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in the office of the Secretary of State
of the State of California

JUN 06 2005

CERTIFICATE OF
THIRD AMENDED AND RESTATED
ARTICLES OF INCORPORATION

OF

ARRIVA PHARMACEUTICALS, INC.

The undersigned officers of Arriva Pharmaceuticals, Inc. (formerly known as AlphaOne Pharmaceuticals, Inc.), a corporation organized and existing under the General Corporation Laws of the State of California (the "Corporation"), **DO HEREBY CERTIFY THAT:**

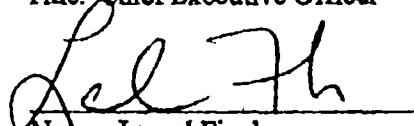
1. They are each the Chief Executive Officer and the Secretary, respectively, of the Corporation.
2. The Third Amended and Restated Articles of Incorporation of the Corporation in the form attached hereto as Exhibit A have been duly approved by the Board of Directors.
3. The Third Amended and Restated Articles of Incorporation have been duly approved by the required vote of the shareholders of the Corporation in accordance with Section 903 of the General Corporation Laws of the State of California.
4. The total number of outstanding shares for each class entitled to vote with respect to the approval of the foregoing Amended and Restated Articles of Incorporation was (a) 6,159,815 shares of Common Stock, (b) 326,124,802 shares of Preferred Stock, (c) 918,000 shares of Series A Preferred Stock, (d) 945,000 shares of Series B Preferred Stock, (e) 2,075,000 shares of Series C Preferred Stock, (f) 30,096,566 shares of Series D-1 Preferred Stock, and (g) 290,912,854 shares of Series D-3 Preferred Stock
5. The number of shares of each class voting in favor of the Third Amended and Restated Articles of Incorporation equaled or exceeded the vote required, such required vote being as follows: (a) a majority of the outstanding shares of Common Stock, (b) a majority of the outstanding shares of voting Preferred Stock voting as a separate class, and (c) a majority of the outstanding shares of voting Preferred Stock and Common Stock voting together as a separate class.
6. The Third Amended and Restated Articles of Incorporation so adopted reads in full as set forth in Exhibit A attached hereto and is hereby incorporated by herein by reference.

We further declare that under penalty of perjury under the laws of the State of California
that the matters set forth in the foregoing Certificate are true and correct of our own knowledge.

Date: June 3, 2005



Name: Robert Williamson
Title: Chief Executive Officer



Name: Laurel Finch
Title: Secretary

EXHIBIT A

**THIRD AMENDED AND RESTATED
ARTICLES OF INCORPORATION**

OF

ARRIVA PHARMACEUTICALS, INC.

Article I. Name

The name of the Corporation is Arriva Pharmaceuticals, Inc.

Article II. Purpose

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business, or the practice of a profession permitted to be incorporated by the California Corporations Code.

Article III. Authorized Capital Stock

1. **Reverse Stock Split.** Upon the effective date of the filing of these Third Amended and Restated Articles of Incorporation (the "Filing Date"), (i) each sixty (60) shares of the Corporation's outstanding Common Stock, and each sixty (60) shares of Common Stock underlying outstanding options and warrants to purchase Common Stock, shall be combined into 1 share of Common Stock, (ii) each sixty (60) shares of the Corporation's outstanding Series A Preferred Stock shall be combined into 1 share of Series A Preferred Stock, (iii) each sixty (60) shares of the Corporation's outstanding Series B Preferred Stock, and each sixty (60) shares of Series B Preferred Stock underlying outstanding warrants to purchase Series B Preferred Stock shall be combined into 1 share of Series B Preferred Stock, (iv) each sixty (60) shares of the Corporation's outstanding Series C Preferred Stock shall be combined into 1 share of Series C Preferred Stock, (v) each sixty (60) shares of the Corporation's outstanding Series D-1 Preferred Stock shall be combined into 1 share of Series D-1 Preferred Stock, (vi) each sixty (60) shares of the Corporation's outstanding Series D-2 Preferred Stock shall be combined into 1 share of Series D-2 Preferred Stock and (vii) each sixty (60) shares of the Corporation's outstanding Series D-3 Preferred Stock shall be combined into 1 share of Series D-3 Preferred Stock (collectively, the "Reverse Stock Split"). No further adjustment of any preference or price in these Third Amended and Restated Articles of Incorporation shall be made as a result of the Reverse Stock Split, as all share amounts per share and per share numbers set forth in this Third Amended and Restated Articles of Incorporation have been appropriately adjusted to reflect the Reverse Stock Split.

The Reverse Stock Split shall occur automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation; provided, however, that the Corporation shall not be obligated to issue certificates evidencing such shares issuable following such Reverse Stock Split unless

certificates evidencing such shares are either delivered to the Corporation as hereinafter provided or the holder notifies the Corporation that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith.

No fractional shares shall be issued upon the Reverse Stock Split. Cash will be paid in lieu of fractional shares except as to holders who have agreed to waive such payment.

2. The total number of shares of capital stock that the Corporation shall have authority to issue is 27,198,002, of which (i) 19,166,666 shares shall be common stock, no par value, (the “**Common Stock**”), and (ii, 8,031,336, shares shall be preferred stock, no par value (the “**Preferred Stock**”), consisting of 15,300 shares of Series A Convertible Preferred Stock, no par value (the “**Series A Preferred Stock**”), 15,750 shares of Series B Convertible Preferred Stock, no par value (the “**Series B Preferred Stock**”), 34,583 shares of Series C Convertible Preferred Stock, no par value (the “**Series C Preferred Stock**,” and together with the Series A Preferred Stock and Series B Preferred Stock, the “**Junior Preferred Stock**,” and the Junior Preferred Stock together with the Common Stock, the “**Junior Stock**”), 520,852 shares of Series D-1 Convertible Preferred Stock, no par value (the “**Series D-1 Preferred Stock**”), 19,248 shares of Non-Voting Series D-2 Preferred Stock, no par value (the “**Series D-2 Preferred Stock**”) and 7,425,603 shares of Series D-3 Preferred Stock, no par value (the “**Series D-3 Preferred Stock**” and together with the Series D-1 Preferred Stock and the Series D-2 Preferred Stock, the “**Series D Preferred Stock**”).

The voting powers, designations, preferences, privileges and relative, participating, optional or other special rights, and the qualifications, limitations or restrictions of each class of capital stock of the Corporation, shall be as provided in these Second Amended and Restated Articles of Incorporation.

Article IV. Series A Preferred Stock

1. Rank. With respect to the payment of dividends, the Series A Preferred Stock shall rank junior to the Series D Preferred Stock, on a parity with the Series B Preferred Stock and Series C Preferred Stock, and senior to the Common Stock. With respect to the distribution of assets upon a Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction (as defined in Section IV.3(c)(i)) that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the Series A Preferred Stock shall rank junior to the Series D Preferred Stock, on a parity with the Series B Preferred Stock and Series C Preferred Stock, and senior to the Common Stock.

2. Dividend Provisions.

(a) After the payment in full of the Series D Dividends (as defined in Section VII.2(a)) pursuant to Section VII.2(j), the holders of shares of Series A Preferred Stock shall be entitled to receive dividends in accordance with Section VII.2(b), out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of the

Corporation) on the Common Stock of the Corporation, at the rate of \$1.50 per share of Series A Preferred Stock per annum (as adjusted for any stock dividends, combinations, splits, recapitalizations (excluding the sale of Series D Preferred Stock) and the like with respect to such shares) (the “**Series A Dividends**”). Such dividends shall be payable only when, as and if declared by the Board of Directors of the Corporation, and shall not be cumulative.

(b) Unless the Series A Dividends shall have been paid or declared and a sum sufficient for the payment thereof set apart: (A) no dividend whatsoever (other than a dividend payable solely in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock) shall be paid or declared, and no distribution shall be made, on any Common Stock, and (B) no shares of Common Stock shall be purchased, redeemed, or acquired by the Corporation and no funds shall be paid into or set aside or made available for a sinking fund for the purchase, redemption, or acquisition thereof; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock that is unanimously approved by the Board of Directors of the Corporation; and provided, further, that this restriction shall not apply to the repurchase of shares of Common Stock held by employees, officers, directors and consultants pursuant to any employment, option or other similar agreement approved by the Board of Directors under which the Corporation has the option to repurchase shares of Common Stock upon the occurrence of certain events, such as termination of employment.

3. Liquidation Preference.

(a) In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary (a “**Liquidation Event**”), the holders of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be entitled to receive, after the payment by the Corporation of the applicable Series D Base Amount (as defined in Section VII.3(a)) on each issued and outstanding share of Series D Preferred Stock (the “**Aggregate Series D Base Amounts**”), and 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 the sum of (i) (A) in the case of holders of Series A Preferred Stock, \$100.20 (the “**Original Series A Issue Price**”), (B) in the case of holders of Series B Preferred Stock, \$120.00 (the “**Original Series B Issue Price**”), and (C) in the case of holders of Series C Preferred Stock, \$240.00 (the “**Original Series C Issue Price**”) (in each case, as adjusted for any stock dividends, combinations, splits, recapitalizations (excluding the sale of Series D Preferred Stock) and the like with respect to such shares) and (ii) an amount equal to any declared but unpaid dividends on such share. If, upon the occurrence of a Liquidation Event, or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), and after the payment by the Corporation of the Aggregate Series D Base Amounts, the assets and funds available for distribution among the holders of the Junior Preferred Stock pursuant to this subsection 3(a) shall be insufficient to permit the payment to such holders of the full Junior Preferred Preference Amount (as defined below) applicable to such series of Preferred Stock, then the entire assets and funds of the Corporation legally available for distribution therefor shall be distributed pro rata among the holders of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock in proportion to the full Junior Preferred Preference Amount to which each such holder is entitled. For purposes hereof (i) the preference amount that each holder of Series A Preferred Stock is entitled to receive

pursuant to the provisions hereof shall be referred to as the “**Series A Preference Amount**,” (ii) the preference amount that each holder of Series B Preferred Stock is entitled to receive pursuant to the provisions hereof shall be referred to as the “**Series B Preference Amount**,” (iii) the preference amount that each holder of Series C Preferred Stock is entitled to receive pursuant to the provisions hereof shall be referred to as the “**Series C Preference Amount**,” and (iv) the Series A Preference Amount, the Series B Preference Amount and the Series C Preference Amount shall collectively be referred to as the “**Junior Preferred Preference Amount**. ”

(b) After the payment of the Aggregate Series D Base Amounts and the Junior Preferred Preference Amount as set forth in Section 3(a) above, the assets of the Corporation legally available for distribution, if any, shall be distributed to the holders of the Series D Preferred Stock and the Common Stock pursuant to the provisions of Section VII.3(b) below.

(c) (i) For purposes of these Articles, unless the holders of at least a majority of the voting power of the then outstanding shares of Series D-1 Preferred Stock and Series D-3 Preferred Stock, voting together as a single class (a “**Series D Majority Interest**”), otherwise elect by giving written notice thereof to the Corporation at least ten (10) days before the effective date of an Extraordinary Transaction (as defined below), an Extraordinary Transaction shall be deemed a Liquidation Event. An “**Extraordinary Transaction**” means

(A) a merger or consolidation in which

(1) the Corporation is a constituent party, or

(2) a subsidiary of the Corporation is a constituent party

and either (x) the Corporation issues shares of its capital stock pursuant to such merger or consolidation, or (y) as a result of such merger or consolidation of a subsidiary, the Corporation’s ownership interest in the surviving entity is reduced;

provided that neither subsection 3(c)(i)(A)(1) nor subsection 3(c)(i)(A)(2) above shall include any such merger or consolidation involving the Corporation or a subsidiary in which the holders of capital stock of the Corporation immediately prior to such merger or consolidation continue to hold immediately following such merger or consolidation at least a majority of the voting power of (xx) the surviving or resulting entity or (yy) if the surviving or resulting entity is a wholly-owned subsidiary of another entity immediately following such merger or consolidation, the parent entity of such surviving or resulting entity;

(B) the disposition by holders of the Corporation’s then outstanding capital stock of at least a majority of the then outstanding equity voting power of the Corporation in a single or a series of related transactions;

(C) the sale, lease or other disposition of all or substantially all of the assets of the Corporation in a single transaction or series of related transactions (except any such disposition to a wholly-owned subsidiary of the Corporation unless such sale, lease or other disposition is followed by a subsequent disposition or transfer of (1) such assets or (2) at least a majority of the then outstanding equity voting power of the Corporation or such subsidiary in a single or a series of related transactions); or

(D) the disposition by exclusive license, sale, assignment or otherwise of all or substantially all of the intellectual property rights of the Corporation ((except (1) any such disposition to a wholly-owned subsidiary of the Corporation unless such sale, lease or other disposition is followed by a subsequent disposition or transfer of (x) such assets or (y) at least a majority of the then outstanding equity voting power of the Corporation or such subsidiary in a single or a series of related transactions).

(ii) All consideration payable to the shareholders of the Corporation (in the case of an acquisition or disposition as set forth in subsections 3(c)(i)(A) and (B)), or all consideration payable to the Corporation, together with all other available assets of the Corporation (in the case of an asset sale as set forth in subsections 3(c)(i)(C) and (D)), shall be distributed to the holders of capital stock of the Corporation in accordance with subsections 3(a) and (b) above.

(iii) In the event of any Liquidation Event, or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), if the consideration received by the Corporation is securities or other non-cash consideration, its value will be deemed its fair market value, determined in accordance with the following:

(A) If any such securities are traded on a securities exchange or through NASDAQ National Market, the value thereof shall be deemed to be the average of the closing prices of the securities on such exchange over the thirty-day period ending three (3) days prior to the closing of such transaction;

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

(C) If there is no active public market for any such securities or other non-cash consideration, the value shall be the fair market value thereof, as determined in good faith by the Board of Directors of the Corporation.

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

(iv) In the event the requirements of this subsection 3(c) are not complied with in connection with any Extraordinary Transaction, the Corporation shall forthwith either:

(A) cause the closing of such transaction to be postponed until such time as the requirements of this subsection 3(c) have been complied with; or

(B) cancel such transaction, in which event the rights, preferences and privileges of the holders of the Preferred Stock shall revert to and be the same as such rights, preferences and privileges existing immediately prior to the date of the first notice referred to in subsection 3(c)(v) hereof.

(v) The Corporation shall give each holder of record of Preferred Stock written notice of any impending Liquidation Event, or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), not later than twenty (20) days prior to the shareholders' meeting called to approve such transaction, or twenty (20) days prior to the closing of such transaction, whichever is earlier, and shall also notify such holders in writing of the final approval of such transaction. The first of such notices shall describe the material terms and conditions of the impending transaction and the provisions of this Section 3, and the Corporation shall thereafter give such holders prompt notice of any material changes. The transaction shall in no event take place sooner than twenty (20) days after the Corporation has given the first notice provided for herein or sooner than ten (10) days after the Corporation has given notice of any material changes provided for herein; provided, however, that such periods may be shortened upon the written consent of the holders of Preferred Stock that represent at least a majority of the voting power of all then outstanding shares of Preferred Stock.

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

(a) Right to Convert. Each share of Series A 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 Series A Issue Price by the Series A Conversion Price (as defined in this subsection 4(a)) in effect on the date that the certificate for such Series A Preferred Stock is surrendered for conversion. The conversion price per share of Series A Preferred Stock as of the Filing Date shall be \$6.412636! (the "Series A Conversion Price"); provided, however, that the Series A Conversion Price for the Series A Preferred Stock shall be subject to adjustment as set forth in this subsection 4 after the Filing Date.

(b) Automatic Conversion. Each share of Series A Preferred Stock shall automatically be converted into the number of shares of Common Stock determined pursuant to subsection 4(a) above upon the earlier of (i) the closing of the Corporation's first firm commitment underwritten public offering pursuant to a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), covering the offer and sale of Common Stock (A) at a price per share of Common Stock of not less than \$13.80 (appropriately adjusted to reflect stock dividends, stock splits, combinations, recapitalizations (excluding the sale of Series D Preferred Stock) and the like), (B) resulting in gross proceeds of at least \$50 million being paid to the Corporation and (C) resulting in the Common Stock being listed for trading on either the New York Stock Exchange or the NASDAQ National Market (a "QPO"), or (ii) the date specified by written consent or agreement of the holders of a majority of the then outstanding shares of Series A Preferred Stock. If a closing of a QPO occurs, all outstanding shares of Series A Preferred Stock shall be deemed to have been converted into shares of Common Stock immediately prior to such closing.

(c) Mechanics of Conversion. Before any holder of Series A Preferred Stock shall be entitled to convert the same 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 the Series A 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 to such holder of Series A 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 and a certificate or certificates for the number of shares of Series A Preferred Stock, if any, that were not converted by such holder. Subject to the last sentence of subsection 4(b) above, 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 Series A 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 offering of securities registered pursuant to the Securities Act of 1933 (other than a QPO) or an Extraordinary Transaction, the conversion may, at the option of any holder tendering Series A Preferred Stock for conversion, be conditioned upon the closing of such offering or Extraordinary Transaction, in which event the person(s) entitled to receive the Common Stock upon such conversion of the Series A Preferred Stock shall not be deemed to have converted such Series A Preferred Stock until immediately prior to the closing of such offering or Extraordinary Transaction.

(d) Conversion Price Adjustments of Series A Preferred Stock for Certain Dilutive Issuances. The Series A Conversion Price shall be subject to adjustment from time to time as follows:

(i) (A) If the Corporation shall issue, after the Filing Date, any Additional Stock (as defined in subsection 4(d)(iii)(C)) without consideration or for a consideration per share less than the Series D-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to the issuance of such Additional Stock, the Series A Conversion Price in effect immediately prior to each such issuance shall forthwith (except as otherwise provided in this clause (d)) be adjusted to a price determined by multiplying such Series A Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), 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-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to such issuance of Additional Stock; and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), plus the number of shares of such Additional Stock.

(B) No adjustment of the Series A Conversion Price 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 3 years from the date the event giving rise to the adjustment being carried forward, or shall be made at the end of 3 years from the date of the event giving rise to the adjustment being carried forward. Except to the limited extent provided for in subsection 4(d)(ii)(D), no adjustment of such Series A Conversion Price pursuant to this subsection 4(d) shall have the effect of increasing the Series A Conversion Price above the Series A Conversion Price in effect immediately prior to such adjustment.

(C) 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 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.

(D) In the case of the issuance of the Common Stock for a 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 in good faith by the Board of Directors of the Corporation.

(ii) Issue of Securities Deemed Issue of Additional Stock.

(A) If the Corporation at any time or from time to time after the Filing Date shall issue any Options (as defined in subsection 4(d)(iii)(A)) or Convertible Securities (as defined in subsection 4(d)(iii)(B)) (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock by subsection 4(d)(iii)(A) or (B)), or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date.

(B) If the terms of any Option or Convertible Security, the issuance of which resulted in an adjustment to the Series A Conversion Price after the Filing Date pursuant to the terms of subsection 4(d)(ii)(A) above, are revised (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then, effective upon such increase or decrease becoming effective, the Series A Conversion Price computed upon the original issue of such Option or Convertible Security (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Series A Conversion Price as would have been obtained had such revised terms been in effect upon the original date of

issuance of such Option or Convertible Security. Notwithstanding the foregoing, no adjustment pursuant to this clause (B) shall have the effect of increasing the Series A Conversion Price to an amount which exceeds the lower of (i) the Series A Conversion Price on the original adjustment date, or (ii) the Series A Conversion Price that would have resulted from any issuances of Additional Stock between the original adjustment date and such readjustment date.

(C) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock in subsection 4(d)(iii)(A) or (B)), the issuance of which did not result in an adjustment to the Series A Conversion Price pursuant to the terms of subsection 4(d)(i)(A) (either because the consideration per share (determined pursuant to subsection 4(d)(i)(C) and (D) hereof) of the shares of Additional Stock subject thereto was equal to or greater than the applicable Series A Conversion Price then in effect, or because such Option or Convertible Security was issued before the Filing Date), are revised after the Filing Date (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms, but excluding automatic revisions of conversion ratios of any Preferred Stock pursuant to the provisions of the Preferred Stock existing on the Filing Date) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended, and the shares of Additional Stock subject thereto (determined in the manner provided in subsection 4(d)(ii)(A) above) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(D) Upon the expiration or termination of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised or converted, the Series A Conversion Price 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 or termination, be recomputed as if:

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

(2) 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 shares of Additional Stock deemed to have been then issued was the consideration actually received by the Corporation for the issue of all such Options, whether or not exercised, plus the consideration deemed to have been received by the Corporation (determined pursuant to

subsection 4(d)(i)(C) and (D)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised.

(E) No further adjustment in the Series A Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities.

(F) In the case of any Options which expire by their terms not more than thirty (30) days after the date of issue thereof, no adjustment of the Series A Conversion Price shall be made until the expiration or exercise of all such Options, whereupon such adjustment shall be made in the same manner provided in clause (D) above.

(iii) For purposes of this subsection 4, the following definitions shall apply:

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

(B) "**Convertible Securities**" shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

(C) "**Additional Stock**" shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to subsection 4(d)(ii)) by the Corporation after the Filing Date other than:

(1) shares of Common Stock issued pursuant to a transaction described in subsection 4(e) and (f) hereof;

(2) shares of Common Stock issuable or issued to employees, consultants, directors, vendors or other strategic partners of the Corporation in transactions with primarily non-financing purposes pursuant to a plan, agreement or other arrangement approved by the Board of Directors of the Corporation; or

(3) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options outstanding or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security.

(e) **Adjustment to Series A Conversion Price for Stock Splits and Combinations.** If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding Common Stock, the Series A Conversion Price in effect immediately before that subdivision shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Series A Preferred Stock without making a corresponding combination of the Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, then the Series A Conversion Price in effect immediately before that combination shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding

shares of Common Stock, the Series A Conversion Price in effect immediately before that combination shall be proportionately increased. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding shares of Series A Preferred Stock without effecting a corresponding subdivision of the Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, the Series A Conversion Price in effect immediately before that subdivision shall be proportionately increased. Any adjustment under this paragraph shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) Adjustment to Series A Conversion Price for Certain Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, then and in each such event the Series A Conversion Price in effect immediately before such event shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Series A Conversion Price then in effect by a fraction:

(i) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

: (ii) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series A Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series A Conversion Price shall be adjusted pursuant to this paragraph as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made if the holders of Series A Preferred Stock simultaneously receive (i) a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series A Preferred Stock had been converted into Common Stock on the date of such event or (ii) a dividend or other distribution of shares of Series A Preferred Stock which are convertible, as of the date of such event, into such number of shares of Common Stock as is equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series A Preferred Stock had been converted into Common Stock on the date of such event.

(g) Adjustments to Series A Preferred Stock for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than shares of Common Stock) or in cash or other property (other than regular cash dividends paid out of earnings or earned surplus, determined in accordance with generally accepted accounting principles), then and in each such event provision shall be made so that the holders of

the Series A Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the kind and amount of securities of the Corporation, cash or other property which they would have been entitled to receive had the Series A Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all adjustments called for during such period under this paragraph with respect to the rights of the holders of the Series A Preferred Stock; provided that no such adjustment shall be made if the holders of Series A Preferred Stock simultaneously receive a dividend or other distribution of such securities, cash, or other property in an amount equal to the amount of such securities, cash, or other property as they would have received if all outstanding shares of Series A Preferred Stock had been converted into Common Stock on the date of such event.

(l) Recapitalizations, Reclassifications, Exchanges and Substitutions. If at any time or from time to time, whether pursuant to a transaction with another entity or otherwise, there shall be a recapitalization, reclassification, exchange, substitution or other change of the Common Stock (other than pursuant to a subdivision, combination or merger or sale of assets transaction provided for elsewhere in subsection 3 or this subsection 4), provision shall be made so that the holders of the Series A Preferred Stock shall thereafter be entitled to receive upon conversion of the Series A Preferred Stock the kind and amount of stock or other securities or property to which a holder of the Common Stock deliverable upon conversion of the Series A Preferred Stock would have been entitled on the recapitalization, reclassification, exchange, substitution or other change. In any such case, appropriate adjustment shall be made in the application of the provisions of this subsection 4 with respect to the rights of the holders of the Series A Preferred Stock after such recapitalization, reclassification, exchange, substitution or other change, to the end that the provisions of this subsection 4 (including adjustment of the Series A Conversion Price then in effect and the number of shares issuable upon conversion of the Series A Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

(i) No Impairment. The Corporation will not, by amendment of its Articles of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this subsection 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Series A Conversion Rights against impairment.

(j) No Fractional Shares and Certificate as to Adjustments.

(i) No fractional shares of Common Stock shall be issued upon conversion of the Series A Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series A Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Corporation shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Common

Stock's fair market value (as determined in good faith by the Board of Directors of the Corporation) on the date of conversion.

(ii) Upon the occurrence of each adjustment or readjustment of the Series A Conversion Price pursuant to this subsection 4, 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 Series A 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, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Series A Conversion Price 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 Series A Preferred Stock.

(k) 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, at least 20 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.

(l) 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, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A 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 Series A 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 shareholder approval of any necessary amendment to the Corporation's Articles of Incorporation.

(m) Notices. Any notice required by the provisions of this subsection 4 to be given to the holders of shares of Series A 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.

5. Voting Rights. The holder of each share of Series A Preferred Stock shall have the right to one vote for each share of Common Stock into which such Series A Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any shareholders' meeting in

accordance with the laws of the Corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote, except as may be otherwise provided by applicable law. Except as otherwise expressly provided herein or as required by law, the holders of Series A Preferred Stock and the holders of Common Stock shall vote together and not as separate classes. 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 held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

6. **Protective Provisions.** So long as any shares of Series A Preferred Stock are issued and outstanding, the Corporation shall not 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 issued and outstanding shares of Series A Preferred Stock:

- (a) alter or change the rights, preferences or privileges of the shares of Series A Preferred Stock so as to affect adversely the shares;
- (b) redeem any shares of Common Stock (other than pursuant to agreements entered into in connection with employment or the delivery of consulting or other similar services to the Corporation);
- (c) amend or waive any provision of the Corporation's Articles of Incorporation or Bylaws relating to the Series A Preferred Stock; or
- (d) pay or declare any cash dividend on any shares of Common or Junior Preferred Stock.

7. **Status of Converted Stock.** In the event any shares of Series A Preferred Stock shall be converted pursuant to subsection 4 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation. The Articles of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

8. **Repurchase of Shares.** In connection with repurchases by the Corporation of its Common Stock pursuant to repurchase rights contained in certain employment, option and other similar agreements approved by the Board of Directors (under which the Corporation has the option to repurchase shares of Common Stock from certain employees, officers, directors and consultants upon the occurrence of certain events, such as termination of employment), Sections 502 and 503 of the California Corporations Code shall not apply in whole or in part with respect to such repurchases.

Article V. Series B Preferred Stock

1. Rank. With respect to the payment of dividends, the Series B Preferred Stock shall rank junior to the Series D Preferred Stock, on a parity with the Series A Preferred Stock and Series C Preferred Stock, and senior to the Common Stock. With respect to the distribution of assets upon a Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction (as defined in Section IV.3(c)(i)) that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the Series B Preferred Stock shall rank junior to the Series D Preferred Stock, on a parity with the Series A Preferred Stock and Series C Preferred Stock, and senior to the Common Stock.

2. Dividend Provisions.

(a) After the payment in full of the Series D Dividends (as defined in Section VII.2(a)) pursuant to Section VII.2(a), the holders of shares of Series B Preferred Stock shall be entitled to receive dividends in accordance with Section VII.2(b), out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of the Corporation) on the Common Stock of the Corporation, at the rate of \$1.80 per share of Series B Preferred Stock per annum (as adjusted for any stock dividends, combinations, splits, recapitalizations (excluding the sale of Series D Preferred Stock) and the like with respect to such shares) (the "Series B Dividends"). Such dividends shall be payable only when, as and if declared by the Board of Directors of the Corporation, and shall not be cumulative.

(b) Unless the Series B Dividends shall have been paid or declared and a sum sufficient for the payment thereof set apart: (A) no dividend whatsoever (other than a dividend payable solely in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock) shall be paid or declared, and no distribution shall be made, on any Common Stock, and (B) no shares of Common Stock shall be purchased, redeemed, or acquired by the Corporation and no funds shall be paid into or set aside or made available for a sinking fund for the purchase, redemption, or acquisition thereof; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock that is unanimously approved by the Board of Directors of the Corporation; and provided, further, that this restriction shall not apply to the repurchase of shares of Common Stock held by employees, officers, directors and consultants pursuant to any employment, option or other similar agreement approved by the Board of Directors under which the Corporation has the option to repurchase shares of Common Stock upon the occurrence of certain events, such as termination of employment.

3. Liquidation Preference.

(a) In the event of any Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction (as defined in Section IV.3(c)) that is deemed to be a Liquidation Event pursuant to Section IV.3(c), after the payment by the Corporation of the Aggregate Series D Base Amounts (as defined in Section IV.3(a)), and 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, the holders of Series B Preferred Stock shall be entitled to receive the Series B Preference Amount (as defined in Section IV.3(a)), pursuant to the provisions of Section IV.3.

(b) After the payment of the full Junior Preferred Liquidation Amount (as defined in Section IV.3(a)), the assets of the Corporation legally available for distribution, if any, shall be distributed to the holders of the Series D Preferred Stock and the Common Stock pursuant to the provisions of Section VII.3(b) below.

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

(a) Right to Convert. Each share of Series B 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 Series B Issue Price by the Series B Conversion Price (as defined in this subsection 4(a)) in effect on the date that the certificate for such Series B Preferred Stock is surrendered for conversion. The conversion price per share of Series B Preferred Stock as of the Filing Date shall be \$6.7906792 (the "Series B Conversion Price"); provided, however, that the Series B Conversion Price for the Series B Preferred Stock shall be subject to adjustment as set forth in this subsection 4 after the Filing Date.

(b) Automatic Conversion. Each share of Series B Preferred Stock shall automatically be converted into the number of shares of Common Stock determined pursuant to subsection 4(a) above upon the earlier of (i) the closing of a QPO (as defined in Section IV.4(b)), or (ii) the date specified by written consent or agreement of the holders of two thirds of the then outstanding shares of Series B Preferred Stock. If a closing of a QPO occurs, all outstanding shares of Series B Preferred Stock shall be deemed to have been converted into shares of Common Stock immediately prior to such closing.

(c) Mechanics of Conversion. Before any holder of Series B Preferred Stock shall be entitled to convert the same 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 the Series B 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 to such holder of Series B 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 and a certificate or certificates for the number of shares of Series B Preferred Stock, if any, that were not converted by such holder. Subject to the last sentence of subsection 4(b) above, 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 Series B 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 offering of securities

registered pursuant to the Securities Act of 1933 (other than a QPO) or an Extraordinary Transaction, the conversion may, at the option of any holder tendering Series B Preferred Stock for conversion, be conditioned upon the closing of such offering or Extraordinary Transaction, in which event the person(s) entitled to receive the Common Stock upon such conversion of the Series B Preferred Stock shall not be deemed to have converted such Series B Preferred Stock until immediately prior to the closing of such offering or Extraordinary Transaction.

(d) Conversion Price Adjustments of Series B Preferred Stock for Certain Dilutive Issuances. The Series B Conversion Price shall be subject to adjustment from time to time as follows:

(i) (A) If the Corporation shall issue, after the Filing Date, any Additional Stock (as defined in subsection 4(d)(iii)(C)) without consideration or for a consideration per share less than the Series D-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to the issuance of such Additional Stock, the Series B Conversion Price in effect immediately prior to each such issuance shall forthwith (except as otherwise provided in this clause (d)) be adjusted to a price determined by multiplying such Series B Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A))), 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-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to such issuance of Additional Stock; and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A))), plus the number of shares of such Additional Stock.

(B) No adjustment of the Series B Conversion Price 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 3 years from the date the event giving rise to the adjustment being carried forward, or shall be made at the end of 3 years from the date of the event giving rise to the adjustment being carried forward. Except to the limited extent provided for in subsection 4(d)(ii)(D), no adjustment of such Series B Conversion Price pursuant to this subsection 4(d) shall have the effect of increasing the Series B Conversion Price above the Series B Conversion Price in effect immediately prior to such adjustment.

(C) 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 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.

(D) In the case of the issuance of the Common Stock for a 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 in good faith by the Board of Directors of the Corporation.

(ii) Issue of Securities Deemed Issue of Additional Stock.

(A) If the Corporation at any time or from time to time after the Filing Date shall issue any Options (as defined in subsection 4(d)(iii)(A)) or Convertible Securities (as defined in subsection 4(d)(iii)(B)) (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock by subsection 4(d)(iii)(A) or (B)), or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date.

(B) If the terms of any Option or Convertible Security, the issuance of which resulted in an adjustment to the Series B Conversion Price after the Filing Date pursuant to the terms of subsection 4(d)(ii)(A) above, are revised (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then, effective upon such increase or decrease becoming effective, the Series B Conversion Price computed upon the original issue of such Option or Convertible Security (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Series B Conversion Price as would have been obtained had such revised terms been in effect upon the original date of issuance of such Option or Convertible Security. Notwithstanding the foregoing, no adjustment pursuant to this clause (B) shall have the effect of increasing the Series B Conversion Price to an amount which exceeds the lower of (i) the Series B Conversion Price on the original adjustment date, or (ii) the Series B Conversion Price that would have resulted from any issuances of Additional Stock between the original adjustment date and such readjustment date.

(C) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock in subsection 4(d)(iii)(A) or (B)), the issuance of which did not result in an adjustment to the Series B Conversion Price pursuant to the terms of subsection 4(d)(i)(A) (either because the consideration per share (determined pursuant to subsection 4(d)(i)(C) and (D) hereof) of the shares of Additional Stock subject thereto was equal to or greater than the applicable Series B Conversion Price then in effect, or because such Option or Convertible Security was issued before the Filing Date), are revised after

the Filing Date (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms, but excluding automatic revisions of conversion ratios of any Preferred Stock pursuant to the provisions of the Preferred Stock existing on the Filing Date) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended, and the shares of Additional Stock subject thereto (determined in the manner provided in subsection 4(d)(ii)(A) above) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(D) Upon the expiration or termination of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised or converted, the Series B Conversion Price 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 or termination, be recomputed as if:

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

(2) 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 shares of Additional Stock deemed to have been then issued was the consideration actually received by the Corporation for the issue of all such Options, whether or not exercised, plus the consideration deemed to have been received by the Corporation (determined pursuant to subsection 4(d)(i)(C) and (D)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised.

(E) No further adjustment in the Series B Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities.

(F) In the case of any Options which expire by their terms not more than thirty (30) days after the date of issue thereof, no adjustment of the Series B Conversion Price shall be made until the expiration or exercise of all such Options, whereupon such adjustment shall be made in the same manner provided in clause (D) above.

(iii) For purposes of this subsection 4, the following definitions shall apply:

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

(B) “**Convertible Securities**” shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

(C) “**Additional Stock**” shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to subsection 4(d)(ii)) by the Corporation after the Filing Date other than:

(1) shares of Common Stock issued pursuant to a transaction described in subsection 4(e) and (f) hereof;

(2) shares of Common Stock issuable or issued to employees, consultants, directors, vendors or other strategic partners of the Corporation in transactions with primarily non-financing purposes pursuant to a plan, agreement or other arrangement approved by the Board of Directors of the Corporation; or

(3) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options outstanding or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security.

(e) Adjustment to Series B Conversion Price for Stock Splits and Combinations. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding Common Stock, the Series B Conversion Price in effect immediately before that subdivision shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Series B Preferred Stock without making a corresponding combination of the Series A Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, then the Series B Conversion Price in effect immediately before that combination shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Common Stock, the Series B Conversion Price in effect immediately before that combination shall be proportionately increased. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding shares of Series B Preferred Stock without effecting a corresponding subdivision of the Series A Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, the Series B Conversion Price in effect immediately before that subdivision shall be proportionately increased. Any adjustment under this paragraph shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) Adjustment to Series B Conversion Price for Certain Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, then and in each such event the Series B Conversion Price in effect immediately before

such event shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Series B Conversion Price then in effect by a fraction:

(i) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

(ii) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series B Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series B Conversion Price shall be adjusted pursuant to this paragraph as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made if the holders of Series B Preferred Stock simultaneously receive (i) a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series B Preferred Stock had been converted into Common Stock on the date of such event or (ii) a dividend or other distribution of shares of Series B Preferred Stock which are convertible, as of the date of such event, into such number of shares of Common Stock as is equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series B Preferred Stock had been converted into Common Stock on the date of such event.

(g) Adjustments to Series B Preferred Stock for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than shares of Common Stock) or in cash or other property (other than regular cash dividends paid out of earnings or earned surplus, determined in accordance with generally accepted accounting principles), then and in each such event provision shall be made so that the holders of the Series B Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the kind and amount of securities of the Corporation, cash or other property which they would have been entitled to receive had the Series B Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all adjustments called for during such period under this paragraph with respect to the rights of the holders of the Series B Preferred Stock; provided that no such adjustment shall be made if the holders of Series B Preferred Stock simultaneously receive a dividend or other distribution of such securities, cash, or other property in an amount equal to the amount of such securities, cash, or other property as they would have received if all outstanding shares of Series B Preferred Stock had been converted into Common Stock on the date of such event.

(h) Recapitalizations, Reclassifications, Exchanges and Substitutions. If at any time or from time to time, whether pursuant to a transaction with another entity or otherwise, there shall be a recapitalization, reclassification, exchange, substitution or other change of the Common Stock (other than pursuant to a subdivision, combination or merger or sale of assets transaction provided for elsewhere in subsection 3 or this subsection 4), provision shall be made so that the holders of the Series B Preferred Stock shall thereafter be entitled to receive upon conversion of the Series B Preferred Stock the kind and amount of stock or other securities or property to which a holder of the Common Stock deliverable upon conversion of the Series B Preferred Stock would have been entitled on the recapitalization, reclassification, exchange, substitution or other change. In any such case appropriate adjustment shall be made in the application of the provisions of this subsection 4 with respect to the rights of the holders of the Series B Preferred Stock after such recapitalization, reclassification, exchange, substitution or other change, to the end that the provisions of this subsection 4 (including adjustment of the Series B Conversion Price then in effect and the number of shares issuable upon conversion of the Series B Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

(i) No Impairment. The Corporation will not, by amendment of its Articles of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this subsection 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Series B Conversion Rights against impairment.

(j) No Fractional Shares and Certificate as to Adjustments.

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

(ii) Upon the occurrence of each adjustment or readjustment of the Series B Conversion Price pursuant to this subsection 4, 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 Series B 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 B Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Series B Conversion Price 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 Series B Preferred Stock.

(k) 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 B Preferred Stock, at least 20 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.

(l) 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 B 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 Series B 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 Series B 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 shareholder approval of any necessary amendment to the Corporation's Articles of Incorporation.

(m) Notices. Any notice required by the provisions of this subsection 4 to be given to the holders of shares of Series B 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.

5. Voting Rights. The holder of each share of Series B Preferred Stock shall have the right to one vote for each share of Common Stock into which such Series B Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any shareholders' meeting in accordance with the bylaws of the Corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote, except as may be otherwise provided by applicable law. Except as otherwise expressly provided herein or as required by law, the holders of Series B Preferred Stock and the holders of Common Stock shall vote together and not as separate classes. 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 B Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

6. Protective Provisions. So long as any shares of Series B Preferred Stock are issued and outstanding, the Corporation shall not without first obtaining the approval (by vote or

written consent, as provided by law) of the holders of at least two thirds of the then issued and outstanding shares of Series B Preferred Stock:

(a) alter or change the rights, preferences or privileges of the shares of Series B Preferred Stock so as to affect adversely the shares;

(b) redeem any shares of Common Stock (other than pursuant to agreements entered into in connection with employment or the delivery of consulting or other similar services to the Corporation);

(c) amend or waive any provision of the Corporation's Articles of Incorporation or Bylaws relating to the Junior Preferred Stock; or

(d) pay or declare any cash dividend on any shares of Common or Junior Preferred Stock; or

(e) authorize, or increase the authorized amount of, whether by reclassification or otherwise, any class of shares or series of equity securities of the Corporation ranking senior to the Series B Preferred Stock in right of redemption, liquidation preference, voting or dividends.

7. Status of Converted Stock. In the event any shares of Series B Preferred Stock shall be converted pursuant to subsection 4 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation. The Articles of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

8. Repurchase of Shares. In connection with repurchases by the Corporation of its Common Stock pursuant to repurchase rights contained in certain employment, option and other similar agreements approved by the Board of Directors (under which the Corporation has the option to repurchase shares of Common Stock from certain employees, officers, directors and consultants upon the occurrence of certain events, such as termination of employment), Sections 502 and 503 of the California Corporations Code shall not apply in whole or in part with respect to such repurchases.

Article VI. Series C Preferred Stock

1. **Rank.** With respect to the payment of dividends, the Series C Preferred Stock shall rank junior to the Series D Preferred Stock, on a parity with the Series A Preferred Stock and Series B Preferred Stock, and senior to the Common Stock. With respect to the distribution of assets upon a Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction (as defined in Section IV.3(c)(i)) that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the Series C Preferred Stock shall rank junior to the Series D Preferred Stock, on a parity with the Series A Preferred Stock and Series B Preferred Stock, and senior to the Common Stock.

2. Dividend Provisions.

(a) After the payment in full of the Series D Dividends (as defined in Section VII.2(a)) pursuant to Section VII.2(a), the holders of shares of Series C Preferred Stock shall be entitled to receive dividends in accordance with Section VII.2(b), out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of the Corporation) on the Common Stock of the Corporation, at the rate of \$7.20 per share of Series C Preferred Stock per annum (as adjusted for any stock dividends, combinations, splits, recapitalizations (excluding the sale of Series D Preferred Stock) and the like with respect to such shares) (the “**Series C Dividends**”). Such dividends shall be payable only when, as and if declared by the Board of Directors of the Corporation, and shall not be cumulative.

(b) Unless the Series C Dividends shall have been paid or declared and a sum sufficient for the payment thereof set apart: (A) no dividend whatsoever (other than a dividend payable solely in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock) shall be paid or declared, and no distribution shall be made, on any Common Stock, and (B) no shares of Common Stock shall be purchased, redeemed, or acquired by the Corporation and no funds shall be paid into or set aside or made available for a sinking fund for the purchase, redemption, or acquisition thereof; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock that is unanimously approved by the Board of Directors of the Corporation; and provided, further, that this restriction shall not apply to the repurchase of shares of Common Stock held by employees, officers, directors and consultants pursuant to any employment, option or other similar agreement approved by the Board of Directors under which the Corporation has the option to repurchase shares of Common Stock upon the occurrence of certain events, such as termination of employment.

3. Liquidation Preference.

(a) In the event of any Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction (as defined in Section IV.3(c)) that is deemed to be a Liquidation Event pursuant to Section IV.3(c), after the payment by the Corporation of the Aggregate Series D Base Amounts (as defined in Section IV.3(a)), and 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, the holders of Series C Preferred Stock shall be entitled to receive the Series C Preference Amount (as defined in Section IV.3(a)), pursuant to the provisions of Section IV.3.

(b) After the payment of the full Junior Preferred Liquidation Amount (as defined in Section IV.3(a)), the assets of the Corporation legally available for distribution, if any, shall be distributed to the holders of the Series D Preferred Stock and the Common Stock pursuant to the provisions of Section VII.3(b) below.

4. Conversion. The holders of the Series C Preferred Stock shall have conversion rights as follows (the “**Series C Conversion Rights**”):

(a) Right to Convert. Each share of 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 Series C Issue Price by the Series C Conversion Price (as defined in this subsection 4(a)) in effect on the date that the certificate for such Series C Preferred Stock is surrendered for conversion. The conversion price per share of Series C Preferred Stock as of the Filing Date shall be \$8.9934637 (the “**Series C Conversion Price**”); provided, however, that the Series C Conversion Price for the Series C Preferred Stock shall be subject to adjustment as set forth in this subsection 4 after the Filing Date.

(b) Automatic Conversion. Each share of Series C Preferred Stock shall automatically be converted into the number of shares of Common Stock determined pursuant to subsection 4(a) above upon the earlier of (i) the closing of a QPO (as defined in Section IV.4(b)), or (ii) the date specified by written consent or agreement of the holders of a majority of the then outstanding shares of Series C Preferred Stock. If a closing of a QPO occurs, all outstanding shares of Series C Preferred Stock shall be deemed to have been converted into shares of Common Stock immediately prior to such closing.

(c) Mechanics of Conversion. Before any holder of Series C Preferred Stock shall be entitled to convert the same 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 the Series C 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 to such holder of Series C 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 and a certificate or certificates for the number of shares of Series C Preferred Stock, if any, that were not converted by such holder. Subject to the last sentence of subsection 4(b) above, 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 Series C 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 offering of securities

registered pursuant to the Securities Act of 1933 (other than a QPO) or an Extraordinary Transaction, the conversion may, at the option of any holder tendering Series C Preferred Stock for conversion, be conditioned upon the closing of such offering or Extraordinary Transaction, in which event the person(s) entitled to receive the Common Stock upon such conversion of the Series C Preferred Stock shall not be deemed to have converted such Series C Preferred Stock until immediately prior to the closing of such offering or Extraordinary Transaction.

(d) Conversion Price Adjustments of Series C Preferred Stock for Certain Dilutive Issuances. The Series C Conversion Price shall be subject to adjustment from time to time as follows:

(i) (A) if the Corporation shall issue, after the Filing Date, any Additional Stock (as defined in subsection 4(d)(iii)(C)) without consideration or for a consideration per share less than the Series D-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to the issuance of such Additional Stock, the Series C Conversion Price in effect immediately prior to each such issuance shall forthwith (except as otherwise provided in this clause (d)) be adjusted to a price determined by multiplying such Series C Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), 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-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to such issuance of Additional Stock; and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), plus the number of shares of such Additional Stock.

(B) No adjustment of the Series C Conversion Price 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 3 years from the date the event giving rise to the adjustment being carried forward, or shall be made at the end of 3 years from the date of the event giving rise to the adjustment being carried forward. Except to the limited extent provided for in subsection 4(d)(ii)(D), no adjustment of such Series C Conversion Price pursuant to this subsection 4(d) shall have the effect of increasing the Series C Conversion Price above the Series C Conversion Price in effect immediately prior to such adjustment.

(C) 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 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.

(D) In the case of the issuance of the Common Stock for a 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 in good faith by the Board of Directors of the Corporation.

(ii) Issue of Securities Deemed Issue of Additional Stock.

(A) If the Corporation at any time or from time to time after the Filing Date shall issue any Options (as defined in subsection 4(d)(iii)(A)) or Convertible Securities (as defined in subsection 4(d)(iii)(B)) (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock by subsection 4(d)(iii)(A) or (B)), or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date.

(B) If the terms of any Option or Convertible Security, the issuance of which resulted in an adjustment to the Series C Conversion Price after the Filing Date pursuant to the terms of subsection 4(d)(ii)(A) above, are revised (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then, effective upon such increase or decrease becoming effective, the Series C Conversion Price computed upon the original issue of such Option or Convertible Security (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Series C Conversion Price as would have been obtained had such revised terms been in effect upon the original date of issuance of such Option or Convertible Security. Notwithstanding the foregoing, no adjustment pursuant to this clause (B) shall have the effect of increasing the Series C Conversion Price to an amount which exceeds the lower of (i) the Series C Conversion Price on the original adjustment date, or (ii) the Series C Conversion Price that would have resulted from any issuances of Additional Stock between the original adjustment date and such readjustment date.

(C) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock in subsection 4(d)(iii)(A) or (B)), the issuance of which did not result in an adjustment to the Series C Conversion Price pursuant to the terms of subsection 4(d)(i)(A) (either because the consideration per share (determined pursuant to subsection 4(d)(i)(C) and (D) hereof) of the shares of Additional Stock subject thereto was equal to or greater than the applicable Series C Conversion Price then in effect, or because such Option or Convertible Security was issued before the Filing Date), are revised after

the Filing Date (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms, but excluding automatic revisions of conversion ratios of any Preferred Stock pursuant to the provisions of the Preferred Stock existing on the Filing Date) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended, and the shares of Additional Stock subject thereto (determined in the manner provided in subsection 4(d)(ii)(A) above) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(D) Upon the expiration or termination of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised or converted, the Series C Conversion Price 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 or termination, be recomputed as if:

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

(2) 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 shares of Additional Stock deemed to have been then issued was the consideration actually received by the Corporation for the issue of all such Options, whether or not exercised, plus the consideration deemed to have been received by the Corporation (determined pursuant to subsection 4(d)(i)(C) and (D)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised.

(E) No further adjustment in the Series C Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities.

(F) In the case of any Options which expire by their terms not more than thirty (30) days after the date of issue thereof, no adjustment of the Series C Conversion Price shall be made until the expiration or exercise of all such Options, whereupon such adjustment shall be made in the same manner provided in clause (D) above.

(iii) For purposes of this subsection 4, the following definitions shall apply:

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

(B) “**Convertible Securities**” shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

(C) “**Additional Stock**” shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to subsection 4(d)(ii)) by the Corporation after the Filing Date other than:

(1) shares of Common Stock issued pursuant to a transaction described in subsection 4(e) and (f) hereof;

(2) shares of Common Stock issuable or issued to employees, consultants or directors of the Corporation in transactions with primarily non-financing purposes pursuant to a plan, agreement or other arrangement approved by the Board of Directors of the Corporation; or

(3) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options outstanding or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security.

(e) **Adjustment to Series C Conversion Price for Stock Splits and Combinations.** If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding Common Stock, the Series C Conversion Price in effect immediately before that subdivision shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Series C Preferred Stock without making a corresponding combination of the Series A Preferred Stock, Series B Preferred Stock and Series D Preferred Stock, then the Series C Conversion Price in effect immediately before that combination shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Common Stock, the Series C Conversion Price in effect immediately before that combination shall be proportionately increased. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding shares of Series C Preferred Stock without effecting a corresponding subdivision of the Series A Preferred Stock, Series B Preferred Stock and Series D Preferred Stock, the Series C Conversion Price in effect immediately before that subdivision shall be proportionately increased. Any adjustment under this paragraph shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) **Adjustment to Series C Conversion Price for Certain Dividends and Distributions.** In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, then and in each such event the Series C Conversion Price in effect immediately before

such event shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Series C Conversion Price then in effect by a fraction:

(i) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

(ii) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series C Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series C Conversion Price shall be adjusted pursuant to this paragraph as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made if the holders of Series C Preferred Stock simultaneously receive (i) a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series C Preferred Stock had been converted into Common Stock on the date of such event or (ii) a dividend or other distribution of shares of Series C Preferred Stock which are convertible, as of the date of such event, into such number of shares of Common Stock as is equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series C Preferred Stock had been converted into Common Stock on the date of such event.

(g) Adjustments to Series C Preferred Stock for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than shares of Common Stock) or in cash or other property (other than regular cash dividends paid out of earnings or earned surplus, determined in accordance with generally accepted accounting principles), then and in each such event provision shall be made so that the holders of the Series C Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the kind and amount of securities of the Corporation, cash or other property which they would have been entitled to receive had the Series C Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all adjustments called for during such period under this paragraph with respect to the rights of the holders of the Series C Preferred Stock; provided that no such adjustment shall be made if the holders of Series C Preferred Stock simultaneously receive a dividend or other distribution of such securities, cash, or other property in an amount equal to the amount of such securities, cash, or other property as they would have received if all outstanding shares of Series C Preferred Stock had been converted into Common Stock on the date of such event.

(h) Recapitalizations, Reclassifications, Exchanges and Substitutions. If at any time or from time to time, whether pursuant to a transaction with another entity or otherwise, there shall be a recapitalization, reclassification, exchange, substitution or other change of the Common Stock (other than pursuant to a subdivision, combination or merger or sale of assets transaction provided for elsewhere in subsection 3 or this subsection 4), provision shall be made so that the holders of the Series C Preferred Stock shall thereafter be entitled to receive upon conversion of the Series C Preferred Stock the kind and amount of stock or other securities or property to which a holder of the Common Stock deliverable upon conversion of the Series C Preferred Stock would have been entitled on the recapitalization, reclassification, exchange, substitution or other change. In any such case, appropriate adjustment shall be made in the application of the provisions of this subsection 4 with respect to the rights of the holders of the Series C Preferred Stock after such recapitalization, reclassification, exchange, substitution or other change, to the end that the provisions of this subsection 4 (including adjustment of the Series C Conversion Price then in effect and the number of shares issuable upon conversion of the Series C Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

(i) No Impairment. The Corporation will not, by amendment of its Articles of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this subsection 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Series C Conversion Rights against impairment.

(j) No Fractional Shares and Certificate as to Adjustments.

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

(ii) Upon the occurrence of each adjustment or readjustment of the Series C Conversion Price pursuant to this subsection 4, 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 Series C 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 C Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Series C Conversion Price 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 Series C Preferred Stock.

(k) 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 C Preferred Stock, at least 20 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.

(l) 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 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 the Series C 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 Series C 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 shareholder approval of any necessary amendment to the Corporation's Articles of Incorporation.

(m) Notices. Any notice required by the provisions of this subsection 4 to be given to the holders of shares of Series C 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.

5. Voting Rights. The holder of each share of Series C Preferred Stock shall have the right to one vote for each share of Common Stock into which such Series C Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any shareholders' meeting in accordance with the bylaws of the Corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote, except as may be otherwise provided by applicable law. Except as otherwise expressly provided herein or as required by law, the holders of Series C Preferred Stock and the holders of Common Stock shall vote together and not as separate classes. 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 C Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

6. Protective Provisions. So long as any shares of Series C Preferred Stock are issued and outstanding, the Corporation shall not 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 issued and outstanding shares of Series C Preferred Stock:

(a) alter or change the rights, preferences or privileges of the shares of Series C Preferred Stock so as to affect adversely the shares;

(b) redeem any shares of Common Stock (other than pursuant to agreements entered into in connection with employment or the delivery of consulting or other similar services to the Corporation);

(c) amend or waive any provision of the Corporation's Articles of Incorporation or Bylaws relating to the Series C Preferred Stock; or

(d) pay or declare any cash dividend on any shares of Common or Junior Preferred Stock; or

(e) authorize, or increase the authorized amount of, whether by reclassification or otherwise, any class of shares or series of equity securities of the Corporation ranking senior to the Series C Preferred Stock in right of redemption, liquidation preference, voting or dividends.

(f) consummate an Extraordinary Transaction the result of which would be the distribution to the holders of the Series C Preferred Stock of consideration having a value per share of Series C Preferred Stock, determined in accordance with the terms hereof, of less than the Original Series C Purchase Price.

7. Status of Converted Stock. In the event any shares of Series C Preferred Stock shall be converted pursuant to subsection 4 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation. The Articles of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

8. Repurchase of Shares. In connection with repurchases by the Corporation of its Common Stock pursuant to repurchase rights contained in certain employment, option and other similar agreements approved by the Board of Directors (under which the Corporation has the option to repurchase shares of Common Stock from certain employees, officers, directors and consultants upon the occurrence of certain events, such as termination of employment), Sections 502 and 503 of the California Corporations Code shall not apply in whole or in part with respect to such repurchases.

Article VII. Series D-1 Preferred Stock

1. **Rank.** With respect to the payment of dividends, Series D-1 Preferred Stock shall rank senior to the Junior Stock (as defined in Section III) and on a parity with the Series D-2 Preferred Stock and the Series D-3 Preferred Stock. With respect to the distribution of assets upon a Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the Series D-1 Preferred Stock shall rank senior to the Junior Stock and on a parity with the Series D-2 Preferred Stock and the Series D-3 Preferred Stock.

2. Dividend Provisions.

(a) The holders of shares of Series D Preferred Stock shall be entitled to receive cumulative dividends, out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of the Corporation) on any Junior Stock of the Corporation, at the rate of \$3.22545 per share per annum in the case of the Series D-1 Preferred Stock and Series D-2 Preferred Stock and at a rate of \$0.3232061 per share per annum in the case of the Series D-3 Preferred Stock (each as adjusted for any stock dividends, combinations, splits, recapitalizations (excluding the sale of Series D Preferred Stock) and the like with respect to such shares), which dividends shall accrue daily in arrears from the date on which such share of Series D Preferred Stock was issued and be compounded quarterly, whether or not such dividends are declared by the Board of Directors or paid (the "Series D Dividends"). If the amount of any dividends to be distributed among the holders of Series D Preferred Stock as dividends pursuant to this subsection 2(a) is insufficient to permit the payment to the holders of Series D Preferred Stock of all of the accrued but unpaid Series D Dividends, then the funds of the Corporation available for distribution shall be distributed pro rata among the holders of Series D Preferred Stock in proportion to the full Series D Dividends to which each such holder is entitled.

(b) Unless the Series D Dividends (as set forth in Section 2(a)) shall have been paid in full or declared and a sum sufficient for the full payment thereof set apart: (i) no dividend whatsoever (other than a dividend payable solely in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock) shall be paid or declared, and no distribution shall be made, on any Junior Stock, and (ii) no shares of Junior Stock shall be purchased, redeemed, or acquired by the Corporation and no funds shall be paid into or set aside or made available for a sinking fund for the purchase, redemption, or acquisition thereof; provided, however, that this restriction shall not apply to the repurchase of shares of Junior Stock that is unanimously approved by the Board of Directors of the Corporation; and provided, further, that this restriction shall not apply to the repurchase of shares of Common Stock held by employees, officers, directors and consultants pursuant to any employment, option or other similar agreement approved by the Board of Directors under which the Corporation has the option to repurchase shares

of Common Stock upon the occurrence of certain events, such as termination of employment.

(c) In addition to the Series D Dividends, the holders of Series D Preferred Stock shall be entitled to receive dividends out of funds legally available therefor at such times and in such amounts as the Board of Directors may determine in its sole discretion; provided, however, that no such dividend may be declared or paid on any shares of Series D Preferred Stock unless at the same time a dividend is declared or paid on all outstanding shares of Common Stock, and vice versa, with holders of Series D Preferred Stock sharing in such dividends as if they constituted a single class of stock, and with each holder of shares of Series D Preferred Stock entitled to receive such dividends based on the number of shares of Common Stock into which such shares of Series D Preferred Stock are then convertible in accordance with subsection 4(a) below (assuming for purposes of calculating such number, that all outstanding shares of Series D-2 Preferred Stock had been first converted into shares of Series D-1 Preferred Stock in accordance with Section VIII.4(a)). Nothing in this subsection 2(c) shall in any way limit, impair or affect the rights of the holders of the Series D Preferred Stock to receive the Series D Dividends and the holders of the Series D Preferred Stock shall be entitled to receive the Series D Dividends without regard to whether any dividend is declared or paid on any outstanding shares of Common Stock.

3. Liquidation Preference.

(a) In the event of any Liquidation Event (as defined in Section IV.3) or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the holders of Series D-1 Preferred Stock, Series D-2 Preferred Stock and Series D-3 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 any Junior Stock by reason of their ownership thereof, an amount per share equal to the sum of (i) (A) in the case of the Series D-1 Preferred Stock, \$53.75751 (the “**Original Series D-1 Issue Price**”), (B) in the case of the Series D-2 Preferred Stock, \$53.75751 (the “**Original Series D-2 Issue Price**”), and (C) in the case of the Series D-3 Preferred Stock, \$5.3867678 (the “**Original Series D-3 Issue Price**”) (in each case, as adjusted for any stock dividends, combinations, splits, recapitalizations (excluding the sale of Series D Preferred Stock) and the like with respect to such shares) and (ii) an amount equal to any accrued but unpaid dividends on such share (subsections (i) and (ii) are collectively referred to as the “**Series D Base Amount**”). If upon the occurrence of such event, the assets and funds distributed among the holders of Series D Preferred Stock are insufficient to permit the payment to such holders of the full Aggregate Series D Base Amounts, then the entire assets and funds of the Corporation legally available for distribution shall be distributed pro rata among the holders of Series D Preferred Stock in proportion to the full Aggregate Series D Base Amounts to which each such holder is entitled.

(b) After the payment of the full Aggregate Series D Base Amounts as set forth in subsection 3(a) above, the assets of the Corporation legally available for distribution, if any, shall be distributed to the holders of Junior Preferred Stock pursuant

to the provisions of Section IV.3(a). After payment in full of the Aggregate Series D Base Amounts as set forth in subsection 3(a) above and payment in full of the Junior Preferred Preference Amount as set forth in Section IV.3(a), the assets of the Corporation legally available for distribution, if any, shall be distributed ratably to the holders of Series D Preferred Stock and Common Stock pro rata based upon the number of shares of Common Stock held by each, determined on an as-if-converted basis (assuming conversion of all such Series D Preferred Stock (including the conversion into Common Stock of shares of Series D-1 Preferred Stock issuable upon conversion of shares of Series D-2 Preferred Stock) into Common Stock pursuant to the terms hereof) (such amount, together with the Aggregate Series D Base Amounts, the “**Series D Preference Amount**”).

(c) In the event of an Extraordinary Transaction pursuant to Sections IV.3(c)(i)(A)(2), IV.3(c)(i)(B), IV.3(c)(i)(C) or IV.3(c)(i)(D), if the Corporation does not effect a dissolution of the Corporation within sixty (60) days after such Extraordinary Transaction, then (i) the Corporation shall deliver a written notice to each holder of Series D Preferred Stock no later than the 60th day after the Extraordinary Transaction advising such holders of their right (and the requirements to be met to secure such right) pursuant to the terms of the following clause (ii) to require the redemption of such shares of Series D Preferred Stock, and (ii) if the holders of at least a majority of the voting power of the then outstanding shares of Series D Preferred Stock so request in a written instrument delivered to the Corporation not later than seventy-five (75) days after such Extraordinary Transaction, the Corporation shall use the consideration received by the Corporation in such Extraordinary Transaction (net of any liabilities associated with the assets sold or technology licensed, as determined in good faith by the Board of Directors of the Corporation, and appropriations for reserves that the Board of Directors in good faith may deem necessary for the payment of liabilities, obligations and expenses of the Corporation), to the extent legally available therefor (the “**Net Proceeds**”), to redeem, on the 90th day after such Company Sale (the “**Liquidation Redemption Date**”), all outstanding shares of Series D Preferred Stock in accordance with the relative priorities specified and at a price per share calculated pursuant to subsections 2(a) and (b) above. The provisions of subsections 6(c) through 6(g) below shall apply, with such necessary changes in the details thereof as are necessitated by the context, to the redemption of the Series D Preferred Stock pursuant to this subsection 3(c). Prior to the distribution or redemption provided for in this subsection 3(c), the Corporation shall not expend or dissipate the consideration received for such Extraordinary Transaction, except to discharge expenses incurred in connection with such Extraordinary Transaction or winding up of the Corporation’s business.

4. Conversion. The holders of the Series D-1 Preferred Stock shall have conversion rights as follows (the “**Series D-1 Conversion Rights**”):

(a) Right to Convert. Each share of Series D-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 such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the applicable Series D Base Amount by the Series D-1 Conversion Price (as

defined in this subsection 4(a)) in effect on the date that the certificate for such Series D-1 Preferred Stock is surrendered for conversion. The conversion price per share of Series D-1 Preferred Stock as of the Filing Date shall be \$5.3867678 (the “**Series D-1 Conversion Price**”); provided, however, that the Series D-1 Conversion Price for the Series D-1 Preferred Stock shall be subject to adjustment as set forth in this subsection 4 after the Filing Date.

(b) Automatic Conversion. Each share of Series D-1 Preferred Stock shall automatically be converted into the number of shares of Common Stock determined pursuant to subsection 4(a) above upon the earlier of (i) a QPO or (ii) the date specified by written consent or agreement of the holders of a majority of the then outstanding shares of Series D-1 Preferred Stock. If a closing of a QPO occurs, all outstanding shares of Series D-1 Preferred Stock shall be deemed to have been converted into shares of Common Stock immediately prior to such closing (the “**Series D-1 QPO Conversion Time**”).

(c) Mechanics of Conversion. Before any holder of Series D-1 Preferred Stock shall be entitled to convert the same 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 the Series D-1 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 to such holder of Series D-1 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 and a certificate or certificates for the number of shares of Series D-1 Preferred Stock, if any, that were not converted by such holder. Subject to the last sentence of subsection 4(b) above, 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 Series D-1 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 offering of securities registered pursuant to the Securities Act of 1933 (other than a QPO) or an Extraordinary Transaction, the conversion may, at the option of any holder tendering Series D-1 Preferred Stock for conversion, be conditioned upon the closing of such offering or Extraordinary Transaction, in which event the person(s) entitled to receive the Common Stock upon such conversion of the Series D-1 Preferred Stock shall not be deemed to have converted such Series D-1 Preferred Stock until immediately prior to the closing of such offering or Extraordinary Transaction.

(d) Conversion Price Adjustments of Series D-1 Preferred Stock for Certain Dilutive Issuances. The Series D-1 Conversion Price shall be subject to adjustment from time to time as follows:

(i) (A) If the Corporation shall issue, after the Filing Date, any Additional Stock (as defined in subsection 4(d)(iii)(C)) without consideration or for a consideration per share less than the Series D-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to the issuance of such Additional Stock, the Series D-1 Conversion Price in effect immediately prior to each such issuance shall forthwith (except as otherwise provided in this clause (d)) be adjusted to a price determined by multiplying such Series D-1 Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), 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-3 Conversion Price (as defined in Section IX.4(a)) in effect immediately prior to such issuance of Additional Stock; and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), plus the number of shares of such Additional Stock.

(B) No adjustment of the Series D-1 Conversion Price 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 3 years from the date the event giving rise to the adjustment being carried forward, or shall be made at the end of 3 years from the date of the event giving rise to the adjustment being carried forward. Except to the limited extent provided for in subsection 4(d)(ii)(D), no adjustment of such Series D-1 Conversion Price pursuant to this subsection 4(d) shall have the effect of increasing the Series D-1 Conversion Price above the Series D-1 Conversion Price in effect immediately prior to such adjustment.

(C) 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 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.

(D) In the case of the issuance of the Common Stock for a 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 in good faith by the Board of Directors of the Corporation.

(ii) Issue of Securities Deemed Issue of Additional Stock.

(A) If the Corporation at any time or from time to time after the Filing Date shall issue any Options (as defined in subsection 4(d)(iii)(A)) or Convertible Securities (as defined in subsection 4(d)(iii)(B)) (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock by subsection 4(d)(iii)(A) or (B)), or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date.

(B) If the terms of any Option or Convertible Security, the issuance of which resulted in an adjustment to the Series D-1 Conversion Price after the Filing Date pursuant to the terms of subsection 4(d)(ii)(A) above, are revised (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then, effective upon such increase or decrease becoming effective, the Series D-1 Conversion Price computed upon the original issue of such Option or Convertible Security (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Series D-1 Conversion Price as would have been obtained had such revised terms been in effect upon the original date of issuance of such Option or Convertible Security. Notwithstanding the foregoing, no adjustment pursuant to this clause (B) shall have the effect of increasing the Series D-1 Conversion Price to an amount which exceeds the lower of (i) the Series D-1 Conversion Price on the original adjustment date, or (ii) the Series D-1 Conversion Price that would have resulted from any issuances of Additional Stock between the original adjustment date and such readjustment date.

(C) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock in subsection 4(d)(iii)(A) or (B)), the issuance of which did not result in an adjustment to the Series D-1 Conversion Price pursuant to the terms of subsection 4(d)(i)(A) (either because the consideration per share (determined pursuant to subsection 4(d)(i)(C) and (D) hereof) of the shares of Additional Stock subject thereto was equal to or greater than the applicable Series D-1 Conversion Price then in effect, or because such Option or Convertible Security was issued before the Filing Date), are issued after the Filing Date (either automatically pursuant to the provisions contained therein or as a result of an amendment

to such terms, but excluding automatic revisions of conversion ratios of any Preferred Stock pursuant to the provisions of the Preferred Stock existing on the Filing Date) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended, and the shares of Additional Stock subject thereto (determined in the manner provided in subsection 4(d)(ii)(A) above) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(D) Upon the expiration or termination of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised or converted, the Series D-1 Conversion Price 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 or termination, be recomputed as if:

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

(2) 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 shares of Additional Stock deemed to have been then issued was the consideration actually received by the Corporation for the issue of all such Options, whether or not exercised, plus the consideration deemed to have been received by the Corporation (determined pursuant to subsection 4(d)(i)(C) and (D)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised.

(E) No further adjustment in the Series D-1 Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities.

(F) In the case of any Options which expire by their terms not more than thirty (30) days after the date of issue thereof, no adjustment of the Series D-1 Conversion Price shall be made until the expiration or exercise of all such Options, whereupon such adjustment shall be made in the same manner provided in clause (D) above.

(iii) For purposes of this subsection 4, the following definitions shall apply:

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

(B) "**Convertible Securities**" shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

(C) "**Additional Stock**" shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to subsection 4(d)(ii)) by the Corporation after the Filing Date other than:

(1) shares of Common Stock issued pursuant to a transaction described in subsection 4(e) and (f) hereof;

(2) shares of Common Stock issuable or issued to employees, consultants or directors in transactions with primarily non-financing purposes pursuant to a plan, agreement or other arrangement approved by the Board of Directors of the Corporation; or

(3) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options outstanding or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security.

(e) Adjustment to Series D-1 Conversion Price for Stock Splits and Combinations. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding Common Stock, the Series D-1 Conversion Price in effect immediately before that subdivision shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Series D-1 Preferred Stock without making a corresponding combination of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D-2 Preferred Stock and Series D-3 Preferred Stock, then the Series D-1 Conversion Price in effect immediately before that combination shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Common Stock, the Series D-1 Conversion Price in effect immediately before that combination shall be proportionately increased. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding shares of Series D-1 Preferred Stock without effecting a corresponding subdivision of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D-2 Preferred Stock and Series D-3 Preferred Stock, the Series D-1 Conversion Price in effect immediately before that subdivision shall be proportionately increased. Any adjustment under this paragraph shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) Adjustment to Series D-1 Conversion Price for Certain Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, then and in each such event the Series D-1 Conversion Price in effect immediately before such event shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Series D-1 Conversion Price then in effect by a fraction:

(i) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

(ii) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series D-1 Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series D-1 Conversion Price shall be adjusted pursuant to this paragraph as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made if the holders of Series D-1 Preferred Stock simultaneously receive (i) a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series D-1 Preferred Stock had been converted into Common Stock on the date of such event or (ii) a dividend or other distribution of shares of Series D-1 Preferred Stock which are convertible, as of the date of such event, into such number of shares of Common Stock as is equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series D-1 Preferred Stock had been converted into Common Stock on the date of such event.

(g) Adjustments to Series D-1 Preferred Stock for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than shares of Common Stock) or in cash or other property (other than regular cash dividends paid out of earnings or earned surplus, determined in accordance with generally accepted accounting principles), then and in each such event provision shall be made so that the holders of the Series D-1 Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the kind and amount of securities of the Corporation, cash or other property which they would have been entitled to receive had the Series D-1 Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all

adjustments called for during such period under this paragraph with respect to the rights of the holders of the Series D-1 Preferred Stock; provided that no such adjustment shall be made if the holders of Series D-1 Preferred Stock simultaneously receive a dividend or other distribution of such securities, cash, or other property in an amount equal to the amount of such securities, cash, or other property as they would have received if all outstanding shares of Series D-1 Preferred Stock had been converted into Common Stock on the date of such event.

(h) Recapitalizations, Reclassifications, Exchanges and Substitutions.

If at any time or from time to time, whether pursuant to a transaction with another entity or otherwise, there shall be a recapitalization, reclassification, exchange, substitution or other change of the Common Stock (other than pursuant to a subdivision, combination or merger or sale of assets transaction provided for elsewhere in subsection 3 or this subsection 4), provision shall be made so that the holders of the Series D-1 Preferred Stock shall thereafter be entitled to receive upon conversion of the Series D-1 Preferred Stock the kind and amount of stock or other securities or property to which a holder of the Common Stock deliverable upon conversion of the Series D-1 Preferred Stock would have been entitled on the recapitalization, reclassification, exchange, substitution or other change. In any such case, appropriate adjustment shall be made in the application of the provisions of this subsection 4 with respect to the rights of the holders of the Series D-1 Preferred Stock after such recapitalization, reclassification, exchange, substitution or other change, to the end that the provisions of this subsection 4 (including adjustment of the Series D-1 Conversion Price then in effect and the number of shares issuable upon conversion of the Series D-1 Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

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

(i) No fractional shares of Common Stock shall be issued upon conversion of the Series D-1 Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series D-1 Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Corporation shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Common Stock's fair market value (as determined in good faith by the Board of Directors of the Corporation) on the date of conversion.

(ii) Upon the occurrence of each adjustment or readjustment of the Series D-1 Conversion Price pursuant to this subsection 4, 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 Series D-1 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 D-1 Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and

readjustment, (B) the Series D-1 Conversion Price 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 Series D-1 Preferred Stock (assuming for purposes of calculating such number, that all outstanding shares of Series D-2 Preferred Stock had been first converted into shares of Series D-1 Preferred Stock in accordance with Section VIII.4(a)).

(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 D-1 Preferred Stock, at least 20 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 D-1 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 Series D-1 Preferred Stock (including any shares of D-1 Preferred Stock issuable upon the conversion of all outstanding shares of Series D-2 Preferred Stock in accordance with Section VIII.4(a)); 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 Series D-1 Preferred Stock (including any shares of D-1 Preferred Stock issuable upon the conversion of all outstanding shares of Series D-2 Preferred Stock in accordance with Section VIII.4(a)), 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 shareholder approval of any necessary amendment to the Corporation's Articles of Incorporation.

(l) Notices. Any notice required by the provisions of this subsection 4 to be given to the holders of shares of Series D-1 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.

5. Redemption.

(a) Optional Redemption; Redemption Date. At any time on or after May 3, 2007, the holder(s) of at least a majority of the then outstanding shares of Series D Preferred Stock may elect to have all (but not less than all) of the outstanding shares of Series D Preferred Stock redeemed. In such event, the Corporation shall

redeem all (but not less than all) of the outstanding shares of Series D Preferred Stock, out of funds legally available therefor, for an amount equal to the aggregate Series D Redemption Price specified in subsection 5(b). Any election by the holders of at least a majority of the then outstanding shares of Series D Preferred Stock pursuant to this subsection 5(a) shall be made by written notice to the Corporation and the other holders of Series D Preferred Stock at least fifteen (15) days prior to the elected redemption date (the “**Series D Redemption Date**”). Upon such election, all holders of Series D Preferred Stock shall be deemed to have elected to have their shares of Series D Preferred Stock redeemed pursuant to this subsection 5(a) and such election shall bind all holders of Series D Preferred Stock. Notwithstanding anything to the contrary contained herein, (i) each holder of shares of Series D-1 Preferred Stock shall have the right to elect to give effect to the Series D-1 Conversion Rights instead of giving effect to the provisions contained in this Section 5(a) with respect to the shares of Series D-1 Preferred Stock held by such holder and (ii) each holder of shares of Series D-3 Preferred Stock shall have the right to elect to give effect to the Series D-3 Conversion Rights instead of giving effect to the provisions contained in this Section 5(a) with respect to the shares of Series D-3 Preferred Stock held by such holder.

(b) **Redemption Price.** The price for each share of Series D Preferred Stock redeemed pursuant to this Section 5 shall be an amount equal to the Series D Preference Amount (such amount to be adjusted appropriately for stock splits, stock dividends, combinations, recapitalizations and the like) (the “**Series D Redemption Price**”). The aggregate Series D Redemption Price shall be payable in cash in immediately available funds to the respective holders of the Series D Preferred Stock on the Series D Redemption Date.

(c) **Insufficient Funds.** If the funds of the Corporation legally available to redeem shares of Series D Preferred Stock on the Series D Redemption Date are insufficient to redeem the total number of such shares required to be redeemed on such date, the Corporation shall (i) take any action necessary or appropriate, to the extent reasonably within its control, to remove promptly any impediments to its ability to redeem the total number of shares of Series D Preferred Stock required to be so redeemed, including, without limitation, (A) to the extent permissible under applicable law, reducing the stated capital of the Corporation to create sufficient surplus to make such redemption and (B) incurring any indebtedness necessary to make such redemption, and (ii) in any event, use any funds that are legally available to redeem the maximum possible number of such shares from the holders of such shares to be redeemed in proportion to the respective number of such shares that otherwise would have been redeemed if all such shares had been redeemed in full. At any time thereafter when additional funds of the Corporation are legally available to redeem such shares of Series D Preferred Stock, the Corporation shall immediately use such funds to redeem the balance of the shares that the Corporation became obligated to redeem on the Series D Redemption Date (but which it has not yet redeemed) at such Series D Redemption Price.

(d) **Interest.** If any shares of Series D Preferred Stock are not redeemed on the Series D Redemption Date for any reason, all such unredeemed shares shall remain outstanding and entitled to all the rights and preferences provided herein,

and the Corporation shall pay interest on the Series D Redemption Price applicable to such unredeemed shares at an aggregate per annum rate equal to ten percent (10%) (increased by 1% at the end of each three (3) month period thereafter until the Series D Redemption Price, and any interest thereon, is paid in full) with such interest to accrue daily in arrears and to be compounded quarterly; provided, however, that in no event shall such interest exceed the maximum permitted rate of interest under applicable law (the “**Maximum Permitted Rate**”). In the event that fulfillment of any provision hereof results in such rate of interest being in excess of the Maximum Permitted Rate, the amount of interest required to be paid hereunder shall automatically be reduced to eliminate such excess; provided, however, that any subsequent increase in the Maximum Permitted Rate shall be retroactively effective to the applicable Series D Redemption Date to the extent permitted by law.

(e) Right to Elect Additional Directors. If any shares of Series D Preferred Stock are not redeemed on the Series D Redemption Date for any reason, the number of Directors constituting the Board of Directors of the Corporation shall automatically be increased by a number equal to the number of Directors then constituting the Board of Directors, plus one (1), and the holders of outstanding shares of Series D-1 Preferred Stock and Series D-3 Preferred Stock shall be entitled, voting as a single class (to the exclusion of the holders of all other securities and classes of capital stock of the Corporation), to elect such additional Directors. The period beginning on the Series D Redemption Date and ending on the date upon which all shares of Series D Preferred Stock required to be redeemed are so redeemed is referred to herein as the “**Voting Period.**”

(i) As soon as practicable after the commencement of the Voting Period, the Corporation shall call a special meeting of the holders of outstanding shares of Series D-1 Preferred Stock and Series D-3 Preferred Stock to be held not more than ten (10) days after the date of mailing of notice of such meeting. If the Corporation fails to send a notice, any such holder may call the meeting on like notice. The record date for determining the holders of Series D-1 Preferred Stock and Series D-3 Preferred Stock entitled to notice of and to vote at such special meeting shall be the close of business on the fifth (5th) business day preceding the day on which such notice is mailed. At any such special meeting and at each meeting of holders of shares of Series D-1 Preferred Stock and/or Series D-3 Preferred Stock held during a Voting Period at which Directors are to be elected (or with respect to any action by written consent in lieu of a meeting of shareholders), such holders, voting together as a single class to the exclusion of the holders of all other securities and classes of capital stock of the Corporation, shall be entitled to elect the number of Directors prescribed in this Section 5(e), and each share of Series D-1 Preferred Stock and Series D-3 Preferred Stock, voting together as a single class, shall be entitled to one (1) vote (whether voted in person by the holder thereof or by proxy or pursuant to a shareholders consent).

(ii) The terms of office of all persons who are incumbent Directors of the Corporation at the time of a special meeting of the holders of Series D Preferred Stock to elect such additional Directors shall continue, notwithstanding the election at such meeting of the additional Directors that such holders are entitled to elect,

and the additional Directors so elected by such holders, together with such incumbent Directors, shall constitute the duly elected Directors of the Corporation. Simultaneously with the termination of a Voting Period, the terms of office of the additional Directors elected by the holders of the Series D-1 Preferred Stock and Series D-3 Preferred Stock shall terminate, such incumbent Directors shall constitute the Directors of the Corporation and the rights of the holders of Series D-1 Preferred Stock and Series D-3 Preferred Stock to elect additional Directors pursuant to this Section 5(e) shall cease.

(f) Dividend After Redemption Date. In the event that shares of Series D Preferred Stock required to be redeemed are not redeemed and continue to be outstanding, such shares shall continue to be entitled to cumulative dividends thereon as provided in subsection 2 until the date on which the Corporation actually redeems such shares.

(g) Surrender of Certificates. Each holder of shares of Series D Preferred Stock to be redeemed shall surrender the certificate or certificates representing such shares to the Corporation, duly assigned or endorsed for transfer to the Corporation (or accompanied by duly executed stock powers relating thereto), or, in the event the certificate or certificates are lost, stolen or missing, shall deliver an affidavit of loss, at the principal executive office of the Corporation or such other place as the Corporation may from time to time designate by notice to the holders of Series D Preferred Stock, and each surrendered certificate shall be canceled and retired and the Corporation shall thereafter make payment of the applicable Series D Redemption Price by certified check or wire transfer; provided, however, that if the Corporation has insufficient funds legally available to redeem all shares of Series D Preferred Stock required to be redeemed, each such holder shall, in addition to receiving the payment of the portion of the aggregate Series D Redemption Price that the Corporation is not legally prohibited from paying to such holder by certified check or wire transfer, receive a new stock certificate for those shares of Series D Preferred Stock not so redeemed.

6. Voting Rights

(a) Board of Directors. Subject to the provisions of Section 5(e) hereof, the holders of outstanding shares of Series D-1 Preferred Stock shall be entitled to elect four (4) Directors of the Corporation. Except as provided in Section 6(a)(iv) below, and subject to the cumulative voting provisions of Section 708 of the California General Corporation Law, such Directors shall be elected by a plurality vote, with the elected candidates being the candidates receiving the greatest number of affirmative votes (with each holder of Series D-1 Preferred Stock entitled to cast one vote for or against each candidate with respect to each share of Series D-1 Preferred Stock held by such holder) of the outstanding shares of Series D-1 Preferred Stock, with votes cast against such candidates and votes withheld having no legal effect. The election of such Directors shall occur (i) at the annual meeting of holders of capital stock, (ii) at any special meeting of holders of capital stock if such meeting is called for the purpose of electing directors, (iii) at any special meeting of holders of Series D-1 Preferred Stock called by holders of not less than a majority of the outstanding shares of Series D-1 Preferred Stock or (iv) as otherwise provided by law. If at any time when any share of Series D-1 Preferred Stock

is outstanding any such Director should cease to be a Director for any reason, the vacancy shall only be filled by the vote or written consent of the holders of the outstanding shares of Series D-1 Preferred Stock in the manner and on the basis specified above or as otherwise provided by law. The holders of outstanding shares of Series D-1 Preferred Stock shall also be entitled to vote in the election of all other Directors of the Corporation (other than the election of the Director pursuant to Section IX.6(a)) together with holders of all other shares of the Corporation's outstanding capital stock entitled to vote thereon, voting as a single class, with each outstanding share of Series D-1 Preferred Stock entitled to the number of votes specified in Section 6(b) hereof. The holders of outstanding shares of Series D-1 Preferred Stock may, in their sole discretion, determine not to elect one or more Directors as provided herein from time to time, and during any such period the Board of Directors shall not be deemed unduly constituted solely as a result of such vacancy.

(b) Voting Generally. The holder of each share of Series D-1 Preferred Stock shall have the right to one vote for each share of Common Stock into which such share of Series D-1 Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any shareholders' meeting in accordance with the Bylaws of the Corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote, except as may be otherwise provided by applicable law. Except as otherwise expressly provided herein or as required by law, the holders of Series D-1 Preferred Stock and the holders of Common Stock shall vote together and not as separate classes. 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 D-1 Preferred Stock held by each holder could be converted) shall be rounded to be nearest whole number (with one-half being rounded upward).

7. Protective Provisions. So long as shares of Series D-1 Preferred Stock or Series D-3 Preferred Stock are issued and outstanding, the Corporation shall not, by merger, consolidation, recapitalization, operation of law or otherwise, without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least a Series D Majority Interest (as defined in Section IV.3(c)(i)):

(a) declare or pay any dividends (other than dividends on the Series D Preferred Stock), or make any distributions of cash, property or securities of the Corporation in respect of its capital stock, or apply any of its assets to the redemption, retirement, purchase or other acquisition of its capital stock, directly or indirectly, through subsidiaries or otherwise, except for (i) the redemption of Series D Preferred Stock as provided herein, or (ii) shares of Common Stock held by any employee, officer, director or consultant pursuant to any employment, option or other similar agreement approved by the Board of Directors under which the Corporation has the option to repurchase shares of Common Stock upon the occurrence of certain events, such as termination of employment, or (iii) dividends or distributions payable solely in shares of Common Stock;

(b) reclassify any capital stock in any manner that affects the rights, designations, preferences, powers and/or relative, participating, optional or other special rights, or the restrictions provided for the benefit of, the Series D Preferred Stock;

(c) authorize or issue, or obligate itself to issue, any convertible debt or other debt with any equity participation, any securities convertible into or exercisable or exchangeable for any equity securities, or any other equity security, in any case ranking senior to or on parity with the Series D Preferred Stock as to liquidation, sale or merger preferences, redemption, or dividend rights, or with any special voting rights, or permit any subsidiary of the Corporation to issue any capital stock, or securities convertible into or exercisable or exchangeable for capital stock or other securities of such Subsidiary, to any person or entity other than the Corporation;

(d) amend, alter or repeal (whether by merger, consolidation, recapitalization, operation of law, or otherwise) any provision of, or add any provision to, (i) the Corporation's Articles of Incorporation (including, without limitation, increasing the total number of shares of any series of Preferred Stock or Common Stock that the Corporation shall have the authority to issue) or (ii) with respect to provisions which relate to the rights and preferences of the Series D Preferred Stock or in a manner which adversely affects the rights of the Series D Preferred Stock, the bylaws of the Corporation as in effect on the Filing Date;

(e) adopt any new stock option, stock grant or other equity incentive plan or materially amend the existing Stock Option Plan, including without limitation, by increasing the number of shares issuable upon the exercise of options or other rights issuable thereunder in an amount in excess of 2,166,667;

(f) effect any Liquidation Event or Extraordinary Transaction;

(g) make any material change in the nature of the Corporation's business (as it is established on the Filing Date);

(h) increase or decrease the size of the Board of Directors (except as contemplated by Section 5(e) hereof);

(i) take any other action not described in Section 7(a)-(h) if such action could adversely alter or change the preferences, rights, privileges or powers of, or the restrictions provided for the benefit of, the Series D Preferred Stock; or

(j) enter into any agreement to do any of the foregoing that is not expressly made conditional on obtaining the affirmative vote or written consent of a Series D Majority Interest.

8. Status of Converted Stock. In the event any shares of Series D-1 Preferred Stock shall be converted pursuant to subsection 4 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation. The Articles of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

9. **Repurchase of Shares.** In connection with repurchases by the Corporation of its Common Stock pursuant to repurchase rights contained in certain employment, option and other similar agreements approved by the Board of Directors (under which the Corporation has the option to repurchase shares of Common Stock from certain employees, officers, directors and consultants upon the occurrence of certain events, such as termination of employment), Sections 502 and 503 of the California Corporations Code shall not apply in whole or in part with respect to such repurchases.

10. **No Impairment.** The Corporation will not, by amendment of its Articles of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, and will at all times in good faith assist in the carrying out of all the provisions of this Article VIII and in the taking of all such action as may be necessary or appropriate in order to protect the Series D-1 Conversion Rights and all other rights contained in this Article VIII against impairment.

Article VIII. Series D-2 Preferred Stock

1. **Rank.** With respect to the payment of dividends, Series D-2 Preferred Stock shall rank senior to the Junior Stock (as defined in Article III) and on a parity with the Series D-1 Preferred Stock and the Series D-3 Preferred Stock. With respect to the distribution of assets upon a Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the Series D-2 Preferred Stock shall rank senior to the Junior Stock and on a parity with the Series D-1 Preferred Stock and the Series D-3 Preferred Stock.

2. **Dividend Provisions.** The holders of shares of Series D-2 Preferred Stock shall be entitled to receive the Series D Dividends pursuant to the provisions of Section VII.2.

3. **Liquidation Preference.** In the event of any Liquidation Event (as defined in Section IV.3) or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the holders of Series D-2 Preferred Stock shall be entitled to receive the Series D Preference Amount pursuant to the provisions of Section VII.3.

4. **Conversion.** The holders of Series D-2 Preferred Stock shall have conversion rights (the “**Series D-2 Conversion Rights**”) as follows:

(a) **Right to Convert.** Each share of Series D-2 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 fully paid and nonassessable share of Series D-1 Preferred Stock.

(b) **Automatic Conversion.** Each share of Series D-2 Preferred Stock shall automatically be converted into the number of shares of Series D-1 Preferred Stock

determined pursuant to subsection 4(a) above immediately prior to the closing of a QPO, except as provided in subsection 4(c). If a closing of a QPO occurs, all outstanding shares of Series D-2 Preferred Stock shall be deemed to have been converted into shares of Series D-1 Preferred Stock immediately prior to the Series D-1 QPO Conversion Time (as defined in Section VII.4(b)).

(c) Mechanics of Conversion. Before any holder of Series D-2 Preferred Stock shall be entitled to convert the same into shares of Series D-1 Preferred Stock pursuant to subsection 4(a), the holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Series D-2 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 to such holder of Series D-2 Preferred Stock, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of Series D-1 Preferred Stock to which such holder shall be entitled as aforesaid and a certificate or certificates for the number of shares of Series D-2 Preferred Stock, if any, that were not converted by such holder. Subject to the last sentence of subsection 4(b) above, 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 Series D-2 Preferred Stock to be converted, and the person or persons entitled to receive the shares of Series D-1 Preferred Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Series D-1 Preferred Stock as of such date. If the conversion is in connection with an underwritten offering of securities registered pursuant to the Securities Act of 1933 (other than a QPO) or an Extraordinary Transaction, the conversion may, at the option of any holder tendering Series D-2 Preferred Stock for conversion, be conditioned upon the closing of such offering or Extraordinary Transaction, in which event the person(s) entitled to receive the Series D-1 Preferred Stock upon such conversion of the Series D-2 Preferred Stock shall not be deemed to have converted such Series D2 Preferred Stock until immediately prior to the closing of such offering or Extraordinary Transaction.

(d) Recapitalizations, Reclassifications, Exchanges and Substitutions. If at any time or from time to time, whether pursuant to a transaction with another entity or otherwise, there shall be a recapitalization, reclassification, exchange, substitution or other change of the Common Stock (other than pursuant to a subdivision, combination or merger or sale of assets transaction provided for elsewhere in subsection 3 or this subsection 4), provision shall be made so that the holders of Series D-2 Preferred Stock shall thereafter be entitled to receive upon conversion into Common Stock of shares of Series D-1 Preferred Stock issuable upon the conversion of shares of Series D-2 Preferred Stock the kind and amount of stock or other securities or property to which a holder of the Common Stock deliverable upon the conversion of shares of Series D-2 Preferred Stock (assuming that all outstanding shares of Series D-2 Preferred Stock had been first converted into shares of Series D-1 Preferred Stock in accordance with Section VIII.4(a)) would have been entitled on the recapitalization, reclassification, exchange, substitution or other change.

(e) No Impairment. The Corporation will not, by amendment of its Articles of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Article VIII and in the taking of all such action as may be necessary or appropriate in order to protect the rights and preferences of the Series D-2 Preferred Stock against impairment.

(f) 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 D-2 Preferred Stock, at least 20 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.

(g) Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Series D-1 Preferred Stock, solely for the purpose of effecting the conversion of the shares of the Series D-2 Preferred Stock, such number of its shares of Series D-1 Preferred Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series D-2 Preferred Stock; and if at any time the number of authorized but unissued shares of Series D-1 Preferred Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series D-2 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 Series D-1 Preferred Stock to such number of shares as shall be sufficient for such purposes, including, without limitation, engaging in best efforts to obtain the requisite shareholder approval of any necessary amendment to the Corporation's Articles of Incorporation.

(h) Notices. Any notice required by the provisions of this subsection 4 to be given to the holders of shares of Series D-2 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.

5. Redemption. The holders of shares of Series D-2 Preferred Stock shall have the redemption rights provided in Section VII.5. Notwithstanding anything to the contrary herein, each holder of shares of Series D-2 Preferred Stock shall have the right to elect to give effect to the Series D-2 Conversion Rights instead of giving effect to the provisions contained in this Section 5 with respect to the shares of Series D-2 Preferred Stock held by such holder.

6. **Voting Rights.** Except as otherwise required by applicable law, the holder of each share of Series D-2 Preferred Stock shall not be entitled to vote on any matter on which the shareholders shall be entitled to vote.

7. **Status of Converted Stock.** In the event any shares of Series D-2 Preferred Stock shall be converted pursuant to subsection 4 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation. The Articles of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

8. **Repurchase of Shares.** In connection with repurchases by the Corporation of its Common Stock pursuant to repurchase rights contained in certain employment, option and other similar agreements approved by the Board of Directors (under which the Corporation has the option to repurchase shares of Common Stock from certain employees, officers, directors and consultants upon the occurrence of certain events, such as termination of employment), Sections 502 and 503 of the California Corporations Code shall not apply in whole or in part with respect to such repurchases.

Article IX. Series D-3 Preferred Stock

1. **Rank.** With respect to the payment of dividends, Series D-3 Preferred Stock shall rank senior to the Junior Stock (as defined in Article III) and on a parity with the Series D-1 Preferred Stock and the Series D-2 Preferred Stock. With respect to the distribution of assets upon a Liquidation Event (as defined in Section IV.3(a)) or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the Series D-3 Preferred Stock shall rank senior to the Junior Stock and on a parity with the Series D-1 Preferred Stock and the Series D-2 Preferred Stock.

2. **Dividend Provisions.** The holders of shares of Series D-3 Preferred Stock shall be entitled to receive the Series D Dividends pursuant to the provisions of Section VII.2.

3. **Liquidation Preference.** In the event of any Liquidation Event (as defined in Section IV.3) or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), the holders of Series D-3 Preferred Stock shall be entitled to receive the Series D Preference Amount pursuant to the provisions of Section VII.3.

4. **Conversion.** The holders of the Series D-3 Preferred Stock shall have conversion rights as follows (the "Series D-3 Conversion Rights"):

(a) **Right to Convert.** Each share of Series D-3 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 applicable Series D Base Amount by the Series D-3 Conversion Price (as defined in this subsection 4(a)) in effect on the date that the certificate for such Series D-

3 Preferred Stock is surrendered for conversion. The conversion price per share of Series D-3 Preferred Stock as of the Filing Date shall be \$5.3867678 (the “**Series D-3 Conversion Price**”); provided, however, that the Series D-3 Conversion Price for the Series D-3 Preferred Stock shall be subject to adjustment as set forth in this subsection 4 after the Filing Date.

(b) **Automatic Conversion.** Each share of Series D-3 Preferred Stock shall automatically be converted into the number of shares of Common Stock determined pursuant to subsection 4(a) above upon the earlier of (i) a QPO or (ii) the date specified by written consent or agreement of the holders of a majority of the then outstanding shares of Series D-3 Preferred Stock. If a closing of a QPO occurs, all outstanding shares of Series D-3 Preferred Stock shall be deemed to have been converted into shares of Common Stock immediately prior to such closing.

(c) **Mechanics of Conversion.** Before any holder of Series D-3 Preferred Stock shall be entitled to convert the same 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 the Series D-3 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 to such holder of Series D-3 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 and a certificate or certificates for the number of shares of Series D-3 Preferred Stock, if any, that were not converted by such holder. Subject to the last sentence of subsection 4(b) above, 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 Series D-3 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 offering of securities registered pursuant to the Securities Act of 1933 (other than a QPO) or an Extraordinary Transaction, the conversion may, at the option of any holder tendering Series D-3 Preferred Stock for conversion, be conditioned upon the closing of such offering or Extraordinary Transaction, in which event the person(s) entitled to receive the Common Stock upon such conversion of the Series D-3 Preferred Stock shall not be deemed to have converted such Series D-3 Preferred Stock until immediately prior to the closing of such offering or Extraordinary Transaction.

(d) **Conversion Price Adjustments of Series D-3 Preferred Stock for Certain Dilutive Issuances.** The Series D-3 Conversion Price shall be subject to adjustment from time to time as follows:

(i) (A) If the Corporation shall issue, after the Filing Date, any Additional Stock (as defined in subsection 4(d)(iii)(C)) without consideration or for a consideration per share less than the Series D-3 Conversion Price in effect immediately

prior to the issuance of such Additional Stock, the Series D-3 Conversion Price in effect immediately prior to each such issuance shall forthwith (except as otherwise provided in this clause (d)) be adjusted to a price determined by multiplying such Series D-3 Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), 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-3 Conversion Price in effect immediately prior to such issuance of Additional Stock; and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (assuming the conversion into Common Stock of all outstanding Series A Preferred Stock, Series B Preferred and Series C Preferred Stock and not including shares issuable upon conversion of any other Convertible Securities (as defined in subsection 4(d)(iii)(B)) or any Options (as defined in subsection 4(d)(iii)(A)), plus the number of shares of such Additional Stock.

(B) No adjustment of the Series D-3 Conversion Price 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 3 years from the date the event giving rise to the adjustment being carried forward, or shall be made at the end of 3 years from the date of the event giving rise to the adjustment being carried forward. Except to the limited extent provided for in subsection 4(d)(ii)(D), no adjustment of such Series D-3 Conversion Price pursuant to this subsection 4(d) shall have the effect of increasing the Series D-3 Conversion Price above the Series D-3 Conversion Price in effect immediately prior to such adjustment.

(C) 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 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.

(D) In the case of the issuance of the Common Stock for a 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 in good faith by the Board of Directors of the Corporation.

(ii) Issue of Securities Deemed Issue of Additional Stock.

(A) If the Corporation at any time or from time to time after the Filing Date shall issue any Options (as defined in subsection 4(d)(iii)(A)) or Convertible Securities (as defined in subsection 4(d)(iii)(B)) (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically

excepted from the definition of Additional Stock by subsection 4(d)(iii)(A) or (B)), or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date.

(B) If the terms of any Option or Convertible Security, the issuance of which resulted in an adjustment to the Series D-3 Conversion Price after the Filing Date pursuant to the terms of subsection 4(d)(ii)(A) above, are revised (either automatically pursuant the provisions contained therein or as a result of an amendment to such terms) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then, effective upon such increase or decrease becoming effective, the Series D-3 Conversion Price computed upon the original issue of such Option or Convertible Security (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Series D-3 Conversion Price as would have been obtained had such revised terms been in effect upon the original date of issuance of such Option or Convertible Security. Notwithstanding the foregoing, no adjustment pursuant to this clause (B) shall have the effect of increasing the Series D-3 Conversion Price to an amount which exceeds the lower of (i) the Series D-3 Conversion Price on the original adjustment date, or (ii) the Series D-3 Conversion Price that would have resulted from any issuances of Additional Stock between the original adjustment date and such readjustment date.

(C) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive shares of Common Stock which are specifically excepted from the definition of Additional Stock in subsection 4(d)(iii)(A) or (B)), the issuance of which did not result in an adjustment to the Series D-3 Conversion Price pursuant to the terms of subsection 4(d)(i)(A) (either because the consideration per share (determined pursuant to subsection 4(d)(i)(C) and (D) hereof) of the shares of Additional Stock subject thereto was equal to or greater than the applicable Series D-3 Conversion Price then in effect, or because such Option or Convertible Security was issued before the Filing Date), are revised after the Filing Date (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms, but excluding automatic revisions of conversion ratios of any Preferred Stock pursuant to the provisions of the Preferred Stock existing on the Filing Date) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended, and the shares of Additional Stock subject thereto (determined in the manner provided in

subsection 4(d)(ii)(A) above) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(D) Upon the expiration or termination of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised or converted, the Series D-3 Conversion Price 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 or termination, be recomputed as if:

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

(2) 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 shares of Additional Stock deemed to have been then issued was the consideration actually received by the Corporation for the issue of all such Options, whether or not exercised, plus the consideration deemed to have been received by the Corporation (determined pursuant to subsection 4(d)(i)(C) and (D)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised.

(E) No further adjustment in the Series D-3 Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities.

(F) In the case of any Options which expire by their terms not more than thirty (30) days after the date of issue thereof, no adjustment of the Series D-3 Conversion Price shall be made until the expiration or exercise of all such Options, whereupon such adjustment shall be made in the same manner provided in clause (D) above.

(iii) For purposes of this subsection 4, the following definitions shall apply:

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

(B) “**Convertible Securities**” shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

(C) “**Additional Stock**” shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to subsection 4(d)(ii)) by the Corporation after the Filing Date other than:

(1) shares of Common Stock issued pursuant to a transaction described in subsection 4(e) and (f) hereof;

(2) shares of Common Stock issuable or issued to employees, consultants or directors in transactions with primarily non-financing purposes pursuant to a plan, agreement or other arrangement approved by the Board of Directors of the Corporation; or

(3) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options outstanding or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security.

(e) **Adjustment to Series D-3 Conversion Price for Stock Splits and Combinations.** If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding Common Stock, the Series D-3 Conversion Price in effect immediately before that subdivision shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Series D-3 Preferred Stock without making a corresponding combination of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D-1 Preferred Stock and Series D-2 Preferred Stock, then the Series D-3 Conversion Price in effect immediately before that combination shall be proportionately decreased. If the Corporation shall at any time or from time to time after the Filing Date combine the outstanding shares of Common Stock, the Series D-3 Conversion Price in effect immediately before that combination shall be proportionately increased. If the Corporation shall at any time or from time to time after the Filing Date effect a subdivision of the outstanding shares of Series A Preferred Stock without effecting a corresponding subdivision of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D-1 Preferred Stock and Series D-2 Preferred Stock, the Series D-3 Conversion Price in effect immediately before that subdivision shall be proportionately increased. Any adjustment under this paragraph shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) **Adjustment to Series D-3 Conversion Price for Certain Dividends and Distributions.** In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, then and in each such event the Series D-3 Conversion Price in

effect immediately before such event shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Series D-3 Conversion Price then in effect by a fraction:

(i) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

(ii) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series D-3 Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series D-3 Conversion Price shall be adjusted pursuant to this paragraph as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made if the holders of Series D-3 Preferred Stock simultaneously receive (i) a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series D-3 Preferred Stock had been converted into Common Stock on the date of such event or (ii) a dividend or other distribution of shares of Series D-3 Preferred Stock which are convertible, as of the date of such event, into such number of shares of Common Stock as is equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series D-3 Preferred Stock had been converted into Common Stock on the date of such event.

(g) Adjustments to Series D-3 Preferred Stock for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Filing Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than shares of Common Stock) or in cash or other property (other than regular cash dividends paid out of earnings or earned surplus, determined in accordance with generally accepted accounting principles), then and in each such event provision shall be made so that the holders of the Series D-3 Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the kind and amount of securities of the Corporation, cash or other property which they would have been entitled to receive had the Series D-3 Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all adjustments called for during such period under this paragraph with respect to the rights of the holders of the Series D-3 Preferred Stock; provided that no such adjustment shall be made if the holders of Series D-3 Preferred Stock simultaneously receive a dividend or other distribution of such securities, cash, or other property in an amount equal to the amount of such securities, cash, or other property as they would have received if all

outstanding shares of Series D-3 Preferred Stock had been converted into Common Stock on the date of such event.

(h) Recapitalizations, Reclassifications, Exchanges and Substitutions.

If at any time or from time to time, whether pursuant to a transaction with another entity or otherwise, there shall be a recapitalization, reclassification, exchange, substitution or other change of the Common Stock (other than pursuant to a subdivision, combination or merger or sale of assets transaction provided for elsewhere in subsection 3 or this subsection 4), provision shall be made so that the holders of the Series D-3 Preferred Stock shall thereafter be entitled to receive upon conversion of the Series D-3 Preferred Stock the kind and amount of stock or other securities or property to which a holder of the Common Stock deliverable upon conversion of the Series D-3 Preferred Stock would have been entitled on the recapitalization, reclassification, exchange, substitution or other change. In any such case, appropriate adjustment shall be made in the application of the provisions of this subsection 4 with respect to the rights of the holders of the Series D-3 Preferred Stock after such recapitalization, reclassification, exchange, substitution or other change, to the end that the provisions of this subsection 4 (including adjustment of the Series D-3 Conversion Price then in effect and the number of shares issuable upon conversion of the Series D-3 Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

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

(i) No fractional shares of Common Stock shall be issued upon conversion of the Series D-3 Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series D-3 Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Corporation shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Common Stock's fair market value (as determined in good faith by the Board of Directors of the Corporation) on the date of conversion.

(ii) Upon the occurrence of each adjustment or readjustment of the Series D-3 Conversion Price pursuant to this subsection 4, 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 Series D-3 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 D-3 Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Series D-3 Conversion Price 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 Series D-3 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 D-3 Preferred Stock, at least 20 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 D-3 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 Series D-3 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 Series D-3 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 shareholder approval of any necessary amendment to the Corporation's Articles of Incorporation.

(l) Notices. Any notice required by the provisions of this subsection 4 to be given to the holders of shares of Series D-3 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.

5. Redemption. The holders of shares of Series D-3 Preferred Stock shall have the redemption rights provided in Section VII.5. Notwithstanding anything to the contrary herein, each holder of shares of Series D-3 Preferred Stock shall have the right to elect to give effect to the Series D-3 Conversion Rights instead of giving effect to the provisions contained in this Section 5 with respect to the shares of Series D-3 Preferred Stock held by such holder.

6. Voting Rights

(a) Board of Directors. Subject to the provisions of Section 5(e) hereof, the holders of outstanding shares of Series D-3 Preferred Stock shall be entitled to elect one (1) Director of the Corporation. Except as provided in Section 6(a)(iv) below, and subject to the cumulative voting provisions of Section 708 of the California General Corporation Law, such Director shall be elected by a plurality vote, with the elected candidate being the candidate receiving the greatest number of affirmative votes (with each holder of Series D-3 Preferred Stock entitled to cast one vote for or against each candidate with respect to each share of Series D-3 Preferred Stock held by such holder)

of the outstanding shares of Series D-3 Preferred Stock, with votes cast against such candidates and votes withheld having no legal effect. The election of such Director shall occur (i) at the annual meeting of holders of capital stock, (ii) at any special meeting of holders of capital stock if such meeting is called for the purpose of electing directors, (iii) at any special meeting of holders of Series D-3 Preferred Stock called by holders of not less than a majority of the outstanding shares of Series D-3 Preferred Stock or (iv) as otherwise provided by law. If at any time when any share of Series D-3 Preferred Stock is outstanding any such Director should cease to be a Director for any reason, the vacancy shall only be filled by the vote or written consent of the holders of the outstanding shares of Series D-3 Preferred Stock, in the manner and on the basis specified above or as otherwise provided by law. The holders of outstanding shares of Series D-3 Preferred Stock shall also be entitled to vote in the election of all other Directors of the Corporation (other than the election of the Directors pursuant to Section VII.6(a)) together with holders of all other shares of the Corporation's outstanding capital stock entitled to vote thereon, voting as a single class, with each outstanding share of Series D-3 Preferred Stock entitled to the number of votes specified in Section 6(b) hereof. The holders of outstanding shares of Series D-3 Preferred Stock may, in their sole discretion, determine not to elect a Director as provided herein from time to time, and during any such period the Board of Directors shall not be deemed unduly constituted solely as a result of such vacancy.

(b) Voting Generally. The holder of each share of Series D-3 Preferred Stock shall have the right to one vote for each share of Common Stock into which such share of Series D-3 Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any shareholders' meeting in accordance with the Bylaws of the Corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote, except as may be otherwise provided by applicable law. Except as otherwise expressly provided herein or as required by law, the holders of Series D-3 Preferred Stock and the holders of Common Stock shall vote together and not as separate classes. 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 D-3 Preferred Stock held by each holder could be converted) shall be rounded to be nearest whole number (with one-half being rounded upward).

7. Protective Provisions. So long as shares of Series D-1 Preferred Stock and Series D-3 Preferred Stock are issued and outstanding, the Corporation shall not, by merger, consolidation, recapitalization, operation of law or otherwise, without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least a Series D Majority Interest (as defined in Section IV.3(c)(i)), take any action listed in Section VII.7.

8. Status of Converted Stock. In the event any shares of Series D-3 Preferred Stock shall be converted pursuant to subsection 4 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation. The Articles of Incorporation of

the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

9. **Repurchase of Shares.** In connection with repurchases by the Corporation of its Common Stock pursuant to repurchase rights contained in certain employment, option and other similar agreements approved by the Board of Directors (under which the Corporation has the option to repurchase shares of Common Stock from certain employees, officers, directors and consultants upon the occurrence of certain events, such as termination of employment), Sections 502 and 503 of the California Corporations Code shall not apply in whole or in part with respect to such repurchases.

10. **No Impairment.** The Corporation will not, by amendment of its Articles of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, and will at all times in good faith assist in the carrying out of all the provisions of this Article IX and in the taking of all such action as may be necessary or appropriate in order to protect the Series D-3 Conversion Rights and all other rights contained in this Article IX against impairment.

Article X. Common Stock.

1. **General.** The dividend, liquidation, and voting rights of the holders of the Common Stock are subject to and qualified by the rights of the holders of the Preferred Stock.

2. **Dividends.** Subject to the rights and preferences of any then outstanding Preferred Stock, the holders of shares of Common Stock shall be entitled to receive such dividends from time to time as may be declared by the Board of Directors out of the funds lawfully available therefor.

3. Liquidation. Subject to the rights and preferences of any then outstanding Preferred Stock, upon any Liquidation Event (as defined in Section IV.3) or any Extraordinary Transaction that is deemed to be a Liquidation Event pursuant to Section IV.3(c)(i), or any other distribution of assets of the Corporation to its shareholders for the purpose of winding up its affairs, the holders of Common Stock shall be entitled to receive all assets of the Corporation available for distribution to its shareholders.

4. Voting. Subject to the provisions of applicable law and the rights of any then outstanding Preferred Stock, each holder of one or more shares of Common Stock will be entitled to receive notice of, to attend, and to vote (in person or by proxy) at all meetings of shareholders of the Corporation (other than separate meetings of the holders of any other class or series of shares) and will be entitled to one vote for each share of Common Stock held of record as of the record date for such meeting (and written actions in lieu of meetings). Except as provided by law, the holders of Common Stock and of any other outstanding series of voting Common Stock shall vote together with the holders of the Preferred Stock as a single class.

Article XI. Director Liability; Indemnification

1. The liability of the directors of the Corporation for monetary damages shall be eliminated to the fullest extent permissible under California law.

2. The Corporation is authorized to provide indemnification of agents (as defined in Section 317 of the General Corporation Law of California) through bylaw provisions, agreements with the agents, vote of shareholders or disinterested directors, or otherwise, in excess of the indemnification otherwise permitted by Section 317 of the General Corporation Law of California, subject only to the limits set forth in Section 204 of the General Corporation Law of California with respect to actions for breach of duty to the Corporation or its shareholders. The Corporation is further authorized to provide insurance for agents as set forth in Section 317 of the General Corporation Law of California, provided that, in cases where the Corporation owns all or a portion of the shares (or other capital stock or equity) of the entity issuing the insurance policy, such company and/or the policy must meet one of the two sets of conditions set forth in Section 317, as amended.

3. Any repeal or modification of the foregoing provisions of this Article X by the shareholders of the Corporation shall not adversely affect any right or protection of an agent of the Corporation existing at the time of such repeal or modification.