This sample document is the work product of a coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample presents an array of (often mutually exclusive) options with respect to particular deal provisions.

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION

Preliminary Notes

General.

The Certificate of Incorporation is a key document produced in connection with a venture capital portfolio investment. Among other things, the Corporation's Certificate of Incorporation establishes the rights, preferences, privileges and restrictions of each class and series of the Corporation's stock.

No Impairment Clause.

It is not uncommon for counsel to the investors to include a "no impairment" clause in their Certificate of Incorporation drafts. A "no impairment" clause is a broad and general provision that prohibits the Corporation from acting (or failing to act) in a way that would circumvent the express and specific provisions of the Certificate of Incorporation. Although Delaware courts narrowly construe "no impairment" clauses[1], such provisions can be dangerous, both to the Corporation and to the controlling investors, because they can give rise to claims of violation by disgruntled minority investors looking for some grounds on which to base a claim, in the absence of any specific protective provisions in the Certificate of Incorporation. In addition, in a transaction in which the terms of the outstanding Preferred Stock are to be amended, specifically the anti-dilution and conversion rights, certain law firms have taken the position that the existence of a "no impairment" clause in the Certificate of Incorporation requires their firm to express no opinion with regard to the stockholder action taken in connection with the subject transaction, and instead assume for purposes of their opinion that the Corporation has complied with the provisions of the "no impairment" clause. If appropriate attention is paid to the specific, substantive provisions of the Certificate of Incorporation, there is no need for a vague catchall, which may give rise to the problems described above. Accordingly, the drafters intentionally did not include a "no impairment" clause in this Certificate of Incorporation.

Pay-to-Play Provision.

This Certificate of Incorporation includes a sample "pay-to-play" provision, pursuant to which Preferred Stock investors are penalized if they fail to invest to a specified extent in certain future rounds of financing. The provision included herein provides for conversion into Common Stock of some or all of the Series A Preferred Stock held by non-participating investors. An alternative provision which provides for conversion of some or all of the Series A Preferred Stock held by non-participating investors into a new series of Preferred Stock (e.g., Series A-1 Preferred Stock) identical to the Series A Preferred Stock but with no anti-dilution protection and no further pay-to-play provision is also sometimes used. It is the drafters' view that this latter provision is not seen very frequently and therefore it has been intentionally omitted from this Certificate of Incorporation. In the event such a provision is used, careful attention should be paid to the mechanics of implementing the creation of the additional series of Preferred Stock, which may include the authorization of blank check preferred (as described below).

[1] See *Kumar v. Racing Corp. of Am., Inc., Case No. C.A. 12039 (Del. Ch. Ct. April 26, 1991).*

Blank Check Preferred.

Blank check preferred is the term used when the Certificate of Incorporation authorizes shares of undesignated Preferred Stock and grants the Board of Directors the authority to create a new series of Preferred Stock and establish the rights and preferences of such series. Without this express grant of authority to the Board, the Corporation would need to obtain stockholder approval to amend the Certificate of Incorporation to create a new series of Preferred Stock. The drafters view the inclusion of blank check preferred in a Certificate of Incorporation for a venture backed company as unusual. It is sometimes seen, if (as noted above under "Pay-to-Play Provision") the Series A Preferred Stock terms include a pay-to-play provision in which the Series A Preferred Stock of non-participating investors is converted into a shadow series of Series A Preferred Stock, in which case it can be desirable to include blank check preferred to facilitate the creation (if necessary) of such shadow series. Even in those circumstances, however, Section 3 of the Series A Preferred Stock terms often includes restrictions on the designation or issuance of blank check preferred.

Accordingly, this Certificate of Incorporation assumes that blank check preferred will not be used and the drafters intentionally did not include a provision authorizing blank check preferred. In the event blank check preferred is to be included in the Certificate of Incorporation, appropriate references to other potential series of Preferred Stock should be included in the Series A Preferred Stock terms so as to permit the Corporation to create another series of Preferred Stock by means of a Certificate of Designations without having to revise the terms of the Series A Preferred Stock (which can only be done by a Certificate of Amendment, approved by stockholders, and not by a Certificate of Designations). In addition, in the event provision is to be made for blank check preferred, appropriate consideration should also be given to building in references to such other potential series of Preferred Stock in the contractual agreements providing for additional rights and obligations of the holders of Series A Preferred Stock (such as the Investors' Rights Agreement, Right of First Refusal and Co-Sale Agreement, and Voting Agreement).

Choice of Jurisdiction.

This form is set up for a portfolio company incorporated in Delaware. Delaware is generally the preferred jurisdiction for incorporation of venture-backed companies for many reasons, including:

1. The Delaware General Corporation Law (the "DGCL") is a modern, current, and internationally recognized and copied corporation statute which is updated annually to take into account new business and court developments;

2. Delaware offers a well-developed body of case law interpreting the DGCL, which facilitates certainty in business planning;

3. The Delaware Court of Chancery is considered by many to be the nation's leading business court, where judges expert in business law matters deal with business issues in an impartial setting; and

4. Delaware offers an efficient and user-friendly Secretary of State's office permitting, among other things, prompt certification of filings of corporate documents.

Please note the following special considerations if the Corporation is located in California, even though incorporated in Delaware:

Considerations for Corporation with California Shareholders and Operations.

Section 2115 of the California Corporations Code provides that certain provisions of California corporate law are applicable to foreign corporations (e.g., one incorporated in Delaware), to the exclusion of the law of the state of incorporation, if more than half of the Corporation's shareholders and more than half its "business" (a defined formula based on property, payroll and sales) are located in California. As a result, some companies based in California may be subject to certain provisions of the California corporate law despite being incorporated in another state, such as Delaware (although, as noted below, it is not clear that courts will apply Section 2115 if the law of the jurisdiction of incorporation is inconsistent with the provisions of Section 2115). Section 2115 does not apply to public companies listed on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ National Market.

One provision of the California Corporations Code that applies to such "quasi-California" corporations is Section 708, which requires that shareholders be permitted to cumulate votes in the election of directors. However, Section 2115 does not require corporations to set forth this right in their articles or bylaws, and most Silicon Valley companies that are subject to Section 2115 do not do so. Under Delaware law, a corporation must include a provision in its Certificate of Incorporation in order to allow cumulative voting (see Section 214 of the DGCL). Therefore, should a stockholder choose to exercise its right to cumulate votes under Sections 2115 and 708 of the California Corporations Code, the corporation may find itself forced to choose between violating those provisions if it denies cumulative voting, or violating Section 214 of the DGCL if it allows it. Current California case law enforces a shareholder's rights to cumulate votes in this situation, relying on the language of Section 2115 stating that the cited provisions of the California Code apply "to the exclusion of the law of the jurisdiction in which [the corporation] is incorporated." See Wilson v. Louisiana-Pacific Resources, Inc. (138 Cal. App. 3d 216 (1983)). However, a Delaware case, VantagePoint Venture Partners 1996 v. Examen (Del. 2005), held that the provisions of Section 2115 of the California Corporation Code, insofar as they purport to regulate what stockholder vote is required to approve a corporate action, are inapplicable to a Delaware corporation, regardless of the Corporation's California contacts. In late May 2012, a California Court of Appeals case, Lidow v. Superior Court, 141 Cal. Rptr. 3d 729 (Cal. Ct. App. 2012), for the first time signaled acceptance of the analysis in VantagePoint by a California court; however, this decision did not explicitly speak to Section 2115 and practitioners remain advised that it may be prudent for "quasi-California" corporations to comply with Section 2115 whenever possible.

Another provision applicable to such "quasi-California" corporations is the restriction on distributions to shareholders under Section 500 of the California Corporations Code. California Corporations Code Section 166 defines "distributions to shareholders" to include all transfers of cash or property to shareholders without consideration, including dividends paid to shareholders (except stock dividends), and the redemptions or repurchases of stock by a corporation or its subsidiary (subject to certain exclusions, such as the repurchase of stock held by employees). The consequence of this broad definition is that dividends, stock repurchases, and stock redemptions are all subject to the same tests and restrictions. Unlike Delaware law, which generally permits companies to pay dividends or make redemptions as long as the Corporation is solvent following the transaction, California law prohibits such payments unless

the Corporation meets certain mechanical tests (in particular, that either retained earnings equal or exceed the size of the proposed distribution or that assets equal or exceed current liabilities). Additionally, California requires quasi-California companies to take "preferential dividends" and "preferential rights" into account when making distributions. However, California does allow such companies to waive these preferred stock considerations (see THIRTEENTH in the model charter). As a result of the restrictions in Section 500, quasi-California companies may be precluded by California law from making a required dividend or redemption payment, even though such a payment would be permissible under Delaware law. Under California Corporations Code Section 316(a)(1), also applicable to "quasi-California" corporations, directors are liable to the corporation for illegal distributions if they acted willfully or negligently with respect to such a distribution.

The limitations on director and officer indemnification under Section 317 of the California Corporations Code also purport to be applicable to a "quasi-California" corporation. As a result, counsel may want to tailor indemnification provisions for a "quasi-California" corporation to reflect California law so that all parties have consistent expectations with regard to indemnification of officers and directors.

Finally, Section 1001 and 1101, and Chapter 12 and 13 of the California Corporations Code also purport to apply to "quasi-California" corporations. These provisions deal with mergers, reorganizations, and asset sales, including voting rights and the application of California dissenters" rights. California may require class votes on sale transactions, so parties should consider whether additional voting agreements are appropriate to secure a possible Common Stock class vote in such a transaction. Additionally, in contrast to Delaware law, California law will grant dissenters' rights in connection with the sale of assets in exchange for stock of an acquiring corporation. Furthermore, California law will require a fairness opinion in connection with certain interested party transactions, so the parties should take particular care if a merger, reorganization or asset sale involves a potentially interested party.

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION[2]
OF
[_____]

(Pursuant to Sections 242 and 245 of the
General Corporation Law of the State of Delaware)

[_____], a corporation organized and existing under and by virtue of the provisions of the General Corporation Law of the State of Delaware (the "**General Corporation Law**"),

DOES HEREBY CERTIFY:

1. That the name of this corporation is [_____], and that this corporation was originally incorporated pursuant to the General Corporation Law on [_____ __, 20__] under the name [_____].[3]

2. That the Board of Directors duly adopted resolutions proposing to amend and restate the Certificate of Incorporation of this corporation, declaring said amendment and restatement to be advisable and in the best interests of this corporation and its stockholders, and authorizing the appropriate officers of this corporation to solicit the consent of the stockholders therefor, which resolution setting forth the proposed amendment and restatement is as follows:

RESOLVED, that the Certificate of Incorporation of this corporation be amended and restated in its entirety to read as follows:

FIRST: The name of this corporation is [_____] (the "**Corporation**").

SECOND: The address of the registered office of the Corporation in the State of Delaware is [_____], in the City of [_____], County of [_____]. The name of its registered agent at such address is [_____].

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[2] Pursuant to Section 242 of the DGCL, a Delaware corporation "may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of the filing of the amendment." Section 242(b) sets forth the specific requirements that must be followed to properly effect the amendment. Section 245 of the DGCL further permits a Delaware corporation to restate its Certificate of Incorporation in order to "integrate into a single instrument all of the provisions of its certificate of incorporation which are then in effect and operative." Section 245(c) requires that a restated Certificate of Incorporation shall be specifically designated as such in its heading.

[3] Section 245(c) of the DGCL requires that a restated Certificate of Incorporation state, either in its heading or in an introductory paragraph, the corporation's present name (and, if it has changed, the name under which it was originally incorporated) and the date the original Certificate of Incorporation was filed with the Secretary of State of Delaware.

THIRD: The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law.

FOURTH: The total number of shares of all classes of stock which the Corporation shall have authority to issue is (i) [_____] shares of Common Stock, $[_____] par value per share ("**Common Stock**") and (ii) [_____] shares of Preferred Stock, $[_____] par value per share ("**Preferred Stock**").[4]

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[4] The number of authorized shares of Common Stock should be high enough to cover all outstanding shares of Common Stock, plus all shares of Common Stock (i) issuable upon exercise of outstanding options and all other uncommitted shares of stock available for grant under the stock plan pool, (ii) issuable upon the conversion of shares of designated Preferred Stock, including, if applicable, accrued dividends, (iii) issuable upon the exercise or conversion of all other securities exercisable for or convertible into Common Stock (*e.g.*, warrants and convertible promissory notes), and (iv) issuable within a reasonable time frame in respect of any compounding dividend, if applicable. Consideration should also be given to authorizing additional shares of Common Stock to permit the Board of Directors to issue such stock in connection with future events, such as acquisitions of other companies or businesses or in lending transactions. Note, however, that many venture capital investors will not permit the authorization of significant amounts of (or even any) additional shares of Common Stock.

The decision to select par or no par stock and, if par, what par value, has two consequences. First, as explained in more detail below, it determines the filing fee owed to the State of Delaware upon filing the Certificate of Incorporation. Second, in Delaware, the aggregate par value of the outstanding stock is subtracted from the net assets of the corporation in determining the amount of the corporation's funds that are "surplus" lawfully available for the payment of dividends and the repurchase or redemption of stock. See 8 Del. C § § 154 (setting forth how "surplus" is calculated), 170(a) (setting forth the sources of funds from which dividends may lawfully be paid), 160(a) (setting forth the sources of funds from which stock may lawfully be redeemed or repurchased). As is discussed below, both of these consequences counsel in favor of assigning to stock a low par value (but not no par value). The concept of paid in capital being an asset dedicated to protect creditors has passed. Creditors no longer rely solely upon paid in capital or upon the statutory restrictions upon dividends, redemptions, and other distributions to stockholders that "impair" capital to protect their interests. Instead, creditors negotiate and rely upon a wide variety of contractual arrangements to protect their interests, including, for example, loan covenants, security interests and third-party guarantees. See generally Manning and Hanks, Legal Capital (3d Ed. 1990).

Corporations incorporated in Delaware are subject to fees for filing their certificates of incorporation and also are required to pay an annual franchise tax. Filing fees for a Certificate of Incorporation are calculated based on the number of authorized shares, and filing fees for an amendment increasing the number of authorized shares are calculated based on the increase in the number of authorized shares. There is no cap on filing fees. For purposes of computing the filing fee on par value stock, each $100 of authorized capital stock is counted as one taxable share. Accordingly, assigning a low par value to stock can result in a significant reduction in the filing fee. For example, the filing fee on 10,000 $.01 par value shares is the same as the filing fee on 1 $100 par value share. No par stock is assumed to be $100 par for this purpose. Accordingly, in order to minimize the filing fees, a low par value is recommended ($.01 or less; the State will accept par values as low as $.00001).

In addition to the filing fees described above, Delaware corporations are required to pay an annual franchise tax which can be no lower than $35 per annum and no greater than $165,000 per annum. Within this range, the franchise tax due is the lesser of the amount calculated either on the basis of number of authorized shares (currently $60 per 10,000 authorized shares) or on the basis of an alternative method which takes into account the corporation's gross assets and the ratio of its authorized to its issued shares; as a result, the greater the overhang, the greater the franchise tax under the alternative method. Unlike with the filing fee, the par value of the authorized stock does not generally affect the amount of the annual franchise tax owed under the authorized shares method. In addition, the tax is based on authorized shares, not only the number of shares that are issued and outstanding. Accordingly, it is advisable to consider the franchise taxes that will result from a particular capitalization before choosing it.

The following is a statement of the designations and the powers, privileges and rights, and the qualifications, limitations or restrictions thereof in respect of each class of capital stock of the Corporation.

A. COMMON STOCK

1. General. The voting, dividend and liquidation rights of the holders of the Common Stock are subject to and qualified by the rights, powers and preferences of the holders of the Preferred Stock set forth herein.

2. Voting. The holders of the Common Stock are entitled to one vote for each share of Common Stock held at all meetings of stockholders (and written actions in lieu of meetings)[; provided, however, that, except as otherwise required by law, holders of Common Stock, as such, shall not be entitled to vote on any amendment to the Certificate of Incorporation that relates solely to the terms of one or more outstanding series of Preferred Stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to the Certificate of Incorporation or pursuant to the General Corporation Law].[5] [There shall be no cumulative voting.][6] [The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by (in addition to any vote of the holders of one or more series of Preferred Stock that may be required by the terms of the Certificate of Incorporation) the affirmative vote of the holders of shares of capital stock of the Corporation representing a majority of the votes represented by all outstanding shares of capital stock of the Corporation

[5] This proviso is intended to ensure that where an amendment to the Certificate of Incorporation (or a Certificate of Designations created pursuant to any "blank check" authority) affects only a series of Preferred Stock, such amendment may be approved by only the holders of the affected series of Preferred Stock, without the necessity of approval by the holders of Common Stock. Section 212 of the General Corporation Law states that, unless otherwise provided in the Certificate of Incorporation, each share of capital stock is entitled to one vote on all matters presented to stockholders for a vote. Any amendment to the Certificate of Incorporation must be effected in accordance with the procedure in Section 242 of the General Corporation Law, which typically includes the vote of the holders of the Common Stock. Accordingly, it may be desirable to provide in the Certificate of Incorporation that only the holders of the affected series of Preferred Stock need vote on an amendment to the terms of such series. This is not a common provision, however, and adding it to the Certificate of Incorporation may require a class vote of the Common Stock.

[6] See the introductory notes to this form regarding Section 2115 of the California Corporations Code. Alternative provision: No person entitled to vote at an election for directors may cumulate votes to which such person is entitled, unless, at the time of such election, the Corporation is subject to Section 2115 of the California Corporations Code. During such time or times that the Corporation is subject to Section 2115(b) of the California Corporations Code, every stockholder entitled to vote at an election for directors may cumulate such stockholder's votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which such stockholder's shares are otherwise entitled, or distribute the stockholder's votes on the same principle among as many candidates as such stockholder desires. No stockholder, however, shall be entitled to so cumulate such stockholder's votes unless (i) the names of such candidate or candidates have been placed in nomination prior to the voting, and (ii) the stockholder has given notice at the meeting, prior to the voting, of such stockholder's intention to cumulate such stockholder's votes. If any stockholder has given proper notice to cumulate votes, all stockholders may cumulate their votes for any candidates who have been properly placed in nomination. Under cumulative voting, the candidates receiving the highest number of votes, up to the number of directors to be elected, are elected.

entitled to vote, irrespective of the provisions of Section 242(b)(2) of the General Corporation Law.][7]

B. PREFERRED STOCK

[_____] shares of the authorized and unissued Preferred Stock of the Corporation are hereby designated "**Series A Preferred Stock**" with the following rights, preferences, powers, privileges and restrictions, qualifications and limitations. Unless otherwise indicated, references to "sections" or "subsections" in this Part B of this Article Fourth refer to sections and subsections of Part B of this Article Fourth.

1. Dividends.[8]

[*Use the following paragraph if the Term Sheet calls for no specific dividend on the Series A Preferred Stock, but an equal sharing if dividends are declared on the Common Stock.*]

The Corporation shall not declare, pay or set aside any dividends on shares of any other class or series of capital stock of the Corporation (other than dividends on shares of Common Stock payable in shares of Common Stock[9]) unless (in addition to the obtaining of any consents required elsewhere in the Certificate of Incorporation) the holders of the Series A Preferred Stock then outstanding shall first receive, or simultaneously receive, a dividend on each outstanding share of Series A Preferred Stock in an amount at least equal to (i) in the case of a dividend on Common Stock or any class or series that is convertible into Common Stock, that dividend per share of Series A Preferred Stock as would equal the product of (A) the dividend payable on each share of such class or series determined, if applicable, as if all shares of such class or series had been converted into Common Stock and (B) the number of shares of Common Stock issuable upon conversion of a share of Series A Preferred Stock, in each case calculated on the record date for determination of holders entitled to receive such dividend or (ii) in the case of a dividend on any class or series that is not convertible into Common Stock, at a rate per share of Series A Preferred Stock determined by (A) dividing the amount of the dividend payable on each share of such class or series of capital stock by the original issuance price of such class or series of capital stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to such class or series) and (B) multiplying such fraction by an amount equal to the Series A Original Issue Price (as defined below); provided that, if the Corporation declares, pays or sets aside, on the same date, a

[7] Note that including the final bracketed sentence requires the approval of the holders of Common Stock unless such provision was contained in the original Certificate of Incorporation. Without such a provision, the holders of the Common Stock effectively retain a class protective vote on subsequent equity financings if the number of authorized shares of Common Stock would need to be increased to accommodate the conversion rights of securities issued in such financings.

[8] Note that this Certificate of Incorporation provides for two bracketed alternative dividend provisions. There are a variety of other alternatives that may be encountered in the market place (including for example, specified non-cumulative dividends), but the drafter should be able to easily adapt one of the two provisions included herein to provide for whatever dividend terms are applicable to a particular transaction.

[9] The reason for this exclusion (and the comparable exclusion in the alternative dividend provisions that follow) is that such dividends are covered by the provisions of Section 4.6 which adjust the Series A Conversion Price in the event of such a dividend.

dividend on shares of more than one class or series of capital stock of the Corporation, the dividend payable to the holders of Series A Preferred Stock pursuant to this Section 1 shall be calculated based upon the dividend on the class or series of capital stock that would result in the highest Series A Preferred Stock dividend. The "**Series A Original Issue Price**" shall mean $[*insert initial Series A purchase price*] per share, subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series A Preferred Stock.

[*Use the following paragraph if the Term Sheet calls for a specified cumulative dividend, payable if and when declared by the Board.*]

From and after the date of the issuance of any shares of Series A Preferred Stock, dividends at the rate per annum of $[___] per share[10] shall accrue on such shares of Series A Preferred Stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series A Preferred Stock) (the "**Accruing Dividends**"). Accruing Dividends shall accrue from day to day, whether or not declared, and shall be cumulative; provided, however, that except as set forth in the following sentence of this Section 1 [or in Subsection 2.1 and Section 6][11], such Accruing Dividends shall be payable only when, as, and if declared by the Board of Directors and the Corporation shall be under no obligation to pay such Accruing Dividends. The Corporation shall not declare, pay or set aside any dividends on shares of any other class or series of capital stock of the Corporation (other than dividends on shares of Common Stock payable in shares of Common Stock) unless (in addition to the obtaining of any consents required elsewhere in the Certificate of Incorporation) the holders of the Series A Preferred Stock then outstanding shall first receive, or simultaneously receive, a dividend on each outstanding share of Series A Preferred Stock in an amount at least equal to [the greater of][the sum of][12] (i) the amount of the aggregate Accruing Dividends then accrued on such share of Series A Preferred Stock and not previously paid and (ii) (A) in the case of a dividend on Common Stock or any class or series that is convertible into Common Stock, that dividend per share of Series A Preferred Stock as would equal the product of (1) the dividend payable on each share of such class or series determined, if applicable, as if all shares of such class or series had been converted into Common Stock and (2) the number of shares of Common Stock issuable upon conversion of a share of Series A Preferred Stock, in each case calculated on the record date for determination of holders entitled to receive such dividend or (B) in the case of a dividend on any class or series that is not convertible into

[10] A cumulative dividend expressed as "$____ per share" will by definition be non-compounding. If a compounding accrued dividend is desired, it should be expressed as a percentage of a "base amount," with the "base amount" defined as the original purchase price plus the amount of previously accrued dividends (it should also be specified whether this "compounding" of the original purchase price is done on an annual, quarterly, etc. basis).

[11] Insert the bracketed language if the holders of Series A Preferred Stock will receive the benefit of the accruing dividends upon a liquidation event or upon redemption.

[12] Note that the second bracketed alternative may not be sensible with respect to dividends paid on another series of Preferred Stock, particularly one which contains a reciprocal dividend provision, as it may result in an endless series of payments as any payment with respect to one series would trigger a payment with respect to the other). This provision (and the similar provision in the first alternative dividend paragraph) are likely to be of little practicable import, as most venture capital-backed companies do not have the cash flow to make any dividend payments, and the negative covenants (contained in Subsection 3.3) prohibit dividend payments without the consent of some percentage of the holders of Series A Preferred Stock.

Common Stock, at a rate per share of Series A Preferred Stock determined by (1) dividing the amount of the dividend payable on each share of such class or series of capital stock by the original issuance price of such class or series of capital stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to such class or series) and (2) multiplying such fraction by an amount equal to the Series A Original Issue Price (as defined below); provided that if the Corporation declares, pays or sets aside, on the same date, a dividend on shares of more than one class or series of capital stock of the Corporation, the dividend payable to the holders of Series A Preferred Stock pursuant to this Section 1 shall be calculated based upon the dividend on the class or series of capital stock that would result in the highest Series A Preferred Stock dividend. The "**Series A Original Issue Price**" shall mean $[*insert initial Series A purchase price*] per share, subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series A Preferred Stock.

2. Liquidation, Dissolution or Winding Up; Certain Mergers, Consolidations and Asset Sales.

[Use the following Subsections 2.1 and 2.2 if the term sheet calls for non-participating Preferred Stock.]

2.1 Preferential Payments to Holders of Series A Preferred Stock. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, the holders of shares of Series A Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Corporation available for distribution to its stockholders before any payment shall be made to the holders of Common Stock by reason of their ownership thereof, an amount per share equal to the greater of (i) [__ times] the Series A Original Issue Price, plus any dividends declared but unpaid thereon,[13] or (ii) such amount per share as would have been payable had all shares of Series A Preferred Stock been converted into Common Stock pursuant to Section 4 immediately prior to such liquidation, dissolution, winding up or Deemed Liquidation Event (the amount payable pursuant to this sentence is hereinafter referred to as the "**Series A Liquidation Amount**").[14] If upon any such

[13] If accruing dividends are provided for, the following language would generally be used instead: "the Series A Original Issue Price, plus any Accruing Dividends accrued but unpaid thereon, whether or not declared, together with any other dividends declared but unpaid thereon."

[14] If this form is being modified to add Series B Preferred Stock as part of these Preferred Stock terms, the calculation of the Series A Liquidation Amount and the Series B Liquidation Amount becomes quite complicated, for the following reason. In determining whether the payment to the holders of any particular series of Preferred Stock would be maximized by the conversion of those shares into Common Stock, it is necessary to make an assumption as to which shares of Preferred Stock have converted into Common Stock. The most logical approach is to assume the conversion into Common Stock of all shares of each series of Preferred Stock that would receive a greater per share liquidation payment if converted into Common Stock than if remaining as Preferred Stock, and to provide (in the version of the Certificate of Incorporation incorporating the Series B Preferred Stock terms) that this assumption shall apply in making the calculation required by this sentence. However, determining the amount provided for in clause (ii) of this sentence for any particular series of Preferred Stock requires you to calculate the Liquidation Amount for each other series of Preferred Stock (so you can calculate the amount available for distribution to the holders of Common Stock and the series of Preferred Stock in question); and calculating the Liquidation Amount for each such other series itself involves a determination of whether the original purchase price for such other series of Preferred Stock (plus dividends, if applicable) exceeds the amount payable with respect to such series on an as-converted basis – and this latter amount cannot be calculated without knowing what the
(Footnote continued on next page)

liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, the assets of the Corporation available for distribution to its stockholders shall be insufficient to pay the holders of shares of Series A Preferred Stock the full amount to which they shall be entitled under this Subsection 2.1, the holders of shares of Series A Preferred Stock shall share ratably in any distribution of the assets available for distribution in proportion to the respective amounts which would otherwise be payable in respect of the shares held by them upon such distribution if all amounts payable on or with respect to such shares were paid in full.

2.2 Payments to Holders of Common Stock. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, after the payment of all preferential amounts required to be paid to the holders of shares of Series A Preferred Stock, the remaining assets of the Corporation available for distribution to its stockholders shall be distributed among the holders of shares of Common Stock, pro rata based on the number of shares held by each such holder.

[Use the following Subsections 2.1 and 2.2 if the term sheet calls for participating Preferred Stock.]

2.3 Preferential Payments to Holders of Series A Preferred Stock. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, the holders of shares of Series A Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Corporation available for distribution to its stockholders before any payment shall be made to the holders of Common Stock by reason of their ownership thereof, an amount per share equal to [___ times] the Series A Original Issue Price, plus any dividends declared but unpaid thereon.[15] If upon any such liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, the assets of the Corporation available for distribution to its stockholders shall be insufficient to pay

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Liquidation Amounts are for all other series of Preferred Stock. If the various series of Preferred Stock are not pari passu, these calculations become even more difficult.

Some versions of Preferred Stock terms simply state that the liquidation payment to be made to a particular series of Preferred Stock is equal to the original purchase price of such Preferred Stock (plus dividends, if applicable) rather than the higher of such amount and the as-converted payment. That alternative formulation is not intended to result in a substantive difference from the approach taken in this form; rather, in that alternative formulation, it is assumed that the holders of a particular series of Preferred Stock would simply convert into Common Stock if the as-converted payment is greater than the original purchase price (plus dividends, if applicable). While such alternative formulation avoids the drafting complexities described in the preceding paragraph, it simply shifts those complexities to the decision each individual holder of Preferred Stock must make at the time of a liquidation event. That is, each holder of Preferred Stock must decide whether it will receive a higher payment if it converts into Common Stock; and such determination would require each holder of Preferred Stock to make an assumption as to whether the other holders of Preferred Stock (both of the same series and of different series) will convert into Common Stock.

This issue is not applicable to participating Preferred Stock without a cap on the liquidation preference – because participating Preferred Stock entitles its holder to receive both the basic liquidation payment and the as-converted payment, there is no need to determine whether the basic payment or the as-converted payment is greater.

[15] If accruing dividends are provided for, the following language would generally be used instead: "the Series A Original Issue Price, plus any Accruing Dividends accrued but unpaid thereon, whether or not declared, together with any other dividends declared but unpaid thereon."

the holders of shares of Series A Preferred Stock the full amount to which they shall be entitled under this Subsection 2.1, the holders of shares of Series A Preferred Stock shall share ratably in any distribution of the assets available for distribution in proportion to the respective amounts which would otherwise be payable in respect of the shares held by them upon such distribution if all amounts payable on or with respect to such shares were paid in full.

2.4 Distribution of Remaining Assets. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, after the payment of all preferential amounts required to be paid to the holders of shares of Series A Preferred Stock the remaining assets of the Corporation available for distribution to its stockholders shall be distributed among the holders of the shares of Series A Preferred Stock and Common Stock, pro rata based on the number of shares held by each such holder, treating for this purpose all such securities as if they had been converted to Common Stock pursuant to the terms of the Certificate of Incorporation immediately prior to such liquidation, dissolution or winding up of the Corporation.[16] The aggregate amount which a holder of a share of Series A Preferred Stock is entitled to receive under Subsections 2.1 and 2.2 is hereinafter referred to as the "**Series A Liquidation Amount**."

2.5 Deemed Liquidation Events.[17]

2.5.1 Definition. Each of the following events shall be considered a "**Deemed Liquidation Event**" unless the holders of at least [*specify percentage*][18] of the outstanding shares of Series A Preferred Stock elect otherwise by written notice sent to the Corporation at least [__] days prior to the effective date of any such event:

(a) a merger or consolidation[19] in which

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[16] If a cap to the liquidation preference is specified in the term sheet, add the following language at the end of this sentence: "; provided, however, that if the aggregate amount which the holders of Series A Preferred Stock are entitled to receive under Subsections 2.1 and 2.2 shall exceed [$_____] per share (subject to appropriate adjustment in the event of a stock split, stock dividend, combination, reclassification, or similar event affecting the Series A Preferred Stock) (the "Maximum Participation Amount"), each holder of Series A Preferred Stock shall be entitled to receive upon such liquidation, dissolution or winding up of the Corporation the greater of (i) the Maximum Participation Amount and (ii) the amount such holder would have received if all shares of Series A Preferred Stock had been converted into Common Stock immediately prior to such liquidation, dissolution or winding up of the Corporation."

[17] It is generally unadvisable to insert language that includes a change of control transaction as a Deemed Liquidation Event, as such transactions may not be within the control of the Corporation and, in any event, could be inadvertently triggered with unintended consequences. A better practice is to protect against such events through a combination of other measures, including protective provisions regarding the issuance of stock and rights of first refusal over transfers of stock by other stockholders. Counsel should be aware, however, that protective provisions and rights of first refusal may not be sufficient to protect against all eventualities, particularly given that many venture capital investors refuse to subject their own shares to transfer restrictions such as a right of first refusal.

[18] The vote required to waive the treatment of a particular transaction as a Deemed Liquidation Event is generally the same vote that would be required to amend this provision under the terms of Subsection 3.3.

[19] If the Corporation is incorporated in a state whose corporate statute provides for statutory share exchanges (Delaware currently does not), a share exchange transaction should be referenced (along with a merger or consolidation) in Subsection 2.3.1(a), as well as in 2.3.2(a) below.

(i) the Corporation is a constituent party or

(ii) a subsidiary of the Corporation is a constituent party and the Corporation issues shares of its capital stock pursuant to such merger or consolidation,

except any such merger or consolidation involving the Corporation or a subsidiary in which the shares of capital stock of the Corporation outstanding immediately prior to such merger or consolidation continue to represent, or are converted into or exchanged for shares of capital stock that represent, immediately following such merger or consolidation, at least a [majority], by voting power, of the capital stock of (1) the surviving or resulting corporation; or (2) if the surviving or resulting corporation is a wholly owned subsidiary of another corporation immediately following such merger or consolidation, the parent corporation of such surviving or resulting corporation; or

(b) the sale, lease, transfer, exclusive license or other disposition, in a single transaction or series of related transactions, by the Corporation or any subsidiary of the Corporation of all or substantially all the assets of the Corporation and its subsidiaries taken as a whole (including, without limitation, [_____]),[20] or the sale or disposition (whether by merger, consolidation or otherwise) of one or more subsidiaries of the Corporation if substantially all of the assets of the Corporation and its subsidiaries taken as a whole are held by such subsidiary or subsidiaries, except where such sale, lease, transfer, exclusive license or other disposition is to a wholly owned subsidiary of the Corporation.

2.5.2 Effecting a Deemed Liquidation Event.

(a) The Corporation shall not have the power to effect a Deemed Liquidation Event referred to in Subsection 2.3.1(a)(i) unless the agreement or plan of merger or consolidation for such transaction (the "**Merger Agreement**") provides that the consideration payable to the stockholders of the Corporation shall be allocated among the holders of capital stock of the Corporation in accordance with Subsections 2.1 and 2.2.

(b) In the event of a Deemed Liquidation Event referred to in Subsection 2.3.1(a)(ii) or 2.3.1(b), if the Corporation does not effect a dissolution of the Corporation under the General Corporation Law within ninety (90) days after such Deemed Liquidation Event, then (i) the Corporation shall send a written notice to each holder of Series A Preferred Stock no later than the ninetieth (90^{th}) day after the Deemed Liquidation Event advising such holders of their right (and the requirements to be met to secure such right) pursuant to the terms of the following clause; (ii) to require the redemption of such shares of Series A Preferred Stock, and (iii) if the holders of at least [*specify percentage*] of the then outstanding shares of Series A Preferred Stock so request in a written instrument delivered to the Corporation not later than one hundred twenty (120) days after such Deemed Liquidation Event, the Corporation shall use the consideration received by the Corporation for such Deemed Liquidation Event (net of any retained liabilities associated with the assets sold or technology licensed, as determined in good faith by the Board of Directors of the Corporation)**,** together with

[20] Occasionally, it may be appropriate to specify important assets of the Corporation.

any other assets of the Corporation available for distribution to its stockholders, all to the extent permitted by Delaware law governing distributions to stockholders (the "**Available Proceeds**"), on the one hundred fiftieth (150^{th}) day after such Deemed Liquidation Event, to redeem all outstanding shares of Series A Preferred Stock at a price per share equal to the Series A Liquidation Amount. Notwithstanding the foregoing, in the event of a redemption pursuant to the preceding sentence, if the Available Proceeds are not sufficient to redeem all outstanding shares of Series A Preferred Stock, the Corporation shall ratably redeem each holder's shares of Series A Preferred Stock to the fullest extent of such Available Proceeds, and shall redeem the remaining shares as soon as it may lawfully do so under Delaware law governing distributions to stockholders. The provisions of Section 6 shall apply, with such necessary changes in the details thereof as are necessitated by the context, to the redemption of the Series A Preferred Stock pursuant to this Subsection 2.3.2(b).[21] Prior to the distribution or redemption provided for in this Subsection 2.3.2(b), the Corporation shall not expend or dissipate the consideration received for such Deemed Liquidation Event, except to discharge expenses incurred in connection with such Deemed Liquidation Event [or in the ordinary course of business].

2.5.3 Amount Deemed Paid or Distributed.[22] The amount deemed paid or distributed to the holders of capital stock of the Corporation upon any such merger, consolidation, sale, transfer, exclusive license, other disposition or redemption shall be the cash or the value of the property, rights or securities paid or distributed to such holders by the Corporation or the acquiring person, firm or other entity. [The value of such property, rights or securities shall be determined in good faith by the Board of Directors of the Corporation.][23]

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[21] In the event the Series A Preferred Stock is not redeemable, replace this sentence with modified versions of Subsection 6.2 through 6.4.

[22] Alternative provision: "Amount of Deemed Paid or Distributed. If the amount deemed paid or distributed under this Subsection 2.3.3 is made in property other than in cash, the value of such distribution shall be the fair market value of such property, determined as follows:

(a) For securities not subject to investment letters or other similar restrictions on free marketability,

(i) if traded on a securities exchange, the value shall be deemed to be the average of the closing prices of the securities on such exchange or market over the thirty (30) day period ending three (3) days prior to the closing of such transaction;

(ii) if actively traded over-the-counter, the value shall be deemed to be the average of the closing bid prices over the thirty (30) day period ending three (3) days prior to the closing of such transaction; or

(iii) if there is no active public market, the value shall be the fair market value thereof, as determined in good faith by the Board of Directors of the Corporation.

(b) The method of valuation of securities subject to investment letters or other similar restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall take into account an appropriate discount (as determined in good faith by the Board of Directors of the Corporation) from the market value as determined pursuant to clause (a) above so as to reflect the approximate fair market value thereof."

[23] Investor counsel may seek to add further investor protection by providing that, if a specified percentage of the Series A holders object to the valuation, then the value shall be the FMV as mutually determined by the Corporation and the specified Series A holders, and if the Corporation and those Series A holders are unable to reach agreement, then FMV shall be established by an independent appraisal. If such a provision is used, the (Footnote continued on next page)

2.5.4 Allocation of Escrow and Contingent Consideration. In the event of a Deemed Liquidation Event pursuant to Subsection 2.3.1(a)(i), if any portion of the consideration payable to the stockholders of the Corporation is payable only upon satisfaction of contingencies (the "**Additional Consideration**"), the Merger Agreement shall provide that (a) the portion of such consideration that is not Additional Consideration (such portion, the "**Initial Consideration**") shall be allocated among the holders of capital stock of the Corporation in accordance with Subsections 2.1 and 2.2 as if the Initial Consideration were the only consideration payable in connection with such Deemed Liquidation Event; and (b) any Additional Consideration which becomes payable to the stockholders of the Corporation upon satisfaction of such contingencies shall be allocated among the holders of capital stock of the Corporation in accordance with Subsections 2.1 and 2.2 after taking into account the previous payment of the Initial Consideration as part of the same transaction. For the purposes of this Subsection 2.3.4, consideration placed into escrow or retained as holdback to be available for satisfaction of indemnification or similar obligations in connection with such Deemed Liquidation Event shall be deemed to be [Initial Consideration] [Additional Consideration]. [24]

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procedural details (*e.g.*, how appraiser is to be selected, who pays, is the appraisal binding, etc.) should be spelled out.

[24] This section addresses two related issues that may arise when a venture-capital backed company is acquired in a merger (1) the allocation of earn-out or performance-based consideration, if any and (2) how any deductions from the merger consideration to fund an indemnity escrow or holdback are allocated among the holders of capital stock of the company. This provision is designed to address both issues, with optional language regarding the treatment of escrow.

In transactions involving earn-out or performance-based consideration, one approach is to allocate the closing proceeds in accordance with the liquidation provisions of the Certificate of Incorporation as if such closing proceeds were the only amounts payable in the transaction. If, subsequent to the closing of the transaction, any additional payments are made upon satisfaction of earn-out or performance-based contingencies, the liquidation provisions would be re-applied to ensure that the aggregate consideration is allocated as it would have been were the closing and post-closing payments made at a single time. Alternatively, in a transaction where the closing proceeds were less than the aggregate liquidation preference of the Preferred Stock and potential earn-out payments were of sufficient size as to result in full conversion of all Preferred Stock (assuming such Preferred Stock was not fully participating) and all proceeds shared pro rata on an as-converted basis, it has occasionally been argued that in the absence of explicit language to the contrary, the holders of Preferred Stock must choose to either be paid their liquidation preference from the closing proceeds and forego any as-converted based participation in the earn-out, or convert into Common Stock prior to the closing and thereby waive any liquidation preference in order to preserve the ability to participate in the distribution of earn-out proceeds on an as-converted basis. Given the consensus view that such alternative is inconsistent with the bargain implicit in a preferred security, this Subsection 2.3.4 makes it clear that the "greater of preference or participation" character of Preferred Stock survives in transaction involving contingent consideration.

With respect to the allocation of amounts placed in escrow or subject to holdback to be available for the satisfaction of indemnity obligations, Subsection 2.3.4 contains optional language that permits such amounts to either be treated as "Initial Consideration" and paid with the closing proceeds and withheld on a pro rata basis from all stockholders, or instead treated as "Additional Consideration" (*e.g.*, a separate contingent payment), which results in the holders of Preferred Stock always receiving their liquidation preference, even if some or all of the escrow is forfeited (see further discussion on this point below). If escrowed amounts are to be treated as "Initial Consideration," the parties may wish to consider whether future earn-out payments in such transaction should take into account whether any portion of such escrow amounts have been paid to the buyer or other third parties prior to the time such earn-out payments are made – *e.g.*, whether the earn-out should "backfill" any escrow dollars applied as liquidation preference but not eventually paid.

(Footnote continued on next page)

3. Voting.

3.1 General. On any matter presented to the stockholders of the Corporation for their action or consideration at any meeting of stockholders of the Corporation (or by written consent of stockholders in lieu of meeting), each holder of outstanding shares of Series A Preferred Stock shall be entitled to cast 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 of the record date for determining stockholders entitled to vote on such matter. Except as provided by law or by the other provisions of the Certificate of Incorporation,

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From the perspective of the holders of Preferred Stock, the pro rata approach resulting from treating the escrowed amount as "Initial Consideration" may not give them the full benefit of their bargained-for liquidation preference because if not all of the escrow is ultimately released to company stockholders, it can result in the Preferred Stock holders receiving less, and the Common Stock holders receiving more, than they would have been entitled to receive if the reduced consideration had been allocated in the manner provided for in the Certificate of Incorporation. The difference between the two approaches is illustrated by the following example:

- 100 shares of Series A Preferred Stock and 100 shares of Common Stock are outstanding;
- the Series A Preferred Stock has a liquidation preference of $1.00 per share, and is non-participating;
- the purchase price for the company is $150; and
- $15 is placed in escrow, which ultimately is returned to the acquirer (such the actual purchase price turns out to be $135).

If the escrow were allocated among all stockholders pro rata, the initial $135 payment would be allocated $90 to the holders of Series A Preferred Stock and $45 to the holders of Common Stock; and the escrow would be allocated $10 to the holders of Series A Preferred Stock and $5 to the holders of Common Stock. If the escrow were later paid to the stockholders, the $150 purchase price would be allocated as the Certificate of Incorporation provides – $100 to the Series A holders and $50 to the Common holders. On the other hand, if the $15 escrow were forfeited, the $135 purchase price would be allocated $90 to the Series A holders and $45 to the Common holders. However, according to the liquidation provisions of the Certificate of Incorporation, a purchase price of $135 should be allocated $100 to the holders of Series A Preferred Stock and $35 to the holders of Common Stock. Thus this pro rata allocation of the escrow could provide a smaller payout to the Preferred Stock holders than would be the result if the liquidation provisions of the Certificate of Incorporation were applied to the reduced purchase price (after deducting the forfeited escrow proceeds).

Deeming the escrowed consideration as "Additional Consideration" ensures that the Preferred Stock holders always receive their liquidation preference, even if some or all of the escrow is forfeited – the initial payment of $135 would be allocated $100 to the Series A holders and $35 to the Common holders, and all $15 of the escrow would be allocated to the Common holders (with any proceeds released from escrow also going solely to the Common holders). Whether the escrow is forfeited or paid to the holders of Common Stock, the result would be an allocation that is consistent with how the Certificate of Incorporation would allocate whatever the ultimate purchase price turns out to be.

If the Certificate of Incorporation is silent on allocation of escrow and contingent consideration, at the time of an acquisition the company's Board of Directors will have to approve allocations without the benefit of a Certificate of Incorporation provision stipulating how that should be done. This could create the risk that some constituency will have grounds to complain about the Board's decision, including a claim that the terms of the merger agreement are inconsistent with the liquidation provisions of the Certificate of Incorporation addressing how merger consideration must be allocated among the various series and classes of stock of the company.

holders of Series A Preferred Stock shall vote together with the holders of Common Stock as a single class.

3.2 Election of Directors. The holders of record of the shares of Series A Preferred Stock, exclusively and as a separate class, shall be entitled to elect [__] directors of the Corporation (the "**Series A Directors**") and the holders of record of the shares of Common Stock, exclusively and as a separate class, shall be entitled to elect [__] directors of the Corporation.[25] Any director elected as provided in the preceding sentence may be removed without cause by, and only by, the affirmative vote of the holders of the shares of the class or series of capital stock entitled to elect such director or directors, given either at a special meeting of such stockholders duly called for that purpose or pursuant to a written consent of stockholders. If the holders of shares of Series A Preferred Stock or Common Stock, as the case may be, fail to elect a sufficient number of directors to fill all directorships for which they are entitled to elect directors, voting exclusively and as a separate class, pursuant to the first sentence of this Subsection 3.2, then any directorship not so filled shall remain vacant until such time as the holders of the Series A Preferred Stock or Common Stock, as the case may be, elect a person to fill such directorship by vote or written consent in lieu of a meeting; and no such directorship may be filled by stockholders of the Corporation other than by the stockholders of the Corporation that are entitled to elect a person to fill such directorship, voting exclusively and as a separate class.[26] The holders of record of the shares of Common Stock and of any other class or series of voting stock (including the Series A Preferred Stock), exclusively and voting together as a single class, shall be entitled to elect the balance of the total number of directors of the Corporation. At any meeting held for the purpose of electing a director, the presence in person or by proxy of the holders of a majority of the outstanding shares of the class or series entitled to elect such director shall constitute a quorum for the purpose of electing such director. Except as otherwise provided in this Subsection 3.2, a vacancy in any directorship filled by the holders of any class or series shall be filled only by vote or written consent in lieu of a meeting of the holders of such class or series or by any remaining director or directors elected by the holders of such class or series pursuant to this Subsection 3.2. [The rights of the holders of the Series A Preferred Stock and the rights of the holders of the Common Stock under the first sentence of this Subsection 3.2 shall terminate on the first date following the Series A Original Issue Date (as defined below) on which there are issued and outstanding less than [_____] shares of Series A Preferred Stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination, or other similar recapitalization with respect to the Series A Preferred Stock).]

3.3 Series A Preferred Stock Protective Provisions. At any time when [shares of Series A Preferred Stock] [at least [____] shares of Series A Preferred Stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series A Preferred Stock)] are outstanding, the Corporation shall not, either directly or indirectly by amendment, merger, consolidation or otherwise, do any of the following without (in addition to any other vote required by law or the

[25] The size of the Board of Directors is typically fixed in the Bylaws (which permits it to be amended without the need for a charter amendment), though it could be fixed here. The Voting Agreement also typically obligates the parties to vote to fix the size of the Board at a specified number of directors.

[26] This sentence has been added in response to *FGC Holdings Ltd. v. Teltronics, Inc., Case No. C.A. 883-N (Del. Ch. Ct. Sept. 14, 2005)*.

Certificate of Incorporation) the written consent or affirmative vote of the holders of at least [*specify percentage*] of the then outstanding shares of Series A Preferred Stock, given in writing or by vote at a meeting, consenting or voting (as the case may be) separately as a class,[27] and any such act or transaction entered into without such consent or vote shall be null and void *ab initio*, and of no force or effect.[28]

3.3.1 liquidate, dissolve or wind-up the business and affairs of the Corporation, effect any merger or consolidation[29] or any other Deemed Liquidation Event,[30] or consent to any of the foregoing;

3.3.2 amend, alter or repeal any provision of the Certificate of Incorporation or Bylaws of the Corporation [in a manner that adversely affects the powers, preferences or rights of the Series A Preferred Stock];[31]

3.3.3 create, or authorize the creation of, [or issue or obligate itself to issue shares of,] any additional class or series of capital stock [unless the same ranks junior to the Series A Preferred Stock with respect to the distribution of assets on the liquidation, dissolution or winding up of the Corporation, the payment of dividends and rights of redemption], or increase the authorized number of shares of Series A Preferred Stock or increase the authorized number of shares of any additional class or series of capital stock [unless the same

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[27] Consider including here some or all of the additional restrictions in Section 5.5 of the Model Investors' Rights Agreement (which, as set forth in that form, require the consent of some number of the investor-designated directors). Bear in mind that if the matter may be waived by a vote of a specified portion of the Board, any investor-designated director will be constrained by his or her fiduciary duties to the Corporation. Also, if the consent rights are contained in the charter, the investor can argue that an act by the Corporation in contravention of those provisions would be void or voidable rather than simply a breach of contract. But see footnote 30.

[28] This language has been added in response to the Delaware Chancery Court's opinion in *Fletcher Int'l, Ltd. v. ION Geophysical Corp., Case No. C.A. 5109-VCP (Del. Ch. Ct. May 28, 2010)*, where the court declined to unwind promissory notes issued by the defendant corporation in apparent violation of a preferred stock consent right in its charter. Rather than simply declaring the issuance void and ordering the transaction to be rescinded, the court applied an injunction standard and concluded that, although the preferred stockholder had proven the likelihood that its consent right had been contravened, compensatory damages were calculable (or another equitable remedy might be available), and, in balancing the potential harms to the parties, held that the corporation would suffer the greater harm were it forced to return the borrowed funds.

[29] The purpose of including the broader language relating to "any merger or consolidation" is to prevent mergers that have no independent economic substance but rather are effected for the sole purpose of subverting the terms of the outstanding Series A Preferred Stock (see, *e.g.*, *Benchmark Capital Partners IV, L.P. v. Vague, Case No. C.A. 19719 (Del. Ch. Ct. July 15, 2002).* If the investors have not negotiated for a veto right on a sale of the company, the provision might instead read "effect any merger or consolidation, other than a Deemed Liquidation Event." If the parties consider such provision too broad, the investors are nevertheless well advised to include an additional protective provision prohibiting any mergers or consolidations that result in conversion of the preferred stock other than in accordance with the provisions of Sections 4 and 5, in order to prevent any mischief.

[30] A Deemed Liquidation Event is defined to include a sale or disposition, by the Corporation or any subsidiary, of substantially all of the assets of the Corporation and its subsidiaries taken as a whole. See clause (g) for a prohibition on dispositions of assets by subsidiaries that do not rise to the level of a Deemed Liquidation Event.

[31] Under Delaware law, the authorization of another series of Preferred Stock with rights senior to those of the Series A Preferred Stock as to dividends, liquidation and redemption would generally not constitute an amendment that adversely affects the Series A Preferred Stock. Accordingly, the following subsection contains additional restrictions specifically dealing with the authorization of senior or pari passu stock.

ranks junior to the Series A Preferred Stock with respect to the distribution of assets on the liquidation, dissolution or winding up of the Corporation, the payment of dividends and rights of redemption];

3.3.4 (i) reclassify, alter or amend any existing security of the Corporation that is pari passu with the Series A Preferred Stock in respect of the distribution of assets on the liquidation, dissolution or winding up of the Corporation, the payment of dividends or rights of redemption, if such reclassification, alteration or amendment would render such other security senior to the Series A Preferred Stock in respect of any such right, preference, or privilege or (ii) reclassify, alter or amend any existing security of the Corporation that is junior to the Series A Preferred Stock in respect of the distribution of assets on the liquidation, dissolution or winding up of the Corporation, the payment of dividends or rights of redemption, if such reclassification, alteration or amendment would render such other security senior to or pari passu with the Series A Preferred Stock in respect of any such right, preference or privilege;

3.3.5 purchase or redeem (or permit any subsidiary to purchase or redeem) or pay or declare any dividend or make any distribution on, any shares of capital stock of the Corporation other than (i) redemptions of or dividends or distributions on the Series A Preferred Stock as expressly authorized herein, (ii) dividends or other distributions payable on the Common Stock solely in the form of additional shares of Common Stock and (iii) repurchases of stock from former employees, officers, directors, consultants or other persons who performed services for the Corporation or any subsidiary in connection with the cessation of such employment or service at the lower of the original purchase price or the then-current fair market value thereof [or (iv) as approved by the Board of Directors, including the approval of at least one Series A Director];[32]

3.3.6 create, or authorize the creation of, or issue, or authorize the issuance of any debt security, or permit any subsidiary to take any such action with respect to any debt security[, if the aggregate indebtedness of the Corporation and its subsidiaries for borrowed money following such action would exceed $_____] [other than equipment leases or bank lines of credit] [unless such debt security has received the prior approval of the Board of Directors, including the approval of [at least one] Series A Director];[33] [or]

3.3.7 create, or hold capital stock in, any subsidiary that is not wholly owned (either directly or through one or more other subsidiaries) by the Corporation, or sell, transfer or otherwise dispose of any capital stock of any direct or indirect subsidiary of the Corporation, or permit any direct or indirect subsidiary to sell, lease, transfer, exclusively license or otherwise dispose (in a single transaction or series of related transactions) of all or substantially all of the assets of such subsidiary[.][; or]

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[32] Inclusion of a requirement that Board approval include approval by a Series A Director is frequently seen as a compromise between requiring approval of the holders of Series A Preferred Stock (*qua*-stockholders) and simply requiring Board approval. However, prior to inclusion of the bracketed language, consideration should be given to the fact that any board-level approval of the Series A Director (as opposed to stockholder approval by the holders of Series A Preferred Stock) will be in such director's capacity as a member of the board of directors and therefore subject to such director's fiduciary duties to the corporation.

[33] See footnote 34.

3.3.8 [increase or decrease the authorized number of directors constituting the Board of Directors].[34]

4. Optional Conversion.

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

4.1 Right to Convert.

4.1.1 Conversion Ratio. Each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time and from time to time, and without the payment of additional consideration by the holder thereof, into such number of fully paid and non-assessable shares of Common Stock as is determined by dividing the Series A Original Issue Price by the Series A Conversion Price (as defined below) in effect at the time of conversion. The "**Series A Conversion Price**" shall initially be equal to $_____ [*insert original purchase price of Series A Preferred Stock*].[35] Such initial Series A Conversion Price, and the rate at which shares of Series A Preferred Stock may be converted into shares of Common Stock, shall be subject to adjustment as provided below.

4.1.2 Termination of Conversion Rights. In the event of a notice of redemption of any shares of Series A Preferred Stock pursuant to Section 6, the Conversion Rights of the shares designated for redemption shall terminate at the close of business on the last full day preceding the date fixed for redemption, unless the redemption price is not fully paid on such redemption date, in which case the Conversion Rights for such shares shall continue until such price is paid in full.[36] In the event of a liquidation, dissolution or winding up of the Corporation or a Deemed Liquidation Event, the Conversion Rights shall terminate at the close of business on the last full day preceding the date fixed for the payment of any such amounts distributable on such event to the holders of Series A Preferred Stock.

4.2 Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of the Series A Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the fair market value of a share of Common Stock as determined in good faith by the Board of Directors of the Corporation. Whether or not fractional shares would be issuable upon such conversion shall be determined on the basis of the total number of shares of Series A Preferred Stock the holder is at the time converting into Common Stock and the aggregate number of shares of Common Stock issuable upon such conversion.

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[34] This provision often is addressed in the Voting Agreement rather than in the Certificate of Incorporation.

[35] Remember in future rounds to substitute a different number, if there have been adjustments to the Series A Conversion Price, and provide for additional adjustments based only on events from that date forward.

[36] Remove this sentence if the Series A Preferred Stock is not redeemable.

4.3 Mechanics of Conversion.

4.3.1 Notice of Conversion. In order for a holder of Series A Preferred Stock to voluntarily convert shares of Series A Preferred Stock into shares of Common Stock, such holder shall (a) provide written notice to the Corporation's transfer agent at the office of the transfer agent for the Series A Preferred Stock (or at the principal office of the Corporation if the Corporation serves as its own transfer agent) that such holder elects to convert all or any number of such holder's shares of Series A Preferred Stock and, if applicable, any event on which such conversion is contingent and (b), if such holder's shares are certificated, surrender the certificate or certificates for such shares of Series A Preferred Stock (or, if such registered holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate), at the office of the transfer agent for the Series A Preferred Stock (or at the principal office of the Corporation if the Corporation serves as its own transfer agent). Such notice shall state such holder's name or the names of the nominees in which such holder wishes the shares of Common Stock to be issued. If required by the Corporation, any certificates surrendered for conversion shall be endorsed or accompanied by a written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or his, her or its attorney duly authorized in writing. The close of business on the date of receipt by the transfer agent (or by the Corporation if the Corporation serves as its own transfer agent) of such notice and, if applicable, certificates (or lost certificate affidavit and agreement) shall be the time of conversion (the "**Conversion Time**"), and the shares of Common Stock issuable upon conversion of the specified shares shall be deemed to be outstanding of record as of such date. The Corporation shall, as soon as practicable after the Conversion Time (i) [issue and deliver to such holder of Series A Preferred Stock, or to his, her or its nominees, a certificate or certificates for the number of full shares of Common Stock issuable upon such conversion in accordance with the provisions hereof and a certificate for the number (if any) of the shares of Series A Preferred Stock represented by the surrendered certificate that were not converted into Common Stock][37], (ii) pay in cash such amount as provided in Subsection 4.2 in lieu of any fraction of a share of Common Stock otherwise issuable upon such conversion and (iii) pay all declared but unpaid dividends on the shares of Series A Preferred Stock converted.

4.3.2 Reservation of Shares. The Corporation shall at all times when the Series A Preferred Stock shall be outstanding, reserve and keep available out of its authorized but unissued capital stock, for the purpose of effecting the conversion of the Series A Preferred Stock, such number of its duly authorized shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding 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 shall take such corporate action as may be necessary to increase its authorized but

[37] For uncertificated shares of Common Stock, use the following for (i): "issue and deliver to such holder of Series A Preferred Stock, or to his, her or its nominees, a notice of issuance of uncertificated shares and may, upon written request, issue and deliver a certificate for the number of full shares of Common Stock issuable upon such conversion in accordance with the provisions hereof and, may, if applicable and upon written request, issue and deliver a certificate for the number (if any) of the shares of Series A Preferred Stock represented by any surrendered certificate that were not converted into Common Stock,"

unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to the Certificate of Incorporation. Before taking any action which would cause an adjustment reducing the Series A Conversion Price below the then par value of the shares of Common Stock issuable upon conversion of the Series A Preferred Stock, the Corporation will take any corporate action which may, in the opinion of its counsel, be necessary in order that the Corporation may validly and legally issue fully paid and non-assessable shares of Common Stock at such adjusted Series A Conversion Price.

4.3.3 Effect of Conversion. All shares of Series A Preferred Stock which shall have been surrendered for conversion as herein provided shall no longer be deemed to be outstanding and all rights with respect to such shares shall immediately cease and terminate at the Conversion Time, except only the right of the holders thereof to receive shares of Common Stock in exchange therefor, to receive payment in lieu of any fraction of a share otherwise issuable upon such conversion as provided in Subsection 4.2 and to receive payment of any dividends declared but unpaid thereon.[38] Any shares of Series A Preferred Stock so converted shall be retired and cancelled and may not be reissued as shares of such series, and the Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized number of shares of Series A Preferred Stock accordingly.

4.3.4 No Further Adjustment. Upon any such conversion, no adjustment to the Series A Conversion Price shall be made for any declared but unpaid dividends on the Series A Preferred Stock surrendered for conversion or on the Common Stock delivered upon conversion.

4.3.5 Taxes. The Corporation shall pay any and all issue and other similar taxes that may be payable in respect of any issuance or delivery of shares of Common Stock upon conversion of shares of Series A Preferred Stock pursuant to this Section 4. The Corporation shall not, however, be required to pay any tax which may be payable in respect of any transfer involved in the issuance and delivery of shares of Common Stock in a name other than that in which the shares of Series A Preferred Stock so converted were registered, and no such issuance or delivery shall be made unless and until the person or entity requesting such issuance has paid to the Corporation the amount of any such tax or has established, to the satisfaction of the Corporation, that such tax has been paid.

4.4 Adjustments to Series A Conversion Price for Diluting Issues.

4.4.1 Special Definitions. For purposes of this Article Fourth, the following definitions shall apply:

[38] Some investors will insist that, upon conversion, all declared but unpaid dividends (and, if the Series A Preferred Stock is entitled to accruing dividends, all accrued dividends, whether or not declared) be paid in additional shares of Common Stock rather than in cash. Assuming that the Series A Preferred Stock is "preferred stock" for purposes of Section 305 of the Internal Revenue Code, the issuance of additional shares of Common Stock in payment of accrued but unpaid dividends will likely be deemed to be a taxable stock dividend to the extent of the Corporation's current and accumulated earnings and profits.

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

(b) "**Series A Original Issue Date**" shall mean the date on which the first share of Series A Preferred Stock was issued.

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

(d) "**Additional Shares of Common Stock**" shall mean all shares of Common Stock issued (or, pursuant to Subsection 4.4.3 below, deemed to be issued) by the Corporation after the Series A Original Issue Date, other than (1) the following shares of Common Stock and (2) shares of Common Stock deemed issued pursuant to the following Options and Convertible Securities (clauses (1) and (2), collectively, "**Exempted Securities**"):

(i) shares of Common Stock, Options or Convertible Securities issued as a dividend or distribution on Series A Preferred Stock;

(ii) shares of Common Stock, Options or Convertible Securities issued by reason of a dividend, stock split, split-up or other distribution on shares of Common Stock that is covered by Subsection 4.5, 4.6, 4.7 or 4.8**;**

(iii) shares of Common Stock or Options issued to employees or directors of, or consultants or advisors to, the Corporation or any of its subsidiaries pursuant to a plan, agreement or arrangement approved by the Board of Directors of the Corporation[, including the Series A Directors][, including at least one Series A Director];[39,40] [or]

(iv) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options or shares of Common Stock

[39] See footnote 34.

[40] Alternative provision: "(iii) up to [_____] shares of Common Stock, including Options therefor (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization affecting such shares), issued to employees or directors of, or consultants or advisors to, the Corporation or any of its subsidiaries pursuant to the [_____] Plan of the Corporation, whether issued before or after the Series A Original Issue Date (provided that any Options for such shares that expire or terminate unexercised or any restricted stock repurchased by the Corporation at cost shall not be counted toward such maximum number unless and until such shares are re-granted as new stock grants (or as new Options) pursuant to the terms of any such plan, agreement or arrangement)."

actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security[.][; or]

(v) [shares of Common Stock, Options or Convertible Securities issued to banks, equipment lessors or other financial institutions, or to real property lessors, pursuant to a debt financing, equipment leasing or real property leasing transaction approved by the Board of Directors of the Corporation[, including the Series A Directors][, including at least one Series A Director][41][that do not exceed an aggregate of [_____] shares of Common Stock (including shares underlying (directly or indirectly) any such Options or Convertible Securities)]][.][; or]

(vi) [shares of Common Stock, Options or Convertible Securities issued to suppliers or third party service providers in connection with the provision of goods or services pursuant to transactions approved by the Board of Directors of the Corporation [, including the Series A Directors][, including at least one Series A Director][42][that do not exceed an aggregate of [_____] shares of Common Stock (including shares underlying (directly or indirectly) any such Options or Convertible Securities)]][.][; or]

(vii) [shares of Common Stock, Options or Convertible Securities issued pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets or other reorganization or to a joint venture agreement, provided that such issuances are approved by the Board of Directors of the Corporation[, including the Series A Directors][, including at least one Series A

[41] See footnote 34.

[42] See footnote 34.

Director][43][that do not exceed an aggregate of [_____] shares of Common Stock (including shares underlying (directly or indirectly) any such Options or Convertible Securities)]][.][; or]

(viii) [shares of Common Stock, Options or Convertible Securities issued in connection with sponsored research, collaboration, technology license, development, OEM, marketing or other similar agreements or strategic partnerships approved by the Board of Directors of the Corporation[, including the Series A Directors][, including at least one Series A Director][44][that do not exceed an aggregate of [_____] shares of Common Stock (including shares underlying (directly or indirectly) any such Options or Convertible Securities)]].

4.4.2 No Adjustment of Series A Conversion Price. No adjustment in the Series A Conversion Price shall be made as the result of the issuance or deemed issuance of Additional Shares of Common Stock if the Corporation receives written notice from the holders of at least [*specify percentage*] of the then outstanding shares of Series A Preferred Stock agreeing that no such adjustment shall be made as the result of the issuance or deemed issuance of such Additional Shares of Common Stock.

4.4.3 Deemed Issue of Additional Shares of Common Stock.

(a) If the Corporation at any time or from time to time after the Series A Original Issue Date shall issue any Options or Convertible Securities (excluding Options or Convertible Securities which are themselves Exempted Securities) or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto, assuming the satisfaction of any conditions to exercisability, convertibility or exchangeability but without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date.

(b) If the terms of any Option or Convertible Security, the issuance of which resulted in an adjustment to the Series A Conversion Price pursuant to the

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[43] See footnote 34.

[44] See footnote 34.

terms of Subsection 4.4.4, are revised as a result of an amendment to such terms or any other adjustment pursuant to the provisions of such Option or Convertible Security (but excluding automatic adjustments to such terms pursuant to anti-dilution or similar provisions of such Option or Convertible Security)[45] to provide for either (1) any increase or decrease in the number of shares of Common Stock issuable upon the exercise, conversion and/or exchange of any such Option or Convertible Security or (2) any increase or decrease in the consideration payable to the Corporation upon such exercise, conversion and/or exchange, then, effective upon such increase or decrease becoming effective, the Series A Conversion Price computed upon the original issue of such Option or Convertible Security (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Series A Conversion Price as would have obtained had such revised terms been in effect upon the original date of issuance of such Option or Convertible Security. Notwithstanding the foregoing, no readjustment pursuant to this clause (b) shall have the effect of increasing the Series A Conversion Price to an amount which exceeds the lower of (i) the Series A Conversion Price in effect immediately prior to the original adjustment made as a result of the issuance of such Option or Convertible Security, or (ii) the Series A Conversion Price that would have resulted from any issuances of Additional Shares of Common Stock (other than deemed issuances of Additional Shares of Common Stock as a result of the issuance of such Option or Convertible Security) between the original adjustment date and such readjustment date.

(c) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which are themselves Exempted Securities), the issuance of which did not result in an adjustment to the Series A Conversion Price pursuant to the terms of Subsection 4.4.4 (either because the consideration per share (determined pursuant to Subsection 4.4.5) of the Additional Shares of Common Stock subject thereto was equal to or greater than the Series A Conversion Price then in effect, or because such Option or Convertible Security was issued before the Series A Original Issue Date), are revised after the Series A Original Issue Date as a result of an amendment to such terms or any other adjustment pursuant to the provisions of such Option or Convertible Security (but excluding automatic adjustments to such terms pursuant to anti-dilution or similar provisions of such Option or Convertible Security)[46] to provide for either (1) any increase in the number of shares of Common Stock

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[45] The reason for this parenthetical is that an automatic change in another security pursuant to its anti-dilution provisions would cause an automatic adjustment pursuant to this provision. If the adjustment pursuant to this provision then causes another automatic change in the other security, it is possible that the second change in the other security can cause a second change pursuant to this provision, which causes a third change to the other security and then a third adjustment pursuant to this provision, and on and on. This form does not provide for adjustment to the Series A Conversion Price as a result of anti-dilution adjustments to the terms of Options or Convertible Securities, because of the complexity involved in such calculations, and because the dilutive event triggering the adjustment to the terms of the Option or Convertible Security would presumably also trigger an adjustment to the Series A Conversion Price under the terms Subsection 4.4.4 (thus obviating the need to provide for an adjustment to the Series A Conversion Price as a result of an anti-dilution adjustment to the terms of the Option or Convertible Security).

[46] The reason for this parenthetical is that an automatic change in another security pursuant to its anti-dilution provisions would cause an automatic adjustment pursuant to this provision. If the adjustment pursuant to this provision then causes another automatic change in the other security, it is possible that the second change in the other security can cause a second change pursuant to this provision, which causes a third change to the other security and then a third adjustment pursuant to this provision, and on and on. This form does not provide for adjustment to the Series A Conversion Price as a result of anti-dilution adjustments to the terms of Options or Convertible Securities, because of the complexity involved in such calculations, and because the dilutive event (Footnote continued on next page)

issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended or adjusted, and the Additional Shares of Common Stock subject thereto (determined in the manner provided in Subsection 4.4.3(a) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(d) Upon the expiration or termination of any unexercised Option or unconverted or unexchanged Convertible Security (or portion thereof) which resulted (either upon its original issuance or upon a revision of its terms) in an adjustment to the Series A Conversion Price pursuant to the terms of Subsection 4.4.4, the Series A Conversion Price shall be readjusted to such Series A Conversion Price as would have obtained had such Option or Convertible Security (or portion thereof) never been issued.

(e) If the number of shares of Common Stock issuable upon the exercise, conversion and/or exchange of any Option or Convertible Security, or the consideration payable to the Corporation upon such exercise, conversion and/or exchange, is calculable at the time such Option or Convertible Security is issued or amended but is subject to adjustment based upon subsequent events, any adjustment to the Series A Conversion Price provided for in this Subsection 4.4.3 shall be effected at the time of such issuance or amendment based on such number of shares or amount of consideration without regard to any provisions for subsequent adjustments (and any subsequent adjustments shall be treated as provided in clauses (b) and (c) of this Subsection 4.4.3). If the number of shares of Common Stock issuable upon the exercise, conversion and/or exchange of any Option or Convertible Security, or the consideration payable to the Corporation upon such exercise, conversion and/or exchange, cannot be calculated at all at the time such Option or Convertible Security is issued or amended, any adjustment to the Series A Conversion Price that would result under the terms of this Subsection 4.4.3 at the time of such issuance or amendment shall instead be effected at the time such number of shares and/or amount of consideration is first calculable (even if subject to subsequent adjustments), assuming for purposes of calculating such adjustment to the Series A Conversion Price that such issuance or amendment took place at the time such calculation can first be made.

[*Use the following Subsection 4.4.4 if the terms sheet calls for a broad-based weighted average anti-dilution provision*]

4.4.4 Adjustment of Series A Conversion Price Upon Issuance of Additional Shares of Common Stock.[47] In the event the Corporation shall at any time after the

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triggering the adjustment to the terms of the Option or Convertible Security would presumably also trigger an adjustment to the Series A Conversion Price under the terms Subsection 4.4.4 (thus obviating the need to provide for an adjustment to the Series A Conversion Price as a result of an anti-dilution adjustment to the terms of the Option or Convertible Security).

[47] This subsection represents a typical "broad-based weighted average" anti-dilution provision. Broad-based anti-dilution is more founder-friendly than a "narrow-based" anti-dilution formula. Whether an anti-dilution provision is broad or narrow is determined by how broad or narrow is the formula (set forth in clause (c) of this subsection) for calculating the number of outstanding shares of Common Stock. An even broader formula would include in that calculation all shares reserved under stock plans, whether or not subject to outstanding options (on the theory that those shares are generally included when translating the "pre-money valuation" agreed between (Footnote continued on next page)

Series A Original Issue Date issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Subsection 4.4.3), without consideration or for a consideration per share less than the Series A Conversion Price in effect immediately prior to such issue, then the Series A Conversion Price shall be reduced, concurrently with such issue, to a price (calculated to the nearest [one-hundredth of a cent]) determined in accordance with the following formula:

$$CP_2 = CP_1 * (A + B) \div (A + C).$$

For purposes of the foregoing formula, the following definitions shall apply:

(a) "CP_2" shall mean the Series A Conversion Price in effect immediately after such issue of Additional Shares of Common Stock

(b) "CP_1" shall mean the Series A Conversion Price in effect immediately prior to such issue of Additional Shares of Common Stock;

(c) "A" shall mean the number of shares of Common Stock outstanding immediately prior to such issue of Additional Shares of Common Stock (treating for this purpose as outstanding all shares of Common Stock issuable upon exercise of Options outstanding immediately prior to such issue or upon conversion or exchange of Convertible Securities (including the Series A Preferred Stock) outstanding (assuming exercise of any outstanding Options therefor) immediately prior to such issue);

(d) "B" shall mean the number of shares of Common Stock that would have been issued if such Additional Shares of Common Stock had been issued at a price per share equal to CP_1 (determined by dividing the aggregate consideration received by the Corporation in respect of such issue by CP_1); and

(e) "C" shall mean the number of such Additional Shares of Common Stock issued in such transaction.

[Use the following Subsection 4.4.4 if the term sheet calls for a full ratchet anti-dilution provision]

4.4.4 Adjustment of Series A Conversion Price Upon Issuance of Additional Shares of Common Stock. In the event the Corporation shall at any time after the Series A Original Issue Date [and prior to [*specify end date if one was negotiated*]] issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Subsection 4.4.3), without consideration or for a consideration per share less than the applicable Series A Conversion Price in effect immediately prior to such issue, then the Series A Conversion Price shall be reduced, concurrently with such issue, to the consideration per share received by the Corporation for such issue or deemed issue of the

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the Corporation and the investors to a per share purchase price for the financing). In contrast, a narrower formula might include in the calculation of outstanding shares only those shares of Common Stock that are actually outstanding (*i.e.*, excluding shares of Common Stock issuable on conversion of options, warrants and, potentially, even the Preferred Stock itself). While narrow-based anti-dilution formulas are more investor-friendly, the most investor-friendly category of anti-dilution protection is a "full ratchet" anti-dilution.

Additional Shares of Common Stock; provided that if such issuance or deemed issuance was without consideration, then the Corporation shall be deemed to have received an aggregate of [$.001] of consideration for all such Additional Shares of Common Stock issued or deemed to be issued.

4.4.5 Determination of Consideration. For purposes of this Subsection 4.4, the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(a) Cash and Property: Such consideration shall:

(i) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation, excluding amounts paid or payable for accrued interest;

(ii) insofar as it consists of property other than cash, be computed at the fair market value thereof at the time of such issue, as determined in good faith by the Board of Directors of the Corporation; and

(iii) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (i) and (ii) above, as determined in good faith by the Board of Directors of the Corporation.

(b) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Subsection 4.4.3, relating to Options and Convertible Securities, shall be determined by dividing:

(i) The total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of

Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by

(ii) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities.

4.4.6 Multiple Closing Dates. In the event the Corporation shall issue on more than one date Additional Shares of Common Stock that are a part of one transaction or a series of related transactions and that would result in an adjustment to the Series A Conversion Price pursuant to the terms of Subsection 4.4.4[, and such issuance dates occur within a period of no more than [ninety (90)] days from the first such issuance to the final such issuance,] then, upon the final such issuance, the Series A Conversion Price shall be readjusted to give effect to all such issuances as if they occurred on the date of the first such issuance (and without giving effect to any additional adjustments as a result of any such subsequent issuances within such period).

4.5 Adjustment for Stock Splits and Combinations.[48] If the Corporation shall at any time or from time to time after the Series A Original Issue Date effect a subdivision of the outstanding Common Stock, the Series A Conversion Price in effect immediately before that subdivision shall be proportionately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase in the aggregate number of shares of Common Stock outstanding. If the Corporation shall at any time or from time to time after the Series A Original Issue Date combine the outstanding shares of Common Stock, the Series A Conversion Price in effect immediately before the combination shall be proportionately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in the aggregate number of shares of Common Stock outstanding. Any adjustment under this subsection shall become effective at the close of business on the date the subdivision or combination becomes effective.

[48] This subsection and the subsections that follow do not provide for any adjustment to the Series A Conversion Price in the event of stock splits, etc. affecting the Series A Preferred Stock, because those adjustments are covered by the definition of Series A Original Issue Price, which automatically adjusts the numerator of the conversion ratio.

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

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

(2) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution.

Notwithstanding the foregoing (a) if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series A Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series A Conversion Price shall be adjusted pursuant to this subsection as of the time of actual payment of such dividends or distributions; and (b) that no such adjustment shall be made if the holders of Series A Preferred Stock simultaneously receive a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Series A Preferred Stock had been converted into Common Stock on the date of such event.

4.7 Adjustments for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Series A Original Issue Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than a distribution of shares of Common Stock in respect of outstanding shares of Common Stock) or in other property and the provisions of Section 1 do not apply to such dividend or distribution, then and in each such event the holders of Series A Preferred Stock shall receive, simultaneously with the distribution to the holders of Common Stock, a dividend or other distribution of such securities or other property in an amount equal to the amount of such securities or other property as they would have received if all outstanding shares of Series A Preferred Stock had been converted into Common Stock on the date of such event.[49]

[49] Alternative provision: add the following after "in each such event" in place of the current text – "provision shall be made so that the holders of the Series A Preferred Stock shall receive upon conversion thereof, in addition to the number of shares of Common Stock receivable thereupon, the kind and amount of securities of the Corporation, cash or other property which they would have been entitled to receive had the Series A Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all adjustments called for during such period under this paragraph with respect to the rights of the holders of the Series A Preferred Stock; provided, however, that no such provision shall (Footnote continued on next page)

4.8 Adjustment for Merger or Reorganization, etc. Subject to the provisions of Subsection 2.3, if there shall occur any reorganization, recapitalization, reclassification, consolidation or merger involving the Corporation in which the Common Stock (but not the Series A Preferred Stock) is converted into or exchanged for securities, cash or other property (other than a transaction covered by Subsections 4.4, 4.6 or 4.7), then, following any such reorganization, recapitalization, reclassification, consolidation or merger, each share of Series A Preferred Stock shall thereafter be convertible in lieu of the Common Stock into which it was convertible prior to such event into the kind and amount of securities, cash or other property which a holder of the number of shares of Common Stock of the Corporation issuable upon conversion of one share of Series A Preferred Stock immediately prior to such reorganization, recapitalization, reclassification, consolidation or merger would have been entitled to receive pursuant to such transaction; and, in such case, appropriate adjustment (as determined in good faith by the Board of Directors of the Corporation) shall be made in the application of the provisions in this Section 4 with respect to the rights and interests thereafter of the holders of the Series A Preferred Stock, to the end that the provisions set forth in this Section 4 (including provisions with respect to changes in and other adjustments of the Series A Conversion Price) shall thereafter be applicable, as nearly as reasonably may be, in relation to any securities or other property thereafter deliverable upon the conversion of the Series A Preferred Stock. [For the avoidance of doubt, nothing in this Subsection 4.8 shall be construed as preventing the holders of Series A Preferred Stock from seeking any appraisal rights to which they are otherwise entitled under the DGCL in connection with a merger triggering an adjustment hereunder, nor shall this Subsection 4.8 be deemed conclusive evidence of the fair value of the shares of Series A Preferred Stock in any such appraisal proceeding.][50]

4.9 Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Series A Conversion Price pursuant to this Section 4, the Corporation at its expense shall, as promptly as reasonably practicable but in any event not later than [ten (10)] days thereafter, compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Series A Preferred Stock a certificate setting forth such adjustment or readjustment (including the kind and amount of securities, cash or other property into which the Series A Preferred Stock is convertible) and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, as promptly as reasonably practicable after the written request at any time of any holder of Series A Preferred Stock (but in any event not later than [ten (10)] days thereafter), furnish or cause to be furnished to such holder a certificate setting forth (i) the Series A Conversion Price then in effect, and (ii)

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be made if the holders of Series A Preferred Stock receive, simultaneously with the distribution to the holders of Common Stock, a dividend or other distribution of such securities, cash or other property in an amount equal to the amount of such securities, cash or other property as they would have received if all outstanding shares of Series A Preferred Stock had been converted into Common Stock on the date of such event."

[50] In several recent Delaware cases involving mergers that were *not* treated as a liquidation under the Certificate of Incorporation, the Court of Chancery construed anti-destruction language of the type found in Section 4.8 as capping the value of the Preferred Stock in an appraisal proceeding. See *In re Appraisal of Metromedia International Group, Inc.*, Case No. C.A. 3351-CC (Del. Ch. Ct. April 16, 2009). Anti-destruction provisions such as those above focus on the conversion rights of the Series A Preferred Stock. An appraisal, by contrast, could theoretically account for the liquidation, dividend and other preferences of the Series A Preferred Stock. In this Model Charter many mergers are treated as liquidations; the bracketed language provides the Series A investors protection in the case of a merger that does not trigger payment of the liquidation preference.

the number of shares of Common Stock and the amount, if any, of other securities, cash or property which then would be received upon the conversion of Series A Preferred Stock.

4.10 Notice of Record Date. In the event:

(a) the Corporation shall take a record of the holders of its Common Stock (or other capital stock or securities at the time issuable upon conversion of the Series A Preferred Stock) for the purpose of entitling or enabling them to receive any dividend or other distribution, or to receive any right to subscribe for or purchase any shares of capital stock of any class or any other securities, or to receive any other security; or

(b) of any capital reorganization of the Corporation, any reclassification of the Common Stock of the Corporation, or any Deemed Liquidation Event; or

(c) of the voluntary or involuntary dissolution, liquidation or winding-up of the Corporation,

then, and in each such case, the Corporation will send or cause to be sent to the holders of the Series A Preferred Stock a notice specifying, as the case may be, (i) the record date for such dividend, distribution or right, and the amount and character of such dividend, distribution or right, or (ii) the effective date on which such reorganization, reclassification, consolidation, merger, transfer, dissolution, liquidation or winding-up is proposed to take place, and the time, if any is to be fixed, as of which the holders of record of Common Stock (or such other capital stock or securities at the time issuable upon the conversion of the Series A Preferred Stock) shall be entitled to exchange their shares of Common Stock (or such other capital stock or securities) for securities or other property deliverable upon such reorganization, reclassification, consolidation, merger, transfer, dissolution, liquidation or winding-up, and the amount per share and character of such exchange applicable to the Series A Preferred Stock and the Common Stock. Such notice shall be sent at least [ten (10)] days prior to the record date or effective date for the event specified in such notice.

5. Mandatory Conversion.

5.1 Trigger Events. Upon either (a) the closing of the sale of shares of Common Stock to the public at a price of at least $[_____] per share (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Common Stock), in a firm-commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, resulting in at least $[_____] of [gross] proceeds [, net of the underwriting discount and commissions,] to the Corporation or (b) the date and time, or the occurrence of an event, specified by vote or written consent of the holders of at least [*specify percentage*] of the then outstanding shares of Series A Preferred Stock[51] (the time of such closing or the date and time

[51] See *Greenmont Capital Partners I, LP v. Mary's Gone Crackers, Inc., Case No. C.A. 7265-VCP (Del. Ch. Ct. Sept. 28, 2012)* in which plaintiff, who did *not* have a blocking vote on mandatory conversion, unsuccessfully argued that its blocking vote on actions that would "alter or change" its rights under the Charter prevented the majority of Preferred holders from converting all Preferred to Common Stock. See also *Alta Berkeley VI C.V. v. Omeneon, Inc., Case No. 442,2011 (Del. Supreme Ct. March 5, 2012)* in which plaintiff, who (Footnote continued on next page)

specified or the time of the event specified in such vote or written consent is referred to herein as the "**Mandatory Conversion Time**"), then (i) all outstanding shares of Series A Preferred Stock shall automatically be converted into shares of Common Stock, at the then effective conversion rate as calculated pursuant to Subsection 4.1.1. and (ii) such shares may not be reissued by the Corporation.

5.2 Procedural Requirements. All holders of record of shares of Series A Preferred Stock shall be sent written notice of the Mandatory Conversion Time and the place designated for mandatory conversion of all such shares of Series A Preferred Stock pursuant to this Section 5. Such notice need not be sent in advance of the occurrence of the Mandatory Conversion Time. Upon receipt of such notice, each holder of shares of Series A Preferred Stock in certificated form shall surrender his, her or its certificate or certificates for all such shares (or, if such holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate) to the Corporation at the place designated in such notice. If so required by the Corporation, any certificates surrendered for conversion shall be endorsed or accompanied by written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or by his, her or its attorney duly authorized in writing. All rights with respect to the Series A Preferred Stock converted pursuant to Subsection 5.1, including the rights, if any, to receive notices and vote (other than as a holder of Common Stock), will terminate at the Mandatory Conversion Time (notwithstanding the failure of the holder or holders thereof to surrender any certificates at or prior to such time), except only the rights of the holders thereof, upon surrender of any certificate or certificates of such holders (or lost certificate affidavit and agreement) therefor, to receive the items provided for in the next sentence of this Subsection 5.2. As soon as practicable after the Mandatory Conversion Time and, if applicable, the surrender of any certificate or certificates (or lost certificate affidavit and agreement) for Series A Preferred Stock, the Corporation shall (a) [issue and deliver to such holder, or to his, her or its nominees, a certificate or certificates for the number of full shares of Common Stock issuable on such conversion in accordance with the provisions hereof][52] and (b)pay cash as provided in Subsection 4.2 in lieu of any fraction of a share of Common Stock otherwise issuable upon such conversion and the payment of any declared but unpaid dividends on the shares of Series A Preferred Stock converted. Such converted Series A Preferred Stock shall be retired and cancelled and may not be reissued as shares of such series, and the Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized number of shares of Series A Preferred Stock accordingly.

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did *not* have a blocking vote on mandatory conversion, unsuccessfully argued that it was entitled to its liquidation preference (rather than its Common Stock payout) where its stock was converted to Common prior to a liquidation event.

[52] For uncertificated shares of Common Stock, use the following for (a): "issue and deliver to such holder, or to his, her or its nominees, a notice of issuance of uncertificated shares and may, upon written request, issue and deliver a certificate for the number of full shares of Common Stock issuable upon such conversion in accordance with the provisions hereof"

[*Use the following Section 5A if the Term Sheet calls for a pay-to-play provision where the penalty is conversion into Common Stock.*][53]

5A. Special Mandatory Conversion.

5A.1. Trigger Event. In the event that any holder of shares of Series A Preferred Stock does not participate in a Qualified Financing (as defined below) by purchasing in the aggregate, in such Qualified Financing and within the time period specified by the Corporation (provided that, the Corporation has sent to each holder of Series A Preferred Stock at least ten (10) days written notice of, and the opportunity to purchase its Pro Rata Amount (as defined below) of, the Qualified Financing), such holder's Pro Rata Amount, [then each share] [then the Applicable Portion (as defined below) of the shares] of Series A Preferred Stock held by such holder shall automatically, and without any further action on the part of such holder, be converted into shares of Common Stock at the Series A Conversion Price in effect immediately prior to the consummation of such Qualified Financing, effective upon, subject to, and concurrently with, the consummation of the Qualified Financing. For purposes of determining the number of shares of Series A Preferred Stock owned by a holder, and for determining the number of Offered Securities (as defined below) a holder of Series A Preferred Stock has purchased in a Qualified Financing, all shares of Series A Preferred Stock held by Affiliates (as defined below) of such holder shall be aggregated with such holder's shares and all Offered Securities purchased by Affiliates of such holder shall be aggregated with the Offered Securities purchased by such holder (provided that no shares or securities shall be attributed to more than one entity or person within any such group of affiliated entities or persons). Such conversion is referred to as a "**Special Mandatory Conversion.**"[54]

5A.2. Procedural Requirements. Upon a Special Mandatory Conversion, each holder of shares of Series A Preferred Stock converted pursuant to Subsection 5A.1 shall be sent written notice of such Special Mandatory Conversion and the place designated for mandatory conversion of all such shares of Series A Preferred Stock pursuant to this Section 5A. Upon receipt of such notice, each holder of such shares of Series A Preferred Stock in certificated form shall surrender his, her or its certificate or certificates for all such shares (or, if such holder alleges that any such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate) to the Corporation at the place designated in such notice. If so required by the Corporation, any certificates surrendered for conversion shall be endorsed or accompanied by written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or by his, her or its attorney duly authorized

[53] Structuring the pay-to-play provision so that the Series A Preferred Stock of a non-participating investor converts into Common Stock (rather than a "shadow series" of Preferred Stock as discussed in the preliminary notes under "Pay-to-Play Provision") is generally preferable, because (1) this is a harsher penalty; (2) under Delaware law, certain charter amendments may not be effected without the approval of the holders of a majority of the outstanding shares of the new shadow series of Preferred Stock; and (3) conversion to Common Stock avoids the complexities associated with the creation of the shadow series of Preferred Stock.

[54] Careful consideration must be given to whether shares of Series A Preferred Stock converted upon a Special Mandatory Conversion should lose the contractual rights provided under the various ancillary agreements typically involved in a Preferred Stock financing (*e.g.*, registration rights, pre-emptive rights, etc.).

in writing. All rights with respect to the Series A Preferred Stock converted pursuant to Subsection 5A.1, including the rights, if any, to receive notices and vote (other than as a holder of Common Stock), will terminate at the time of the Special Mandatory Conversion (notwithstanding the failure of the holder or holders thereof to surrender any certificates for such shares at or prior to such time), except only the rights of the holders thereof, upon surrender of any certificate or certificates of such holders therefor (or lost certificate affidavit and agreement), to receive the items provided for in the next sentence of this Subsection 5A.2. As soon as practicable after the Special Mandatory Conversion and, if applicable, the surrender of any certificate or certificates (or lost certificate affidavit and agreement) for Series A Preferred Stock so converted, the Corporation shall (a) [issue and deliver to such holder, or to his, her or its nominees, a certificate or certificates for the number of full shares of Common Stock issuable on such conversion in accordance with the provisions hereof][55] and (b) pay cash as provided in Subsection 4.2 in lieu of any fraction of a share of Common Stock otherwise issuable upon such conversion and the payment of any declared but unpaid dividends on the shares of Series A Preferred Stock converted [and (c) a new certificate for the number of shares, if any, of Series A Preferred Stock represented by such surrendered certificate and not converted pursuant to Subsection 5A.1].[5657] Such converted Series A Preferred Stock shall be retired and cancelled and may not be reissued as shares of such series, and the Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized number of shares of Series A Preferred Stock accordingly.

5A.3. Definitions. For purposes of this Section 5A, the following definitions shall apply:

5A.3.1 "**Affiliate**" shall mean, with respect to any holder of shares of Series A Preferred Stock, any person, entity or firm which, directly or indirectly, controls, is controlled by or is under common control with such holder, including, without limitation, any entity of which the holder is a partner or member, any partner, officer, director, member or employee of such holder and any venture capital fund now or hereafter existing of which the holder is a partner or member which is controlled by or under common control with one or more general partners of such holder or shares the same management company with such holder.

5A.3.2 ["**Applicable Portion**" shall mean, with respect to any holder of shares of Series A Preferred Stock, a number of shares of Series A Preferred Stock calculated by multiplying the aggregate number of shares of Series A Preferred Stock held by such holder immediately prior to a Qualified Financing by a fraction, the numerator of which is equal to the amount, if positive, by which such holder's Pro Rata Amount exceeds the number of Offered

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[55] For uncertificated shares of Common Stock, use the following for (a): "issue and deliver to such holder, or to his, her or its nominees, a notice of issuance of uncertificated shares and may, upon written request, issue and deliver a certificate for the number of full shares of Common Stock issuable upon such conversion in accordance with the provisions hereof"

[56] Applicable only if proportional conversion is provided for by the Certificate of Incorporation.

[57] For uncertificated shares of Common Stock, use the following for (c): "may, if applicable and upon written request, issue and deliver a new certificate for the number of shares, if any, of Series A Preferred Stock represented by such surrendered shares and not converted pursuant to Subsection 5A.1"

Securities actually purchased by such holder in such Qualified Financing, and the denominator of which is equal to such holder's Pro Rata Amount.][58]

5A.3.3 "**Offered Securities**" shall mean the equity securities of the Corporation set aside by the Board of Directors of the Corporation for purchase by holders of outstanding shares of Series A Preferred Stock in connection with a Qualified Financing, and offered to such holders.

5A.3.4 "**Pro Rata Amount**" shall mean, with respect to any holder of Series A Preferred Stock, the lesser of (a) a number of Offered Securities calculated by multiplying the aggregate number of Offered Securities by a fraction, the numerator of which is equal to [the number of shares of Series A Preferred Stock owned by such holder, and the denominator of which is equal to the aggregate number of outstanding shares of Series A Preferred Stock],[59] or (b) the maximum number of Offered Securities that such holder is permitted by the Corporation to purchase in such Qualified Financing, after giving effect to any cutbacks or limitations established by the Board of Directors and applied on a pro rata basis to all holders of Series A Preferred Stock.

5A.3.5 "**Qualified Financing**" shall mean any transaction involving the issuance or sale of Additional Shares of Common Stock after the Series A Original Issue Date [that would result in at least $_____ in gross proceeds to the Corporation [including by way of the conversion of any outstanding debt] [and the reduction of the Series A Conversion Price pursuant to the terms of the Certificate of Incorporation (without giving effect to the operation of Subsection 4.4.2)], unless the holders of at least [*specify percentage*] of the Series A Preferred Stock elect, by written notice sent to the Corporation at least [__] days prior to the consummation of the Qualified Financing, that such transaction not be treated as a Qualified Financing for purposes of this Section 5A.

6. Redemption.[60]

6.1 General. Unless prohibited by Delaware law governing distributions to stockholders, shares of Series A Preferred Stock shall be redeemed by the Corporation at a price equal to [the greater of (A)][the Series A Original Issue Price per share,

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[58] Applicable only if proportional conversion is provided for by the Certificate of Incorporation.

[59] Alternative: "the number of shares of outstanding Common Stock owned by such holder, and the denominator of which is equal to the aggregate number of outstanding shares of Common Stock (for the purpose of this definition, treating all shares of Common Stock issuable upon exercise of Options outstanding immediately prior to such Qualified Financing or upon conversion of Convertible Securities outstanding (assuming exercise of any outstanding Options therefor) immediately prior to such Qualified Financing as outstanding)."

[60] Redemption provisions are more common in East Coast venture transactions than in West Coast venture transactions. However, in the wake of the Delaware Chancery Court's opinion in *re Trados Inc. S'holder Litigation, Case No. C.A. 1512-CC (Del. Ch. Ct. July 24, 2009)*, investors may be foregoing a substantial protection/benefit if they do not have the right to put their shares back to the company at a time when they may wish to seek the sale of the company. See footnote 29 in the Addendum of the Model Voting Agreement for a more detailed discussion of these issues.

plus all declared but unpaid dividends thereon][61][and (B) the Fair Market Value (determined in the manner set forth below) of a single share of Series A Preferred Stock as of the date of the Company's receipt of the Redemption Request] (the "**Redemption Price**"),[62] in three (3) annual installments commencing not more than sixty (60) days after receipt by the Corporation at any time on or after [_____], from the holders of at least [*specify percentage*] of the then outstanding shares of Series A Preferred Stock, of written notice requesting redemption of all shares of Series A Preferred Stock (the "**Redemption Request**").[63] Upon receipt of a Redemption Request, the Corporation shall apply all of its assets to any such redemption, and to no other corporate purpose, except to the extent prohibited by Delaware law governing distributions to stockholders.[64] [For purposes of this Subsection 6.1, the Fair Market Value of a

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[61] Replace with the following if accruing dividends are selected: "the Series A Original Issue Price per share, plus any Accruing Dividends accrued but unpaid thereon, whether or not declared, together with any other dividends declared but unpaid thereon."

[62] Redemption prices are sometimes fixed at the greater of the Series A Original Issue Price (plus dividends, if applicable) and the fair market value of the Series A Preferred Stock on the date of the Redemption Notice or the date of redemption. When structuring redeemable Preferred Stock, consideration should be given to Section 305(c) of the Internal Revenue Code. Section 305(c) provides that, in certain circumstances, redemption premiums on Preferred Stock are treated for tax purposes in the same manner as original issue discount on bonds. That is, redemption premiums are generally treated as being distributed to the holders of Preferred Stock over the period that the Preferred Stock is outstanding (the "Constructive Distribution Rule"). Distribution amounts for tax periods prior to redemption are determined by applying the yield to maturity (determined as the discount rate that, when used to compute the present value of the redemption price, produces an amount equal to the issue price of the Preferred Stock) to the issue price plus previously accrued amounts. If Preferred Stock is subject to either an automatic redemption or redemption at the request of the Preferred Stock holders, the only exception to the Constructive Distribution Rule is for a redemption premium that is de minimis in amount (the "De Minimis Exception"). The De Minimis Exception applies where the amount by which the redemption price at maturity exceeds the issue price is less than one-quarter of one percent (0.25%) of the redemption price multiplied by the number of complete years to maturity.

It is important to note that the Constructive Distribution Rule only applies to stock that is treated as "preferred stock" for tax purposes. Applicable Treasury Regulations under Code Section 305 indicate that a class of stock will be treated as "preferred stock" only if it has limited rights to participate in the growth of the issuer (as determined without regard to any conversion right inherent in the stock). Thus, Preferred Stock with unlimited rights to participate (a) in dividend distributions and (b) upon liquidation in excess of any stated preference (all as determined without regard to any right to convert such stock into Common Stock) will allow holders of such Preferred Stock to assert that their stock is not "preferred stock" for tax purposes. Note that even "nonparticipating" Preferred Stock can be structured in this manner by providing (as does this form) that upon liquidation of the Corporation the Preferred Stock will receive the greater of (i) its liquidation preference or (ii) the amount the holders of such Preferred Stock would receive if the proceeds were distributed to holders based on the number of shares of Common Stock into which the Preferred Stock could then be converted.

[63] The Corporation's accountants may take the position that, because the holders of Series A Preferred Stock have the right to force a redemption, the Preferred Stock should be reflected above the stockholders' equity section of the Corporation's balance sheet, as opposed to in the stockholders' equity section of the balance sheet. If so, it is not uncommon for a Corporation to have negative stockholders' equity. In addition, if the Series A Preferred Stock is redeemable at the greater of the original purchase price and the then current fair market value, this might cause the Corporation to have to "mark to market" the redeemable Preferred Stock each quarter, which could cause significant practical and accounting complexities for the Corporation. The Corporation may want to consult with its accountants about this.

[64] This sentence has been added in response to the Delaware Chancery Court's opinion in *SV Investment Partners, LLC v. Thoughtworks, Inc., Case No. C.A. 2724 (Del. Ch. Ct. Nov. 10, 2010)* (see footnote 64), and is intended to require the corporation to use all of its assets (other than those required to pay its debts as they

(Footnote continued on next page)

single share of Series A Preferred Stock shall be the value of a single share of Series A Preferred Stock as mutually agreed upon by the Company and the holders of a majority of the shares of Series A Preferred Stock then outstanding, and, in the event that they are unable to reach agreement, by a third-party appraiser agreed to by the Company and the holders of a majority of the shares of Series A Preferred Stock then outstanding.][65] The date of each such installment shall be referred to as a "**Redemption Date.**" On each Redemption Date, the Corporation shall redeem, on a pro rata basis in accordance with the number of shares of Series A Preferred Stock owned by each holder, that number of outstanding shares of Series A Preferred Stock determined by dividing (i) the total number of shares of Series A Preferred Stock outstanding immediately prior to such Redemption Date by (ii) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies)[; provided, however, that Excluded Shares (as such term is defined in Subsection 6.2) shall not be redeemed and shall be excluded from the calculations set forth in this sentence].[66] If on any Redemption Date Delaware law governing distributions to stockholders prevents the Corporation from redeeming all shares of Series A Preferred Stock to be redeemed, the Corporation shall ratably redeem the maximum number of shares that it may redeem consistent with such law, and shall redeem the remaining shares as soon as it may lawfully do so under such law.[67]

6.2 Redemption Notice. The Corporation shall send written notice of the mandatory redemption (the "**Redemption Notice**") to each holder of record of Series A Preferred Stock not less than forty (40) days prior to each Redemption Date. Each Redemption Notice shall state:

(a) the number of shares of Series A Preferred Stock held by the holder that the Corporation shall redeem on the Redemption Date specified in the Redemption Notice;

(b) the Redemption Date and the Redemption Price;

(c) the date upon which the holder's right to convert such shares terminates (as determined in accordance with Subsection 4.1); and

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come due and to continue as a going concern under applicable Delaware law) to redeem the Series A Preferred Stock.

[65] Fair market value could also be determined by the Board with the concurrence of the designee of the holders of Series A Preferred Stock on the Board.

[66] The bracketed language, although not commonplace, may be desirable to minority investors in the Series A Preferred. If this is included, also include the applicable bracketed language in Section 6.2.

[67] Investors may also seek enforcement provisions for failure to redeem, including provisions that may entitle the investors to gain control of the Board of Directors. Such provisions are generally atypical in early stage venture transactions but are seen from time to time in private equity and late stage venture transactions. However, that may change in the wake of the Delaware Chancery Court's opinion in *SV Investment Partners, LLC v. Thoughtworks, Inc., Case No. C.A. 2724 (Del. Ch. Ct. Nov. 10, 2010)* in which the Court construed the words "funds legally available" in a manner unhelpful to investors. The Court described a number of "additional protections" that the investors could have included to give their redemption rights more teeth, and stated that "sophisticated investors understand that mandatory redemption rights provide limited protection and function imperfectly, particularly when a corporation is struggling financially."

(d) for holders of shares in certificated form, that the holder is to surrender to the Corporation, in the manner and at the place designated, his, her or its certificate or certificates representing the shares of Series A Preferred Stock to be redeemed.

[If the Corporation receives, on or prior to the twentieth (20^{th}) day after the date of delivery of the Redemption Notice to a holder of Series A Preferred Stock, written notice from such holder that such holder elects to be excluded from the redemption provided in this Section 6, then the shares of Series A Preferred Stock registered on the books of the Corporation in the name of such holder at the time of the Corporation's receipt of such notice shall thereafter be "**Excluded Shares**." Excluded Shares shall not be redeemed or redeemable pursuant to this Section 6, whether on such Redemption Date or thereafter.]

6.3 Surrender of Certificates; Payment. On or before the applicable Redemption Date, each holder of shares of Series A Preferred Stock to be redeemed on such Redemption Date, unless such holder has exercised his, her or its right to convert such shares as provided in Section 4, shall, if a holder of shares in certificated form, surrender the certificate or certificates representing such shares (or, if such registered holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate) to the Corporation, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price for such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof. In the event less than all of the shares of Series A Preferred Stock represented by a certificate are redeemed, a new certificate, instrument, or book entry representing the unredeemed shares of Series A Preferred Stock shall promptly be issued to such holder.

6.4 Rights Subsequent to Redemption. If the Redemption Notice shall have been duly given, and if on the applicable Redemption Date the Redemption Price payable upon redemption of the shares of Series A Preferred Stock to be redeemed on such Redemption Date is paid or tendered for payment or deposited with an independent payment agent so as to be available therefor in a timely manner, then notwithstanding that any certificates evidencing any of the shares of Series A Preferred Stock so called for redemption shall not have been surrendered, dividends with respect to such shares of Series A Preferred Stock shall cease to accrue after such Redemption Date and all rights with respect to such shares shall forthwith after the Redemption Date terminate, except only the right of the holders to receive the Redemption Price without interest upon surrender of any such certificate or certificates therefor.

7. Redeemed or Otherwise Acquired Shares. Any shares of Series A Preferred Stock that are redeemed or otherwise acquired by the Corporation or any of its subsidiaries shall be automatically and immediately cancelled and retired and shall not be reissued, sold or transferred. Neither the Corporation nor any of its subsidiaries may exercise any voting or other rights granted to the holders of Series A Preferred Stock following redemption.

8. Waiver. Any of the rights, powers, preferences and other terms of the Series A Preferred Stock set forth herein may be waived on behalf of all holders of Series A

Preferred Stock by the affirmative written consent or vote of the holders of at least [*specify percentage*] of the shares of Series A Preferred Stock then outstanding.[68]

9. Notices. Any notice required or permitted by the provisions of this Article Fourth to be given to a holder of shares of Series A Preferred Stock shall be mailed, postage prepaid, to the post office address last shown on the records of the Corporation, or given by electronic communication in compliance with the provisions of the General Corporation Law, and shall be deemed sent upon such mailing or electronic transmission.

FIFTH: Subject to any additional vote required by the Certificate of Incorporation or Bylaws, in furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, repeal, alter, amend and rescind any or all of the Bylaws of the Corporation.

SIXTH: Subject to any additional vote required by the Certificate of Incorporation, the number of directors of the Corporation shall be determined in the manner set forth in the Bylaws of the Corporation.

SEVENTH: Elections of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

EIGHTH: Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws of the Corporation may provide. The books of the Corporation may be kept outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

NINTH: To the fullest extent permitted by law, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. If the General Corporation Law or any other law of the State of Delaware is amended after approval by the stockholders of this Article Ninth to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law as so amended.

Any repeal or modification of the foregoing provisions of this Article Ninth by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of, or increase the liability of any director of the Corporation with respect to any acts or omissions of such director occurring prior to, such repeal or modification.

TENTH: [69] To the fullest extent permitted by applicable law, the Corporation is authorized to provide indemnification of (and advancement of expenses to) directors, officers

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[68] The percentage of shares of Series A Preferred Stock required for a waiver is generally fixed at the percentage (typically set forth in Subsection 3.3) required to amend the Series A Preferred Stock terms.

[69] This provision authorizes the indemnification of directors, officers and agents of the Corporation, but does not require it. Investors who have the right or ability to appoint affiliates to the Board of Directors often request that more detailed, mandatory indemnification provisions be included in the Certificate of Incorporation or (Footnote continued on next page)

and agents of the Corporation (and any other persons to which General Corporation Law permits the Corporation to provide indemnification) through Bylaw provisions, agreements with such agents or other persons, vote of stockholders or disinterested directors or otherwise, in excess of the indemnification and advancement otherwise permitted by Section 145 of the General Corporation Law.

Any amendment, repeal or modification of the foregoing provisions of this Article Tenth shall not adversely affect any right or protection of any director, officer or other agent of the Corporation existing at the time of such amendment, repeal or modification.

ELEVENTH: [The Corporation renounces, to the fullest extent permitted by law, any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, any Excluded Opportunity. An "**Excluded Opportunity**" is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of (i) any director of the Corporation who is not an employee of the Corporation or any of its subsidiaries, or (ii) any holder of Series A Preferred Stock or any partner, member, director, stockholder, employee or agent of any such holder, other than someone who is an employee of the Corporation or any of its subsidiaries (collectively, "**Covered Persons**"), unless such matter, transaction or interest is presented to, or acquired, created or developed by, or otherwise comes into the possession of, a Covered Person expressly and solely in such Covered Person's capacity as a director of the Corporation.][70]

TWELFTH: [Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery in the State of Delaware shall be the sole and exclusive forum for any stockholder (including a beneficial owner) to bring (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation, its directors, officers or employees arising pursuant to any provision of the Delaware General Corporation Law or the Corporation's certificate of incorporation or bylaws or (iv) any action asserting a claim against the Corporation, its directors, officers or employees governed by the internal affairs doctrine, except for, as to each of (i) through (iv) above, any claim as to which the Court of Chancery determines that there is an indispensable party not subject to the jurisdiction of the Court of Chancery (and the indispensable party does not consent to the personal jurisdiction of the Court of Chancery within ten days following such determination), which is vested in the exclusive jurisdiction of a court or forum other than the Court of Chancery, or for which the Court of Chancery does not have subject matter jurisdiction.

Bylaws, and/or indemnification contracts and insurance coverage. A form of mandatory indemnification provision, which could be inserted in this Article Tenth in place of what is currently there, is attached as Exhibit A hereto.

[70] Section 122(17) of the DGCL permits the Corporation to renounce in its certificate of incorporation the Corporation's interest or expectancy in specified business opportunities or specified classes or categories of business opportunities. This enables the Corporation to determine in advance whether these opportunities are corporate opportunities of the Corporation rather than to address such opportunities as they arise. Venture capital investors may be concerned about having to provide these opportunities to the Corporation and thus may seek this type of provision. Note that the defined term "Excluded Opportunity" in the above example is very pro-investor. The foregoing Article Eleventh is merely an example of such a provision, and is not necessarily an appropriate starting point for any particular transaction.

If any provision or provisions of this Article Twelfth shall be held to be invalid, illegal or unenforceable as applied to any person or entity or circumstance for any reason whatsoever, then, to the fullest extent permitted by law, the validity, legality and enforceability of such provisions in any other circumstance and of the remaining provisions of this Article Twelfth (including, without limitation, each portion of any sentence of this Article Twelfth containing any such provision held to be invalid, illegal or unenforceable that is not itself held to be invalid, illegal or unenforceable) and the application of such provision to other persons or entities and circumstances shall not in any way be affected or impaired thereby.][71]

THIRTEENTH: [For purposes of Section 500 of the California Corporations Code (to the extent applicable), in connection with any repurchase of shares of Common Stock permitted under this Certificate of Incorporation from employees, officers, directors or consultants of the Company in connection with a termination of employment or services pursuant to agreements or arrangements approved by the Board of Directors (in addition to any other consent required under this Certificate of Incorporation), such repurchase may be made without regard to any "preferential dividends arrears amount" or "preferential rights amount" (as those terms are defined in Section 500 of the California Corporations Code). Accordingly, for purposes of making any calculation under California Corporations Code Section 500 in connection with such repurchase, the amount of any "preferential dividends arrears amount" or "preferential rights amount" (as those terms are defined therein) shall be deemed to be zero (0).][72]

* * *

[71] In order to avoid forum shopping in a situation where several courts might have personal and subject matter jurisdiction over the parties and claims, the parties may wish to pick a particular court for any stockholder litigation. The advantage of Delaware is a neutral forum with judges who will be familiar with the issues raised. It may also serve as a disincentive to potential plaintiffs if they have to come to Delaware to litigate. Whether other state courts will honor such a provision and bounce a plaintiff who tries to bring suit elsewhere is at the moment an open question.

[72] Because Section 2115 of the California Corporations Code purports to impose California corporate laws on foreign corporations with sufficient assets and stockholders in the State of California, corporations incorporated in other states with California stockholders and assets in California should consider adopting a provision similar to the one above. Section 500(a) of the California Corporations Code sets forth a solvency test governing when a corporation may make distributions to stockholders or redeem shares of stock, including distributions to junior stockholders and redemptions of junior stock. Section 502(b) of the California Corporations Code allows the corporation and the holders of Preferred Stock to opt out of the restrictions on distributions to junior stockholders and redemptions of junior stock in the Certificate of Incorporation.

3. That the foregoing amendment and restatement was approved by the holders of the requisite number of shares of this corporation in accordance with Section 228 of the General Corporation Law.

4. That this Amended and Restated Certificate of Incorporation, which restates and integrates and further amends the provisions of this Corporation's Certificate of Incorporation, has been duly adopted in accordance with Sections 242 and 245 of the General Corporation Law.

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been executed by a duly authorized officer of this corporation on this [__ day of _____, 20__].[73]

By:_____
President

[73] See DGCL Section 103 for the requirements regarding the execution of the Restated Certificate of Incorporation.

EXHIBIT A[74]

(Alternative Indemnification Provisions)

TENTH: The following indemnification provisions shall apply to the persons enumerated below.

1. Right to Indemnification of Directors and Officers. The Corporation shall indemnify and hold harmless, to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person (an "**Indemnified Person**") who was or is made or is threatened to be made a party or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "**Proceeding**"), by reason of the fact that such person, or a person for whom such person is the legal representative, is or was a director or officer of the Corporation or, while a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, limited liability company, trust, enterprise or nonprofit entity, including service with respect to employee benefit plans, against all liability and loss suffered and expenses (including attorneys" fees) reasonably incurred by such Indemnified Person in such Proceeding. Notwithstanding the preceding sentence, except as otherwise provided in Section 3 of this Article Tenth, the Corporation shall be required to indemnify an Indemnified Person in connection with a Proceeding (or part thereof) commenced by such Indemnified Person only if the commencement of such Proceeding (or part thereof) by the Indemnified Person was authorized in advance by the Board of Directors.

2. Prepayment of Expenses of Directors and Officers. The Corporation shall pay the expenses (including attorneys' fees) incurred by an Indemnified Person in defending any Proceeding in advance of its final disposition, provided, however, that, to the extent required by law, such payment of expenses in advance of the final disposition of the Proceeding shall be made only upon receipt of an undertaking by the Indemnified Person to repay all amounts advanced if it should be ultimately determined that the Indemnified Person is not entitled to be indemnified under this Article Tenth or otherwise.

3. Claims by Directors and Officers. If a claim for indemnification or advancement of expenses under this Article Tenth is not paid in full within thirty (30) days after a written claim therefor by the Indemnified Person has been received by the Corporation, the Indemnified Person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action the Corporation shall have the burden of proving that the Indemnified Person is not entitled to the requested indemnification or advancement of expenses under applicable law.

4. Indemnification of Employees and Agents. The Corporation may indemnify and advance expenses to any person who was or is made or is threatened to be made or is otherwise

[74] If indemnification agreements will be used for directors, care should be given to ensure that the provisions of such indemnification agreements and any mandatory indemnification provision contained in the Certificate of Incorporation or Bylaws (or elsewhere) do not conflict.

involved in any Proceeding by reason of the fact that such person, or a person for whom such person is the legal representative, is or was an employee or agent of the Corporation or, while an employee or agent of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, limited liability company, trust, enterprise or nonprofit entity, including service with respect to employee benefit plans, against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such person in connection with such Proceeding. The ultimate determination of entitlement to indemnification of persons who are non-director or officer employees or agents shall be made in such manner as is determined by the Board of Directors in its sole discretion. Notwithstanding the foregoing sentence, the Corporation shall not be required to indemnify a person in connection with a Proceeding initiated by such person if the Proceeding was not authorized in advance by the Board of Directors.

5. Advancement of Expenses of Employees and Agents. The Corporation may pay the expenses (including attorneys' fees) incurred by an employee or agent in defending any Proceeding in advance of its final disposition on such terms and conditions as may be determined by the Board of Directors.

6. Non-Exclusivity of Rights. The rights conferred on any person by this Article Tenth shall not be exclusive of any other rights which such person may have or hereafter acquire under any statute, provision of the certificate of incorporation, these by-laws, agreement, vote of stockholders or disinterested directors or otherwise.

7. Other Indemnification. The Corporation's obligation, if any, to indemnify any person who was or is serving at its request as a director, officer or employee of another Corporation, partnership, limited liability company, joint venture, trust, organization or other enterprise shall be reduced by any amount such person may collect as indemnification from such other Corporation, partnership, limited liability company, joint venture, trust, organization or other enterprise.

8. Insurance. The Board of Directors may, to the full extent permitted by applicable law as it presently exists, or may hereafter be amended from time to time, authorize an appropriate officer or officers to purchase and maintain at the Corporation's expense insurance: (a) to indemnify the Corporation for any obligation which it incurs as a result of the indemnification of directors, officers and employees under the provisions of this Article Tenth; and (b) to indemnify or insure directors, officers and employees against liability in instances in which they may not otherwise be indemnified by the Corporation under the provisions of this Article Tenth.

9. Amendment or Repeal. Any repeal or modification of the foregoing provisions of this Article Tenth shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring prior to the time of such repeal or modification. The rights provided hereunder shall inure to the benefit of any Indemnified Person and such person's heirs, executors and administrators.