stock or the holders thereof are as follows:

1. **Dividends.** Subject to the prior rights of holders of all classes of stock at the time outstanding having superior rights as to dividends, the holders of the Common Stock shall be entitled to receive, when, as and if 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.** Upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation shall be distributed as provided in Section 2 of Division (B) above.

3. **Redemption.** The Common Stock is not redeemable other than at the sole discretion of the Corporation, pursuant to the terms of a written plan or agreements with individual stockholders that provide for repurchases by the Corporation in connection with the termination of such stockholder's services to the Corporation.

4. **Voting.** The holder of each share of Common Stock shall have the right to one vote per share, 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.

ARTICLE V

(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 V, nor the adoption of any provision of the Corporation's Certificate of Incorporation inconsistent with this Article V, shall eliminate or reduce the effect of this Article V in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this Article V, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

ARTICLE VI

Subject to Section 6 of Division (B) of Article IV, the board of directors of the Corporation is expressly authorized to make, alter or repeal bylaws of the Corporation, but the stockholders may make additional bylaws and may alter or repeal any bylaw whether adopted by them or otherwise.

ARTICLE VII

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

ARTICLE VIII

The Corporation shall have perpetual existence.

ARTICLE IX

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 statutory provision) outside the State of Delaware at such place or places as may be designated from time to time by the board of directors in the bylaws of the Corporation.

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