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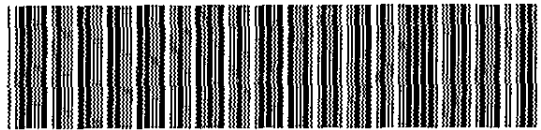
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DIVISION OF CORPORATION

C. Ouellette DEC 18 2003



CORPORATION SERVICE COMPANY™

ACCOUNT NO. : 072100000032  
REFERENCE : 361502 7195153  
AUTHORIZATION : *Patricia Pijet*  
COST LIMIT : \$ 43.75

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ORDER DATE : December 16, 2003  
ORDER TIME : 10:31 AM  
ORDER NO. : 361502-005  
CUSTOMER NO: 7195153  
CUSTOMER: Jason Perlman, Esq  
Jason E. Perlman, Esq.  
4040 Sheridan Street  
Hollywood, FL 33021  
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DOMESTIC AMENDMENT FILING

NAME: OMNICLUSTER TECHNOLOGIES,  
INC.

EFFECTIVE DATE:

XX ARTICLES OF AMENDMENT  
       RESTATED ARTICLES OF INCORPORATION

PLEASE RETURN THE FOLLOWING AS PROOF OF FILING:

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       PLAIN STAMPED COPY  
       CERTIFICATE OF GOOD STANDING

CONTACT PERSON: Troy Todd -- EXT# 1140  
EXAMINER'S INITIALS: \_\_\_\_\_



FLORIDA DEPARTMENT OF STATE  
Glenda E. Hood  
Secretary of State

December 16, 2003

CSC  
ATTN: TROY  
TALLAHASSEE, FL

SUBJECT: OMNICLUSTER TECHNOLOGIES, INC.  
Ref. Number: P00000045946

We have received your document for OMNICLUSTER TECHNOLOGIES, INC. and the authorization to debit your account in the amount of \$~~13~~. However, the document has not been filed and is being returned for the following:

You will need to send in your document with original signatures before you can obtain a filed status for this amendment.

If you have any questions concerning the filing of your document, please call (850) 245-6903.

Cheryl Coulliette  
Document Specialist

Letter Number: 703A00067384

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EXECUTION COPY

ARTICLES OF AMENDMENT TO THE AMENDED AND RESTATED ARTICLES OF  
INCORPORATION  
OF OMNICLUSTER TECHNOLOGIES, INC., A FLORIDA CORPORATION

In accordance with the terms of Section 607.1006 of the Florida Business Corporation Act, OMNICLUSTER TECHNOLOGIES, INC., a Florida corporation (the "Corporation") hereby adopts the following amendments to its Articles of Incorporation:

1. Article V is hereby amended to read in its entirety as follows:

**ARTICLE V**

**CAPITAL STOCK**

Effective immediately upon the filing of these Articles of Amendment (the "Effective Time"), (i) a one-for-ten reverse stock split of the Corporation's common stock shall become effective, pursuant to which each ten shares of common stock outstanding and held of record by each stockholder of the Corporation (including treasury shares) immediately prior to the Effective Time shall be reclassified and combined into one share of common stock automatically and without any action by the holder thereof upon the Effective Time and shall represent one share of common stock from and after the Effective Time; (ii) a one-for-ten reverse stock split of the Corporation's preferred stock shall become effective (the "Preferred Reverse Stock Split"), pursuant to which each ten shares of preferred stock outstanding and held of record by each stockholder of the Corporation (including treasury shares) immediately prior to the Effective Time shall be reclassified and combined into one share of preferred stock automatically and without any action by the holder thereof upon the Effective Time and shall represent one share of common stock from and after the Effective Time. Immediately prior to the Effective Time (the "Conversion Time"), (i) each outstanding share of Series A-1 Convertible Preferred Stock shall be reclassified into one share of Series A Convertible Preferred Stock automatically and without any action by the holder thereof and shall represent one share of Series A Convertible Preferred Stock from and after the Conversion Time until the Effective Time (upon which time such shares shall be subject to the Preferred Reverse Stock Split described above), (ii) each outstanding share of Series A-2 Convertible Preferred Stock shall be reclassified into one share of Series A Convertible Preferred Stock automatically and without any action by the holder thereof and shall represent one share of Series A Convertible Preferred Stock from and after the Conversion Time until the Effective Time (upon which time such shares shall be subject to the Preferred Reverse Stock Split described above) and (iii) the preferred stock designations with respect to each of the Series A-1 Convertible Preferred Stock, Series A-2 Convertible Preferred Stock and Series A-3 Convertible Preferred Stock are hereby deleted from the Corporation's Articles of Incorporation in their entirety.

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The Corporation shall have the authority to issue a maximum of 51,000,000 shares of Common Stock having a par value of \$0.0001 per share and 40,680,600 shares of Preferred Stock having a par value of \$0.0001 per share.

The Preferred Stock may be issued in one or more series as shall from time to time be created and authorized to be issued by the Board of Directors as hereinafter provided. The Board of Directors is expressly authorized, by resolution or resolutions from time to time adopted providing for the issuance of any series of the Preferred Stock, to the extent not fixed by the provisions hereinafter set forth or otherwise provided by law, to determine that any series of Preferred Stock shall be without voting powers and to fix and state the voting powers, full or limited, if any, the designations, powers, preferences and relative, participating, options and other special rights, if any, of the shares of each series of the Preferred Stock, and the qualifications, limitations and restrictions thereof. The number of votes cast for the amendment by the shareholders was sufficient for approval.

2,111,600 shares of Preferred Stock are designated as Series A Convertible Preferred Stock having no par value with the powers, preferences and relative participating, optional or other special rights, and qualification, limitations or restrictions set forth in Exhibit "A" hereto and 38,569,000 shares of Preferred Stock are designated as Series X Convertible Preferred Stock having no par value with the powers, preferences and relative participating, optional or other special rights, and qualification, limitations or restrictions set forth in Exhibit "B" hereto.

2. Article VIII is hereby amended to read as follows:

#### **Article VIII.**

##### **Right to Elect Default Directors**

For so long as any holder of the Corporation's Series X Preferred Stock is a Lender, as that term is defined in that certain Note Purchase Agreement, dated December 17, 2003, between the Corporation and the parties identified as Lenders therein (the "Note Purchase Agreement"), if an Event of Default, as that term is defined in the Note Purchase Agreement, has occurred and continues uncured for 30 days after written notice to the Board, the number of directors constituting the Corporation's Board shall, upon the written request of the holders of a majority of the Series X Preferred Stock (the "Majority Holders"), be increased by three (or such other amount required to give the holders of Series X Preferred Stock the right to elect a majority of the Board), and the holders of Series X Preferred Stock shall have the special right, voting separately as a single class and to the exclusion of all other classes of the Corporation's stock, to elect individuals to fill such newly created directorships (the "Default Directors"), to remove any individuals elected to be Default Directors and to fill any vacancies among the Default Directors. The special right of the holders of Series X Preferred Stock to elect these Default Directors may be exercised at the special meeting called pursuant to this Article VIII, at any annual or other special meeting of shareholders and, to the extent and in the manner permitted by applicable law and the Corporation's bylaws, pursuant to a written consent in lieu of a shareholders meeting. Such special right shall continue until such time as there is no longer any Event of Default in existence, at which time such special right shall terminate and each Default Director shall

promptly sign, subject to revesting upon the occurrence and continuation of any Event of Default which gives rise to such special right hereunder.

At any time when such special right has vested in the holders of Series X Preferred Stock, a proper officer of the Corporation shall, upon the written request of the Majority Holders, addressed to the secretary of the Corporation, either call a special meeting of the holders of Series X Preferred Stock or circulate a written consent in lieu of such meeting to all holders of Series X Preferred Stock for the purpose of electing directors pursuant to this subparagraph. Such meeting shall be held at the earliest legally permissible date at the principal office of the Corporation, or at such other place designated by the holders of at least 10% of the Series X Preferred Stock. If such meeting has not been called or a written consent not been circulated by a proper officer of the Corporation within 10 days after personal service of such written request upon the secretary of the Corporation or within 20 days after mailing the same to the secretary of the Corporation at its principal office, then the Majority Holders may designate in writing one of their number to call such meeting at the expense of the Corporation, and such meeting may be called by such Person so designated upon the notice required for annual meetings of shareholders and shall be held at the Corporation's principal office, or at such other place designated by the Majority Holders. Any holder of Series X Preferred Stock so designated shall be given access to the stock record books of the Corporation for the purpose of causing a meeting of shareholders to be called pursuant to this Article VIII.

At any meeting or at any adjournment thereof at which the holders of Series X Preferred Stock have the special right to elect directors, the presence, in person or by proxy, of the holders of a majority of the then outstanding shares of Series X Preferred Stock shall be required to constitute a quorum for the election or removal of any director by the holders of Series X Preferred Stock exercising such special right. The vote of a majority of such quorum shall be required to elect or remove any such director.

Any director so elected by the holders of Series X Preferred Stock shall continue to serve as a director until the expiration of the lesser of (a) the date on which there is no longer any Event of Default in existence or (b) the remaining period of the full term for which such director has been elected. After the expiration of such period or when the full term for which such director has been elected ceases (provided that the special right to elect directors has terminated), as the case may be, the number of directors constituting the Board of the Corporation shall decrease to such number as constituted the whole Board of the Corporation immediately prior to the occurrence of the Event or Events of Default giving rise to the special right to elect directors set forth herein.

3. The foregoing amendment was adopted by a majority of the Shareholders of the Corporation eligible to vote by a Written Consent signed by them on December 15, 2003, manifesting their intention that this amendment be adopted, pursuant to Section 607.1003, Florida Statutes.

4. The number of votes cast for said amendment was sufficient for approval.

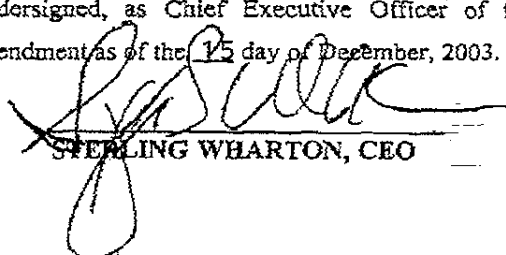
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OMNICLUSTER

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IN WITNESS WHEREOF, the undersigned, as Chief Executive Officer of the Corporation, has executed these Articles of Amendment as of the 15 day of December, 2003.

  
STERLING WHARTON, CEO

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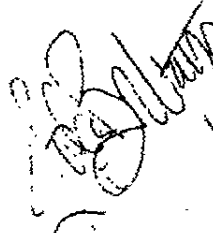
  
12-15-03  
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EXHIBIT A

**OMNICLUSTER TECHNOLOGIES, INC., SERIES A  
CONVERTIBLE PREFERRED STOCK DESIGNATION**

**Series A Convertible Preferred Stock**

Section 1. Participating Dividends. In the event that the Corporation declares or pays any dividends upon the Common Stock (whether payable in cash, securities or other property) other than dividends payable solely in shares of Common Stock, the Corporation shall also declare and pay to the holders of the Series A Preferred Stock at the same time that it declares and pays such dividends to the holders of the Common Stock, the dividends which would have been declared and paid with respect to the Common Stock issuable upon conversion of the Series A Preferred Stock had all of the outstanding Series A Preferred Stock been converted immediately prior to the record date for such dividend, or if no record date is fixed the date as of which the record holders of Common Stock entitled to such dividends are to be determined. In the event that the Corporation declares or pays any dividends upon the Series A Preferred Stock (whether payable in cash, securities or other property) other than dividends payable solely in shares of Series A Preferred Stock, the Corporation shall also declare and pay dividends to the holders of the Common Stock at the same time that it declares and pays such dividends to the holder of the Series A Preferred Stock.

Section 2. Liquidation.

(a) Payment Upon Liquidation. Upon any liquidation, dissolution or winding up of the Corporation (whether voluntary or involuntary) or upon a sale, merger or reorganization of the Corporation pursuant to which there is a Change in Ownership, each holder of Series A Preferred Stock shall be entitled to be paid an amount in cash equal to the sum of the aggregate Liquidation Value (plus all accrued and unpaid dividends thereon) of all shares of Series A Preferred Stock held by such holder plus the amount that such holder of Series A Preferred Stock would receive on an as if converted basis with the holders of the Common Stock as a single class in the distribution of assets of the Corporation with respect to the Common Stock after all distributions and payments have been made upon the Series X Preferred Stock and before any distribution or payment is made upon any Junior Securities.

If upon any such liquidation, dissolution or winding up of the Corporation or upon a sale, merger or reorganization of the Corporation pursuant to which there is a Change in Ownership, the Corporation's assets to be distributed among the holders of the Series A Preferred Stock are insufficient to permit payment to such holders of the aggregate amount which they are entitled to be paid under this Section 2, then the entire assets available to be distributed to the Corporation's stockholders after all distributions and payments due to the holders of Series X Preferred Stock have been made shall be distributed pro rata among such holders of Series A Preferred Stock based upon the aggregate Liquidation Value (plus all accrued and unpaid dividends) of the Series A Preferred Stock held by each such holder.



(b) General Provisions. Note less than 60 days prior to the payment date stated therein, the Corporation shall give written notice of any such liquidation, dissolution or winding up to each record holder of Series A Preferred Stock, setting forth in reasonable detail the amount of proceeds to be paid with respect to each share of Series X Preferred Stock, each share of Series A Preferred Stock and each share of Common Stock in connection with such liquidation, dissolution or winding up. The consolidation or merger of the Corporation into or with any other entity or entities (whether or not the Corporation is the surviving entity), the sale or transfer by the Corporation of all or any part of its asset, the reduction of the capital stock of the Corporation and any other form of recapitalization or reorganization affecting the Corporation pursuant to which control of the Company is transferred shall be deemed to be a liquidation of the Corporation within the meaning of this Section 2.

### Section 3. Redemptions

So long as any Series A Preferred Stock remains outstanding, without the prior written consent of the Majority Holders, the Corporation shall not, nor shall it permit any Subsidiary to, redeem, purchase or otherwise acquire directly or indirectly any Junior Securities, nor shall the Corporation directly or indirectly pay or declare any dividend or make any distribution upon any Junior Securities.

(a) Redemption upon Request. At any time after August 10, 2004 (the "Scheduled Redemption Date"), if there are no shares of Series X Preferred Stock outstanding, the Majority Holders shall have the right to require the Corporation to redeem all but not less than all of the Series A Preferred Stock at a price per share equal to the Liquidation Value thereof (plus all declared and accrued dividends thereon) upon 90 days written notice to the Corporation (a "Redemption Notice").

(b) Redemption Payments. For each share of the Series A Preferred Stock which is to be redeemed hereunder, the Corporation shall be obligated on the Redemption Date to pay to the holder thereof (upon surrender by such holder at the Corporation's principal office of the certificate representing such share of the Series A Preferred Stock) an amount in cash equal to the Liquidation Value of such share (plus all accrued and unpaid dividends thereon). If the funds of the Corporation legally available for redemption of such shares of the Series A Preferred Stock on any Redemption date are insufficient to redeem the total number of shares of the Series A Preferred Stock to be redeemed on such date, those funds which are legally available shall be used to redeem the maximum possible number of shares of the Series A Preferred Stock pro rata among the holders of the shares of the Series A Preferred Stock to be redeemed based upon the aggregate Liquidation Value of such shares of the Series A Preferred Stock held by each such holder (plus all accrued and unpaid dividends thereon). At any time thereafter when additional funds of the Corporation are legally available for the redemption of shares of the Series A Preferred Stock, such funds shall immediately be used to redeem the balance of the shares of the Series A Preferred Stock which the Corporation has become obligated to redeem on any Redemption Date but which it has not redeemed.

(c) Dividends After Redemption Date. No share of the Series A Preferred Stock shall be entitled to any dividends accruing after the date on which the Liquidation Value of such share

of the Series A Preferred Stock (plus all accrued and unpaid dividends thereon) is paid to the holder of such share of the Series A Preferred Stock. On such date, all rights of the holder of such share shall cease, and such share of the Series A Preferred Stock shall no longer be deemed to be issued and outstanding.

(d) Redeemed or Otherwise Acquired Shares. Any share of the Series A Preferred Stock which are redeemed or otherwise acquired by the Corporation shall be canceled and retired to authorized but unissued shares and shall not be reissued, sold or transferred.

(e) Other Redemptions or Acquisitions. The Corporation shall not, nor shall it permit any Subsidiary to, redeem or otherwise acquire any shares of Series A Preferred Stock, except as expressly authorized herein.

(f) Special Redemptions.

(i) If a Change in Ownership has occurred or the Corporation obtains knowledge that a Change in Ownership is proposed to occur, the Corporation shall give prompt written notice of such Change in Ownership describing in reasonable detail the material terms and date of consummation thereof to each holder of Series A Preferred Stock, but in any event such notice shall not be given later than five days after the occurrence of such Change in Ownership, and the Corporation shall give each holder of Series A Preferred Stock prompt written notice of any material change in the terms or timing of such transaction. Subject to the complete satisfaction of the rights of the holders of Series X Preferred Stock in connection with a Change in Ownership, which rights shall be senior to those of the holders of Series A Preferred Stock, any holder of Series A Preferred Stock may require the Corporation to redeem all or any portion of the Series A Preferred Stock owned by such holder at a price per share of Series A Preferred Stock equal to the greater of (a) the Liquidation Value thereof (plus all accrued and unpaid dividends thereon), or (b) an amount equal to the number of shares of Conversion Stock then issuable upon conversion of such shares multiplied by the consideration payable with respect to each share of Common Stock in such Change in Ownership, by giving written notice to the Corporation of such election prior to the later of (a) 21 days after receipt of the Corporation's notice and (b) five days prior to the consummation of the Change in Ownership (the "Expiration Date"). The Corporation shall give prompt written notice of any such election to all other holders of Series A Preferred Stock and within five days after the receipt thereof, and each such holder shall have until the later of (a) the Expiration Date or (b) 10 days after receipt of such second notice to request redemption hereunder (by giving written notice to the Corporation) of all or any portion of the Series A Preferred Stock owned by such holder.

Upon receipt of such election(s), the corporation shall be obligated, subject to the complete satisfaction of the rights of the holders of Series X Preferred Stock, to redeem the aggregate number of shares of Series A Preferred Stock specified therein on the later of (a) the occurrence of the Change in Ownership or (b) five days after the Corporation's receipt of such election(s). If any proposed Change in Ownership does not occur, all requests for redemption in connection therewith shall be automatically rescinded, or if there has been a material change in the terms or the timing of the transaction, any holder of Series A Preferred Stock may rescind

such holder's request for redemption by giving written notice of such rescission to the Corporation.

(ii) If a Fundamental Change is proposed to occur, the Corporation shall give written notice of such Fundamental Change describing in reasonable detail the material terms and date of consummation thereof to each holder of Series A Preferred Stock not more than 45 days nor less than 20 days prior to the consummation of such Fundamental Change, and the Corporation shall give each holder of Series A Preferred Stock prompt written notice of any material change in the terms or timing of such transaction. Subject to the complete satisfaction of the rights of the holders of Series X Preferred Stock which shall be senior to the rights of the holders of Series A Preferred Stock in the event of any Fundamental Change, any holder of Series A Preferred Stock may require the corporation to redeem all or any portion of the Series A Preferred Stock owned by such holder at a price per share equal to the greater of (a) Liquidation Value thereof (plus all accrued and unpaid dividends thereon) or (b) an amount equal to the number of shares of Conversion Stock then issuable upon conversion of such Share multiplied by the consideration payable with respect to each share of Common Stock in such Fundamental Change, by giving written notice to the Corporation of such election prior to the later of (a) ten days prior to the consummation of the Fundamental Change or (b) ten days after receipt of notice from the Corporation. The Corporation shall give prompt written notice of such election to all other holders of Series A Preferred Stock (but in any event within five days prior to the consummation of the Fundamental Change), and each such holder shall have until two days after the receipt of such notice to request redemption (by written notice give to the Corporation) of all or any portion of the Series A Preferred Stock owned by such holder.

Upon receipt of such election(s), the Corporation shall be obligated to redeem the aggregate number of shares of Series A Preferred Stock specified therein upon the consummation of such Fundamental Change. If any proposed Fundamental Change does not occur, all requests for redemption in connection therewith shall be automatically rescinded, or if there has been a material change in the terms or the timing of the transaction, any holder of Series A Preferred Stock may rescind such holder's request for redemption by delivering written notice thereof to the Corporation prior to the consummation of the transaction.

#### Section 4. Voting Rights.

(a) The holders of the series A Preferred Stock shall be entitled to notice of all stockholders meetings in accordance with the Corporation's bylaws, and the holders of the Series A Preferred Stock shall be entitled to vote on all matters submitted to the stockholders for a vote together with the holders of the Common Stock voting together as a single class with each share of Common Stock entitled to one vote per share and each share of Series A Preferred Stock entitled to one vote for each share of Common Stock issuable upon conversion of the Series A Preferred Stock as of the record date for such vote or, if no record date is specified, as of the date of such vote.

(b) The affirmative vote of the Majority Holders, acting by written consent or voting in person or by proxy, at a special or annual meeting of stockholders called for the purpose, shall

be necessary to authorize the Corporation to take any of the following actions (herein, each a "Restricted Action"):

(i) authorize, or increase or permit any Subsidiary to authorize or increase, the authorized number of shares of, or issue additional shares of Series A Preferred Stock or any class or series of the Corporation's or any Subsidiary's capital stock or options, warrants or other rights to acquire any such capital stock ranking with respect to liquidation preference, dividends or voting rights, senior in right to, or pari passu with the Series A Preferred Stock;

(ii) amend, repeal or change, directly or indirectly, any of the provisions of the Articles of Incorporation of the Corporation or the bylaws of the Corporation in any manner that would alter or change the powers, preferences or special rights of the shares of Series A Preferred Stock so as to affect them adversely;

(iii) authorize or effect, or permit any Material Subsidiary to authorize or effect, the sale, lease, license, abandonment or other disposition of all or substantially all of the assets of the Corporation or any Material Subsidiary or the merger or consolidation of the Corporation or any Material Subsidiary with any other Person as a result of which the shareholders of the Corporation immediately prior to such merger and consolidation shall own less than a majority of the voting securities of the surviving corporation, unless such transaction results in each holder of Series A Preferred Stock, or its successor or assigns as the case may be receiving proceeds equal to or exceeding the greater of (a) four (4) times the original aggregate purchase price of the Series A Preferred Stock or (b) a 50% internal rate of return (in each case, based on the original \$5.00 per share valuation (after taking account of the Preferred Reverse Stock Split) of the Series A Preferred Stock)

(iv) authorize the Corporation to, or permit any Subsidiary to incur, create, assume, become or be liable, directly, indirectly or contingently, in any manner with respect to, or permit to exist, any indebtedness or liability for borrowed money, other than indebtedness under capital leases or the like, if the aggregate of all such outstanding indebtedness and liabilities of the Corporation or any Subsidiary exceeds the principal amount of \$200,000;

(v) authorize or effect the declaration or payment of dividends or other distributions upon, or, pursuant to a stock repurchase plan adopted by the Board, redeem or repurchase any equity securities of the Corporation;

(vi) authorize or effect an amendment or change to the Corporation's Articles of Incorporation or bylaws to increase the size of the Corporation's Board beyond 5 Persons; and

(vii) authorize or effect any increase in the number of shares of Common Stock reserved for issuance pursuant to the Corporation's Stock Option Plan.

## Section 5. Conversion.

### (a) Conversion Procedure.

(i) At any time and from time to time, any holder of Series A Preferred Stock may convert all or any portion of the Series A Preferred Stock (including any fraction of a share) held by such holder into a number of shares of Conversion Stock computed by multiplying the number of shares to be converted by the Conversion Value, and dividing the result by the Conversion Price then in effect. All shares of Series A Preferred Stock shall automatically convert into Common Stock at the same ratio set forth in the preceding sentence upon (A) the election of the Majority Holders or (B) the consummation of a Qualified Public Offering.

(ii) Except as otherwise provided herein, each conversion of Series A Preferred Stock shall be deemed to have been converted as of the close of business on the date on which the certificate or certificates representing the Series A Preferred Stock to be converted have been surrendered for conversion at the principal office of the corporation. At the time any such conversion has been effected, the rights of the holder of the shares converted as a holder of Series A Preferred Stock shall cease and the Person or Persons in whose name or names any certificate or certificates for shares of a Conversion Stock are to be issued upon such conversion shall be deemed to have become the holder or holders of record of the shares of Conversion Stock represented thereby,

(iii) The conversion rights of any share subject to redemption hereunder shall terminate on the Redemption Date for such share unless the Corporation has failed to pay to the holder thereof the Liquidation Value of such share (plus all accrued and unpaid dividends thereon).

(iv) Notwithstanding any other provision hereof, if a conversion of Series A Preferred Stock is to be made in connection with a Public Offering, a Change in Ownership, a Fundamental Change or other transaction affecting the Corporation, the conversion of any shares of Series A Preferred Stock may, at the election of the holder thereof, be conditioned upon the consummation of such transaction, in which case such conversion shall not be deemed to be effective until such transaction has been consummated.

(v) As soon as possible after a conversion has been effected (but in any event with five business days in the case of subparagraph (a) below), the Corporation shall deliver to the converting holder:

(1) a certificate or certificates representing the number of shares of Conversion Stock issuable; by reason of such conversion in such name or names and such denomination or denominations as the converting holder has specified; and

(2) a certificate representing any shares of Series A Preferred Stock which were represented by the certificate or certificates delivered to the Corporation in connection with such conversion but which were not converted.

(vi) If for any reason the Corporation is unable to pay any portion of the accrued and unpaid dividends on Series A Preferred Stock being converted, such dividends shall be paid as a note or shall be paid in cash as soon as practicable for the Company to pay such dividends.

(vii) The issuance of certificates for shares of Conversion Stock upon conversion of Series A Preferred Stock shall be made without charge to the holders of such Series A Preferred Stock for any issuance tax in respect thereof or other cost incurred by the Corporation in connection with such conversion and the related issuance of shares of Conversion Stock. Upon conversion of each share of Series A Preferred Stock, the Corporation shall take all such actions as are necessary in order to insure that the Conversion Stock issuable with respect to such conversion shall be validly issued, fully paid and nonassessable, free and clear of all taxes, liens, charges and encumbrances with respect to the issuance thereof.

(viii) The Corporation shall not close its books against the transfer of Series A Preferred Stock or of Conversion Stock issued or issuable upon conversion of Series A Preferred Stock in any manner which interferes with the timely conversion of Series A Preferred Stock. The corporation shall assist and cooperate with any holder of shares of Series A Preferred Stock, at such holder's expense, required to make any governmental filings or obtain any governmental approval prior to or in connection with any conversion of shares hereunder (including, without limitation, making any filings required to be made by the Corporation).

(ix) The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Conversion Stock, solely for the purpose of issuance upon the conversion of the Series A Preferred Stock, such number of shares of Conversion Stock issuable upon the conversion of all outstanding shares of Series A Preferred Stock. All shares of Conversion Stock which are so issuable shall, when issued, be duly and validly issued, fully paid and nonassessable and free from all taxes, liens and charges. The Corporation shall take all such actions as may be necessary to assure that all such shares of Conversion Stock may be so issued without violation of any applicable law or governmental regulation or any requirements of any domestic securities exchange upon which shares of Conversion Stock may be listed (except for official notice of issuance which shall be promptly delivered by the Corporation upon each such issuance). The Corporation shall not take any action which would cause the number of authorized but unissued shares of Conversion Stock to be less than the number of such shares required to be reserved hereunder for issuance upon conversion of the Series A Preferred Stock.

(x) If any fractional interest in a share of Conversion Stock would, except for the provisions of this subparagraph, be delivered upon any conversion of the Series A Preferred Stock, the Corporation, in lieu of delivering the fractional share therefore, shall pay an amount to the holder thereof equal to the Market Price of such fractional interest as of the date of conversion.

(b) Conversion Price.

(i) The Initial Conversion Price shall be \$0.50. In order to prevent dilution of the conversion rights granted under this Section 5, the Conversion Price shall be subject to adjustment from time to time pursuant to Section 5.

(ii) If and whenever on or after the Effective Time, the Corporation issues or sells, or in accordance with paragraph 5(c) is deemed to have issued or sold, any shares of its Common Stock or equivalent thereof (other than (A) to Persons (but not Founders) pursuant to the Corporation's Stock Option Plan subject to Section 5(b)(iii) or (B) upon the exercise or conversion of Common Stock equivalents outstanding at the Effective Time) for a consideration per share less than the Conversion Price in effect immediately prior to the time of such issue or sale, then forthwith upon such issue or sale the Conversion Price shall be reduced to the Conversion Price determined by dividing (1) the sum of (x) the product derived by multiplying the Conversion Price in effect immediately prior to such issue or sale times the number of shares of Common Stock Deemed Outstanding immediately prior to such issue or sale, plus (y) the consideration, if any, received by the Corporation upon such issue or sale, by (2) the number of shares of Common Stock Deemed Outstanding immediately after such issue or sale.

(iii) There shall be no adjustment in the Conversion Price as a result of any issue or sale (or deemed issue or sale) of shares of Common Stock to employees, directors and consultants (but not Founders) of the Corporation and its Subsidiaries pursuant to stock option plans and stock ownership plans approved by the Corporation's Board and the Majority Holders; provided, however, in the event any person (other than a person exercising an option) purchases capital stock of the Corporation as a result of preemptive or other rights that relate to the Corporation's stock option plan, the Conversion Price shall be adjusted so that the holders of the Series A Preferred Stock receive the same percentage interest in the Corporation upon conversion after such purchases as they would have received prior to such purchases, in each case, as and when each such purchase occurs.

(iv) In addition to the antidilution protection provided to the holders of Shares of Series A Preferred Stock in this Section 5, the holders of Shares of Series A Preferred Stock shall receive additional antidilution protection to the extent any more favorable protection is given to International Business Machines Corporation so that such holders have at least equal protection.

(c) Effect on Conversion Price of Certain Events. For purposes of determining the adjusted Conversion Price under paragraph 5(b), the following shall be applicable:

(i) Issuance of Rights or Options. If the Corporation in any manner grants or sells any Options and the price per share for which Common Stock is issuable upon the exercise of such Options, or upon conversion or exchange of any Convertible Securities issuable upon exercise of such Options, is less than the Conversion Price in effect immediately prior to the time of the granting or sale of such Options, then the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon conversion or exchange of the total maximum amount of such Convertible Securities issuable upon the exercise of such Options shall be deemed to be outstanding and to have been issued and sold by the Corporation at the time if the granting or sale of such Options for such price per share. For purposes of this paragraph, the "price per share for which Common Stock is issuable" shall be determined by dividing (A) the total amount, if any, received or receivable by the Corporation as consideration for the granting or sale of such Options, plus the minimum aggregate amount of additional

consideration payable to the Corporation upon exercise of all such Options, plus in the case of such Options which relate to Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable to the Corporation upon the issuance or sale of such Convertible Securities and the conversion or exchange thereof, by (B) the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon the conversion or exchange of all such Convertible Securities issuable upon the exercise of such Options. No further adjustment of the Conversion Price shall be made when Convertible Securities are actually issued upon the exercise of such Options or when Common Stock is actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(ii) Issuance of Convertible Securities. If the Corporation in any manner issues or sells any Convertible Securities and the price per share for which Common Stock is issuable upon conversion or exchange thereof is less than the Conversion Price in effect immediately prior to the time of such issue or sale, then the maximum number of shares of Common Stock issuable upon conversion or exchange of such Convertible Securities shall be deemed to be outstanding and to have been issued and sold by the Corporation at the time of the issuance or sale of such Convertible Securities for such price per share. For the purposes of this paragraph, the "price per share for which Common Stock is issuable" shall be determined by dividing (A) the total amount received or receivable by the Corporation as consideration for the issue or sale of such Convertible Securities, plus the minimum aggregate amount of additional consideration, if any, payable to the Corporation upon the conversion or exchange thereof, by (B) the total maximum number of shares of Common Stock issuable upon the conversion or exchange of all such Convertible Securities. No further adjustment of the Conversion Price shall be made when Common Stock is actually issued upon the conversion or exchange of such Convertible Securities, and if any such issue or sale of such Convertible Securities is made upon exercise of any Options for which adjustments of the Conversion Price had been or are to be made pursuant to other provisions of this Section 5, no further adjustment of the Conversion Price shall be made by reason of such issue or sale.

(iii) Change in Option Price or Conversion Rate. If the purchase price provided for in any Options, the additional consideration, if any, payable upon the conversion or exchange of any Convertible Securities or the rate at which any Convertible Securities are convertible into or exchangeable for Common Stock changes at any time, the Conversion Price in effect at the time of such change shall be immediately adjusted to the Conversion Price which would have been in effect at such time had such Options or Convertible Securities still outstanding provided for such changed purchase price, additional consideration or conversion rate, as the case may be, at the time initially granted issued or sold; provided, that if such adjustment would result in an increase of the Conversion Price then in effect, such adjustment shall not be effective until 30 days after written notice thereof has been given by the Corporation to all holders of the Series A Preferred Stock. For purposes of paragraph 5(c), if the terms of any Option or Convertible Security which was outstanding as of the date of issuance of the Series A Preferred Stock are changed in the manner described in the immediately preceding sentence, then such Option or Convertible Security and the Common Stock deemed issuable upon exercise, conversion or exchange thereof shall be deemed to have been issued as of the date of such



change; provided that no such change shall at any time cause the Conversion Price hereunder to be increased.

(iv) Treatment of Expired Options and Unexercised Convertible Securities.

Upon the expiration of any Option or the termination of any right to convert or exchange any Convertible Security without the exercise of any such Option or right, the Conversion Price then in effect hereunder shall be adjusted immediately to the Conversion Price which would have been effect at the time of such expiration or termination had such Option or Convertible Security, to the extent outstanding immediately prior to such expiration or termination, never been issued; provided, that if such expiration or termination would result in an increase in the Conversion Price then in effect, such increase shall not be effective until 30 days after written notice thereof has been given to all holders of the Series A Preferred Stock. For purposes of paragraph 5(c), the expiration or termination of any Option or Convertible Security which was outstanding as of the date of issuance of the Series A Preferred Stock shall not cause the Conversion Price hereunder to be adjusted unless, and only to the extent that, a change in the terms of such Option or Convertible Security caused it to be deemed to have been issued after the date of issuance of the Series A Preferred Stock.

(v) Calculation of Consideration Received.

If any Common Stock, Option or Convertible Security is issued or sold or deemed to have been issued or sold for cash, the consideration received therefore shall be deemed to be the amount received by the Corporation therefore (net of discounts, commissions and related expenses). If any Common Stock, Option or Convertible Security is issued or sold for a consideration other than cash, the amount of the consideration other than cash received by the Corporation shall be the fair value of such consideration consists of securities, in which case the amount of consideration received by the Corporation shall be the Market Price thereof as of the date of receipt. If any Common Stock, Option or Convertible Security is issued to the owners of the non-surviving entity in connection with any merger in which the Corporation is the surviving corporation, the amount of consideration therefore shall be deemed to be the fair value of such portion of the net assets and business of the non-surviving entity as is attributable to such Common Stock, Option or Convertible Security, as the case may be. The fair value of any consideration other than cash and securities shall be determined jointly by the Corporation and the Majority Holders. If such parties are unable to reach agreement within a reasonable period of time, the fair value of such consideration shall be determined by an independent appraiser experienced in valuing such type of consideration jointly selected by the Corporation and the Majority Holders. The determination of such appraiser shall be final and binding upon the parties, and the fees and expenses of such appraiser shall become by the Corporation.

(vi) Integrated Transactions.

In case any Option is issued in connection with the issue or sale of other securities of the Corporation, together comprising one integrated transaction in which no specific consideration is allocated to such Option by the parties thereto, the Option shall be deemed to have been issued for a consideration of \$.01.

(vii) Treasury Shares.

The number of shares of Common Stock outstanding at any given time shall not include shares owned or held by or for the account of the Corporation or

any Subsidiary, and the disposition of any shares so owned or held shall be considered an issue or sale of Common Stock.

(viii) Record Date. If the Corporation takes a record of the holders of Common Stock for the purposes of entitling them (a) to receive a dividend or other distribution payable in Common Stock, Options or in Convertible Securities or (b) to subscribe for or purchase Common Stock, Options or Convertible Securities, then such record date shall be deemed to be the date of the issue or sale of the shares of Common Stock deemed to have been issued or sold upon the declaration of such dividend or upon the making of such other distribution or the date of the granting of such right of subscription or purchase, as the case may be.

(d) Subdivision or Combination of Common Stock. If the Corporation at any time subdivides (by any stock split, stock dividend, recapitalization or otherwise) one or more classes of its outstanding shares of Common Stock into a greater number of shares, the Conversion Price in effect immediately prior to such subdivision shall be proportionately reduced, and if the Corporation at any time combines (by reverse stock split or otherwise) one or more classes of its outstanding shares of Common Stock into a smaller number of shares, the Conversion Price in effect immediately prior to such combination shall be proportionately increased.

(e) Reorganization, Reclassification, Consolidation, Merger or Sale. Any recapitalization, reorganization, reclassification, consolidation, merger, sale of all or substantially all of the Corporation's assets or other transactions, in each case which is effected in such a manner that the holders of Common Stock are entitled to receive (either directly or upon subsequent liquidation) stock, securities or assets with respect to or in exchange for Common Stock, is referred to herein as an "Organic Change." Prior the consummation of any Organic Change, the Corporation shall make appropriate provisions in form and substance satisfactory to the Majority Holders, to insure that each of the holders of Series A Preferred Stock shall thereafter have the right to acquire and receive, in lieu of or in addition to (as the case may be) the shares of Conversion Stock immediately theretofore acquirable and receivable upon the conversion of such holder would have received in connection with such Organic Change if such holder had converted its Series A Preferred Stock immediately prior to such Organic Change. In each such case, the Corporation shall also make appropriate provisions in form and substance satisfactory to the Majority Holders, to insure that the provisions of this Section 5 and Section 6 hereof shall thereafter be applicable to the Series A Preferred Stock (including, in the case of any such consolidation, merger or sale in which the successor entity or purchasing entity is other than the Corporation, an immediate adjustment of the Conversion Price to the value for the Common Stock reflected by the terms of such consolidation, merger or sale, and a corresponding immediate adjustment in the number of shares of Convertible Stock acquirable and receivable upon conversion of Series A Preferred Stock, if the value so reflected is less than the Conversion Price in effect immediately prior to such consolidation, merger or sale). The Corporation shall not effect any such consolidation, merger or sale, unless prior to the consummation thereof, the successor entity (if other than the Corporation) resulting from consolidation or merger or the entity purchasing such assets assumes by written instrument in form and substance satisfactory to the Majority Holders, the obligation to deliver to each such holder such shares of stock, securities or assets as, in accordance with the foregoing provisions, such holder may be entitled to acquire.

(f) Certain Events. If any event occurs of the type contemplated by the provisions of this Section 5 but not expressly provided for by such provisions (including, without limitation, the granting of stock appreciation rights, phantom stock rights or other rights with equity features), then the Corporation's Board shall make an appropriate adjustment in the Conversion Price so as to protect the rights, phantom stock rights or other rights with equity features), then the Corporation's Board shall make an appropriate adjustment in the Conversion Price so as to protect the rights of the holders of Series A Preferred Stock; provided that no such adjustment shall increase the Conversion Price as otherwise determined pursuant to this Section 5(F) or decrease the number of shares of Conversion Stock issuable upon conversion of each Share of Series A Preferred Stock.

(g) Notices.

(i) Immediately upon any adjustment of the Conversion Price, the Corporation shall give written notice thereof to all holders of Series A Preferred Stock, setting forth in reasonable detail and certifying the calculation of such adjustment.

(ii) The Corporation shall give written notice to all holders of Series A Preferred Stock at least 20 days prior to the date on which the Corporation closes its books or takes a record (a) with respect to any dividend or distribution upon Common Stock, (b) with respect to any pro rata subscription offer to holders of Common Stock or (c) for determining rights to vote with respect to any Organic Change, dissolution or liquidation.

(iii) The Corporation shall also give written notice to the holders of Series A Preferred Stock at least 20 days prior to the date on which any Organic Change shall take place.

(h) Special Mandatory Conversions.

(i) On or about December 17, 2003, the Corporation shall offer the holders of its Preferred Stock the opportunity to purchase 8% Senior Secured Convertible Promissory Notes (the "Notes") pursuant to the terms of a Note Purchase Agreement to be entered into by and among the Corporation and the purchasers of the Notes (the "Note Purchase Agreement"). Each holder of Preferred Stock ("Holder" and collectively, the "Holders") shall be offered the opportunity to purchase its Pro Rata Portion (as defined in the Note Purchase Agreement) of the Notes. The Notes shall be offered for sale in three equal tranches (herein referred to as the "First Tranche", "Second Tranche" and "Third Tranche") as described in the Note Purchase Agreement. The Corporation shall establish a date by which the Holders must purchase their Pro Rata Portion of the First Tranche (the "First Tranche Closing Date") which shall be no later than December 31, 2003. As of 11:59 p.m. (east coast time) on the First Tranche Closing Date, all shares of Series A Preferred Stock owned by Holders (or their successors or assigns) that do not purchase their Pro Rata Portion of the first tranche shall automatically be converted into such number of shares of Common Stock computed by multiplying the number of shares of Series A Preferred Stock owned by such Holder times Conversion Value, and dividing the result by the Conversion Price then in effect. Alternatively, if a Holder purchases its Pro Rata Portion of the First Tranche then as of the time of such purchase one-third (1/3) of the number of shares of Series A Preferred Stock owned by such

Holder (or its successors or assigns) shall automatically be converted into shares of Series X Preferred Stock, such that each such share of Series A Preferred Stock that is to be converted into shares of Series X Preferred Stock shall be converted into ten shares of Series X Preferred Stock.

(ii) If a Holder who has purchased its Pro Rata Portion of the First Tranche also purchases its Pro Rata Portion of the Second Tranche then as of the time such Holders purchases its Pro Rata Portion of the Second Tranche, 50% of the remaining number of shares of Series A Preferred Stock owned by such Holder (or its successors or assigns) shall automatically be converted into shares of Series X Preferred Stock, such that each such share of Series A Preferred Stock that is to be converted into shares of Series X Preferred Stock shall be converted into ten shares of Series X Preferred Stock. Alternatively, unless otherwise agreed to by the Corporation and the holders of at least 50% of the outstanding principal of the Notes, if a Holder purchases its Pro Rata Portion of the First Tranche but fails to purchase its Pro Rata Portion of the Second Tranche by a March 15, 2004 then as of 11:59 p.m. (east coast time) on such date all of the remaining shares of Series A Preferred Stock owned by such Holder (or its successors or assigns) shall automatically be converted into such number of shares of Common Stock computed by multiplying the number of shares of Series A Preferred Stock then owned by such Holder (or its successors or assigns) times Conversion Value, and dividing the result by the Conversion Price then in effect.

(iii) If a Holder who has purchased its Pro Rata Portion of the First Tranche and Second Tranche also purchases its Pro Rata Portion of the Third Tranche then as of the time such Holders purchases its Pro Rata Portion of the Third Tranche, all of the remaining shares of Series A Preferred Stock owned by such Holder (or its successors or assigns) shall automatically be converted into shares of Series X Preferred Stock, such that each such share of Series A Preferred Stock that is to be converted into shares of Series X Preferred Stock shall be converted into ten shares of Series X Preferred Stock. Alternatively, unless otherwise agreed to by the Corporation and the holders of at least 50% of the outstanding principal of the Notes, if a Holder has purchased its Pro Rata Portion of the First Tranche and the Second Tranche but fails to purchase its Pro Rata Portion of the Third Tranche by June 15, 2004 then as of 11:59 p.m. (east coast time) on such date all of the remaining shares of Series A Preferred Stock owned by such Holder (or its successors or assigns) shall automatically be converted into such number of shares of Common Stock computed by multiplying the number of shares of Series A Preferred Stock then owned by such Holder (or its successors or assigns) times Conversion Value, and dividing the result by the Conversion Price then in effect.

(iv) If a Change in Control occurs prior to the closing of the Third Tranche, then immediately prior to such Change in Control, all shares of Series A Preferred Stock owned immediately prior to such Change in Control by each Holder (or its successors or assigns) which has purchased its Pro Rata Portion of each Tranche that has closed prior to such Change in Control shall automatically be converted into shares of Series X Preferred Stock, such that each such share of Series A Preferred Stock that is to be converted into shares of Series X Preferred Stock shall be converted into ten shares of Series X Preferred Stock.

(v) Each automatic conversion of shares of Series A Preferred Stock pursuant to the terms of this Section 5(h) is referred to as a "Special Mandatory Conversion. All Holders shall be given written notice of each Special Mandatory Conversion and the place

designated for mandatory conversion of their shares of Series A Preferred Stock. Such notice need not be given in advance of the occurrence of the Special Mandatory Conversion. Such notice shall be sent by first class or registered mail, postage prepaid, to each Holder, at such holder's address last shown on the records of the transfer agent for the Series A Preferred Stock (or the records of the Corporation, if it serves as its own transfer agent). Upon receipt of such notice, each Holder shall surrender its certificate or certificates for all such shares of Series A Preferred Stock being converted pursuant to the terms of this Section 5(h) to the Corporation at the place designated in such notice, and shall thereafter receive certificates for the number of shares of Common Stock or Series X Preferred Stock to which such holder is entitled pursuant to the terms of this Section 5(h). On the effective date of a Special Mandatory Conversion, all rights with respect to the Series A Preferred Stock so converted, will terminate, except only the rights of the holders thereof, upon surrender of their certificate or certificates therefor, to receive certificates for the number of shares of Common Stock or Series X Preferred Stock into which such Series A Preferred Stock has been converted; provided that the right of any Holder to receive any declared but unpaid dividends on their shares of Series A Preferred Stock shall accrue to the benefit of the shares of stock issued upon conversion of such shares of Series A Preferred Stock. If so required by the Corporation, certificates surrendered for conversion shall be endorsed or accompanied by written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or by its attorney duly authorized in writing. As soon as practicable after the effective date of a Special Mandatory Conversion and the surrender of the certificate or certificates for Series A Preferred Stock so converted, the Corporation shall cause to be issued and delivered to such holder, or on its written order, a certificate or certificates for the number of full shares of Common Stock or Series X Preferred Stock, as the case may be, issuable on such conversion in accordance with the provisions hereof. All certificates evidencing shares of Series A Preferred Stock which are required to be surrendered for conversion in accordance with the provisions hereof shall, from and after the effective date of the Special Mandatory Conversion with respect to such shares, be deemed to have been retired and cancelled and the shares of Series A Preferred Stock represented thereby converted into shares of Common Stock or Series X Preferred Stock, as the case may be, for all purposes, notwithstanding the failure of the holder or holders thereof to surrender such certificates on or prior to such date. Such converted Series A Preferred Stock may not be reissued, and the Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized number of shares of Series A Preferred Stock accordingly.

#### Section 6. Purchase and Subscription Rights.

(a) If at any time the Corporation grants, issues or sells any Options, Convertible Securities or rights to purchase stock, warrants, securities or other property pro rata to the record holders of any class of Common Stock (the "Purchase Rights"), then each holder of Series A Preferred Stock shall be entitled to acquire, upon the terms applicable to such Purchase Rights, the aggregate Purchase Rights which such holder could have acquired if such holder had held the number of shares of Conversion Stock acquirable upon conversion of such holder's Series A Preferred Stock immediately before the date on which a record is taken for the grant, issuance or sale of such Purchase Rights, or if no record is taken, the date as of which the record holders of Common Stock are to be determined for the grant, issue or sale of such Purchase Rights.

(b) Unless (i) prohibited by rule, regulation, order or other writing of the Securities and Exchange Commission, or (ii) reasonably determined by the underwriter(s) to have a material adverse affect on such underwriter(s) ability to market the corporation's initial Public Offering (such determination accompanied by adequate explanation to be provided in writing to the holders of the Series A Preferred Stock), upon the Corporation's initial Public Offering, each holder of the Series A Preferred Stock, shall be entitled to acquire its pro rata portion of an aggregate of (10%) ten percent (or a lesser percentage to be reasonably determined by the underwriter(s) if the (10%) ten percent amount is reasonably determined by the underwriter(s) to have a material adverse affect on such underwriter(s) ability to market the Corporation's initial Public Offering (such determination accompanied by adequate explanation to be provided in writing to the holders of the Series A Preferred Stock)), of the total securities offered in and at the per share price of the initial Public Offering.

#### Section 7. Events of Noncompliance

(a) Definition. An event of Noncompliance shall have occurred if:

(i) the Corporation fails to make any redemption with respect to the Series A Preferred Stock which it is required to make hereunder, whether or not such payment is legally permissible or is prohibited by any agreement to which the Corporation is subject;

(ii) the Corporation breaches or otherwise fails to perform or observe any other covenant or agreement set forth herein or in the Purchase Agreements and such breach, failure to perform or observe such covenant or agreement is not cured by the Corporation within 60 days after written notice to the Corporation from any holder of the Series A Preferred Stock of the breach of or failure to perform or observe such covenant or agreement; provided that no Event of Noncompliance shall have occurred under this subparagraph (ii) if the Corporation establishes (to the reasonable satisfaction of the Majority Holders) that (a) the particular Event of Noncompliance has not been caused by knowing or purposeful conduct by the Corporation or any Subsidiary, (b) the Corporation has exercised, and continues to exercise, best efforts to expeditiously cure the Event of Noncompliance (if cure is possible), (c) the Event of Noncompliance is not material to the financial condition, operating results, operations, assets or business prospects of the Corporation and its subsidiaries, taken as a whole, and (d) the Event of Noncompliance is not material to any holder's investment in the Series A Preferred Stock;

(iii) any representation or warranty contained in the Purchase Agreements or required to be furnished to any holder of Series A Preferred Stock pursuant to the Purchase Agreements, or any information contained in writing required to be furnished by the Corporation or any subsidiary to any holder of Series A Preferred Stock, is false or misleading in any respect on the date made or furnished which results in a "Loss" or Losses to the Corporation in excess of \$100,000 in the aggregate. Loss as used herein means any loss (including diminution in value), liability, demand, claim, action, cause of action, cost, damage, deficiency, tax, penalty, fine or expense, whether or not arising out of third party claims (including, without limitation, interest penalties, reasonable attorneys' fees and expenses, court costs and all amounts paid in investigation, defense or settlement of any of the foregoing);

(iv) the Corporation or any Subsidiary makes an assignment for the benefit of creditors or admits in writing its inability to pay its debts generally as they become due; or any order, judgment or decree is entered adjudicating the Corporation or any Subsidiary bankrupt or insolvent; or any order for relief with respect to the Corporation or any Subsidiary is entered under the Federal Bankruptcy Code; or the Corporation or any Subsidiary petitions or applies to any tribunal for the appointment of a custodian, trustee, receiver or liquidator of the Corporation or any Subsidiary or of any substantial part of the assets of the Corporation or any Subsidiary, or commences any proceeding (other than a proceeding for the voluntary liquidation and dissolution of a Subsidiary) relating to the Corporation or any Subsidiary under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction; or any such petition or application is filed, or any such proceeding is commenced, against the Corporation or any Subsidiary and either (a) the Corporation or any such Subsidiary by any act indicates its approval thereof, consent thereto or acquiescence therein or (b) such petition, application or proceeding is not dismissed within 60 days;

(v) a judgment in excess of \$250,000 is rendered against the Corporation or any Subsidiary and, within 60 days after entry thereof, such judgment is not discharged or execution thereof stayed pending appeal, or within 60 days after the expiration of any such stay, such judgment is not discharged; or

(vi) the Corporation or any Subsidiary defaults in the performance of any obligation or agreement if the effect of such default is to cause an amount exceeding \$250,000 to become due prior to its stated maturity or to permit the holder or holders of any obligation to cause an amount exceeding \$250,000 to become due prior to its stated maturity.

(b) Consequence of Events of Noncompliance

(i) If an Event of Noncompliance of the type described in subparagraph 7(a)(iv) has occurred, at the option of the Majority Holders, all of the Series A Preferred Stock then outstanding shall be subject to immediate redemption by the Corporation (without any action on the part of the holders of the Series A Preferred Stock) at a price per Share equal to the Liquidation Value thereof (plus all accrued and unpaid dividends thereon). In such event, the Corporation shall immediately redeem all Series A Preferred Stock upon the occurrence of such Event of Noncompliance.

(ii) If any Event or Events of Noncompliance of the type described in subparagraphs 7a(i) or 7(a)(ii) exist for an aggregate of 180 days (whether or not such days are consecutive), at the option of the Majority Holders, the Conversion Price of the Series A Preferred Stock shall be reduced immediately by 10% of the Conversion Price in effect immediately prior to such adjustment (the "First Adjustment"). If any Event or Events of Noncompliance exist for an aggregate of 180 days after the First Adjustment (whether or not such days are consecutive and whether or not such days immediately follow the First Adjustment), at the option of the Majority Holders, the Conversion Price shall be reduced immediately by 10% of what the Conversion Price would have been immediately prior to such adjustment if the First Adjustment had not been made (the "Second Adjustment"). If any Event or Events of Noncompliance exist for an aggregate of 180 days after the Second Adjustment

(whether or not such days are consecutive and whether or not such days immediately follow the Second Adjustment), at the option of the Majority Holders, the Conversion Price shall be reduced immediately by 10% of what the Conversion Price would have been immediately prior to such adjustment if the First and Second Adjustments had not been made. In no event shall any Conversion Price adjustment be rescinded, and in no event shall there be more than three Conversion Price adjustments pursuant to this subparagraph.

For example, assume that the Conversion Price of the Series A Preferred Stock is \$4.40. If Events of Noncompliance are in existence for an aggregate of 180 days, the Conversion Price would be reduced immediately by 10% of \$4.40, or \$.44, for a new Conversion Price of \$3.96. If Events of Noncompliance exist for an additional 180 days, the existing Conversion Price would be reduced by 10% of what the Conversion Price would have been if there had been no previous adjustment pursuant to this paragraph (i.e., \$4.40), or \$.44, for a new Conversion Price of \$3.52. Then assume that there is a two-for-one stock split, in which case the Conversion Price would be decreased hereunder from \$3.52 to \$1.76, and assume that Events of Noncompliance exist for an additional 180 days. In this case, the Conversion Price would be reduced by 10% of what the Conversion Price would have been immediately prior to such adjustment if there had been no previous adjustments pursuant to this paragraph (i.e. \$2.20), or \$.22, for a new Conversion Price of \$1.54.

(iii) If any Event of Noncompliance has occurred and continues uncured for 30 days after written notice to the Board, the number of directors constituting the Corporation's Board shall, at the request of the Majority Holders, be increased by two (or such other amount required to give the holders of the Preferred Stock a minimum majority of the Board), and the holders of Preferred Stock shall have the special right, voting separately as a single class (with each share of Preferred Stock being entitled to one vote for each share of Common Stock issuable upon conversion of such share of Preferred Stock) and to the exclusion of all other classes of the Corporation's stock, to elect individuals to fill such newly created directorships, to remove any individuals elected to such directorships and to fill any vacancies in such directorships. The special right of the holders of Preferred Stock to elect two extra members of the Board may be exercised at the special meeting called pursuant to this subparagraph (iv), at any annual or other special meeting of stockholders and, to the extent and in the manner permitted by applicable law, pursuant to a written consent in lieu of a stockholders meeting. Such special right shall continue until such time as there is no longer any Event of Noncompliance in existence, at which time such special right shall terminate subject to revesting upon the occurrence and continuation of any Event of Noncompliance which gives rise to such special right hereunder.

At any time when such special right has vested in the holders of Preferred Stock, a proper officer of the Corporation shall, upon the written request of the Majority Holders, addressed to the secretary of the Corporation, call a special meeting of the holders of Preferred Stock for the purpose of electing directors pursuant to this subparagraph. Such meeting shall be held at the earliest legally permissible date at the principal office of the Corporation, or at such other place designated by the holders of at least 10% of Preferred Stock then outstanding. If such meeting has not been called by a proper officer of the Corporation within 10 days after personal service of such written request upon the secretary of the Corporation or within 20 days



after mailing the same to the secretary of the Corporation at its principal office, then the Majority Holders may designate in writing one of their number to call such meeting at the expense of the Corporation, and such meeting may be called by such Person so designated upon the notice required for annual meetings of stockholders and shall be held at the Corporation's principal office, or at such other place designated by the Majority Holders. Any holder of Preferred Stock so designated shall be given access to the stock record books of the Corporation for the purpose of causing a meeting of stockholders to be called pursuant to this subparagraph.

At any meeting or at any adjournment thereof at which the holders of Preferred Stock have the special right to elect directors, the presence, in person or by proxy, of the Majority Holders shall be required to constitute a quorum for the election or removal of any director by the holders of the Preferred Stock exercising such special right. The vote of a majority of such quorum shall be required to elect or remove any such director.

Any director so elected by the holders of Preferred Stock shall continue to serve as a director until the expiration of the lesser of (a) a period of three months following the date on which there is not longer any Event of Noncompliance in existence or (b) the remaining period of the full term for which such director has been elected. After the expiration of such three-month period or when the full term for which such director has been elected ceases (provided that the special right to elect directors has terminated), as the case may be, the number of directors, constituting the Board of the Corporation shall decrease to such number as constituted the whole Board of the Corporation immediately prior to the occurrence of the Event or Events of Noncompliance giving rise to the special right to elect directors.

(iv) If any Event of Noncompliance exists, each holder of Series A Preferred Stock shall also have any other rights which such holder is entitled to under any contract or agreement at any time and any other rights which such holder may have pursuant to applicable law.

#### Section 8. Registration of Transfer.

The Corporation shall keep at its principal office a register for the registration of Series A Preferred Stock. Upon the surrender of any certificate representing Series A Preferred Stock at such place, the Corporation shall, at the request of the record holder of such certificate, execute and deliver (at the Corporation's expense) a new certificate or certificates in exchange therefor representing in the aggregate the number of shares represented by the surrendered certificate. Each such new certificate shall be registered in such name and shall represent such number of shares as is requested by the holder of the surrendered certificate and shall be substantially identical in form to the surrendered certificate.

#### Section 9. Replacement

Upon receipt of evidence reasonably satisfactory to the Corporation (an affidavit of the registered holder shall be satisfactory) of the ownership and the loss, theft, destruction or mutilation of any certificate evidencing shares of Series A Preferred Stock, and in the case of any such loss, theft or destruction, upon receipt of indemnity reasonably satisfactory to the Corporation (provided that if the holder is a financial institution or other institutional investor its

own agreement shall be satisfactory), or, in the case of any such mutilation upon surrender of such certificate, the Corporation shall (at its expense) execute and deliver in lieu of such certificate a new certificate or like kind representing the number of shares of such class represented by such lost, stolen, destroyed or mutilated certificate and dated the date of such lost, stolen, destroyed or mutilated certificate.

#### Section 10. Definitions.

"Change in Ownership" means (A) any sale, transfer or issuance or series of sales, transfers and/or issuances of Common Stock by the Corporation or any holders thereof which results in any Person or group of Persons (as the term "group" is used under the Securities Exchange Act of 1934), other than the holders of Common Stock and Preferred Stock as of the Effective Time, owning (i) more than 50% of the Common Stock outstanding on a fully-diluted basis at the time of such sale, transfer or issuance or series of sales, transfers and/or issuances or (ii) capital stock of the Corporation possessing the voting power (under ordinary circumstances) to elect a majority of the Corporation's Board or (B) (i) any merger or consolidation of the Company with or into another entity as a result of which all of the Common Stock of the Company is converted into or exchanged for the right to receive cash, securities or other property or (ii) any exchange of all of the Common Stock of the Company for cash, securities or other property pursuant to a share exchange transaction.

"Common Stock" means, collectively, the Corporation's Common Stock and any capital stock of any class of the Corporation hereafter authorized which is not limited to a fixed sum or percentage of par or stated value in respect to the rights of the holders thereof to participate in dividends or in the distribution of assets upon any liquidation, dissolution or winding up of the Corporation.

"Common Stock Deemed Outstanding" means, at any given time, the number of shares of Common Stock deemed to be outstanding pursuant to subparagraphs 6(c)(i) and 6(c)(ii) hereof whether or not the Options or Convertible Securities are actually exercisable at such time, but excluding any shares of Common Stock issuable upon conversion of the Preferred Stock.

"Conversion Stock" means shares of the Corporation's Common Stock issued or to be issued upon the conversion of the Series A Preferred Stock; provided that if there is a change such that the securities issuable upon conversion of the Series A Preferred Stock are issued by an entity other than the Corporation or there is a change in the type of class of securities so issuable, then the term "Conversion Stock" shall mean one share of the security issuable upon conversion of the Series A Preferred Stock (if such security is issuable in shares, or shall mean the smallest unit in which such security is issuable if such security is not issuable in shares).

"Conversion Value" means \$0.50.

"Convertible Securities" means any stock or securities directly or indirectly convertible into or exchangeable for Common Stock.

"Founders" means Christopher Fleck or Chet Heath.

"Fundamental Change" means (a) any sale or transfer of more than 50% of the assets of the Corporation and its Subsidiaries on a consolidated basis (measured either by book value in accordance with generally accepted accounting principles consistently applied or by fair market value determined in the reasonable good faith judgment of the Corporation's Board) in any transaction or series of transactions (other than sales in the ordinary course of business) and (b) any merger or consolidation to which the Corporation is a party, except for a merger in which the Corporation is the surviving corporation, the terms of the Series A Preferred Stock are not changed and the Series A Preferred Stock is not exchanged for cash, securities or other property, and after giving effect to such merger, the holders of the Corporation's outstanding capital stock immediately prior to the merger shall continue to own the Corporation's outstanding capital stock possessing the voting power (under ordinary circumstances) to elect a majority of the Corporation's Board.

"Junior Securities" means any capital stock or other equity securities of the Corporation, except for the Series A Preferred Stock and the Series X Preferred Stock.

"Liquidation Value" of any share of Series A Preferred Stock as of any particular date shall be equal to \$5.00 (as adjusted for subsequent stock splits, combinations and other similar transactions affecting the Common Stock).

"Market Price" of any security means the average of the closing prices of such security's sales on all securities exchanges on which such security may at the time be listed, or, if there has been no sales on any such exchange on any day, the average of the highest bid and lowest asked prices on all such exchanges at the end of such day, or, if on any day such security is not so listed, the average of the representative bid and asked prices quoted in the NASDAQ System as of 4:00 P.M., New York time, or, if on any day such security is not quoted in the NASDAQ System, the average of the highest bid and lowest asked prices on such day in the domestic over-the-counter market as reported by the National Quotation Bureau, Incorporated, or any similar successor organization, in each such case averaged over a period of 21 days consisting of the day as of which "Market Price" is being determined and the 20 consecutive business days prior to such day. If at any time such security is not listed on any securities exchange or quoted in the NASDAQ System or the over-the-counter market, the "Market Price" shall be the fair value thereof determined jointly by the Corporation and the Majority Holders. If such parties are unable to reach agreement within a reasonable period of time, such fair value shall be determined by an independent appraiser experienced in valuing securities jointly selected by the Corporation and the Majority Holders. The determination of such appraiser shall be final and binding upon the parties, and the Corporation shall pay the fees and expenses of such appraiser.

"Majority Holders" shall mean the holders of at least sixty (60) percent of the voting power of the shares of Preferred Stock then outstanding.

"Options" means any rights, warrants or options to subscribe for or purchase Common Stock or Convertible Securities.

"Person" means an individual, a partnership, a corporation, a limited liability company, a limited liability, an association, a joint stock company, a trust, a joint venture, an

unincorporated organization and a governmental entity or any department, agency or political subdivision thereof.

"Preferred Stock" means the Series A Preferred Stock and the Series X Preferred Stock.

"Public Offering" means any offering by the Corporation of its capital stock or equity securities to the public pursuant to an effective registration statement under the Securities Act of 1933, as then in effect, or any comparable statement under any similar federal statute then in force.

"Purchase Agreements" means the Stock Purchase Agreement, dated as of the May 24, 2001, by and among the Corporation and certain investors, as such agreement may from time to time be amended in accordance with its terms and the Amended and Restated Stock Purchase Agreement, dated as of October 30, 2000, by and among the Corporation and certain investors, as such agreement may from time to time be amended in accordance with its terms.

"Qualified Public Offering" means a Public Offering of the Corporation's Common Stock in which the gross proceeds to the Company equal or exceed \$25 million.

"Redemption Date" as to any share of Series A Preferred Stock means the date specified in the notice of any redemption at the holders option or the applicable date specified herein in the case of any other redemption; provided that no such date shall be a Redemption Date unless the Liquidation Value of such share (plus all accrued and unpaid dividends thereon and any required premium with respect thereto) is actually paid in full on such date, and if not so paid in full, the Redemption Date shall be the date on which such amount is fully paid.

"Series A Preferred Stock" means the Corporation's Series A Convertible Preferred Stock, \$0.0001 par value per share.

"Series X Preferred Stock" means the Corporation's Series X Convertible Preferred Stock, \$0.0001 par value per share.

"Subsidiary" means, with respect to any Person, any corporation, limited liability company, partnership, association or other business entity of which (i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (ii) if a limited liability company, partnership, association or other business entity, a majority of the partnership or other similar ownership interest thereof is at the time owned or controlled, directly or indirectly, by any Person or one or more Subsidiaries of that person or a combination thereof. For purposes hereof, a Person or Persons shall be deemed to have a majority ownership interest in a limited liability company, a partnership, association or other business entity if such Person or Persons shall be allocated a majority of limited liability company, partnership, association or other business entity gains or losses or shall be or control the managing general partner of such limited liability company, partnership, association or other business entity.

EXHIBIT B

**OMNICLUSTER TECHNOLOGIES, INC., SERIES X  
CONVERTIBLE PREFERRED STOCK DESIGNATION**

**Series X Convertible Preferred Stock**

Section 1. Participating Dividends. In the event that the Corporation declares or pays any dividends upon the Common Stock (whether payable in cash, securities or other property) other than dividends payable solely in shares of Common Stock, the Corporation shall also declare and pay to the holders of the Series X Preferred Stock at the same time that it declares and pays such dividends to the holders of the Common Stock, the dividends which would have been declared and paid with respect to the Common Stock issuable upon conversion of the Series X Preferred Stock had all of the outstanding Series X Preferred Stock been converted immediately prior to the record date for such dividend, or if no record date is fixed the date as of which the record holders of Common Stock entitled to such dividends are to be determined. In the event that the Corporation declares or pays any dividends upon the Series X Preferred Stock (whether payable in cash, securities or other property) other than dividends payable solely in shares of Series X Preferred Stock, the Corporation shall also declare and pay dividends to the holders of the Common Stock at the same time that it declares and pays such dividends to the holder of the Series X Preferred Stock.

Section 2. Liquidation.

(a) Payment Upon Liquidation. Upon any liquidation, dissolution or winding up of the Corporation (whether voluntary or involuntary) or upon a sale, merger or reorganization of the Corporation pursuant to which there is a Change in Ownership, each holder of Series X Preferred Stock shall be entitled to be paid an amount in cash equal to the sum of the aggregate Liquidation Value (plus all accrued and unpaid dividends thereon) of all shares of Series X Preferred Stock held by such holder plus the amount that such holder of Series X Preferred Stock would receive on an as if converted basis with the holders of the Common Stock as a single class in the distribution of assets of the Corporation with respect to the Common Stock before any distribution or payment is made upon any Junior Securities.

If upon any such liquidation, dissolution or winding up of the Corporation or upon a sale, merger or reorganization of the Corporation pursuant to which there is a Change in Ownership, the Corporation's assets to be distributed among the holders of the Series X Preferred Stock are insufficient to permit payment to such holders of the aggregate amount which they are entitled to be paid under this Section 2, then the entire assets available to be distributed to the Corporation's stockholders shall be distributed pro rata among such holders of Series X Preferred Stock based upon the aggregate Liquidation Value (plus all accrued and unpaid dividends) of the Series X Preferred Stock held by each such holder.

(b) General Provisions. Not less than 60 days prior to the payment date stated therein, the Corporation shall give written notice of any such liquidation, dissolution or winding up to each record holder of Series X Preferred Stock, setting forth in reasonable detail the amount of

proceeds to be paid with respect to each share of Series X Preferred Stock, each share of Series X Preferred Stock and each share of Common Stock in connection with such liquidation, dissolution or winding up. The consolidation or merger of the Corporation into or with any other entity or entities (whether or not the Corporation is the surviving entity), the sale or transfer by the Corporation of all or any part of its asset, the reduction of the capital stock of the Corporation and any other form of recapitalization or reorganization affecting the Corporation pursuant to which control of the Company is transferred shall be deemed to be a liquidation of the Corporation within the meaning of this Section 2.

### Section 3. Redemptions

So long as any Series X Preferred Stock remains outstanding, without the prior written consent of the Majority Holders, the Corporation shall not, nor shall it permit any Subsidiary to, redeem, purchase or otherwise acquire directly or indirectly and Junior Securities, nor shall the Corporation directly or indirectly pay or declare any dividend or make any distribution upon any Junior Securities.

(a) Redemption upon Request. At any time after August 10, 2004 (the "Scheduled Redemption Date"), the Majority Holders shall have the right to require the Corporation to redeem all but not less than all of the Series X Preferred Stock at a price per share equal to the Liquidation Value thereof (plus all declared and accrued dividends thereon) upon 90 days written notice to the Corporation (a "Redemption Notice").

(b) Redemption Payments. For each share of the Series X Preferred Stock which is to be redeemed hereunder, the Corporation shall be obligated on the Redemption Date to pay to the holder thereof (upon surrender by such holder at the Corporation's principal office of the certificate representing such share of the Series X Preferred Stock) an amount in cash equal to the Liquidation Value of such share (plus all accrued and unpaid dividends thereon). If the funds of the Corporation legally available for redemption of such shares of the Series X Preferred Stock on any Redemption date are insufficient to redeem the total number of shares of the Series X Preferred Stock to be redeemed on such date, those funds which are legally available shall be used to redeem the maximum possible number of shares of the Series X Preferred Stock pro rata among the holders of the shares of the Series X Preferred Stock to be redeemed based upon the aggregate Liquidation Value of such shares of the Series X Preferred Stock held by each such holder (plus all accrued and unpaid dividends thereon). At any time thereafter when additional funds of the Corporation are legally available for the redemption of shares of the Series X Preferred Stock, such funds shall immediately be used to redeem the balance of the shares of the Series X Preferred Stock which the Corporation has become obligated to redeem on any Redemption Date but which it has not redeemed.

(c) Dividends After Redemption Date. No share of the Series X Preferred Stock shall be entitled to any dividends accruing after the date on which the Liquidation Value of such share of the Series X Preferred Stock (plus all accrued and unpaid dividends thereon) is paid to the holder of such share of the Series X Preferred Stock. On such date, all rights of the holder of such share shall cease, and such share of the Series X Preferred Stock shall no longer be deemed to be issued and outstanding.

(d) Redeemed or Otherwise Acquired Shares. Any share of the Series X Preferred Stock which are redeemed or otherwise acquired by the Corporation shall be canceled and retired to authorized but unissued shares and shall not be reissued, sold or transferred.

(e) Other Redemptions or Acquisitions. The Corporation shall not, nor shall it permit any Subsidiary to, redeem or otherwise acquire any shares of Series X Preferred Stock, except as expressly authorized herein.

(f) Special Redemptions.

(i) If a Change in Ownership has occurred or the Corporation obtains knowledge that a Change in Ownership is proposed to occur, the Corporation shall give prompt written notice of such Change in Ownership describing in reasonable detail the material terms and date of consummation thereof to each holder of Series X Preferred Stock, but in any event such notice shall not be given later than five days after the occurrence of such Change in Ownership, and the Corporation shall give each holder of Series X Preferred Stock prompt written notice of any material change in the terms or timing of such transaction. Any holder of Series X Preferred Stock may require the Corporation to redeem all or any portion of the Series X Preferred Stock owned by such holder at a price per share of Series X Preferred Stock equal to the greater of (a) the Liquidation Value thereof (plus all accrued and unpaid dividends thereon), or (b) an amount equal to the number of shares of Conversion Stock then issuable upon conversion of such shares multiplied by the consideration payable with respect to each share of Common Stock in such Change in Ownership, by giving written notice to the Corporation of such election prior to the later of (a) 21 days after receipt of the Corporation's notice and (b) five days prior to the consummation of the Change in Ownership (the "Expiration Date"). The Corporation shall give prompt written notice of any such election to all other holders of Series X Preferred Stock and within five days after the receipt thereof, and each such holder shall have until the later of (a) the Expiration Date or (b) 10 days after receipt of such second notice to request redemption hereunder (by giving written notice to the Corporation) of all or any portion of the Series X Preferred Stock owned by such holder.

Upon receipt of such election(s), the Corporation shall be obligated to redeem the aggregate number of shares of Series X Preferred Stock specified therein on the later of (a) the occurrence of the Change in Ownership or (b) five days after the Corporation's receipt of such election(s). If any proposed Change in Ownership does not occur, all requests for redemption in connection therewith shall be automatically rescinded, or if there has been a material change in the terms or the timing of the transaction, any holder of Series X Preferred Stock may rescind such holder's request for redemption by giving written notice of such rescission to the Corporation.

(ii) If a Fundamental Change is proposed to occur, the Corporation shall give written notice of such Fundamental Change describing in reasonable detail the material terms and date of consummation thereof to each holder of Series X Preferred Stock not more than 45 days nor less than 20 days prior to the consummation of such Fundamental Change, and the Corporation shall give each holder of Series X Preferred Stock prompt written notice of any

material change in the terms or timing of such transaction. In the event of any Fundamental Change, any holder of Series X Preferred Stock may require the Corporation to redeem all or any portion of the Series X Preferred Stock owned by such holder at a price per share equal to the greater of (a) Liquidation Value thereof (plus all accrued and unpaid dividends thereon) or (b) an amount equal to the number of shares of Conversion Stock then issuable upon conversion of such Share multiplied by the consideration payable with respect to each share of Common Stock in such Fundamental Change, by giving written notice to the Corporation of such election prior to the later of (a) ten days prior to the consummation of the Fundamental Change or (b) ten days after receipt of notice from the Corporation. The Corporation shall give prompt written notice of such election to all other holders of Series X Preferred Stock (but in any event within five days prior to the consummation of the Fundamental Change), and each such holder shall have until two days after the receipt of such notice to request redemption (by written notice given to the Corporation) of all or any portion of the Series X Preferred Stock owned by such holder.

Upon receipt of such election(s), the Corporation shall be obligated to redeem the aggregate number of shares of Series X Preferred Stock specified therein upon the consummation of such Fundamental Change. If any proposed Fundamental Change does not occur, all requests for redemption in connection therewith shall be automatically rescinded, or if there has been a material change in the terms or the timing of the transaction, any holder of Series X Preferred Stock may rescind such holder's request for redemption by delivering written notice thereof to the Corporation prior to the consummation of the transaction.

#### Section 4. Voting Rights.

(a) The holders of the Series X Preferred Stock shall be entitled to notice of all stockholders meetings in accordance with the Corporation's bylaws, and the holders of the Series X Preferred Stock shall be entitled to vote on all matters submitted to the stockholders for a vote together with the holders of the Common Stock voting together as a single class with each share of Common Stock entitled to one vote per share and each share of Series X Preferred Stock entitled to one vote for each share of Common Stock issuable upon conversion of the Series X Preferred Stock as of the record date for such vote or, if no record date is specified, as of the date of such vote.

(b) The affirmative vote of the Majority Holders, acting by written consent or voting separately as a single class in person or by proxy, at a special or annual meeting of stockholders called for the purpose, shall be necessary to authorize the Corporation to take any of the following actions (herein, each a "Restricted Action"):

(i) authorize, or increase or permit any Subsidiary to authorize or increase, the authorized number of shares of, or issue additional shares of Series X Preferred Stock or any class or series of the Corporation's or any Subsidiary's capital stock or options, warrants or other rights to acquire any such capital stock ranking with respect to liquidation preference, dividends or voting rights, senior in right to, or pari passu with the Series X Preferred Stock;

(ii) amend, repeal or change, directly or indirectly, any of the provisions of the Articles of Incorporation of the Corporation or the bylaws of the Corporation in any manner that



would alter or change the powers, preferences or special rights of the shares of Series X Preferred Stock so as to affect them adversely;

(iii) authorize or effect, or permit any Material Subsidiary to authorize or effect, the sale, lease, license, abandonment or other disposition of all or substantially all of the assets of the Corporation or any Material Subsidiary or the merger or consolidation of the Corporation or any Material Subsidiary with any other Person as a result of which the shareholders of the Corporation immediately prior to such merger and consolidation shall own less than a majority of the voting securities of the surviving corporation, unless such transaction results in each holder of Series X Preferred Stock, or its successor or assigns as the case may be receiving proceeds equal to or exceeding the greater of (a) four (4) times the Liquidation Value.

(iv) authorize the Corporation to, or permit any Subsidiary to incur, create, assume, become or be liable, directly, indirectly or contingently, in any manner with respect to, or permit to exist, any indebtedness or liability for borrowed money, other than indebtedness under capital leases or the like, if the aggregate of all such outstanding indebtedness and liabilities of the Corporation or any Subsidiary exceeds the principal amount of \$200,000;

(v) authorize or effect the declaration or payment of dividends or other distributions upon, or, pursuant to a stock repurchase plan adopted by the Board, redeem or repurchase any equity securities of the Corporation;

(vi) authorize or effect an amendment or change to the Corporation's Articles of Incorporation or bylaws to increase the size of the Corporation's Board beyond 5 Persons; and

(vii) authorize or effect any increase in the number of shares of Common Stock reserved for issuance pursuant to the Corporation's Stock Option Plan.

## Section 5. Conversion.

### (a) Conversion Procedure.

(i) At any time and from time to time, any holder of Series X Preferred Stock may convert all or any portion of the Series X Preferred Stock (including any fraction of a share) held by such holder into a number of shares of Conversion Stock computed by multiplying the number of shares to be converted by the Liquidation Value, and dividing the result by the Conversion Price then in effect. All shares of Series X Preferred Stock shall automatically convert into Common Stock at the same ratio set forth in the preceding sentence upon (A) the election of the Majority Holders or (B) the consummation of a Qualified Public Offering.

(ii) Except as otherwise provided herein, each conversion of Series X Preferred Stock shall be deemed to have been converted as of the close of business on the date on which the certificate or certificates representing the Series X Preferred Stock to be converted have been surrendered for conversion at the principal office of the corporation. At the time any such conversion has been effected, the rights of the holder of the shares converted as a holder of Series X Preferred Stock shall cease and the Person or Persons in whose name or names any

certificate or certificates for shares of a Conversion Stock are to be issued upon such conversion shall be deemed to have become the holder or holders of record of the shares of Conversion Stock represented thereby,

(iii) The conversion rights of any share subject to redemption hereunder shall terminate on the Redemption Date for such share unless the Corporation has failed to pay to the holder thereof the Liquidation Value of such share (plus all accrued and unpaid dividends thereon).

(iv) Notwithstanding any other provision hereof, if a conversion of Series X Preferred Stock is to be made in connection with a Public Offering, a Change in Ownership, a Fundamental Change or other transaction affecting the Corporation, the conversion of any shares of Series X Preferred Stock may, at the election of the holder thereof, be conditioned upon the consummation of such transaction, in which case such conversion shall not be deemed to be effective until such transaction has been consummated.

(v) As soon as possible after a conversion has been effected (but in any event with five business days in the case of subparagraph (a) below), the Corporation shall deliver to the converting holder:

(1) a certificate or certificates representing the number of shares of Conversion Stock issuable; by reason of such conversion in such name or names and such denomination or denominations as the converting holder has specified; and

(2) a certificate representing any shares of Series X Preferred Stock which were represented by the certificate or certificates delivered to the Corporation in connection with such conversion but which were not converted.

(vi) If for any reason the Corporation is unable to pay any portion of the accrued and unpaid dividends on Series X Preferred Stock being converted, such dividends shall be paid as a note or shall be paid in cash as soon as practicable for the Company to pay such dividends.

(vii) The issuance of certificates for shares of Conversion Stock upon conversion of Series X Preferred Stock shall be made without charge to the holders of such Series X Preferred Stock for any issuance tax in respect thereof or other cost incurred by the Corporation in connection with such conversion and the related issuance of shares of Conversion Stock. Upon conversion of each share of Series X Preferred Stock, the Corporation shall take all such actions as are necessary in order to insure that the Conversion Stock issuable with respect to such conversion shall be validly issued, fully paid and nonassessable, free and clear of all taxes, liens, charges and encumbrances with respect to the issuance thereof.

(viii) The Corporation shall not close its books against the transfer of Series X Preferred Stock or of Conversion Stock issued or issuable upon conversion of Series X Preferred Stock in any manner which interferes with the timely conversion of Series X Preferred Stock. The corporation shall assist and cooperative with any holder of shares of Series X Preferred

Stock, at such holder's expense, required to make any governmental filings or obtain any governmental approval prior to or in connection with any conversion of shares hereunder (including, without limitation, making any filings required to be made by the Corporation).

(ix) The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Conversion Stock, solely for the purpose of issuance upon the conversion of the Series X Preferred Stock, such number of shares of Conversion Stock issuable upon the conversion of all outstanding shares of Series X Preferred Stock. All shares of Conversion Stock which are so issuable shall, when issued, be duly and validly issued, fully paid and nonassessable and free from all taxes, liens and charges. The Corporation shall take all such actions as may be necessary to assure that all such shares of Conversion Stock may be so issued without violation of any applicable law or governmental regulation or any requirements of any domestic securities exchange upon which shares of Conversion Stock may be listed (except for official notice of issuance which shall be promptly delivered by the Corporation upon each such issuance). The Corporation shall not take any action which would cause the number of authorized but unissued shares of Conversion Stock to be less than the number of such shares required to be reserved hereunder for issuance upon conversion of the Series X Preferred Stock.

(x) If any fractional interest in a share of Conversion stock would, except for the provisions of this subparagraph, be delivered upon any conversion of the Series X Preferred Stock, the Corporation, in lieu of delivering the fractional share therefore, shall pay an amount to the holder thereof equal to the Market Price of such fractional interest as of the date of conversion.

(b) Conversion Price.

(i) The Initial Conversion Price shall be \$.50. In order to prevent dilution of the conversion rights granted under this Section 5, the Conversion Price shall be subject to adjustment from time to time pursuant to Section 5.

(ii) If and whenever on or after the Effective Time, the Corporation issues or sells, or in accordance with paragraph 5(c) is deemed to have issued or sold, any shares of its Common Stock or equivalent thereof (other than (A) to Persons (but not Founders) pursuant to the Corporation's Stock Option Plan subject to Section 5(b)(iii) or (B) upon the exercise or conversion of Common Stock equivalents outstanding at the Effective Time) for a consideration per share less than the Conversion Price in effect immediately prior to the time of such issue or sale, then forthwith upon such issue or sale the Conversion Price shall be reduced to the consideration per share received (or pursuant to paragraph 5(c), deemed to have been received) by the Corporation for the issue or sale (or in the case of paragraph 5(c), deemed issue or sale) of Common Stock.

(iii) There shall be no adjustment in the Conversion Price as a result of any issue or sale (or deemed issue or sale) of shares of Common Stock to employees, directors and consultants (but not Founders) of the Corporation and its Subsidiaries pursuant to stock option plans and stock ownership plans approved by the Corporation's Board and the Majority Holders; provided, however, in the event any person (other than a person exercising an option) purchases

capital stock of the Corporation as a result of preemptive or other rights that relate to the Corporation's stock option plan, the Conversion Price shall be adjusted so that the holders of the Series X Preferred Stock receive the same percentage interest in the Corporation upon conversion after such purchases as they would have received prior to such purchases, in each case, as and when each such purchase occurs.

(iv) In addition to the antidilution protection provided to the holders of Shares of Series X Preferred Stock in this Section 5, the holders of shares of Series X Preferred Stock shall receive additional antidilution protection to the extent any more favorable protection is given to International Business Machines Corporation so that such holders have at least equal protection.

(c) Effect on Conversion Price of Certain Events. For purposes of determining the adjusted Conversion Price under paragraph 5(b), the following shall be applicable:

(i) Issuance of Rights or Options. If the Corporation in any manner grants or sells any Options and the price per share for which Common Stock is issuable upon the exercise of such Options, or upon conversion or exchange of any Convertible Securities issuable upon exercise of such Options, is less than the Conversion Price in effect immediately prior to the time of the granting or sale of such Options, then the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon conversion or exchange of the total maximum amount of such Convertible Securities issuable upon the exercise of such Options shall be deemed to be outstanding and to have been issued and sold by the Corporation at the time if the granting or sale of such Options for such price per share. For purposes of this paragraph, the "price per share for which Common Stock is issuable" shall be determined by dividing (A) the total amount, if any, received or receivable by the Corporation as consideration for the granting or sale of such Options, plus the minimum aggregate amount of additional consideration payable to the Corporation upon exercise of all such Options, plus in the case of such Options which relate to Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable to the Corporation upon the issuance or sale of such Convertible Securities and the conversion or exchange thereof, by (B) the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon the conversion or exchange of all such Convertible Securities issuable upon the exercise of such Options. No further adjustment of the Conversion Price shall be made when Convertible Securities are actually issued upon the exercise of such Options or when Common Stock is actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(ii) Issuance of Convertible Securities. If the Corporation in any manner issues or sells any Convertible Securities and the price per share for which Common Stock is issuable upon conversion or exchange thereof is less than the Conversion Price in effect immediately prior to the time of such issue or sale, then the maximum number of shares of Common Stock issuable upon conversion or exchange of such Convertible Securities shall be deemed to be outstanding and to have been issued and sold by the Corporation at the time of the issuance or sale of such Convertible Securities for such price per share. For the purposes of this paragraph, the "price per share for which Common Stock is issuable" shall be determined by

dividing (A) the total amount received or receivable by the Corporation as consideration for the issue or sale of such Convertible Securities, plus the minimum aggregate amount of additional consideration, if any, payable to the Corporation upon the conversion or exchange thereof, by (B) the total maximum number of shares of Common Stock issuable upon the conversion or exchange of all such Convertible Securities. No further adjustment of the Conversion Price shall be made when Common Stock is actually issued upon the conversion or exchange of such Convertible Securities, and if any such issue or sale of such Convertible Securities is made upon exercise of any Options for which adjustments of the Conversion Price had been or are to be made pursuant to other provisions of this Section 5, no further adjustment of the Conversion Price shall be made by reason of such issue or sale.

(iii) Change in Option Price or Conversion Rate. If the purchase price provided for in any Options, the additional consideration, if any, payable upon the conversion or exchange of any Convertible Securities or the rate at which any Convertible Securities are convertible into or exchangeable for Common Stock changes at any time, the Conversion Price in effect at the time of such change shall be immediately adjusted to the Conversion Price which would have been in effect at such time had such Options or Convertible Securities still outstanding provided for such changed purchase price, additional consideration or conversion rate, as the case may be, at the time initially granted issued or sold; provided, that if such adjustment would result in an increase of the Conversion Price then in effect, such adjustment shall not be effective until 30 days after written notice thereof has been given by the Corporation to all holders of the Series X Preferred Stock. For purposes of paragraph 5(c), if the terms of any Option or Convertible Security which was outstanding as of the date of issuance of the Series X Preferred Stock are changed in the manner described in the immediately preceding sentence, then such Option or Convertible Security and the Common Stock deemed issuable upon exercise, conversion or exchange thereof shall be deemed to have been issued as of the date of such change; provided that no such change shall at any time cause the Conversion Price hereunder to be increased.

(iv) Treatment of Expired Options and Unexercised Convertible Securities. Upon the expiration of any Option or the termination of any right to convert or exchange any Convertible Security without the exercise of any such Option or right, the Conversion Price then in effect hereunder shall be adjusted immediately to the Conversion Price which would have been effect at the time of such expiration or termination had such Option or Convertible Security, to the extent outstanding immediately prior to such expiration or termination, never been issued; provided, that if such expiration or termination would result in an increase in the Conversion Price then in effect, such increase shall not be effective until 30 days after written notice thereof has been given to all holders of the Series X Preferred Stock. For purposes of paragraph 5(c), the expiration or termination of any Option or Convertible Security which was outstanding as of the date of issuance of the Series X Preferred Stock shall not cause the Conversion Price hereunder to be adjusted unless, and only to the extent that, a change in the terms of such Option or Convertible Security caused it to be deemed to have been issued after the date of issuance of the Series X Preferred Stock.

(v) Calculation of Consideration Received. If any Common Stock, Option or Convertible Security is issued or sold or deemed to have been issued or sold for cash, the

consideration received therefore shall be deemed to be the amount received by the Corporation therefore (net of discounts, commissions and related expenses). If any Common Stock, Option or Convertible Security is issued or sold for a consideration other than cash, the amount of the consideration other than cash received by the Corporation shall be the fair value of such consideration consists of securities, in which case the amount of consideration received by the Corporation shall be the Market Price thereof as of the date of receipt. If any Common Stock, Option or Convertible Security is issued to the owners of the non-surviving entity in connection with any merger in which the Corporation is the surviving corporation, the amount of consideration therefore shall be deemed to be the fair value of such portion of the net assets and business of the non-surviving entity as is attributable to such Common Stock, Option or Convertible Security, as the case may be. The fair value of any consideration other than cash and securities shall be determined jointly by the Corporation and the Majority Holders. If such parties are unable to reach agreement within a reasonable period of time, the fair value of such consideration shall be determined by an independent appraiser experienced in valuing such type of consideration jointly selected by the Corporation and the Majority Holders. The determination of such appraiser shall be final and binding upon the parties, and the fees and expenses of such appraiser shall become by the Corporation.

(vi) Integrated Transactions. In case any Option is issued in connection with the issue or sale of other securities of the Corporation, together comprising one integrated transaction in which no specific consideration is allocated to such Option by the parties thereto, the Option shall be deemed to have been issued for a consideration of \$.01.

(vii) Treasury Shares. The number of shares of Common Stock outstanding at any given time shall not include shares owned or held by or for the account of the Corporation or any Subsidiary, and the disposition of any shares so owned or held shall be considered an issue or sale of Common Stock.

(viii) Record Date. If the Corporation takes a record of the holders of Common Stock for the purposes of entitling them (a) to receive a dividend or other distribution payable in Common Stock, Options or in Convertible Securities or (b) to subscribe for or purchase Common Stock, Options or Convertible Securities, then such record date shall be deemed to be the date of the issue or sale of the shares of Common Stock deemed to have been issued or sold upon the declaration of such dividend or upon the making of such other distribution or the date of the granting of such right of subscription or purchase, as the case may be.

(d) Subdivision or Combination of Common Stock. If the Corporation at any time subdivides (by any stock split, stock dividend, recapitalization or otherwise) one or more classes of its outstanding shares of Common Stock into a greater number of shares, the Conversion Price in effect immediately prior to such subdivision shall be proportionately reduced, and if the Corporation at any time combines (by reverse stock split or otherwise) one or more classes of its outstanding shares of Common Stock into a smaller number of shares, the Conversion Price in effect immediately prior to such combination shall be proportionately increased.

(e) Reorganization, Reclassification, Consolidation, Merger or Sale. Any recapitalization, reorganization, reclassification, consolidation, merger, sale of all or substantially

all of the Corporation's assets or other transactions, in each case which is effected in such a manner that the holders of Common Stock are entitled to receive (either directly or upon subsequent liquidation) stock, securities or assets with respect to or in exchange for Common Stock, is referred to herein as an "Organic Change." Prior the consummation of any Organic Change, the Corporation shall make appropriate provisions in form and substance satisfactory to the Majority Holders, to insure that each of the holders of Series X Preferred Stock shall thereafter have the right to acquire and receive, in lieu of or in addition to (as the case may be) the shares of Conversion Stock immediately theretofore acquirable and receivable upon the conversion of such holder would have received in connection with such Organic Change if such holder had converted its Series X Preferred Stock immediately prior to such Organic Change. In each such case, the Corporation shall also make appropriate provisions in form and substance satisfactory to the Majority Holders, to insure that the provisions of this Section 5 and Section 6 hereof shall thereafter be applicable to the Series X Preferred Stock (including, in the case of any such consolidation, merger or sale in which the successor entity or purchasing entity is other than the Corporation, an immediate adjustment of the Conversion Price to the value for the Common Stock reflected by the terms of such consolidation, merger or sale, and a corresponding immediate adjustment in the number of shares of Convertible Stock acquirable and receivable upon conversion of Series X Preferred Stock, if the value so reflected is less than the Conversion Price in effect immediately prior to such consolidation, merger or sale). The Corporation shall not effect any such consolidation, merger or sale, unless prior to the consummation thereof, the successor entity (if other than the Corporation) resulting from consolidation or merger or the entity purchasing such assets assumes by written instrument in form and substance satisfactory to the Majority Holders, the obligation to deliver to each such holder such shares of stock, securities or assets as, in accordance with the foregoing provisions, such holder may be entitled to acquire.

(f) Certain Events. If any event occurs of the type contemplated by the provisions of this Section 5 but not expressly provided for by such provisions (including, without limitation, the granting of stock appreciation rights, phantom stock rights or other rights with equity features), then the Corporation's Board shall make an appropriate adjustment in the Conversion Price so as to protect the rights, phantom stock rights or other rights with equity features), then the Corporation's Board shall make an appropriate adjustment in the Conversion Price so as to protect the rights of the holders of Series X Preferred Stock; provided that no such adjustment shall increase the Conversion Price as otherwise determined pursuant to this Section 5(f) or decrease the number of shares of Conversion Stock issuable upon conversion of each share of Series X Preferred Stock.

(g) Notices.

(i) Immediately upon any adjustment of the Conversion Price, the Corporation shall give written notice thereof to all holders of Series X Preferred Stock, setting forth in reasonable detail and certifying the calculation of such adjustment.

(ii) The Corporation shall give written notice to all holders of Series X Preferred Stock at least 20 days prior to the date on which the Corporation closes its books or takes a record (a) with respect to any dividend or distribution upon Common Stock, (b) with

respect to any pro rata subscription offer to holders of Common Stock or (c) for determining rights to vote with respect to any Organic Change, dissolution or liquidation.

(iii) The Corporation shall also give written notice to the holders of Series X Preferred Stock at least 20 days prior to the date on which any Organic Change shall take place.

#### Section 6. Purchase and Subscription Rights.

(a) If at any time the Corporation grants, issues or sells any Options, Convertible Securities or rights to purchase stock, warrants, securities or other property pro rata to the record holders of any class of Common Stock (the "Purchase Rights"), then each holder of Series X Preferred Stock shall be entitled to acquire, upon the terms applicable to such Purchase Rights, the aggregate Purchase Rights which such holder could have acquired if such holder had held the number of shares of Conversion Stock acquirable upon conversion of such holder's Series X Preferred Stock immediately before the date on which a record is taken for the grant, issuance or sale of such Purchase Rights, or if no record is taken, the date as of which the record holders of Common Stock are to be determined for the grant, issue or sale of such Purchase Rights.

(b) Unless (i) prohibited by rule, regulation, order or other writing of the Securities and Exchange Commission, or (ii) reasonably determined by the underwriter(s) to have a material adverse affect on such underwriter(s) ability to market the corporation's initial Public Offering (such determination accompanied by adequate explanation to be provided in writing to the holders of the Series X Preferred Stock), upon the Corporation's initial Public Offering, each holder of the Series X Preferred Stock, shall be entitled to acquire its pro rata portion of an aggregate of (10%) ten percent (or a lesser percentage to be reasonably determined by the underwriter(s) if the (10%) ten percent amount is reasonably determined by the underwriter(s) to have a material adverse affect on such underwriter(s) ability to market the Corporation's initial Public Offering (such determination accompanied by adequate explanation to be provided in writing to the holders of the Series X Preferred Stock)), of the total securities offered in and at the per share price of the initial Public Offering.

#### Section 7. Events of Noncompliance

(c) Definition. An event of Noncompliance shall have occurred if:

(i) the Corporation fails to make any redemption with respect to the Series X Preferred Stock which it is required to make hereunder, whether or not such payment is legally permissible or is prohibited by any agreement to which the Corporation is subject;

(ii) the Corporation breaches or otherwise fails to perform or observe any other covenant or agreement set forth herein or in the Purchase Agreements and such breach, failure to perform or observe such covenant or agreement is not cured by the Corporation within 60 days after written notice to the Corporation from any holder of the Series X Preferred Stock of the breach of or failure to perform or observe such covenant or agreement; provided that no Event of Noncompliance shall have occurred under this subparagraph (ii) if the Corporation establishes (to the reasonable satisfaction of the Majority Holders) that (a) the particular Event of Noncompliance has not been caused by knowing or purposeful conduct by the Corporation or



any Subsidiary, (b) the Corporation has exercised, and continues to exercise, best efforts to expeditiously cure the Event of Noncompliance (if cure is possible), (c) the Event of Noncompliance is not material to the financial condition, operating results, operations, assets or business prospects of the Corporation and its subsidiaries, taken as a whole, and (d) the Event of Noncompliance is not material to any holder's investment in the Series X Preferred Stock;

(iii) any representation or warranty contained in the Purchase Agreements or required to be furnished to any holder of Series X Preferred Stock pursuant to the Purchase Agreements, or any information contained in writing required to be furnished by the Corporation or any subsidiary to any holder of Series X Preferred Stock, is false or misleading in any respect on the date made or furnished which results in a "Loss" or Losses to the Corporation in excess of \$100,000 in the aggregate. Loss as used herein means any loss (including diminution in value), liability, demand, claim, action, cause of action, cost, damage, deficiency, tax, penalty, fine or expense, whether or not arising out of third party claims (including, without limitation, interest penalties, reasonable attorneys' fees and expenses, court costs and all amounts paid in investigation, defense or settlement of any of the foregoing);

(iv) the Corporation or any Subsidiary makes an assignment for the benefit of creditors or admits in writing its inability to pay its debts generally as they become due; or any order, judgment or decree is entered adjudicating the Corporation or any Subsidiary bankrupt or insolvent; or any order for relief with respect to the Corporation or any Subsidiary is entered under the Federal Bankruptcy Code; or the Corporation or any Subsidiary petitions or applies to any tribunal for the appointment of a custodian, trustee, receiver or liquidator of the Corporation or any Subsidiary or of any substantial part of the assets of the Corporation or any Subsidiary, or commences any proceeding (other than a proceeding for the voluntary liquidation and dissolution of a Subsidiary) relating to the Corporation or any Subsidiary under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction; or any such petition or application is filed, or any such proceeding is commenced, against the Corporation or any Subsidiary and either (a) the Corporation or any such Subsidiary by any act indicates its approval thereof, consent thereto or acquiescence therein or (b) such petition, application or proceeding is not dismissed within 60 days;

(v) a judgment in excess of \$250,000 is rendered against the Corporation or any Subsidiary and, within 60 days after entry thereof, such judgment is not discharged or execution thereof stayed pending appeal, or within 60 days after the expiration of any such stay, such judgment is not discharged; or

(vi) the Corporation or any Subsidiary defaults in the performance of any obligation or agreement if the effect of such default is to cause an amount exceeding \$250,000 to become due prior to its stated maturity or to permit the holder or holders of any obligation to cause an amount exceeding \$250,000 to become due prior to its stated maturity.

(d) Consequence of Events of Noncompliance

(i) If an Event of Noncompliance of the type described in subparagraph 7(a)(iv) has occurred, at the option of the Majority Holders, all of the Series X

Preferred Stock then outstanding shall be subject to immediate redemption by the Corporation (without any action on the part of the holders of the Series X Preferred Stock) at a price per Share equal to the Liquidation Value thereof (plus all accrued and unpaid dividends thereon). In such event, the Corporation shall immediately redeem all Series X Preferred Stock upon the occurrence of such Event of Noncompliance.

(ii) If any Event or Events of Noncompliance of the type described in subparagraphs 7a(i) or 7(a)(ii) exist for an aggregate of 180 days (whether or not such days are consecutive), at the option of the Majority Holders, the Conversion Price of the Series X Preferred Stock shall be reduced immediately by 10% of the Conversion Price in effect immediately prior to such adjustment (the "First Adjustment"). If any Event or Events of Noncompliance exist for an aggregate of 180 days after the First Adjustment (whether or not such days are consecutive and whether or not such days immediately follow the First Adjustment), at the option of the Majority Holders, the Conversion Price shall be reduced immediately by 10% of what the Conversion Price would have been immediately prior to such adjustment if the First Adjustment had not been made (the "Second Adjustment"). If any Event or Events of Noncompliance exist for an aggregate of 180 days after the Second Adjustment (whether or not such days are consecutive and whether or not such days immediately follow the Second Adjustment), at the option of the Majority Holders, the Conversion Price shall be reduced immediately by 10% of what the Conversion Price would have been immediately prior to such adjustment if the First and Second Adjustments had not been made. In no event shall any Conversion Price adjustment be rescinded, and in no event shall there be more than three Conversion Price adjustments pursuant to this subparagraph.

For example, assume that the Conversion Price of the Series X Preferred Stock is \$4.40. If Events of Noncompliance are in existence for an aggregate of 180 days, the Conversion Price would be reduced immediately by 10% of \$4.40, or \$.44, for a new Conversion Price of \$3.96. If Events of Noncompliance exist for an additional 180 days, the existing Conversion Price would be reduced by 10% of what the Conversion Price would have been if there had been no previous adjustment pursuant to this paragraph (i.e., \$4.40), or \$.44, for a new Conversion Price of \$3.52. Then assume that there is a two-for-one stock split, in which case the Conversion Price would be decreased hereunder from \$3.52 to \$1.76, and assume that Events of Noncompliance exist for an additional 180 days. In this case, the Conversion Price would be reduced by 10% of what the Conversion Price would have been immediately prior to such adjustment if there had been no previous adjustments pursuant to this paragraph (i.e. \$2.20), or \$.22, for a new Conversion Price of \$1.54.

(iii) If any Event of Noncompliance has occurred and continues uncured for 30 days after written notice to the Board, the number of directors constituting the Corporation's Board shall, at the request of the Majority Holders, be increased by two (or such other amount required to give the holders of the Preferred Stock a minimum majority of the Board), and the holders of Preferred Stock shall have the special right, voting separately as a single class (with each share of Preferred Stock being entitled to one vote for each share of Common Stock issuable upon conversion of such share of Preferred Stock) and to the exclusion of all other classes of the Corporation's stock, to elect individuals to fill such newly created directorships, to remove any individuals elected to such directorships and to fill any vacancies in

such directorships. The special right of the holders of Preferred Stock to elect two extra members of the Board may be exercised at the special meeting called pursuant to this subparagraph (iv), at any annual or other special meeting of stockholders and, to the extent and in the manner permitted by applicable law, pursuant to a written consent in lieu of a stockholders meeting. Such special right shall continue until such time as there is no longer any Event of Noncompliance in existence, at which time such special right shall terminate subject to revesting upon the occurrence and continuation of any Event of Noncompliance which gives rise to such special right hereunder.

At any time when such special right has vested in the holders of Preferred Stock, a proper officer of the Corporation shall, upon the written request of the Majority Holders, addressed to the secretary of the Corporation, call a special meeting of the holders of Preferred Stock for the purpose of electing directors pursuant to this subparagraph. Such meeting shall be held at the earliest legally permissible date at the principal office of the Corporation, or at such other place designated by the holders of at least 10% of Preferred Stock then outstanding. If such meeting has not been called by a proper officer of the Corporation within 10 days after personal service of such written request upon the secretary of the Corporation or within 20 days after mailing the same to the secretary of the Corporation at its principal office, then the Majority Holders may designate in writing one of their number to call such meeting at the expense of the Corporation, and such meeting may be called by such Person so designated upon the notice required for annual meetings of stockholders and shall be held at the Corporation's principal office, or at such other place designated by the Majority Holders. Any holder of Preferred Stock so designated shall be given access to the stock record books of the Corporation for the purpose of causing a meeting of stockholders to be called pursuant to this subparagraph.

At any meeting or at any adjournment thereof at which the holders of Preferred Stock have the special right to elect directors, the presence, in person or by proxy, of the Majority Holders shall be required to constitute a quorum for the election or removal of any director by the holders of the Preferred Stock exercising such special right. The vote of a majority of such quorum shall be required to elect or remove any such director.

Any director so elected by the holders of Preferred Stock shall continue to serve as a director until the expiration of the lesser of (a) a period of three months following the date on which there is no longer any Event of Noncompliance in existence or (b) the remaining period of the full term for which such director has been elected. After the expiration of such three-month period or when the full term for which such director has been elected ceases (provided that the special right to elect directors has terminated), as the case may be, the number of directors, constituting the Board of the Corporation shall decrease to such number as constituted the whole Board of the Corporation immediately prior to the occurrence of the Event or Events of Noncompliance giving rise to the special right to elect directors.

(iv) If any Event of Noncompliance exists, each holder of Series X Preferred Stock shall also have any other rights which such holder is entitled to under any contract or agreement at any time and any other rights which such holder may have pursuant to applicable law.

#### Section 8. Registration of Transfer.

The Corporation shall keep at its principal office a register for the registration of Series X Preferred Stock. Upon the surrender of any certificate representing Series X Preferred Stock at such place, the Corporation shall, at the request of the record holder of such certificate, execute and deliver (at the Corporation's expense) a new certificate or certificates in exchange therefor representing in the aggregate the number of shares represented by the surrendered certificate. Each such new certificate shall be registered in such name and shall represent such number of shares as is requested by the holder of the surrendered certificate and shall be substantially identical in form to the surrendered certificate.

#### Section 9. Replacement.

Upon receipt of evidence reasonably satisfactory to the Corporation (an affidavit of the registered holder shall be satisfactory) of the ownership and the loss, theft, destruction or mutilation of any certificate evidencing shares of Series X Preferred Stock, and in the case of any such loss, theft or destruction, upon receipt of indemnity reasonably satisfactory to the Corporation (provided that if the holder is a financial institution or other institutional investor its own agreement shall be satisfactory), or, in the case of any such mutilation upon surrender of such certificate, the Corporation shall (at its expense) execute and deliver in lieu of such certificate a new certificate or like kind representing the number of shares of such class represented by such lost, stolen, destroyed or mutilated certificate and dated the date of such lost, stolen, destroyed or mutilated certificate.

#### Section 10. Definitions.

"Change in Ownership" means (A) any sale, transfer or issuance or series of sales, transfers and/or issuances of Common Stock by the Corporation or any holders thereof which results in any Person or group of Persons (as the term "group" is used under the Securities Exchange Act of 1934), other than the holders of Common Stock and Preferred Stock as of the Effective Time, owning (i) more than 50% of the Common Stock outstanding on a fully-diluted basis at the time of such sale, transfer or issuance or series of sales, transfers and/or issuances or (ii) capital stock of the Corporation possessing the voting power (under ordinary circumstances) to elect a majority of the Corporation's Board or (B) (i) any merger or consolidation of the Company with or into another entity as a result of which all of the Common Stock of the Company is converted into or exchanged for the right to receive cash, securities or other property or (ii) any exchange of all of the Common Stock of the Company for cash, securities or other property pursuant to a share exchange transaction.

"Common Stock" means, collectively, the Corporation's Common Stock and any capital stock of any class of the Corporation hereafter authorized which is not limited to a fixed sum or percentage of par or stated value in respect to the rights of the holders thereof to participate in dividends or in the distribution of assets upon any liquidation, dissolution or winding up of the Corporation.

"Common Stock Deemed Outstanding" means, at any given time, the number of shares of Common Stock deemed to be outstanding pursuant to subparagraphs 6(c)(i) and 6(c)(ii) hereof whether or not the Options or Convertible Securities are actually exercisable at such time, but excluding any shares of Common Stock issuable upon conversion of the Preferred Stock.

“Conversion Stock” means shares of the Corporation’s Common Stock issued or to be issued upon the conversion of the Series X Preferred Stock; provided that if there is a change such that the securities issuable upon conversion of the Series X Preferred Stock are issued by an entity other than the Corporation or there is a change in the type of class of securities so issuable, then the term “Conversion Stock” shall mean one share of the security issuable upon conversion of the Series X Preferred Stock (if such security is issuable in shares, or shall mean the smallest unit in which such security is issuable if such security is not issuable in shares.

“Convertible Securities” means any stock or securities directly or indirectly convertible into or exchangeable for Common Stock.

“Founders” means Christopher Fleck or Chet Heath.

“Fundamental Change” means (a) any sale or transfer of more than 50% of the assets of the Corporation and its Subsidiaries on a consolidated basis (measured either by book value in accordance with generally accepted accounting principles consistently applied or by fair market value determined in the reasonable good faith judgment of the Corporation’s Board) in any transaction or series of transactions (other than sales in the ordinary course of business) and (b) any merger or consolidation to which the Corporation is a party, except for a merger in which the Corporation is the surviving corporation, the terms of the Series X Preferred Stock are not changed and the Series X Preferred Stock is not exchanged for cash, securities or other property, and after giving effect to such merger, the holders of the Corporation’s outstanding capital stock immediately prior to the merger shall continue to own the Corporation’s outstanding capital stock possessing the voting power (under ordinary circumstances) to elect a majority of the Corporation’s Board.

“Junior Securities” means any capital stock (including the Series A Preferred Stock) or other equity securities of the Corporation, except for the Series X Preferred Stock.

“Liquidation Value” of any share of Series X Preferred Stock as of any particular date shall be equal to \$.50 (as adjusted for subsequent stock splits, combinations and other similar transactions affecting the Common Stock).

“Market Price” of any security means the average of the closing prices of such security’s sales on all securities exchanges on which such security may at the time be listed, or, if there has been no sales on any such exchange on any day, the average of the highest bid and lowest asked prices on all such exchanges at the end of such day, or, if on any day such security is not so listed, the average of the representative bid and asked prices quoted in the NASDAQ System as of 4:00 P.M., New York time, or, if on any day such security is not quoted in the NASDAQ System, the average of the highest bid and lowest asked prices on such day in the domestic over-the-counter market as reported by the National Quotation Bureau, Incorporated, or any similar successor organization, in each such case averaged over a period of 21 days consisting of the day as of which “Market Price” is being determined and the 20 consecutive business days prior to such day. If at any time such security is not listed on any securities exchange or quoted in the NASDAQ System or the over-the-counter market, the “Market Price” shall be the fair value thereof determined jointly by the Corporation and the Majority Holders. If

such parties are unable to reach agreement within a reasonable period of time, such fair value shall be determined by an independent appraiser experienced in valuing securities jointly selected by the Corporation and the Majority Holders. The determination of such appraiser shall be final and binding upon the parties, and the Corporation shall pay the fees and expenses of such appraiser.

"Majority Holders" shall mean the holders of at least sixty (60) percent of the voting power of the shares of Preferred Stock then outstanding.

"Options" means any rights, warrants or options to subscribe for or purchase Common Stock or Convertible Securities.

"Person" means an individual, a partnership, a corporation, a limited liability company, a limited liability, an association, a joint stock company, a trust, a joint venture, an unincorporated organization and a governmental entity or any department, agency or political subdivision thereof.

"Preferred Stock" means the Series A Preferred Stock and the Series X Preferred Stock.

"Public Offering" means any offering by the Corporation of its capital stock or equity securities to the public pursuant to an effective registration statement under the Securities Act of 1933, as then in effect, or any comparable statement under any similar federal statute then in force.

"Purchase Agreements" means the Stock Purchase Agreement, dated as of the May 24, 2001, by and among the Corporation and certain investors, as such agreement may from time to time be amended in accordance with its terms and the Amended and Restated Stock Purchase Agreement, dated as of October 30, 2000, by and among the Corporation and certain investors, as such agreement may from time to time be amended in accordance with its terms.

"Qualified Public Offering" means a Public Offering of the Corporation's Common Stock in which the gross proceeds to the Company equal or exceed \$25 million.

"Redemption Date" as to any share of Series X Preferred Stock means the date specified in the notice of any redemption at the holders option or the applicable date specified herein in the case of any other redemption; provided that no such date shall be a Redemption Date unless the Liquidation Value of such share (plus all accrued and unpaid dividends thereon and any required premium with respect thereto) is actually paid in full on such date, and if not so paid in full, the Redemption Date shall be the date on which such amount is fully paid.

"Series A Preferred Stock" means the Corporation's Series A Convertible Preferred Stock, \$0.0001 par value per share.

"Series X Preferred Stock" means the Corporation's Series X Convertible Preferred Stock, \$0.0001 par value per share.

"Subsidiary" means, with respect to any Person, any corporation, limited liability company, partnership, association or other business entity of which (i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (ii) if a limited liability company, partnership, association or other business entity, a majority of the partnership or other similar ownership interest thereof is at the time owned or controlled, directly or indirectly, by any Person or one or more Subsidiaries of that person or a combination thereof. For purposes hereof, a Person or Persons shall be deemed to have a majority ownership interest in a limited liability company, a partnership, association or other business entity if such Person or Persons shall be allocated a majority of limited liability company, partnership, association or other business entity gains or losses or shall be or control the managing general partner of such limited liability company, partnership, association or other business entity.

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