

Aug 16 06 03:19

Division of Corporations

Page 1 of 1

P05000121477

Florida Department of State
Division of Corporations
Public Access System

Electronic Filing Cover Sheet

Note: Please print this page and use it as a cover sheet. Type the fax audit number (shown below) on the top and bottom of all pages of the document.

((H06000205345 3)))



H06000205345ABCZ

Note: DO NOT hit the REFRESH/RELOAD button on your browser from this page. Doing so will generate another cover sheet.

To:
Division of Corporations
Fax Number : (850) 205-0380

From:
Account Name : FEE & JEFFRIES, P.A.
Account Number : I20010000069
Phone : (813) 229-8008
Fax Number : (813) 229-0046

FILED
SECRETARY OF STATE
DIVISION OF CORPORATIONS
06 AUG 16 PM 12:40

RECEIVED

06 AUG 16 8:00

DIVISION OF CORPORATIONS

FOR AMND/RESTATE/CORRECT OR O/D RESIGN

XHALE DIAGNOSTICS, INC.

Certificate of Status	1
Certified Copy	0
Page Count	09
Estimated Charge	\$43.75

Electronic Filing Menu

Corporate Filing Menu

Help

<https://efile.sunbiz.org/scripts/efilcovr.exe>

Amendment
08/17/06

8/16/2006

FILED
SECRETARY OF STATE
DIVISION OF CORPORATIONS
06 AUG 16 PM 12:40

FAX AUDIT NO.: (((H06000205345 3)))

**ARTICLES OF AMENDMENT TO
ARTICLES OF INCORPORATION
OF
XHALE DIAGNOSTICS, INC.**

**DETERMINING AND DESIGNATING THE PREFERENCES,
LIMITATIONS AND RELATIVE RIGHTS OF
SERIES A CONVERTIBLE PREFERRED STOCK**

**Pursuant to Sections 607.0601 and .0602
of the
Florida Business Corporation Act**

Xhale Diagnostics, Inc., a Florida corporation maintaining its principal business offices at 101 S.E. 2nd Place, Suite 201-A, Gainesville, Florida 32601 (the "Corporation"), hereby certifies that pursuant to authority conferred upon the Board of Directors by the Articles of Incorporation of the Corporation, and pursuant to the provisions of Sections 607.0601, .0602 and .0821, Florida Statutes, the Board of Directors, by unanimous written action, taken on August 14 2006, has adopted a resolution approving and providing for the designation and issuance of a series of its 10,000,000 shares of authorized preferred stock, no par value, the content of which resolution is hereafter set forth in its entirety:

RESOLVED, that pursuant to the authority expressly granted and vested in the Board of Directors of this Corporation in accordance with the provisions of its Articles of Incorporation, a series of the Corporation's authorized class of preferred stock, no par value, is hereby established as "Series A Convertible Preferred Stock, No Par Value," hereinafter referred to as the "Series A Preferred Stock", which series shall consist of 10,000,000. The Series A Preferred Stock shall have a stated value of \$0.26 per share (the "Stated Value"), as the same may be equitably adjusted whenever there shall occur a stock dividend, stock split, combination, reclassification or other similar event affecting the Series A Preferred Stock. The preferences and relative, participating, optional or other special rights of, and the qualifications, limitations and restrictions imposed on the Series A Preferred Stock shall be as follows:

1. Ranking.

As provided for herein, the Series A Preferred Stock shall rank senior to the common stock of the Corporation (the "Common Stock") as to liquidation, dissolution or winding up (collectively, the "Liquidation Preferences").

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

2. Dividends.

The holders of shares of the Series A Preferred Stock shall be entitled to share ratably with the Common Stock, with respect to the Series A Preferred Stock on an as converted basis into shares of Common Stock, in all ordinary dividends and other distributions (i.e., not in connection with the liquidation, dissolution or winding up of the Corporation), when and as declared by the Board of Directors out of the funds of the Corporation legally available therefore.

3. Voting Rights.

Each holder of outstanding shares of Series A Preferred Stock shall be entitled to the number of votes equal to the number of whole shares of Common Stock into which the shares of Series A Preferred Stock held by such holder are convertible (as adjusted from time to time pursuant to Section 5 below), at each meeting of stockholders of the Corporation (and written actions of stockholders in lieu of meetings) with respect to any and all matters presented to the stockholders of the Corporation for their action or consideration.

4. Priority in the Event of Liquidation, Dissolution or Winding Up.

In the event of any liquidation, dissolution or winding up of the affairs of the Corporation, whether voluntary or otherwise, after payment or provision for payment of the debts and other liabilities of the Corporation and before any distribution shall be made to the holders of any class of the Common Stock of the Corporation, each holder of Series A Preferred Stock shall be entitled to receive, out of the net assets of the Corporation, the sum of the Stated Value in cash for each share of Series A Preferred Stock so held, plus an amount equal to any dividends declared and remaining unpaid on each such share up to the date fixed for distribution. After payment shall have been made in full to the holders of Series A Preferred Stock, or funds necessary for such payment shall have been set aside in trust for the exclusive benefit of such holders, the holders of the Series A Preferred Stock shall be entitled to no further participation in any distribution of the assets of the Corporation. For purposes of this Section, (i) any acquisition of the Corporation by means of merger or other form of corporate reorganization in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring corporation or its subsidiary in which the holders of the Corporation's outstanding securities immediately before such acquisition do not immediately after such acquisition retain securities representing a majority of the voting power of the surviving entity of such acquisition shall not be treated as a liquidation, dissolution or winding up of the Corporation; and (ii) a sale, transfer or conveyance of all or substantially all of the assets of the Corporation in exchange for all cash consideration shall be treated as a liquidation, dissolution or winding up of the Corporation.

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

5. Conversion of Preferred Stock into Common Stock.

(a) **Right to Convert.** Each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance by the Corporation thereof (the "Effective Date"), at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Stated Value by the Series A Conversion Price applicable to such share, determined as hereinafter provided, in effect on the date the certificate is surrendered for conversion. The price at which shares of Common Stock shall be deliverable upon conversion of shares of the Series A Preferred Stock (the "Series A Conversion Price" or "Conversion Price") shall initially be \$0.26 per share of Common Stock. Such initial Series A Conversion Price shall be adjusted as hereinafter provided.

(b) **Automatic Conversion.** Each share of Series A Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Series A Conversion Price, upon the date of: (i) closing of: (1) the sale of shares of the Corporation's securities through an initial underwritten public offering registered under the Securities Act of 1933, as amended (the "Securities Act"), through lead underwriters of national standing, other than a registration relating solely to a transaction under Rule 145 of such Act (or any successor thereto) or to an employee benefit plan of the Corporation (the "IPO"); or (2) any acquisition of the Corporation by means of merger or other form of corporate reorganization in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring corporation or its subsidiary in which the holders of the Corporation's outstanding securities immediately before such acquisition do not immediately after such acquisition retain securities representing a majority of the voting power of the surviving entity of such acquisition; or (ii) the affirmative vote or written consent of the holders of at least 50.01% of the voting power of the Series A Preferred Stock.

(c) **Mechanics of Conversion.** Before any holder of Series A Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefore, duly endorsed, at the office of the Corporation or of any transfer agent for such stock, and shall give written notice to the Corporation at such office that he elects to convert the same and shall state therein the name or names in which he wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Series A Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which he shall be entitled. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of surrender of the shares of Series A Preferred Stock to be converted, and the person or persons entitled to receive shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

(d) **Adjustments to Series A Conversion Price for Certain Diluting Issues.** If at any time after the date of the filing of these Articles of Amendment with the Secretary of State of the State of Florida (the "Filing Date"), the Corporation shall issue any shares of Common Stock, or shall issue any Common Stock Equivalents (as hereinafter defined), for a consideration per share less than the Conversion Price in effect immediately prior to the issuance of such Common Stock or Common Stock Equivalents, the Conversion Price per share of Series A Preferred Stock in effect immediately prior to each such issuance shall be decreased to such lesser amount, except as otherwise expressly set forth in this Section 5(d).

"Common Stock Equivalents" means any stock or security convertible into or exercisable or exchangeable for Common Stock and any right, warrant or option to acquire Common Stock or any such convertible, exercisable or exchangeable security.

The per share consideration for the sale or issuance of Common Stock shall be the price per share received by the Corporation before payment of commissions, discounts and other expenses. The value of any non-cash consideration received or receivable upon the sale or issuance of Common Stock or Common Stock Equivalents shall be determined in good faith by the Board.

In the case of the sale or issuance of Common Stock Equivalents, the per share consideration shall be determined by dividing the maximum number of shares of Common Stock issuable with respect to such Common Stock Equivalents into the aggregate consideration received by the Corporation upon the sale or issuance of such Common Stock Equivalents plus the minimum aggregate amount of any additional consideration receivable by the Corporation upon the conversion or exercise of such Common Stock Equivalents. For the purpose of calculation, such maximum number of shares shall be assumed to be issued on the earlier of the payment date or record date for a distribution of such Common Stock Equivalents.

If any Common Stock Equivalents included in adjustments under this Section expire or terminate without the Common Stock to which they related having been issued, the Conversion Price shall be readjusted to eliminate the effect of the assumed issuance of such Common Stock. If any Common Stock Equivalents by their terms provide for subsequent increases in the additional consideration payable for or are amended to provide for the related Common Stock or for subsequent decreases in the number of shares of Common Stock obtainable, then, upon any such increase or decrease, the Conversion Price shall be appropriately readjusted to the extent such Common Stock Equivalents have not then expired or been exercised or converted. The aggregate increase in the Conversion Price caused by all such readjustments shall not exceed the decrease in Conversion Price made upon the issuance of the Common Stock Equivalents to which such readjustments relates. If any Common Stock Equivalents by their terms provide for or are amended to provide for subsequent decreases in the additional consideration payable for the related Common Stock or for subsequent increases in the number of shares of Common Stock obtainable, then, upon any such decrease or increase, the Conversion Price shall be

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

appropriately adjusted to the extent such Common Stock Equivalents have not then expired or been exercised or converted.

In case the Corporation shall declare a dividend or make any other distribution upon any stock of the Corporation payable in Common Stock or Common Stock Equivalents, such Common Stock or Common Stock Equivalents shall be deemed to have been issued or sold without consideration as of the earlier of the related record or payment date.

The number of shares of Common Stock outstanding at any point in time shall include all shares then issuable or to become issuable pursuant to any Common Stock Equivalent then issued or to be issued, but only to the extent the then effective exercise price or conversion price of such Common Stock Equivalent is less than or equal to the per share consideration for the shares of Common Stock or Common Stock Equivalents which have given rise to the Conversion Price adjustment being calculated.

The following issuances of Common Stock or Common Stock Equivalents shall not require adjustment of the Conversion Price under this Section: (1) any dividend or distribution on the capital stock of the Corporation pursuant to the terms of Section 2 (Dividends) hereof; (2) securities offered by the Corporation to the public in an IPO; (3) securities issued or securities issuable upon the conversion of any shares of the Series A Preferred Stock by a holder thereof; (4) securities issued or securities issuable upon the exercise or conversion of such securities to employees, consultants, directors and officers of the Corporation pursuant to stock purchase, stock option plans or other agreement approved by the Board; (5) securities issued or securities issuable upon the exercise or conversion of such securities pursuant to any equipment loan or leasing arrangement, real property leasing arrangement or debt financing from a bank or similar financial institution or in connection with strategic partnerships or joint ventures, in each case as approved by the Board and in an aggregate amount not to exceed 5% of the total amount of issued and outstanding shares of Common Stock as of the date of closing of such transaction; (6) securities issued or securities issuable pursuant to the acquisition by the Corporation of another entity by means of merger or other form of corporate reorganization approved by the Board of Directors and in an aggregate amount not to exceed 5% of the total amount of issued and outstanding shares of Common Stock as of the date of closing of such transaction; (7) any shares of Common Stock required to be issued to the University of Florida Research Foundation, Inc. ("UFRF") pursuant to that certain Standard Exclusive License Agreement with Sublicensing Terms, and that certain Equity Agreement, each effective as of March 1, 2006, and each between the Corporation and UFRF; (8) securities issued or securities issuable upon the exercise or conversion of such securities and not otherwise set forth herein where the number of shares issued or issuable does not exceed 2% of the Corporation's issued and outstanding Common Stock, measured as of the date of such issuance or obligation to issue and including any securities issued (or issuable upon the exercise or conversion of such securities) pursuant to this Section 5(d)(8) within the preceding 12-month period, which exception to the adjustment of the Conversion Price may only be used by the Corporation up to twice per calendar year; and (9)

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

securities issued with respect to which the holders of not less than two-thirds (2/3) of the Series A Preferred Stock waive their rights pursuant to this Section.

(e) **Adjustments to Conversion Price for Combinations or Subdivisions of Common Stock.** In the event that this Corporation at any time or from time to time after the Filing Date shall effect a subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock (by stock split, reclassification or otherwise than by payment of a dividend in Common Stock or in any right to acquire Common Stock pursuant to the terms of Section 2 (Dividends) hereof), or in the event the outstanding shares of Common Stock shall be combined or consolidated, by reclassification or otherwise, into a lesser number of shares of Common Stock, then the Conversion Price for the Series A Preferred Stock in effect immediately prior to such event shall, concurrently with the effectiveness of such event, be proportionately decreased or increased, as appropriate.

(f) **Adjustments for Reclassification and Reorganization.** If the Common Stock issuable upon conversion of the Series A Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification or otherwise (other than a subdivision or combination of shares provided for in Section 5(e) above), the Series A Conversion Price then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted so that the Series A Preferred Stock shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of the Series A Preferred Stock immediately before that change.

(g) **No Impairment.** The Corporation will not, by amendment of its Articles of Incorporation or through reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 5 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of the Series A Preferred Stock against impairment.

(h) **Certificates as to Adjustments.** Upon the occurrence of each adjustment or readjustment of any Conversion Price pursuant to this Section 5, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Series A Preferred Stock a certificate executed by the Corporation's President or Chief Financial Officer setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Series A Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustments and readjustments, (B) the Conversion Price for the Series A Preferred Stock at the

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

time in effect, and (C) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of the Series A Preferred Stock.

(i) **Notices of Record Date.** In the event that the Corporation shall propose at any time: (A) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus; (B) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights; (C) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or (D) to merge or consolidate with or into any other corporation, or sell, lease or convey all or substantially all of its assets, or to liquidate, dissolve or wind up; then, in connection with each such event, the Corporation shall send to the holders of Series A Preferred Stock:

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

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

(j) **Issue Taxes.** The Corporation shall pay any and all issue and other taxes that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of Series A Preferred Stock pursuant hereto; provided, however, that the Corporation shall not be obligated to pay any transfer taxes resulting from any transfer requested by any holder in connection with any such conversion.

(k) **Reservation of Stock Issuable Upon Conversion.** The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series A Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series A Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, including, without limitation, engaging in best efforts to obtain the requisite shareholder approval of any necessary amendment to the Corporation's Articles of Incorporation.

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

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

6. Limitations on Corporation; Shareholder Consent.

So long as any shares of Series A Preferred Stock are outstanding, the Corporation shall not, without the affirmative vote or the written consent as provided by law, of holders of two-thirds of the outstanding shares of the Series A Preferred Stock, voting as a class, change the preferences, rights or limitations with respect to such Series in any material respect prejudicial to the holders thereof, or increase the authorized number of shares of such Series, but nothing herein contained shall require such a class vote or consent (a) in connection with any increase in the total number of authorized shares of Common Stock, or (b) in connection with the authorization, designation, increase or issuance of any class or series of stock holding a ranking equal or subordinate to the Series A Preferred Stock with regard to liquidation and payment of dividends. Further, the provisions of this Section shall not in any way limit the right and power of the Corporation to issue any bonds, notes, mortgages, debentures and other obligations, and to incur indebtedness to banks and to other lenders.

7. Notices.

All notices or other communications required or permitted to be given hereunder shall be in writing and shall be considered properly given or made if hand delivered, mailed from within the United States by certified or registered mail, or sent by overnight delivery service, if to the Corporation at its address indicated in its Annual Report as most recently filed with the Florida Department of State, and if to a holder of Series A Preferred Stock at the address set forth in the shareholder records as maintained by the Corporation, or to such other address as any such shareholder may have designated by like notice forwarded to the Corporation. All notices, except notices of change of address, shall be deemed given when mailed or hand delivered and notices of change of address shall be deemed given when received.

The foregoing amendment to the Corporation's Articles of Incorporation was duly adopted by written consent of the holders of a majority of the shares of the Corporation's issued and outstanding common stock, in accordance with the provisions of Section 607.0704, Florida Statutes, and by operation of subsection (5) thereof, and not in contravention of the requirements

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

of Sections 607.1003 or 607.1006, Florida Statutes, the initial such consent being dated and received by the Corporation as of August 14, 2006, and the consent providing the required majority in interest authorization for the proposed action being dated and received as of August 14, 2006, without any such consents being revoked within the intervening period.

[signature page to follow]

FAX AUDIT NO.: (((H06000205345 3)))

FAX AUDIT NO.: (((H06000205345 3)))

In witness whereof, the undersigned has executed these Articles of Amendment effective as of August 15, 2006.

XHALE DIAGNOSTICS, INC.

By: /S/ Richard R. Allen
Richard R. Allen, President

FAX AUDIT NO.: (((H06000205345 3)))