

P96000097910

Florida Department of State  
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BASIC AMENDMENT

CELLIT, INC.

Please Expedite.  
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Certificate of Status	0
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Estimated Charge	\$43.75

Amended & Restated  
Art.

**AMENDED AND RESTATED ARTICLES OF  
INCORPORATION OF CELLIT, INC.**

The undersigned, Alex Tellez, being the President of CellIT, Inc., a Florida Corporation (the "Corporation"), hereby states on behalf of the Corporation as follows:

1. The Corporation was incorporated on November 27, 1996, the date on which the Articles of Incorporation were filed with the Secretary of State for the State of Florida under document number P96000097910.

2. Pursuant to the requirements of Sections 607.1006 and 607.1007 of the Florida Business Corporation Act, the undersigned hereby certifies, attests and serves notice that the Articles of Incorporation of the Corporation are hereby amended and restated to read in their entirety as follows:

**ARTICLE I**

The name of the corporation is CellIT, Inc. (hereinafter called the "Corporation").

**ARTICLE II**

The purpose for which the Corporation is organized is to carry on and transact and to engage in any and all lawful act, activity or business for which Corporations may be organized under the Florida Business Corporation Act, including any amendments thereto.

**ARTICLE III**

The address of the principal office and the mailing office of the Corporation is 8300 N.W. 33rd Street, Suite 200, Miami, Florida 33122.

**ARTICLE IV**

The street address of the registered office of the Corporation is 8300 N.W. 33rd Street, Suite 200, Miami, Florida 33122, and the name and address of the registered agent of the Corporation at the registered office is Olga B. Velasco.

**ARTICLE V**

The Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the Corporation is authorized to issue is Seventy-Five Million (75,000,000) shares. Fifty Million (50,000,000) shares shall be Common Stock and Twenty-Five Million (25,000,000) shares shall be Preferred Stock. The Common Stock shall have a par value of \$0.001 per share. The Preferred Stock shall have a par value of \$0.001 per share.

Preferred Stock may be issued from time to time in one or more series, each of such series to have such terms as stated or expressed herein and in the resolution or resolutions providing for the issue of such series adopted by the Board of Directors of the Corporation as

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hereinafter provided. Any shares of Preferred Stock which may be redeemed, purchased or acquired by the Corporation may be reissued except as otherwise provided by law. Different series of Preferred Stock shall not be construed to constitute different classes of shares for the purposes of voting by classes unless expressly provided herein, by applicable law or in the resolution or resolutions providing for the issue of such series.

Authority is hereby expressly granted to the Board of Directors from time to time to issue the Preferred Stock in one or more series, and in connection with the creation of any such series, by resolution or resolutions providing for the issue of the shares thereof to determine and fix such voting powers, full or limited, or no voting powers, and such designations, preferences and relative participating, optional or other special rights, and qualifications, limitations or restrictions thereof, including without limitation thereof, dividend rights, special voting rights, conversion rights, redemption privileges and liquidation preferences, as shall be stated and expressed in such resolutions, all to the full extent now and hereafter permitted by the Florida Business Corporation Act. Without limiting the generality of the foregoing, the resolutions providing for issuance of any series of Preferred Stock may provide that such series shall be superior or rank equally or be junior to the Preferred Stock of any other series to the extent permitted by law. Except as otherwise specifically provided in these Amended and Restated Articles of Incorporation, no vote of the holders of Preferred Stock or Common Stock shall be a prerequisite to the issuance of any shares of any series of the Preferred Stock authorized by and complying with the conditions of these Amended and Restated Articles of Incorporation, the right to have such vote being expressly waived by all present and future holders of the capital stock of the Corporation.

Eight Million Six Hundred Thirty-Two Thousand Four Hundred Seventy-Eight (8,632,478) shares of the Preferred Stock shall be designated "Series A Preferred Stock" (the "Series A Preferred"). Eight Million Six Hundred Fifty-Eight Thousand Three Hundred Eighty (8,658,380) shares of the Preferred Stock shall be designated "Series B Preferred Stock" (the "Series B Preferred"). The rights, preferences, restrictions and other matters relating to the Series A Preferred and the Series B Preferred are as follows:

1. Dividends.

(a) The holders of the Series B Preferred shall be entitled to receive, when and as declared by the Board of Directors, out of funds legally available thereof, prior to and in preference to the holders of Series A Preferred and Common Stock, dividends at an annual rate equal to 8 percent of the Initial Invested Amount (as defined below) per share of Series B Preferred (the "Series B Preferential Dividend") (which Initial Invested Amount shall be subject to equitable adjustment whenever there shall occur a stock dividend, stock split, combination, reorganization, recapitalization, reclassification or other similar event involving the Series B Preferred). The Series B Preferential Dividend shall be cumulative, compounded annually, and shall accrue daily on each share of Series B Preferred from the original date of issue thereof whether or not such dividends have been declared and whether or not there are profits, surpluses or other funds then legally available for the payment of dividends. No dividends shall be paid or declared, and no other distribution shall be made, on or with respect to the Series A Preferred or Common Stock until payment of the Series B Preferential Dividend has been made or provided for. After payment of the Series B Preferential Dividend has been made, the holders of the

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Series A Preferred, Series B Preferred and Common Stock shall share ratably, on a *pari passu* basis, any dividends (whether payable in cash, property or securities) declared by the Board of Directors and paid by the Corporation (with the distribution to the holders of Preferred Stock being that as would have been payable had each such share been converted to Common Stock immediately prior to the record date for determining shareholders eligible for the dividend (such assumed conversion being referred to herein as being "on an as-converted basis")).

(b) After payment in full of the entire then accrued Series B Preferential Dividend, the holders of the Series A Preferred shall be entitled to receive, when and as declared by the Board of Directors, out of funds legally available therefor, dividends payable *pari passu* with any payment of any dividend on Common Stock of the Corporation and, except with respect to the Series B Preferential Dividend, *pari passu* with any payment of dividends on the Series B Preferred.

(c) Except as expressly set forth herein, the Board of Directors shall not be obligated to declare any dividends on the Preferred Stock or Common Stock, even if there are funds legally available therefor.

(d) Notwithstanding paragraphs (a) and (b) hereof the Corporation may at any time, out of funds legally available therefor, repurchase shares of Common Stock of the Corporation issued to or held by employees of or consultants to the Corporation or its subsidiaries upon termination of their employment or services, pursuant to any agreement approved by the Corporation's Board of Directors providing for such right of repurchase, whether or not dividends on the Series A Preferred or Series B Preferred shall have been paid and whether or not such dividends shall have been declared and funds set aside therefor.

(e) Shares of one class or series of the Corporation's capital stock may, subject to the other provisions of these Articles of Incorporation, be paid as dividends on shares of any other class or Series of the Corporation's capital stock.

(f) For purposes hereof "Initial Invested Amount" means \$2.40.

## 2. Liquidation Preference.

(a) At any time, in the event of any of the following occurrences (a "Transaction"):

(i) any transaction or series of related transactions (including, without limitation, any reorganization, merger or consolidation) which will result in the Corporation's shareholders immediately prior to such transaction not holding (by virtue of such shares of securities issued solely with respect thereto) at least 50% of the voting power of the surviving or continuing entity;

(ii) a sale of all or substantially all of the assets of the Corporation, unless the Corporation's shareholders immediately prior to such sale will, as a result of such sale, hold (by virtue of securities issued as consideration for the Corporation's sale) at least 50% of the voting power of the purchasing entity; or

Fax Audit No. H02000009260

Fax Audit No. H02000009260

(iii) any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary;

then the assets of the Corporation available for distribution or such other property issued in connection with such Transaction shall be distributed at the closing of the Transaction in the order and priority that follows:

(A) the holders of the Series A Preferred and Series B Preferred, on a *pari passu* basis, shall receive an amount equal to (I) One Dollar and Seventeen Cents (\$1.17) per share of Series A Preferred (adjusted for any subdivisions, combinations, consolidations or stock distributions or stock dividends with respect to such shares) plus all declared but unpaid dividends on each such share, if any, and (II) Two Dollars and Forty Cents (\$2.40) per share of Series B Preferred (adjusted for any subdivisions, combinations, consolidations or stock distributions or stock dividends with respect to such shares) plus all accrued but unpaid dividends (including the Series B Preferential Dividend) and all declared but unpaid dividends on each such share, if any; then

(B) after setting apart or paying the full preferential amount due pursuant to subsection (A) above, all remaining assets available for distribution shall be distributed among the holders of the Preferred Stock and Common Stock pro rata according to the number of shares of Common Stock held by such holders on an as-converted basis.

If upon the occurrence of a Transaction the assets and funds distributed among the holders of the Series A Preferred and Series B Preferred shall be insufficient to permit the payment to such holders of the full preferential amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred and Series B Preferred, on a *pari passu* basis, in proportion to the aggregate preferential amount (including without limitation all accrued and unpaid dividends (including the Series B Preferential Dividend) and all declared and unpaid dividends) that the holders of each such Series are otherwise entitled to receive. By way of example, if the Series A Convertible Preferred Stock were entitled to an aggregate of \$X upon liquidation and the Series B Convertible Preferred Stock were entitled to an aggregate of \$Y upon liquidation but an amount of money equal to less than the sum of \$X plus \$Y were available for distribution upon liquidation (such amount of available money being referred to as "\$Z") then there would be allocated to the Series A Convertible Preferred Stock  $(\$X \div (\$X + \$Y)) \times \$Z$  and there would be allocated to the Series B Convertible Preferred Stock  $(\$Y \div (\$X + \$Y)) \times \$Z$ .

(b) Any securities to be delivered to the shareholders pursuant to this Section 2 shall be valued as follows:

(i) If traded on a securities exchange or the Nasdaq Stock Market's National Market and not subject to restrictions on marketability, the value shall be deemed to be the average of the closing prices of the securities on such exchange over the 30-day period ending three (3) days prior to the distribution of such securities; and

Fax Audit No. H02000009260

(ii) If actively traded over the counter and not subject to restrictions on marketability, the value shall be deemed to be the average of the closing bid or sale prices (whichever are applicable) over the 30-day period ending three (3) days prior to the distribution of such securities; and

(iii) If there is no active public market or if such securities are subject to restrictions on free marketability, the value shall be the fair market value thereof as determined in good faith by the Board of Directors, unless the holders of a majority of the then outstanding shares of Series A Preferred or the holders of a majority of the then outstanding shares of Series B Preferred request, in writing, that an independent appraiser perform such valuation, then the value shall be determined by an independent appraiser selected by the Board of Directors and reasonably acceptable to a majority of the holders of such series of Preferred Stock.

(c) Any property other than cash or securities to be delivered to the shareholders pursuant to this Section 2 shall be valued at the fair market value thereof as determined in good faith by the Board of Directors, unless the holders of a majority of the then outstanding shares of Series A Preferred or the holders of a majority of the then outstanding shares of Series B Preferred request, in writing, that an independent appraiser perform such valuation, then the value shall be determined by an independent appraiser selected by the Board of Directors and reasonably acceptable to a majority of the holders of such series of Preferred Stock.

(d) Notwithstanding anything in this Section 2 or elsewhere in these articles of incorporation to the contrary, the holders of the Series A Preferred and the Series B Preferred hereby waive their liquidation preferences as to the proceeds of a merger pursuant to that Merger Agreement, dated January 2002, as follows:

(i) The holders of the Common Stock shall receive \$.95 per share;

(ii) The Corporation may redeem options to acquire up to 683,260 shares of Common Stock or Preferred Stock for an aggregate amount of up to \$64,910.

3. Voting Rights. Except as otherwise provided herein or in that certain Amended and Restated Investors' Rights Agreement, dated as of June 6, 2000, among the Series A Investors (as defined therein), Series B Investors (as defined therein), the Corporation and the Common Stock Holders (as defined therein) (the "Investors' Rights Agreement"), or as required by law, the holder of each share of Common Stock issued and outstanding shall have one vote and the holder of each share of Series A Preferred and Series B Preferred shall be entitled to the number of votes equal to the number of shares of Common Stock into which such share of Series A Preferred or Series B Preferred, as applicable, could be converted at the record date for determination of the shareholders entitled to vote on such matters, or, if no such record date is established, at the date such vote is taken or any written consent of shareholders is solicited, such votes to be counted together with all other shares of stock of the Corporation having a general voting power and not separately as a class. Holders of Common Stock, Series A Preferred and Series B Preferred shall be entitled to notice of any shareholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes by the holders of Series A Preferred and Series B

Preferred shall not, however, be permitted and any fractional voting rights shall (after aggregating all shares into which shares of Series A Preferred or Series B Preferred, as applicable, held by each holder could be converted) be rounded to the nearest whole number.

4. Conversion Rights. The holders of the Series A Preferred and Series B Preferred shall have the following rights with respect to the conversion of such shares into shares of Common Stock:

(a) General. Subject to and in compliance with the provisions of this Section 4, any or all shares of the Series A Preferred and the Series B Preferred may, at the option of the holder thereof, be converted at any time into fully-paid and non-assessable shares of Common Stock. The number of shares of Common Stock to which a holder of Series A Preferred shall be entitled to receive upon conversion shall be the product obtained by multiplying the Series A Applicable Conversion Rate (determined as provided in Section 4(b)) by the number of shares of Series A Preferred being converted at any time. The number of shares of Common Stock to which a holder of Series B Preferred shall be entitled to receive upon such conversion shall be the product obtained by multiplying the Series B Applicable Conversion Rate (determined as provided in Section 4(b)) by the number of shares of Series B Preferred being converted at any time. Upon any conversion pursuant to this Section 4, all accrued and unpaid dividends with respect to the shares of Series B Preferred Stock being converted shall be forfeited.

(b) Applicable Conversion Rate. The conversion rate in effect at any time for the Series A Preferred (the "Series A Applicable Conversion Rate") shall be the quotient obtained by dividing \$1.17 by the Series A Applicable Conversion Value, as defined in Section 4(c). Initially, the Series A Applicable Conversion Rate shall be one (1), and each share of Series A Preferred shall initially be convertible into one (1) share of Common Stock. The conversion rate in effect at any time for the Series B Preferred (the "Series B Applicable Conversion Rate") shall be the quotient obtained by dividing \$2.40 by the Series B Applicable Conversion Value, as defined in Section 4(c). Initially, the Series B Applicable Conversion Rate shall be one (1), and each share of Series B Preferred shall initially be convertible into one (1) share of Common Stock.

(c) Applicable Conversion Value. The Series A Applicable Conversion Value in effect from time to time, except as adjusted in accordance with Section 4(d) hereof, shall be \$1.17 with respect to the Series A Preferred (the "Series A Applicable Conversion Value"). The Series B Applicable Conversion Value in effect from time to time, except as adjusted in accordance with Section 4(d) hereof shall be \$2.40 with respect to the Series B Preferred (the "Series B Applicable Conversion Value").

(d) Adjustment to Series A Applicable Conversion Value and Series B Applicable Conversion Value.

(i) (A) Effect on Series A Applicable Conversion Value Upon Dilutive Issuances of Common Stock or Convertible Securities. If the Corporation shall, while there are any shares of Series A Preferred outstanding, issue or sell shares of its Common Stock (or Common Stock Equivalents, as defined below) without consideration or at a price per share

Fax Audit No. H0200009260

less than the Series A Applicable Conversion Value in effect immediately prior to such issuance or sale, then and in such event, such Series A Applicable Conversion Value upon each such issuance or sale, except as hereinafter provided, shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying the Series A Applicable Conversion Value in effect immediately prior to such calculation by a fraction:

(1) the numerator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully diluted basis assuming the exercise or conversion of all then exercisable options, warrants, purchase rights or convertible securities), plus (b) the number of shares of Common Stock which the net aggregate consideration, if any, received by the Corporation for the total number of such additional shares of Common Stock or Common Stock Equivalents so issued would purchase at the Series A Applicable Conversion Value in effect immediately prior to such issuance, and

(2) the denominator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully diluted basis assuming the exercise or conversion of all then exercisable options, warrants, purchase rights or convertible securities), plus (b) the number of such additional shares of Common Stock or Common Stock Equivalents so issued.

The provisions of this Section 4(d)(i)(A) may be waived in any instance (without the necessity of convening any meeting of shareholders of the Corporation) upon the written consent of the holders of at least 66.66% of the outstanding shares of Series A Preferred.

(i) (B) Effect on Series A Applicable Conversion Value Upon Other Dilutive Issuances of Warrants, Options and Purchase Rights to Common Stock or Convertible Securities.

(1) For the purposes of this Section 4(d)(i), the issuance of any warrants, options, subscription or purchase rights with respect to shares of Common Stock and the issuance of any securities convertible into or exchangeable for shares of Common Stock, or the issuance of any warrants, options, subscription or purchase rights with respect to such convertible or exchangeable securities (collectively, "Common Stock Equivalents"), shall be deemed an issuance of Common Stock with respect to the Series A Preferred if the Net Consideration Per Share (as hereinafter determined) which may be received by the Corporation for such Common Stock Equivalents shall be less than the Series A Applicable Conversion Value in effect at the time of such issuance. Any obligation, agreement or undertaking to issue Common Stock Equivalents at any time in the future shall be deemed to be an issuance at the time such obligation, agreement or undertaking is made or arises. No adjustment of the Series A Applicable Conversion Value shall be made under this Section 4(d)(i) upon the issuance of any shares of Common Stock which are issued pursuant to the exercise, conversion or exchange of any Common Stock Equivalents if any adjustment shall previously have been made upon the issuance of any such Common Stock Equivalents as above provided.



Fax Audit No. H02000009260

(2) Should the Net Consideration Per Share of any such Common Stock Equivalents be decreased from time to time, then, upon the effectiveness of each such change, the Series A Applicable Conversion Value will be that which would have been obtained (x) had the adjustments made upon the issuance of such Common Stock Equivalents been made upon the basis of the actual Net Consideration Per Share of such securities, and (y) had adjustments made to the Series A Applicable Conversion Value since the date of issuance of such Common Stock Equivalents been made to such Series A Applicable Conversion Value as adjusted pursuant to (x) above. Any adjustment of the Series A Applicable Conversion Value with respect to this paragraph which relates to Common Stock Equivalents shall be disregarded if, as, and when all of such Common Stock Equivalents expire or are canceled without being exercised, so that the Series A Applicable Conversion Value effective immediately upon such cancellation or expiration shall be equal to the Series A Applicable Conversion Value in effect at the time of the issuance of the expired or canceled Common Stock Equivalents, with such additional adjustments as would have been made to the Series A Applicable Conversion Value had the expired or canceled Common Stock Equivalents not been issued; provided that such adjustment shall not be effective unless and until the holders of the Series A Preferred shall have first been given five days' notice of such adjustment.

(3) For purposes of the provisions of this Section 4(d)(i), the "Net Consideration Per Share" which may be received by the Corporation shall be determined as follows:

(x) The "Net Consideration Per Share" shall mean the amount equal to the total amount of consideration, if any, received by the Corporation for the issuance of such Common Stock Equivalents, plus the minimum amount of consideration, if any, payable to the Corporation upon exercise, or conversion or exchange thereof, divided by the aggregate number of shares of Common Stock that would be issued if all such Common Stock Equivalents were exercised, exchanged or converted.

(y) The "Net Consideration Per Share" which may be received by the Corporation shall be determined in each instance as of the date of issuance of Common Stock Equivalents without giving effect to any possible future upward price adjustments or rate adjustments which may be applicable with respect to such Common Stock Equivalents.

(i) (C) Effect on Series B Applicable Conversion Value Upon Dilutive Issuances of Common Stock or Convertible Securities. If the Corporation shall, while there are any shares of Series B Preferred outstanding, issue or sell shares of its Common Stock (or Common Stock Equivalents) without consideration or at a price per share less than the Series B Applicable Conversion Value in effect immediately prior to such issuance or sale, then and in such event, such Series B Applicable Conversion Value upon each such issuance or sale, except as hereinafter provided, shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying the Series B Applicable Conversion Value in effect immediately prior to such calculation by a fraction:

Fax Audit No. H02000009260

(1) the numerator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully diluted basis assuming the exercise or conversion of all then exercisable options, warrants, purchase rights or convertible securities), plus (b) the number of shares of Common Stock which the net aggregate consideration, if any, received by the Corporation for the total number of such additional shares of Common Stock or Common Stock Equivalents so issued would purchase at the Series B Applicable Conversion Value in effect immediately prior to such issuance, and

(2) the denominator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully diluted basis assuming the exercise or conversion of all then exercisable options, warrants, purchase rights or convertible securities), plus (b) the number of such additional shares of Common Stock or Common Stock Equivalents so issued.

The provisions of this Section 4(d)(i)(C) may be waived in any instance (without the necessity of convening any meeting of shareholders of the Corporation) upon the written consent of the holders of at least 66.66% of the outstanding shares of Series B Preferred.

(i) (D) Effect on Series B Applicable Conversion Value Upon Other Dilutive Issuances of Warrants, Options and Purchase Rights to Common Stock or Convertible Securities.

(1) For the purposes of this Section 4(d)(i), the issuance of Common Stock Equivalents shall be deemed an issuance of Common Stock with respect to the Series B Preferred if the Net Consideration Per Share which may be received by the Corporation for such Common Stock Equivalents shall be less than the Series B Applicable Conversion Value in effect at the time of such issuance. Any obligation, agreement or undertaking to issue Common Stock Equivalents at any time in the future shall be deemed to be an issuance at the time such obligation, agreement or undertaking is made or arises. No adjustment of the Series B Applicable Conversion Value shall be made under this Section 4(d)(i) upon the issuance of any shares of Common Stock which are issued pursuant to the exercise, conversion or exchange of any Common Stock Equivalents if any adjustment shall previously have been made upon the issuance of any such Common Stock Equivalents as above provided.

(2) Should the Net Consideration Per Share of any such Common Stock Equivalents be decreased from time to time, then, upon the effectiveness of each such change, the Series B Applicable Conversion Value will be that which would have been obtained (x) had the adjustments made upon the issuance of such Common Stock Equivalents been made upon the basis of the actual Net Consideration Per Share of such securities, and (y) had adjustments made to the Series B Applicable Conversion Value since the date of issuance of such Common Stock Equivalents been made to such Series B Applicable Conversion Value as adjusted pursuant to (x) above. Any adjustment of the Series B Applicable Conversion Value with respect to this paragraph

Fax Audit No. H02000009260

which relates to Common Stock Equivalents shall be disregarded if, as, and when all of such Common Stock Equivalents expire or are canceled without being exercised, so that the Series B Applicable Conversion Value effective immediately upon such cancellation or expiration shall be equal to the Series B Applicable Conversion Value in effect at the time of the issuance of the expired or canceled Common Stock Equivalents, with such additional adjustments as would have been made to the Series B Applicable Conversion Value had the expired or canceled Common Stock Equivalents not been issued; provided that such adjustment shall not be effective unless and until the holders of the Series B Preferred shall have been given five days notice of such adjustment.

(i) (E) Consideration Other than Cash. For purposes of this Section 4(d)(i), if a part or all of the consideration received by the Corporation in connection with the issuance of shares of the Common Stock or the issuance of any of the securities described in this Section 4(d)(i) consists of property other than cash, such consideration shall be deemed to have a fair market value as is reasonably determined in good faith by the Board of Directors of the Corporation.

(i) (F) Exceptions to Anti-dilution. This Section 4(d)(i) shall not apply under any of the circumstances which would constitute an Extraordinary Common Stock Event (as described below). Further, this Section 4(d)(i) shall not apply with respect to:

(1) the issuance of shares (inclusive of shares subject to outstanding options) of Common Stock (or options to purchase such shares of Common Stock), issuable to employees, officers or directors of or consultants to the Corporation pursuant to agreements or conversion of any other securities outstanding as of the date upon which shares of Series B Preferred are first issued by the Corporation.

(2) the issuance of options to purchase Common Stock and the issuance of shares of Common Stock upon the exercise of such options to employees and directors of the Corporation or its subsidiaries who are not Founders (as such term is defined in the Investors' Rights Agreement), pursuant to a stock option plan approved by the Board of Directors of the Corporation.

(3) the issuance of shares of Common Stock upon the conversion of any shares of Series A Preferred or Series B Preferred;

(4) the issuance of securities in connection with bona fide equipment or debt financing or leases (including securities issued in consideration of guarantees of such financing or leases) provided such issuance and the terms of such issuance have been approved by the Board of Directors of the Corporation including the Series A Director and one Independent Director;

(5) the issuance of securities as a dividend or distribution on the Series A Preferred or Series B Preferred; or

(6) the issuance of securities as consideration for an acquisition of another company or all or substantially all of the assets thereof or other business combination by the Company that has been approved by the Board of Directors.

(ii) Upon Extraordinary Common Stock Event. Upon the happening of an Extraordinary Common Stock Event (as hereinafter defined), the Series A Applicable Conversion Value and the Series B Applicable Conversion Value (and all other conversion values set forth in Section 4(d)(i) above) shall, simultaneously with the happening of such Extraordinary Common Stock Event, be adjusted by multiplying each of the Series A Applicable Conversion Value and the Series B Applicable Conversion Value by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such Extraordinary Common Stock Event and the denominator of which shall be the number of shares of Common Stock outstanding immediately after such Extraordinary Common Stock Event, and the products so obtained shall thereafter be the Series A Applicable Conversion Value or the Series B Applicable Conversion Value, as applicable. The Series A Applicable Conversion Value or Series B Applicable Conversion Value, as applicable, as so adjusted, shall be readjusted in the same manner upon the happening of any successive Extraordinary Common Stock Event or Events.

An "Extraordinary Common Stock Event" shall mean (i) the issue of additional shares of Common Stock as a dividend or other distribution on outstanding shares of Common Stock, (ii) a subdivision of outstanding shares of Common Stock into a greater number of shares of Common Stock, or (iii) a combination or reverse stock split of outstanding shares of Common Stock into a smaller number of shares of Common Stock.

(e) Automatic Conversion.

(i) Mandatory Conversion of Preferred Stock.

(A) Immediately upon the closing of an underwritten public offering on a firm commitment basis pursuant to an effective registration statement filed pursuant to the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Corporation in which the Corporation receives gross proceeds equal to or greater than \$40 million (calculated before deducting underwriting discounts and commissions and before deduction of fees and expenses) at a price per share to the public which when multiplied by the Fully Diluted Number of Shares of the Corporation's Common Stock (as defined below) then outstanding shall equal not less than \$200,000,000 (a "Qualified Public Offering"), all outstanding shares of Series A Preferred and Series B Preferred shall be converted automatically into the number of shares of Common Stock into which such shares of Series A Preferred and Series B Preferred are then convertible pursuant to Section 4 hereof as of the closing of such underwritten public offering, without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent. For purposes of this Section 4(e) the "Fully Diluted Number of Shares of Common Stock" shall equal the sum of all outstanding shares of Common Stock plus all shares of Common Stock issuable in such public offering and all shares issuable pursuant to then exercisable Common Stock Equivalents at an exercise or conversion price equal to or less than the per share price to the public of the Common Stock sold by the Corporation in such public offering.

Fax Audit No. H02000009260

(B) Upon the written consent or election of holders of a majority of the then outstanding Series A Preferred, all outstanding shares of Series A Preferred shall be converted automatically into the number of shares of Common Stock into which such shares of Series A Preferred are then convertible pursuant to Section 4 hereof as of the date of such written consent or election, without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent.

(C) Upon the written consent or election of holders of a majority of the then outstanding Series B Preferred, all outstanding shares of Series B Preferred shall be converted automatically into the number of shares of Common Stock into which such shares of Series B Preferred are then convertible pursuant to Section 4 hereof as of the date of such written consent or election, without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent. Upon any such automatic conversion, any accrued or declared and unpaid dividends shall be forfeited.

(ii) Surrender of Certificates Upon Mandatory Conversion. Upon the occurrence of the conversion events specified in the preceding paragraph (i), the holders of the Series A Preferred and Series B Preferred shall, upon notice from the Corporation, surrender the certificates representing such shares at the office of the Corporation or of its transfer agent for the Common Stock. Thereupon, there shall be issued and delivered to such holder a certificate or certificates for the number of shares of Common Stock into which the shares of Series A Preferred and Series B Preferred so surrendered were convertible on the date on which such conversion occurred. The Corporation shall not be obligated to issue such certificates unless certificates evidencing the shares of Series A Preferred and Series B Preferred being converted are either delivered to the Corporation or any such transfer agent, or the holder notifies the Corporation that such certificates have been lost, stolen or destroyed and executes an agreement reasonably satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith.

(f) Dividends. In the event the Corporation shall make or issue, or shall fix a record date for the determination of holders of Common Stock entitled to receive a dividend or other distribution (other than a distribution in liquidation or other distribution otherwise provided for herein) with respect to the Common Stock payable in (i) securities of the Corporation other than shares of Common Stock, or (ii) other assets (excluding cash dividends or distributions), then and in each such event provision shall be made so that the holders of the Series A Preferred and the Series B Preferred shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the number of securities or such other assets of the Corporation which they would have received had their Series A Preferred and Series B Preferred been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the Conversion Date (as that term is hereafter defined in Section 4(j)), retained such securities or such other assets receivable by them during such period, giving application to all other adjustments called for during such period under this Section 4 with respect to the rights of the holders of the Series A Preferred and Series B Preferred.

Fax Audit No. H02000009260

(g) Capital Reorganization or Reclassification. If the Common Stock issuable upon the conversion of the Series A Preferred or Series B Preferred shall be changed into the same or different number of shares of any class or classes of capital stock, whether by capital reorganization, recapitalization, reclassification or otherwise (other than a subdivision or combination of shares or stock dividend provided for elsewhere in this Section 4, or a merger, consolidation or sale of all or substantially all of the Corporation's capital stock or assets to any other person), then and in each such event the holder of each share of Series A Preferred and Series B Preferred shall have the right thereafter to convert such share into the kind and amount of shares of capital stock and other securities and property receivable upon such reorganization, recapitalization, reclassification or other change by the holders of the number of shares of Common Stock into which such shares of Series A Preferred and Series B Preferred might have been converted immediately prior to such reorganization, recapitalization, reclassification or change, all subject to further adjustment as provided herein.

(h) Merger, Consolidation or Sale of Assets. If at any time or from time to time there shall be a merger or consolidation of the Corporation with or into another corporation (other than a merger or reorganization involving only a change in the state of incorporation of the Corporation), or the sale of all or substantially all of the Corporation's capital stock or assets to any other person, then, as a part of such reorganization, merger, or consolidation or sale, provision shall be made so that the holders of the Series A Preferred and Series B Preferred shall thereafter be entitled to receive upon conversion of the Series A Preferred and Series B Preferred the number of shares of stock or other securities or property of the Corporation, or of the successor corporation resulting from such merger or consolidation, to which such holder would have been entitled if such holder had converted its shares of Series A Preferred or Series B Preferred immediately prior to such capital reorganization, merger, consolidation or sale. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4 to the end that the provisions of this Section 4 (including adjustment of the Series A Applicable Conversion Value and Series B Applicable Conversion Value then in effect and the number of shares of Common Stock or other securities issuable upon conversion of such shares of Series A Preferred and Series B Preferred) shall be applicable after that event in as nearly equivalent a manner as may be practicable.

(i) Certificate as to Adjustments; Notice by Corporation. In each case of an adjustment or readjustment of the Series A Applicable Conversion Rate or Series B Applicable Conversion Rate, the Corporation at its expense will furnish each holder of Series A Preferred and Series B Preferred with a certificate prepared by the Treasurer or Chief Financial Officer of the Corporation, showing such adjustment or readjustment, and stating in detail the facts upon which such adjustment or readjustment is based.

(j) Exercise of Conversion Privilege. To exercise its conversion privilege, a holder of Series A Preferred or Series B Preferred shall surrender the certificate or certificates representing the shares being converted to the Corporation at its principal office, and shall give written notice to the Corporation at that office that such holder elects to convert such shares. Such notice shall also state the name or names (with address or addresses) in which the certificate or certificates for shares of Common Stock issuable upon such conversion shall be issued. If such certificates are to be issued in the names of persons other than the original holder of the shares, the holder of the shares to be converted shall pay all applicable transfer taxes in

Fax Audit No. H02000009260

connection with the issuance of the shares of Common Stock upon such conversion. The certificate or certificates for shares of Series A Preferred or Series B Preferred surrendered for conversion shall be accompanied by proper assignment thereof to the Corporation or in blank. The date when such written notice is received by the Corporation, together with the certificate or certificates representing the shares of Series A Preferred or Series B Preferred being converted, shall be the "Conversion Date." As promptly as practicable after the Conversion Date, the Corporation shall issue and shall deliver to the holder of the shares of Series A Preferred or Series B Preferred being converted, or on its written order, such certificate or certificates as it may request for the number of whole shares of Common Stock issuable upon the conversion of such shares of Series A Preferred or Series B Preferred in accordance with the provisions of this Section 4, rounded up to the nearest whole share as provided in Section 4(k), in respect of any fraction of a share of Common Stock issuable upon such conversion. Such conversion shall be deemed to have been effected immediately prior to the close of business on the Conversion Date, and at such time the rights of the holder as holder of the converted shares of Series A Preferred or Series B Preferred shall cease and the person(s) in whose name(s) any certificate(s) for shares of Common Stock shall be issuable upon such conversion shall be deemed to have become the holder or holders of record of the shares of Common Stock represented thereby.

(k) No Issuance of Fractional Shares. No fractional shares of Common Stock or scrip representing fractional shares shall be issued upon the conversion of shares of Series A Preferred or Series B Preferred. Instead of any fractional shares of Common Stock which would otherwise be issuable upon conversion of Series A Preferred or Series B Preferred, the Corporation shall round up to the next whole share of Common Stock issuable upon the conversion of shares of Series A Preferred or Series B Preferred. The determination as to whether any fractional shares of Common Stock shall be rounded up shall be made with respect to the aggregate number of shares of Series A Preferred or Series B Preferred being converted at any one time by any holder thereof, not with respect to each share of Series A Preferred or Series B Preferred being converted.

(l) Partial Conversion. In the event some but not all of the shares of Series A Preferred or Series B Preferred represented by a certificate(s) surrendered by a holder are converted, the Corporation shall execute and deliver to or on the order of the holder, at the expense of the Corporation, a new certificate representing the number of shares of Series A Preferred or Series B Preferred which were not converted.

(m) Reservation of Common Stock. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Preferred Stock (including any shares of Preferred Stock represented by any warrants, options, subscription or purchase rights for Preferred Stock), and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock (including any shares of Preferred Stock represented by any warrants, options, subscriptions or purchase rights for such Preferred Stock), the Corporation shall take such action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

Fax Audit No. H02000009260

(n) No Reissuance of Preferred Stock. No share or shares of Preferred Stock acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be reissued, and all such shares shall be canceled, retired and eliminated from the shares which the Corporation shall be authorized to issue. The Corporation shall from time to time take such appropriate corporate action as may be necessary to reduce the authorized number of shares of the Preferred Stock.

5. Investors' Redemption Option.

(a) Redemptions.

(i) Series A Redemption. Upon the written request (the "Series A Redemption Request") of the holders of a majority of the then outstanding shares of Series A Preferred delivered to the Corporation at any time after November 23, 2003, to the extent the shares of Series A Preferred have not been redeemed or converted prior to such date, the Corporation shall redeem, in the manner set forth in the proviso below relating to the redemption and payment in annual installments, all of the outstanding shares of Series A Preferred for an amount in cash (the "Series A Redemption Price") equal to the higher of (i) the original purchase price of the Series A Preferred per share, plus any declared but unpaid dividends, plus any additional amount, if necessary, such that the total amount of dividends declared or paid with respect to the Series A Preferred since the issuance of such share (together with such additional amount) shall equal a seven percent (7%) compound dividend rate (adjusted for any stock distributions or stock dividends with respect to such shares), and (ii) the fair market value of such Series A Preferred shares, as determined by an independent appraiser mutually selected by the Corporation's Board of Directors and the holders of a majority of the outstanding shares of Series A Preferred; provided, however, that the Corporation shall redeem the shares of Series A Preferred in three equal (or nearly equal) annual installments beginning sixty (60) days after delivery of the Redemption Request, and thereafter on the first and second anniversary of such initial redemption, from any source of funds legally available therefor. If and only if no funds or insufficient funds are available to the Corporation at any time to meet the Corporation's redemption obligations pursuant to this subsection, then the Corporation shall redeem as many shares of Series A Preferred as possible out of funds or liquid assets as the Board of Directors of the Corporation may deem legally permissible, the obligation to redeem the remaining Series A Preferred being carried over to the end of each quarterly period thereafter (subject to the same limitations on payment as set forth above) until all shares entitled to be redeemed and qualifying for redemption hereunder have been redeemed. The shares of Series A Preferred that have not been redeemed shall continue to be entitled to the dividend, conversion and other rights, preferences, privileges and restrictions of the Series A Preferred. The date on which a redemption occurs under the terms of this Section 5 (a)(i) shall hereinafter be referred to as a "Series A Redemption Date."

(ii) Series B Redemption. Upon the written request (the "Series B Redemption Request") of the holders of a majority of the then outstanding shares of Series B Preferred delivered to the Corporation at any time after June 6, 2005, to the extent the shares of Series B Preferred have not been redeemed or converted prior to such date (or upon or after the date, if any, upon which the holders of the Series A Preferred make a Series A Redemption Request), the Corporation shall redeem, in the manner set forth in the proviso below relating to



Fax Audit No. H02000009260

the payment in annual installments, all of the outstanding shares of Series B Preferred for an amount in cash (the "Series B Redemption Price") equal to the higher of (i) the original purchase price of the Series B Preferred per share, plus any accrued and unpaid dividends to the Series B Redemption Date (as defined below), plus any additional amount, if necessary, such that the total amount of dividends accrued, declared or paid with respect to the Series B Preferred since the issuance of such share (together with such additional amount) shall equal an eight percent (8%) annual compound dividend rate (adjusted for any stock distributions or stock dividends with respect to such shares), and (ii) an amount equal to the product of (x) (1) the number of shares of Common Stock into which the Series B Preferred are then convertible divided by (2) the fully diluted number of shares of Common Stock then outstanding (determined in accordance with generally accepted accounting principles then applicable to the Corporation's financial statements), multiplied by (y) the fair market value of the Corporation as determined by an independent appraiser mutually selected by the Board of Directors of the Corporation and the holders of a majority of the outstanding shares of Series B Preferred, provided, however, that the Corporation shall redeem the shares of Series B Preferred in three equal (or nearly equal) annual installments beginning sixty (60) days after delivery of the Series B Redemption Request, and thereafter on the first and second anniversary of such initial redemption, from any source of funds legally available therefor. If, and only if, no funds or insufficient funds are available to the Corporation at any time to meet the Corporation's redemption obligations pursuant to this subsection, then the Corporation shall redeem as many shares of Series B Preferred as possible out of funds or liquid assets as the Board of Directors of the Corporation may deem legally permissible, the obligation to redeem the remaining Series B Preferred being carried over to the end of each quarterly period thereafter (subject to the same limitations on payment as set forth above) until all shares entitled to be redeemed and qualifying for redemption hereunder have been redeemed. The shares of Series B Preferred that have not been redeemed shall continue to be entitled to the dividend, conversion and other rights, preferences, privileges and restrictions of the Series B Preferred. The date on which a redemption occurs under the terms of this Section 5(a)(ii) shall hereinafter be referred to as a "Series B Redemption Date." The Series A Redemption Date and the Series B Redemption Date are each sometimes referred to herein as a "Redemption Date."

(iii) If the Corporation is obligated to redeem hereunder shares of Series A Preferred and Series B Preferred and the assets and funds of the Corporation shall be insufficient to permit the payment to such holders of the full Series A Redemption Price and Series B Redemption Price (or any installment thereof), then the entire assets and funds of the Corporation legally available for payment shall be distributed ratably among the holders of the Series A Preferred and Series B Preferred, on a *pari passu* basis, in proportion to the aggregate Series A Redemption Price and Series B Redemption Price (or any installment thereof) the holders of each such Series are otherwise entitled to receive. By way of example, if the Series A Convertible Preferred Stock were entitled to an aggregate of \$X upon redemption and the Series B Convertible Preferred Stock were entitled to an aggregate of \$Y upon redemption but an amount of money equal to less than the sum of \$X plus \$Y were available for payment upon redemption (such amount of available money being referred to as "\$Z") then there would be allocated to the Series A Convertible Preferred Stock  $(\$X \div (\$X + \$Y)) \times \$Z$  and there would be allocated to the Series B Convertible Preferred Stock  $(\$Y \div (\$X + \$Y)) \times \$Z$ .

Fax Audit No. H02000009260

(b) Certificates. In case fewer than the total number of shares represented by any certificate are redeemed under Section 5(a) above, a new certificate representing the number of unredeemed shares shall be issued without cost to such holder within a reasonable period of time after the surrender of the certificate representing the redeemed shares. At least five (5) days prior to a scheduled Series A Redemption Date or Series B Redemption Date, the redeeming holder shall surrender to the Corporation the certificate or certificates representing such shares at the Corporation's headquarters, and thereupon the proportionate amount of the Series A Redemption Price or Series B Redemption Price, as applicable, for such shares shall be payable to the order of the person or entity whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be canceled. To the extent a redeeming holder has not surrendered to the Corporation the certificate or certificates representing such shares, then the scheduled Series A Redemption Date or Series B Redemption Date, as applicable, shall be delayed until five (5) days after the actual surrender of such certificate or certificates. In the event that less than all of the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

(c) Rights After Redemption. Notwithstanding any failure to surrender certificates for redeemed shares, from and after the applicable Series A Redemption Date or Series B Redemption Date, unless there shall have been a default in the payment of the proportionate amount of the Series A Redemption Price or Series B Redemption Price, as applicable, all rights of the holders with respect to the redeemed shares of Series A Preferred or Series B Preferred (except the right to receive the proportionate amount of the Series A Redemption Price or Series B Redemption Price, as applicable, without interest upon surrender of their certificate or certificates, provided that no further dividends shall accrue except in the event of any such default), shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever.

(d) Deposit of Redemption Price. Two (2) days prior to a Redemption Date, the Corporation shall deposit in cash the proportionate amount of the Series A Redemption Price or Series B Redemption Price, as applicable, to be paid on such Redemption Date on such date with a bank or trust company having aggregate capital and surplus in excess of \$50,000,000 in a trust fund for the benefit of the respective holders of the shares designated for redemption and not yet redeemed. Simultaneously, the Corporation shall deposit irrevocable instructions and authority to such bank or trust company to pay, on or after a Redemption Date, the proportionate amount of the Series A Redemption Price or Series B Redemption Price, as applicable, to the holders thereof upon surrender of their certificates. Any monies deposited by the Corporation pursuant to this Section 5(d) for the redemption of shares that are thereafter converted into shares of Common Stock pursuant to these Articles of Incorporation no later than the close of business on such Redemption Date shall be returned to the Corporation forthwith upon such conversion. The balance of any monies deposited by the Corporation pursuant to this Section 5(d) remaining unclaimed at the expiration of six (6) months following a Redemption Date shall thereafter be returned to the Corporation, provided that the holder to which such monies would be payable hereunder shall be entitled, upon proof of its ownership of the Series A Preferred or Series B Preferred, as applicable, or otherwise and execution of a lost certificate affidavit, receive such monies but without interest from such a Redemption Date.

Fax Audit No. H02000009260

6. 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 its property or business, or to liquidate, dissolve or wind up;

then, in connection with each such event, this Corporation shall send to the holders of the Series A Preferred and Series B Preferred:

(i) 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 in respect of the matters referred to in (c) and (d) above; and

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

Each such written notice shall be delivered personally or given by first class mail, postage prepaid, addressed to the holders of the Series A Preferred and Series B Preferred at the address for each such holder as shown on the books of this Corporation.

7. Protective Provisions.

(a) Series A. So long as at least 2,849,002 shares of Series A Preferred remain outstanding (adjusted for any subdivisions, combinations, consolidations or stock distributions or stock dividends with respect to such shares), the Corporation shall not, without the vote or written consent of not less than a majority of the outstanding shares of Series A Preferred voting as a separate class:

(i) Alter or change the rights, preferences or privileges of the Series A Preferred or any other class or series of Preferred Stock;

(ii) Do or omit to do any act or thing which would or would be reasonably likely to result in taxation of the holders of shares of the Series A Preferred under Section 305 of the Internal Revenue Code of 1986, as amended (or any comparable provision of the Internal Revenue Code as hereafter from time to time amended); or

(iii) Increase the number of shares of Common Stock or Preferred Stock or a series of Preferred Stock authorized hereby;

(iv) Increase the number of shares authorized for issuance under any of the Corporation's existing equity incentive plans, create any new such plans or issue any additional shares or rights to acquire such shares of the Corporation outside the aforementioned plans to officers, directors, employees or consultants of the Corporation;

(v) Create or issue any new class or series of equity securities of the Corporation having a preference on a parity with or senior to the Series A Preferred with respect to redemption, voting, liquidation or dividends rights;

(vi) Consolidate or merge the Corporation with or into any other corporation, or any entity or person, or exchange substantially all of the outstanding stock of the Corporation for shares of another entity or property, in which, after any such transaction, the shareholders of the Corporation immediately prior to the consummation of such transaction hold less than fifty percent (50%) of the voting shares of the continuing or surviving entity, or liquidate or sell substantially all of the assets of the Corporation, unless in any of the aforementioned transactions the aggregate valuation of the Corporation is at least Ninety Million Dollars (\$90,000,000);

(vii) Except as otherwise required herein, pay or declare any dividend on or other distribution with respect to any of the Corporation's capital stock (except dividends payable solely in shares of Common Stock) other than the Series B Preferential Dividend;

(viii) Except as expressly set forth in these Articles of Incorporation, apply any of the Company's assets to the redemption, retirement, purchase or acquisition, directly or indirectly, through subsidiaries or otherwise, of any of the Corporation's capital stock (other than Common Stock from employees, officers or directors of the Corporation or its subsidiaries pursuant to the terms of restrictive stock agreements approved by the Corporation's board of directors or pursuant to the Investors' Rights Agreement from a Founder (as defined in the Investors' Rights Agreement) to the extent approved by a majority of the Board of Directors exclusive of any such Founder);

(ix) Directly or indirectly enter into a material agreement or transaction with an Affiliate (as that term is defined in the Securities Act of 1933, as amended); or

(x) Amend, modify or repeal any of the Corporation's Bylaws or change the size of the Board of Directors other than in accordance with the Investors' Rights Agreement.

provided, however, that in the event that any of the foregoing actions affects a holder of twenty-five percent (25%) or more of the Series A Preferred (a "Substantial Minority Holder") in a manner which is materially and adversely different than the manner in which holders of a majority of the Series A Preferred are affected, then the consent of such Substantial Minority Holder shall be required.

(b) Series B. So long as at least 2,108,352 shares of Series B Preferred remain outstanding (adjusted for any subdivisions, combinations, consolidations or stock distributions or stock dividends with respect to such shares), the Corporation shall not, without the vote or written consent of not less than a majority of the outstanding shares of Series B Preferred voting as a separate class:

(i) Alter or change the rights, preferences or privileges of the Series B Preferred or any other class or series of Preferred Stock in any manner adversely affecting the rights of the Series B Preferred;

(ii) Do or omit to do any act or thing which would or would be reasonably likely to result in taxation of the holders of shares of the Series B Preferred under Section 305 of the Internal Revenue Code of 1986, as amended (or any comparable provision of the Internal Revenue Code as hereafter from time to time amended); or

(iii) Increase the number of shares of Common Stock or Preferred Stock or a series of Preferred Stock authorized hereby;

(iv) Increase the number of shares authorized for issuance under any of the Corporation's existing equity incentive plans, create any new such plans or issue any additional shares or rights to acquire such shares of the Corporation outside the aforementioned plans to officers, directors, employees or consultants of the Corporation;

(v) Create or issue any new class or series of equity securities of the Corporation having a preference on a parity with or senior to the Series B Preferred with respect to redemption, voting, liquidation or dividend rights;

(vi) Consolidate or merge the Corporation with or into any other corporation, or any entity or person, or exchange substantially all of the outstanding stock of the Corporation for shares of another entity or property, in which, after any such transaction, the shareholders of the Corporation immediately prior to the consummation of such transaction hold less than fifty percent (50%) of the voting shares of the continuing or surviving entity, or liquidate or sell substantially all of the assets of the Corporation, unless (i) with respect to any of the aforementioned transactions which occurs on or prior to June 6, 2001 the aggregate valuation of the Corporation is at least \$170,364,044 or (ii) with respect to any of the aforementioned transactions which occurs after June 6, 2001, the aggregate valuation of the Corporation is at least \$212,955,055;

(vii) Except as otherwise required herein, pay or declare any dividend on or other distribution with respect to any of the Corporation's capital stock (except dividends payable solely in shares of Common Stock) other than the Series B Preferential Dividend;

(viii) Except as expressly set forth in these Articles of Incorporation, apply any of the Company's assets to the redemption, retirement, purchase or acquisition, directly or indirectly, through subsidiaries or otherwise, of any of the Corporation's capital stock (other than Common Stock from employees, officers or directors of the Corporation or its subsidiaries upon termination of employment pursuant to the terms of restrictive stock agreements approved by the Corporation's board of directors or pursuant to the Investors' Rights

Fax Audit No. H02000009260

Agreement from a Founder to the extent approved by a majority of the Board of Directors exclusive of any such Founder);

(ix) Directly or indirectly enter into a material agreement or transaction with an Affiliate (as that term is defined in the Securities Act of 1933, as amended); or

(x) Increase the authorized number of directors of the Corporation to more than six (6) except where such increase is effected pursuant to Section 6.1(a) or 6.1(g) of the Investors' Rights Agreement.

(xi) Amend, modify or repeal any of the Corporation's Bylaws or change the size of the Board of Directors or change the election procedure for the Board other than in accordance with the Investors' Rights Agreement.

(xii) Amend this Section 7(b).

provided, however, that in the event that any of the foregoing actions affects a holder of twenty percent (20%) or more of the Series B Preferred in a manner which is materially and adversely different than the manner in which holders of a majority of the Series B Preferred are affected, then the consent of such holder shall be required.

8. Status of Converted Stock. In case any shares of Series A Preferred or Series B Preferred shall be converted pursuant to Section 4 hereof the shares so converted shall be cancelled and shall not be issuable by the Corporation. From time to time, the Articles of Incorporation of this Corporation shall be appropriately revised to reflect the corresponding reduction in the Corporation's authorized capital stock.

#### ARTICLE VI

In furtherance and not in limitation of the powers conferred by the laws of Florida, each of the Board of Directors and shareholders is expressly authorized and empowered to make, alter, amend and repeal the Bylaws of the Corporation in any respect not inconsistent with the laws of the State of Florida or with these Amended and Restated Articles of Incorporation. The shareholders of the Corporation may amend or adopt a bylaw that fixes a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is required by law.

#### ARTICLE VII

The books of the Corporation may be kept at such place within or without the State of Florida as the Bylaws of the Corporation may provide or as may be designated from time to time by the Board of Directors of the Corporation.

#### ARTICLE VIII

A director of the Corporation shall not be personally liable to the Corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing

Fax Audit No. H02000009260

violation of law, (iii) under Section 607.0834 of the Florida Business Corporation Act, as the same exists or hereafter may be amended, (iv) for violation of a criminal law, unless the director had reasonable cause to believe his conduct was lawful or had no reasonable cause to believe his conduct was unlawful, or (v) for any transaction from which the director derived an improper personal benefit.

If the Florida Business Corporation Act hereafter is amended to authorize the further elimination or limitation of the liability of directors, then the liability of the Corporation's directors shall be eliminated or limited to the full extent authorized by the Florida Business Corporation Act, as amended.

### ARTICLE IX

#### 1. Indemnification.

(a) The Corporation (and any successor to the Corporation by merger or otherwise) shall, and does hereby, indemnify, to the fullest extent permitted or authorized by current or future legislation (specifically including the full extent of indemnification permitted by §607.0850(7) Fla. Stat. (1999), or current or future judicial or administrative decisions (but, in the case of any such future legislation or decisions, only to the extent that it permits the Corporation to provide broader indemnification rights than permitted prior to such legislation or decision), each person (including the heirs, personal representatives, executors, administrators and estate of the person) who was or is a party, or is threatened to be made a party, or was or is a witness, to any threatened, pending or completed action, suit or proceeding whether civil, criminal, administrative or investigative and any appeal therefrom (collectively, a "Proceeding"), against all liability (which for purposes of this Article includes all judgments, settlements, penalties, fines and taxes under the Employee Retirement Income Security Act of 1974, as amended) and costs, charges, and expenses (including attorneys' fees) asserted against him or incurred by him by reason of the fact that the person is or was (i) a director, or (ii) (x) an officer or (y) an employee of the Corporation who is specifically granted the indemnification rights provided hereby by the Board of Directors, or (iii) serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise (including serving as a fiduciary of an employee benefit plan) and as to whom the Board has granted the right to indemnification provided hereby (each an "Indemnified Person").

(b) Notwithstanding the foregoing, except with respect to the indemnification specified in the third sentence of Section 3 of this Article, the Corporation shall indemnify an Indemnified Person in connection with a Proceeding (or part thereof) initiated by an Indemnified Person only if authorization for the Proceeding (or part thereof) was not denied by the Board of Directors of the Corporation, acting in its sole discretion, within 60 days after receipt of notice thereof from the Indemnified Person.

2. Advance of Costs, Charges and Expenses. Costs, charges and expenses (including attorneys' fees) incurred by an Indemnified Person in defending a Proceeding shall be paid by the Corporation to the fullest extent permitted or authorized by current or future legislation or current or future judicial or administrative decisions (but, in the case of any future

Fax Audit No. H02000009260

legislation or decisions, only to the extent that it permits the Corporation to provide broader rights to advance costs, charges and expenses than permitted prior to the legislation or decisions) in advance of the final disposition of the Proceeding, upon receipt of an undertaking reasonably satisfactory to the Board of Directors (the "Undertaking") by or on behalf of the Indemnified Person to repay all amounts so advanced if it is ultimately determined that such person is not entitled to be indemnified by the Corporation as authorized in this Article; provided that, in connection with a Proceeding (or part thereof) initiated by such Indemnified Person (except a Proceeding authorized by the second sentence of Section 3 of this Article), the Corporation shall pay the costs, charges and expenses in advance of the final disposition of the Proceeding only if authorization for the Proceeding (or part thereof) was not denied by the Board of Directors of the Corporation, acting in its sole discretion, within 60 days after receipt of a request for advancement accompanied by an Undertaking. A person to whom costs, charges and expenses are advanced pursuant to this Article shall not be obligated to repay pursuant to the Undertaking until the final determination of (a) the pending Proceeding in a court of competent jurisdiction concerning the right of that person to be indemnified or (b) the obligation of the person to repay pursuant to the Undertaking.

The Board of Directors may, upon approval of the Indemnified Person, authorize the Corporation's counsel to represent the Indemnified Person in any action, suit or proceeding, whether or not the Corporation is a party to the action, suit or proceeding. In the event that the Corporation's counsel is representing the Indemnified Person and subject to any limitations imposed by law or any insurance policy referred to in Section 5 of this Article IX, any Indemnified Person shall have the right to retain separate counsel and to have the fees and expenses of such counsel paid as incurred as provided herein in the event such person reasonably believes that there is an actual or potential conflict in interest between the Corporation and such person or in the event the Corporation or its insurer shall have failed to assume the defense and employ counsel acceptable to such person within a reasonable period of time after commencement of any action.

3. Procedure For Indemnification. Any indemnification or advance under this Article shall be made promptly, and in any event within 60 days after delivery of the written request of the Indemnified Person. The right to indemnification or advances as granted by this Article shall be enforceable by an Indemnified Person in any court of competent jurisdiction if the Corporation denies the request under this Article in whole or in part, or if no disposition of the request is made within the 60-day period after delivery of the request. The requesting person's costs and expenses incurred in connection with successfully establishing his right to indemnification, in whole or in part, in any action shall also be indemnified by the Corporation. It shall be a defense available to the Corporation to assert in the action that indemnification is prohibited by law or that the claimant has not met the standard of conduct, if any, required by current or future legislation or by current or future judicial or administrative decisions for indemnification (but, in the case of future legislation or decision, only to the extent that the legislation does not impose a more stringent standard of conduct than permitted prior to the legislation or decisions). The burden of proving this defense shall be on the Corporation. Neither (a) the failure of the Corporation (including its Board of Directors or any committee thereof, its independent legal counsel, and its shareholders) to have made a determination (prior to the commencement of the action) that indemnification of the claimant is proper in the circumstances because he has met the applicable standard of conduct, if any, nor (b) the fact that

Fax Audit No. H02000009260



there has been an actual determination by the Corporation (including its Board of Directors or any committee thereof its independent legal counsel, and its shareholders) that the claimant has not met the applicable standard of conduct, shall be a defense to the action or create a presumption that the claimant has not met the applicable standard of conduct.

4. Survival of Indemnification. The indemnification provided by this Article shall not be deemed exclusive of any other rights to which those indemnified may now or hereafter be entitled under any by-law, statute, agreement, vote of shareholders or disinterested directors or recommendation of counsel or otherwise, both as to actions in the person's capacity as a director, officer or employee and as to actions in another capacity while still a director, officer or employee, and shall continue as to an Indemnified Person who has ceased to be a director or officer or employee and shall inure to the benefit of the estate, heirs, personal representatives, beneficiaries, executors and administrators of such a person. All rights to indemnification and advances under this Article shall be deemed to be a contract between the Corporation and each indemnified Person who is an Indemnified Person at any time while this Article is in effect. Any repeal or modification of this Article or any repeal or modification of relevant provisions of the Florida Business Corporation Act or any other applicable laws shall not in any way diminish the rights to indemnification of such Indemnified Person or the obligations of the Corporation arising hereunder for claims relating to matters occurring prior to the repeal or modification. The Board of Directors of the Corporation shall have the authority, by resolution, to provide for indemnification of officers, employees or agents of the Corporation and for such other indemnification of Indemnified Persons as it deems appropriate.

5. Insurance. The Corporation may purchase and maintain insurance on behalf of any person who is or was a director or officer of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise (including serving as a fiduciary of an employee benefit plan), against any liability asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the Corporation would have the power to indemnify him against such liability under the provisions of this Article or the applicable provisions of the Florida Business Corporation Act.

6. Savings Clause. If this Article or any portion is invalidated or held to be unenforceable on any ground by a court of competent jurisdiction, the Corporation shall nevertheless indemnify each Indemnified Person described in Section 1 of this Article to the fullest extent permitted by all applicable portions of this Article that have not been invalidated or adjudicated unenforceable, and as permitted by applicable law.

## ARTICLE X

Subject to Article V, Section 7 and Article IX hereof, the Corporation reserves the right to amend or repeal any provision contained in these Amended and Restated Articles of Incorporation, or any amendment thereto, and any right conferred upon the shareholders is subject to this reservation.

The foregoing amendment and restatement of the Amended and Restated Articles of Incorporation has been duly authorized and directed by Unanimous Written Consent of the

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026

Fax Audit No. H02000009260

Board of Directors of the Corporation, dated January 7, 2002, and by Written Consent of the Shareholders of the Corporation, dated January 7, 2002, which shareholders' consent was signed by the holders of a majority of each outstanding class and series of capital stock of the Corporation and was sufficient for the approval of the amendment and restatement. Such amendment and restatement of the Amended and Restated Articles of Incorporation supersede the original Amended and Restated Articles of Incorporation of the Corporation and all amendments to them.

Fax Audit No. H02000009260

IN WITNESS WHEREOF, these Amended and Restated Articles of Incorporation have been executed by the undersigned in his capacity as aforesaid as of the 9<sup>th</sup> day of January, 2002, on behalf of the Corporation.

Alexander Tellez  
Alex Tellez  
President