


Recordation Form Cover Sheet PATENTS ONLY	
Attorney Docket No.: <u>7147.G001</u>	
To the Director of the United States Patent and Trademark Office. Please record the attached original documents or copy thereof.	
1. Name of conveying party(ies): Kaon Systems, Inc. by their duly authorized officer, Vernon Fotheringham, President Additional name(s) of conveying party(ies) attached? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes	2. Name and address of receiving party(ies): Name: <u>Adaptix, Inc.</u> Internal Address: _____ Street Address: <u>3855 Monte Villa Parkway</u> <u>Suite 150</u> City: <u>Bothell</u> State/Province: <u>WA</u> Zip: <u>98021</u> Country: <u>U.S.A.</u> Additional name(s) & address(es) attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
3. Nature of Conveyance <input type="checkbox"/> Assignment <input type="checkbox"/> Merger <input type="checkbox"/> Security Agreement <input checked="" type="checkbox"/> Change of Name <input type="checkbox"/> Other: _____ Execution Date(s): <u>5/10/2004</u>	4. Application number(s) or patent number(s): If this document is being filed together with a new application, the execution date of the application is: _____ A. Patent Application No.(s) <u>09/685,977, 09/738,086, 09/692,681, 09/837,337, 10/051,348, 09/802,453, 09/837,701, 09/898,163</u> B. Patent No.(s) _____ Additional numbers attached? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
5. Name and address of party to whom correspondence concerning document should be mailed: Name: <u>Blakely, Sokoloff, Taylor & Zafman LLP</u> Internal Address: _____ Street Address: <u>12400 Wilshire Boulevard, 7th Floor</u> <u>Los Angeles, California 90025</u>	6. Total number of applications and patents involved: <u>8</u> 7. Total Fee (37 CFR 3.41).....\$ <u>320.00</u> <input type="checkbox"/> Enclosed <input checked="" type="checkbox"/> Authorized to be charged to deposit account 8. Deposit Account Number: <u>02-2666</u> (Attach duplicate copy of this page if paying by deposit account)
DO NOT USE THIS SPACE	
9. Statement and signature. <i>To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.</i>	
Thomas S. Ferrill Name of Person Signing	 Signature
<u>1-31-05</u> Date	
Total number of pages including cover sheet, attachments, and documents: <u>27</u>	

Mail documents to be recorded with required cover sheet information to:
 Mail Stop Assignment Recordation Services
 Director of the United States Patent and Trademark Office
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 Alexandria, Virginia 22313-1450

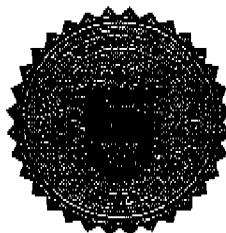
Based on Form PTO-1595 as modified by BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN LLP on 05/09/03

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF "KAON SYSTEMS, INC.", CHANGING ITS NAME FROM "KAON SYSTEMS, INC." TO "ADAPTIX, INC.", FILED IN THIS OFFICE ON THE SIXTH DAY OF AUGUST, A.D. 2004, AT 4:22 O'CLOCK P.M.



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

3796146 8100

AUTHENTICATION: 3412403

040735926

DATE: 10-14-04

PATENT

REEL: 015639 FRAME: 0710

CERTIFICATE OF AMENDMENT
TO THE
AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
KAON SYSTEMS, INC.

Pursuant to Section 242
of the General Corporation Law of
the State of Delaware

Kaon Systems, Inc., a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware (the "Corporation"), does hereby certify as follows:

FIRST: That the Board of Directors of the Corporation, in accordance with Section 141 of the General Corporation Law of the State of Delaware, adopted a resolution setting forth an amendment to the Amended and Restated Certificate of Incorporation of the Corporation and declaring said amendment to be advisable. The resolution setting forth the proposed amendment is as follows:

RESOLVED: That, subject to stockholder approval, the Amended and Restated Certificate of Incorporation of this Corporation be amended by amending Article First thereof to read in its entirety as follows:

FIRST: The name of this corporation is Adaptix, Inc. (the "Corporation").

and that such amendment is hereby declared to be advisable and in the best interests of this Corporation and such amendment be submitted to the stockholders of this Corporation for their approval; and, further, that upon approval of such amendment by such stockholders, the President of this Corporation is hereby authorized, in the name and on behalf of this Corporation, to execute, acknowledge and file a Certificate of Amendment to the Amended and Restated Certificate of Incorporation of this Corporation with the Secretary of State of the State of Delaware.

SECOND: That said amendment has been duly approved by the stockholders of the Corporation in accordance with Section 228 of the General Corporation Law of the State of Delaware.

THIRD: That the aforesaid amendment was duly adopted in accordance with the applicable provisions of Section 242 of the General Corporation Law of the State of Delaware.

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IN WITNESS WHEREOF, the Corporation has caused this Certificate of Amendment to be signed by its President this 5th day of August, 2004.

KAON SYSTEMS, INC.

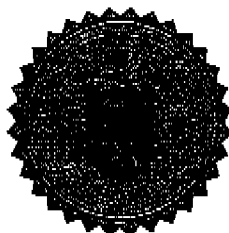
By: /s/ Vernon Fotheringham
Vernon Fotheringham
President

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "KAON SYSTEMS, INC.", FILED IN THIS OFFICE ON THE ELEVENTH DAY OF MAY, A.D. 2004, AT 12:53 O'CLOCK P.M.



3796146 8100

040735926

Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 3412387

DATE: 10-14-04

PATENT

REEL: 015639 FRAME: 0713

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
KAON SYSTEMS, INC.

State of Delaware
Secretary of State
Division of Corporations
Delivered 12:56 PM 05/11/2004
FILED 12:53 PM 05/11/2004
SRV 040342216 - 3796146 FILE

Kaon Systems, Inc., a corporation organized and existing under the laws of the State of Delaware, hereby certifies as follows:

The original Certificate of Incorporation of the corporation was filed with the Secretary of State of the State of Delaware on April 29, 2004.

Pursuant to Sections 241 and 245 of the General Corporation Law of the State of Delaware, this Amended and Restated Certificate of Incorporation has been duly adopted and restates and integrates and further amends the provisions of the Certificate of Incorporation of the corporation. The corporation has not received any payment for any of its stock.

The text of the Certificate of Incorporation of the corporation is hereby amended and restated in its entirety to read as follows:

FIRST: The name of this corporation is Kaon Systems, Inc. (the "**Corporation**").

SECOND: The registered office of this corporation in the State of Delaware is located at 2711 Centerville Road, Suite 400, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is Corporation Service Company.

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 of the State of Delaware (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) 5,000,000 shares of Common Stock, \$0.0001 par value per share ("**Common Stock**"), and (ii) 900,000 shares of Preferred Stock, \$0.0001 par value per share ("**Preferred Stock**"), of which 666,667 shares have been designated Series A Preferred Stock (the "**Series A Preferred Stock**") and 233,333 shares have been designated Junior Preferred Stock (the "**Junior Preferred Stock**").

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. Unless otherwise indicated, references to "Sections" or "Subsections" in this Article refer to sections and subsections of this Article Fourth.

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 held at all meetings of stockholders (and written actions in lieu of meetings).

The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of shares of stock of the Corporation representing a majority of the votes represented by all outstanding shares of stock of the Corporation entitled to vote, irrespective of the provisions of Section 242(b)(2) of the General Corporation Law.

B. PREFERRED STOCK

Preferred Stock may be issued from time to time in one or more series, each of such series to consist of such number of shares and to have such terms, rights, powers and preferences, and the qualifications and limitations with respect thereto, as stated or expressed herein. To the extent permitted by applicable law, different series of Preferred Stock shall not be construed to constitute different classes of shares for the purposes of voting by classes unless expressly provided.

C. SERIES A PREFERRED STOCK AND JUNIOR PREFERRED STOCK

The Series A Preferred Stock and the Junior Preferred Stock have the following rights, preferences, powers, privileges and restrictions, qualifications and limitations.

1. Dividends.

(a) Series A Preferred Stock. From and after the Series A Original Issue Date (as defined below), dividends at the rate per annum of \$1.44 per share compounded annually 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 affecting such shares) (the "Accruing Dividends"). Accruing Dividends shall accrue from day to day, whether or not earned or declared, and shall be cumulative; provided, however, that except as set forth in the following sentence of this paragraph (a) or in Sections 2, 4, 5 and 6, the Corporation shall be under no obligation to pay such Accruing Dividends. The Corporation shall not declare, pay or set aside any dividends on any other shares of capital stock of the Corporation (other than dividends on shares of Common Stock payable in shares of Common Stock) unless 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) the amount of the aggregate Accruing Dividends then accrued on such share of Series A Preferred Stock and not previously paid plus (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 such 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 Common Stock, at a rate per share of Series A Preferred Stock determined by 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 and multiplying such fraction by an amount equal to \$18.00 per share (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization affecting such shares) (such amount, as so adjusted from time to time, being hereinafter referred to as the "**Series A Original Issue Price**").

(b) Junior Preferred Stock. Subject to the rights and preferences of the Series A Preferred Stock with respect to dividends as set forth in Subsection 1(a), the Corporation shall not declare, pay or set aside any dividends on shares of Common Stock (other than dividends on shares of Common Stock payable in shares of Common Stock) unless the holders of the Junior Preferred Stock then outstanding shall first receive, or simultaneously receive, a dividend on each outstanding share of Junior Preferred Stock in an amount at least equal to the product of (1) the dividend payable on each share of Common Stock and (2) the number of shares of Common Stock issuable upon conversion of a share of Junior Preferred Stock, in each case calculated on the record date for determination of holders entitled to receive such dividend.

2. Liquidation, Dissolution or Winding Up; Certain Mergers, Consolidations and Asset Sales. In the event of any liquidation, dissolution, or winding up of the Corporation, either voluntary or involuntary, distributions to the stockholders of the Corporation shall be made in the following manner:

(a) Preferential Payments to Holders of Series A Preferred Stock. The holders of shares of Series A Preferred Stock then outstanding shall be entitled to be paid out of the assets available for distribution to its stockholders, before any payment shall be made to the holders of Common Stock, Junior Preferred Stock or any other class or series of stock ranking on liquidation junior to the Series A Preferred Stock, by reason of their ownership thereof, an amount equal to the sum of 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. If upon any such liquidation, dissolution or winding up of the Corporation the remaining assets 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, the holders of shares of Series A Preferred Stock shall share ratably in any distribution of the remaining 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.

(b) Preferential Payments to Holders of Preferred Stock. After the payment of all preferential amounts required to be paid to the holders of shares of Series A Preferred Stock pursuant to Subsection 2(a), the remaining assets available for distribution to the Corporation's stockholders shall be distributed among the holders of the shares of Series A Preferred Stock and Junior Preferred 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 dissolution, liquidation or winding up of the Corporation, until the holders of the Junior Preferred Stock shall have received distributions pursuant to this Subsection 2(b) in an amount equal to \$25.72 per share (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other

similar recapitalization affecting such shares) (such amount, as so adjusted from time to time, being hereinafter referred to as the "**Junior Preferred Original Issue Price**").

(c) **Distribution of Remaining Assets.** After the payment of all preferential amounts required to be paid to the holders of shares of Series A Preferred Stock and Junior Preferred Stock, the remaining assets available for distribution to the Corporation's stockholders shall be distributed among the holders of the shares of Series A Preferred Stock, Junior 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 dissolution, liquidation or winding up of the Corporation.

(d) **Deemed Liquidation Events.**

(i) The following events shall be deemed to be a liquidation of the Corporation for purposes of this Section 2, unless the holders of a majority of the Series A Preferred Stock elect otherwise (a "**Deemed Liquidation Event**"):

(A) a merger or consolidation in which

(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 or exchanged for shares of capital stock which represent, immediately following such merger or consolidation at least fifty percent (50%), 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 direct or indirect parent corporation of such surviving or resulting corporation;

(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, except where such sale, lease, transfer, exclusive license or other disposition is to a wholly owned subsidiary of the Corporation; or

(C) any other transaction or series of related transactions other than those described in Subsection 2(d)(i)(A) above following which the holders of shares of capital stock of the Corporation outstanding immediately prior to such transaction or series of related transactions hold less than fifty percent (50%), by voting power, of the capital stock of (1) the Corporation or (2) in the case of a transaction or series of related transactions involving the sale or exchange of all of the capital stock of the Corporation for, in whole or in part, capital stock of another issuer, such other issuer.

(ii) The Corporation shall not have the power to effect any transaction constituting a Deemed Liquidation Event pursuant to Subsection 2(d)(i)(A)(I) above unless the agreement or plan of merger or consolidation 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(a) through 2(c) above.

(iii) The amount deemed paid or distributed to the holders of capital stock of the Corporation upon any such merger, consolidation, sale, lease, transfer, exclusive license, other disposition or other transaction or series of related transactions 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.

3. Voting.

(a) 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 or Junior 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 or Junior Preferred Stock held by such holder are convertible as of the record date for determining stockholders entitled to vote on such matter (excluding solely for this purpose the number of shares of Common Stock into which such shares of Series A Preferred Stock are convertible on account of any Accruing Dividends accrued but unpaid thereon or any other dividends declared but unpaid thereon). Except as provided by law or by the provisions of Subsection 3(b) or 3(c) below, the holders of Series A Preferred Stock and the holders of Junior Preferred Stock shall vote together with the holders of Common Stock, and with the holders of any other outstanding series of Preferred Stock, as a single class.

(b) The Board of Directors shall consist of five (5) members. The holders of record of the shares of Series A Preferred Stock, exclusively and as a separate class, shall be entitled to elect three (3) directors of the Corporation (the "Series A Directors"). 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 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. 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 and the Junior 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. 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(b).

(c) Covenants. In addition to any other rights provided by law, the Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of a majority of Series A Preferred Stock then outstanding:

(i) effect any liquidation, dissolution or winding up of the business and affairs of the Corporation, any filing of a petition for relief under any bankruptcy or insolvency laws, any Deemed Liquidation Event, any merger or consolidation of the Corporation with any other entity or any conversion of the Corporation to another type of entity pursuant to Section 266 of the General Corporation Law;

(ii) create any subsidiary of the Corporation or permit any subsidiary to take such action;

(iii) create any additional class or series of shares of stock, or increase the authorized number of shares of any class or series of shares of stock, or create or authorize any obligation or security convertible into, exchangeable for or exercisable for shares of any class or series of stock (other than Options issued pursuant to an Approved Stock Option Plan with respect to any available Reserved Shares);

(iv) issue, or authorize the issuance of, any shares of any class or series of stock or any obligation or security convertible into, exchangeable for or exercisable for shares of any class or series of stock, except for (A) shares of Common Stock issued pursuant to the conversion of any shares of Preferred Stock pursuant to the terms of the Certificate of Incorporation, (B) Options issued pursuant to an Approved Stock Option Plan with respect to any available Reserved Shares and shares of stock issued pursuant to such Options and (C) dividends or other distributions payable on the Common Stock solely in the form of additional shares of Common Stock;

(v) purchase or redeem, or pay or declare any dividend or make any distribution on, any shares of stock other than the Series A Preferred Stock as expressly authorized herein, or permit any subsidiary of the Corporation to take any such action, except for (A) dividends or other distributions payable on the Common Stock solely in the form of additional shares of Common Stock and (B) securities repurchased, with the approval of the Board of Directors, 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;

(vi) create, issue, purchase or redeem, or authorize the creation, issuance, purchase or redemption of, any debt security, or permit any subsidiary to take any such action, including, without limitation, any debt security which by its terms is convertible into or exchangeable for any equity security of the Corporation and any security of the Corporation which is a combination of debt and equity;

(vii) increase or decrease the authorized number of directors constituting the Board of Directors; or

(viii) amend, alter or repeal any provision of the Certificate of Incorporation or Bylaws of the Corporation, including by means of merger, consolidation or otherwise.

4. Optional Conversion.

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

(a) Right to Convert.

(i) 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 nonassessable shares of Common Stock equal to the sum of (i) the number of shares 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 and (ii) the number of shares determined by dividing the amount of any Accruing Dividends accrued but unpaid thereon, whether or not declared, together with any other dividends declared but unpaid thereon, by the fair market value of a share of Common Stock as determined pursuant to Subsection 4(b). The "**Series A Conversion Price**" shall initially be equal to the Series A Original Issue Price. 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 in this Section 4 below.

(ii) Each share of Junior 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 nonassessable shares of Common Stock as is determined by dividing the Junior Preferred Original Issue Price by the Junior Preferred Conversion Price (as defined below). The "**Junior Preferred Conversion Price**" shall initially be equal to the Junior Preferred Original Issue Price. Such initial Junior Preferred Conversion Price, and the rate at which shares of Junior Preferred Stock may be converted into shares of Common Stock, shall be subject to adjustment as provided below.

(iii) The term "**Conversion Price**" shall refer to the Series A Conversion Price and/or the Junior Preferred Conversion Price, as applicable.

(iv) In the event of a notice of redemption of any shares of Series A Preferred Stock pursuant to Section 6 hereof, 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 paid on such redemption date, in which case the Conversion Rights for such shares shall continue until such price is paid in full. 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 Preferred Stock.

(b) Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of the 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 value of a share of Common Stock determined as follows:

(i) if such conversion of the Preferred Stock is in connection with an underwritten public offering of Common Stock pursuant to an effective registration statement under the Securities Act of 1933, as amended, the value shall be public offering price per share of Common Stock, net of the underwriting discount and commissions;

(ii) if such conversion of the Preferred Stock is in connection with any merger, consolidation, sale, lease, transfer, exclusive license, other disposition or other transaction or series of related transactions constituting a Deemed Liquidation Event, the value shall be the cash or the value of the property, rights or securities paid in such Deemed Liquidation Event in respect of a share of Common Stock as determined pursuant to Subsection 2(d)(iii); or

(iii) otherwise, the value shall be 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 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.

(c) Mechanics of Conversion.

(i) In order for a holder of Preferred Stock to voluntarily convert shares of Preferred Stock into shares of Common Stock, such holder shall surrender the certificate or certificates for such shares of 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 Preferred Stock (or at the principal office of the Corporation if the Corporation serves as its own transfer agent), together with written notice that such holder elects to convert all or any number of the shares of the Preferred Stock represented by such certificate or certificates and, if applicable, any event on which such conversion is contingent. Such notice shall state such holder's name or the names of the nominees in which such holder wishes the certificate or certificates for shares of Common Stock to be issued. If required by the Corporation, 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 of such certificates (or lost certificate affidavit and agreement) and notice (or by the Corporation if the Corporation serves as its own transfer agent) shall be the time of conversion (the "**Conversion Time**"), and the shares of Common Stock issuable upon conversion of the shares represented by such certificate shall be deemed to be outstanding of record as of such date. The Corporation

shall, as soon as practicable after the Conversion Time, issue and deliver at such office to such holder of Preferred Stock, or to his, her or its nominees, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled, together with cash in lieu of any fraction of a share.

(ii) The Corporation shall at all times when the Series A Preferred Stock or the Junior Preferred Stock shall be outstanding, reserve and keep available out of its authorized but unissued stock, for the purpose of effecting the conversion of the Series A Preferred Stock or the Junior Preferred Stock, respectively, 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 or Junior Preferred Stock, respectively; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect such conversion, the Corporation shall take such corporate action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this Certificate of Incorporation. Before taking any action which would cause an adjustment reducing any Conversion Price below the then par value of the shares of Common Stock issuable upon conversion of the applicable series of 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 nonassessable shares of Common Stock at such adjusted Conversion Price.

(iii) All shares of 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, including the rights, if any, to receive notices and to vote, 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 and, in the case of the Junior Preferred Stock, to receive payment of any dividends declared but unpaid thereon. Any shares of Preferred Stock so converted shall be retired and cancelled and shall not be reissued as shares of such series, and the Corporation (without the need for stockholder action) may from time to time take such appropriate action as may be necessary to reduce the authorized number of shares of such series of Preferred Stock accordingly.

(iv) Upon any such conversion of the Junior Preferred Stock, no adjustment to the Junior Preferred Conversion Price shall be made for any declared but unpaid dividends on the Junior Preferred Stock surrendered for conversion or on the Common Stock delivered upon conversion.

(v) 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 Preferred Stock. 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 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.

(d) Adjustments to Series A Conversion Price for Diluting Issues.

(i) Special Definitions. For purposes of this Section 4, the following definitions shall apply:

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

(B) **"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(d)(iii) below, deemed to be issued) by the Corporation after the Series A Original Issue Date, other than the following (**"Exempted Securities"**):

- (I) shares of Common Stock issued or deemed issued as a dividend or distribution on Series A Preferred Stock;
- (II) shares of Common Stock issued or issuable by reason of a dividend, stock split, split-up or other distribution on shares of Common Stock that is covered by Subsection 4(e) or 4(f) below;
- (III) up to an aggregate of 100,000 shares of Common Stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization affecting such shares, the **"Reserved Shares"**) issued or deemed issued to employees or directors of, or consultants to, the Corporation or any of its subsidiaries pursuant to the Corporation's 2004 Incentive Plan or other plan, agreement or arrangement approved by the Board of Directors of the Corporation and by the holders of a majority of the then outstanding shares of Series A Preferred Stock (each an **"Approved Stock Option Plan"**); or
- (IV) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities,

in each case provided such issuance is pursuant to the terms of such Option or Convertible Security.

(ii) No Adjustment of Series A Conversion Price. No adjustment in the Series A Conversion Price shall be made as the result of the issuance of Additional Shares of Common Stock if: (a) the consideration per share (determined pursuant to Subsection 4(d)(v)) for such Additional Shares of Common Stock issued or deemed to be issued by the Corporation is equal to or greater than the Series A Conversion Price in effect immediately prior to the issuance or deemed issuance of such Additional Shares of Common Stock, or (b) prior to such issuance or deemed issuance, the Corporation receives written notice from the holders of at least a majority 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.

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

(C) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which, upon exercise, conversion or exchange thereof, would entitle the holder thereof to receive Exempted Securities pursuant to Subsections 4(d)(i)(D)(I), (II), (III), or (IV)), the issuance of which did not result in an adjustment to the Series A Conversion Price pursuant to the terms of Subsection 4(d)(iv) below (either because the consideration per share (determined pursuant to Subsection 4(d)(v) hereof) 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 (either automatically pursuant to the provisions contained therein or as a result of an amendment to such terms) to provide for either (1) any increase or decrease in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any increase or decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended, and the Additional Shares of Common Stock subject thereto (determined in the manner provided in Subsection 4(d)(iii)(A) above) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(D) Upon the expiration or termination of any unexercised Option or unconverted or unexchanged Convertible Security 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(d)(iv) below, the Series A Conversion Price shall be readjusted to such Series A Conversion Price as would have obtained had such Option or Convertible Security never been issued.

(iv) Adjustment of Series A Conversion Price Upon Issuance of Additional Shares of Common Stock.

(A) In the event the Corporation shall, at any time after the Series A Original Issue Date and on or before the third anniversary of the 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(d)(iii)), 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 the consideration per share received by the Corporation for such issue or deemed issue of the 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 \$0.0001 of consideration for all such Additional Shares of Common Stock issued or deemed to be issued.

(B) In the event the Corporation shall, at any time after the third anniversary of the 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(d)(iii)), 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 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:

- (I) CP_2 shall mean the Series A Conversion Price in effect immediately after such issue of Additional Shares of Common Stock
- (II) CP_1 shall mean the Series A Conversion Price in effect immediately prior to such issue of Additional Shares of Common Stock;
- (III) "A" shall mean the number of shares of Common Stock outstanding and deemed 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 of Convertible Securities (including the Series A Preferred Stock and Junior Preferred Stock) outstanding immediately prior to such issue);
- (IV) "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
- (V) "C" shall mean the number of such Additional Shares of Common Stock issued in such transaction.

(v) Determination of Consideration. For purposes of this Subsection 4(d), 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(d)(iii), 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.

(vi) 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(d)(iv) above 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 additional giving effect to any adjustments as a result of any subsequent issuances within such period).

(e) Adjustment for Stock Splits and Combinations. 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 without a comparable subdivision of the Series A Preferred Stock or

the Junior Preferred Stock, or combine the outstanding shares of Series A Preferred Stock or Junior Preferred Stock without a comparable combination of the Common Stock, the applicable Conversion Price in effect immediately before that subdivision or combination 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 without a comparable combination of the Series A Preferred Stock or the Junior Preferred Stock or effect a subdivision of the outstanding shares of Series A Preferred Stock or Junior Preferred Stock without a comparable subdivision of the Common Stock, the applicable Conversion Price in effect immediately before the combination or subdivision 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.

(f) 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 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 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;

provided, however, that 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 Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Conversion Price shall be adjusted pursuant to this subsection as of the time of actual payment of such dividends or distributions; and provided further, however, that no such adjustment shall be made to the applicable Conversion Price if the holders of Series A Preferred Stock or Junior Preferred Stock simultaneously receive (i) a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of such series of Preferred Stock had been converted into Common Stock on the date of such event or (ii) a dividend or other distribution of shares of such series of Preferred Stock which are convertible, as of the date of such event, into such number of shares of

Common Stock as is equal to the number of additional shares of Common Stock being issued with respect to each share of Common Stock in such dividend or distribution.

(g) 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 capital stock of the Corporation 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 (C)(1) do not apply to such dividend or distribution in respect of the Series A Preferred Stock or the Junior Preferred Stock, then and in each such event provision shall be made so that the holders of such series of 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 such Preferred Stock been converted into Common Stock on the date of such event and had such holders 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 such series of Preferred Stock; provided, however, that no such provision shall be made if the holders of such series of 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 such series of Preferred Stock had been converted into Common Stock on the date of such event.

(h) Adjustment for Merger or Reorganization, etc. Subject to the provisions of Subsection 2(d), 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 or the Junior Preferred Stock) is converted into or exchanged for securities, cash or other property (other than a transaction covered by Subsections (e), (f) or (g) of this Section 4), then, following any such reorganization, recapitalization, reclassification, consolidation or merger, each share of the applicable series of 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 such series of 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 such series of 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 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 such shares of Preferred Stock.

(i) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the 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 10 days thereafter, compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of the applicable series of Preferred Stock a certificate setting forth such adjustment or readjustment (including the kind and amount of securities, cash or other property into which such series of 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 or Junior Preferred Stock (but in any event not later than 10 days thereafter), furnish or cause to be furnished to such holder a certificate setting forth (i) the Conversion Price then in effect, and (ii) 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 such series of Preferred Stock.

(j) Notice of Record Date. In the event:

(i) the Corporation shall take a record of the holders of its Common Stock (or other stock or securities at the time issuable upon conversion of the Series A Preferred Stock or the Junior 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 stock of any class or any other securities, or to receive any other right; or

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

(iii) 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 and the holders of the Junior 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, Deemed Liquidation Event, 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 stock or securities at the time issuable upon the conversion of the Series A Preferred Stock or the Junior Preferred Stock) shall be entitled to exchange their shares of Common Stock (or such other stock or securities) for securities or other property deliverable upon such reorganization, reclassification, Deemed Liquidation Event, dissolution, liquidation or winding-up, and the amount per share and character of such exchange applicable to the Series A Preferred Stock or the Junior Preferred Stock, as the case may be, and the Common Stock. Such notice shall be sent at least 10 days prior to the record date or effective date for the event specified in such notice. Any notice required by the provisions hereof to be given to a holder of shares of Series A Preferred Stock or Junior Preferred Stock shall be deemed sent to such holder if deposited in the United States mail, first class or registered, postage prepaid, and addressed to such holder at his, her or its address appearing on the books of the Corporation.

5. Mandatory Conversion.

(a) Upon the earlier of (A) the closing of the sale of shares of Common Stock to the public at a price per share of at least five (5) times the Series A Original Issue Price (subject to appropriate adjustment for stock splits, stock dividends, combinations and other similar recapitalizations affecting the shares of 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 \$50,000,000 of gross proceeds to the Corporation (a "**Qualified Public Offering**") or (B) a date specified by vote or written consent of the holders of at least a majority of the then outstanding shares of Series A Preferred Stock (in the case of (A) or (B), the "**Series A Mandatory Conversion Date**"), (i) all outstanding shares of Series A Preferred Stock shall automatically be converted into shares of Common Stock, at the then effective conversion rate and (ii) such shares may not be reissued by the Corporation as shares of such series.

(b) Upon the earlier of (A) the mandatory conversion of all outstanding shares of Series A Preferred Stock or (B) a date specified by vote or written consent of the holders of at least a majority of the then outstanding shares of Junior Preferred Stock (in the case of (A) or (B), the "**Junior Preferred Mandatory Conversion Date**"), (i) all outstanding shares of Junior Preferred Stock shall automatically be converted into shares of Common Stock, at the then effective conversion rate and (ii) such shares may not be reissued by the Corporation as shares of such series.

(c) All holders of record of shares of the applicable series of Preferred Stock shall be given written notice of the applicable Mandatory Conversion Date and the place designated for mandatory conversion of all such shares of such series of Preferred Stock pursuant to this Section 5. Such notice need not be given in advance of the occurrence of the Mandatory Conversion Date. Such notice shall be sent by first class or registered mail, postage prepaid, or given by electronic communication in compliance with the provisions of the General Corporation Law, to each record holder of such series of Preferred Stock. Upon receipt of such notice, each holder of shares of such series of Preferred Stock shall surrender his, her or its certificate or certificates for all such shares to the Corporation at the place designated in such notice, and shall thereafter receive certificates for the number of shares of Common Stock to which such holder is entitled pursuant to this Section 5. On the Mandatory Conversion Date, all outstanding shares of such series of Preferred Stock shall be deemed to have been converted into shares of Common Stock, which shall be deemed to be outstanding of record, and all rights with respect to the Preferred Stock so converted, including the rights, if any, to receive notices and vote (other than as a holder of Common Stock), will terminate, except only the rights of the holders thereof, upon surrender of their certificate or certificates therefor, to receive certificates for the number of shares of Common Stock into which such Preferred Stock has been converted, and, in the case of the Junior Preferred Stock, payment of any declared but unpaid dividends thereon. If so required by the Corporation, certificates surrendered for conversion shall be endorsed or accompanied by written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or by his, her or its attorney duly authorized in writing. As soon as practicable after the Mandatory Conversion Date and the surrender of the certificate or certificates for such shares of Preferred Stock, the Corporation shall cause to be issued and delivered to such holder, or on his, her or its written order, a certificate or certificates for the

number of full shares of Common Stock issuable on such conversion in accordance with the provisions hereof and cash as provided in Subsection 4(b) in respect of any fraction of a share of Common Stock otherwise issuable upon such conversion.

(d) All certificates evidencing shares of Preferred Stock which are required to be surrendered for conversion in accordance with the provisions hereof shall, from and after the Mandatory Conversion Date, be deemed to have been retired and cancelled and the shares of Preferred Stock represented thereby converted into Common Stock for all purposes, notwithstanding the failure of the holder or holders thereof to surrender such certificates on or prior to such date. Such converted Preferred Stock 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 such series of Preferred Stock accordingly.

6. Redemption.

(a) The Corporation will, subject to the conditions set forth below, at any time and from time to time after the fifth anniversary of the Series A Original Issue Date, upon receipt of written requests for redemption from holders of at least a majority of the then outstanding shares of Series A Preferred Stock (an "**Initial Redemption Request**"), redeem from each holder of shares of Series A Preferred Stock that request redemption pursuant to the Initial Redemption Request or pursuant to a subsequent election made in accordance with Subsection 6(b) below (a "**Requesting Holder**"), at a price per share equal to the greater of (i) the sum of 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 and (ii) the fair market value of the Series A Preferred Stock (the "**Redemption Price**"), the number of shares of Series A Preferred Stock requested to be redeemed by each Requesting Holder.

(b) The Corporation shall provide notice of its receipt of an Initial Redemption Request, specifying the date (which date shall be within 60 days of the Corporation's receipt of the Initial Redemption Request, such date being the "**Redemption Date**"), time, manner and place of redemption and Redemption Price (a "**Redemption Notice**"), by first class or registered mail, postage prepaid, and addressed to such holder at his, her or its address appearing on the books of the Corporation, not less than 45 days prior to the Redemption Date. Each holder of Series A Preferred Stock (other than a holder that has made the applicable Initial Redemption Request) may elect to become a Requesting Holder on such Redemption Date by so indicating in a written notice provided to the Corporation by first class or registered mail, postage prepaid, at least 20 days prior to such Redemption Date. Except as provided in Subsection 6(c) below, each Requesting Holder shall surrender to the Corporation on such Redemption Date the certificate or certificates representing the shares to be redeemed on such date, in the manner and at the place designated in the Redemption Notice. Thereupon, the Redemption Price shall be paid to the order of each such Requesting Holder and each certificate surrendered for redemption shall be cancelled and retired. In the event less than all of the shares of Series A Preferred Stock represented by a certificate are redeemed, a new certificate representing the unredeemed shares of Series A Preferred Stock shall promptly be issued to such Requesting Holder.

(c) If the Corporation does not have sufficient funds legally available to redeem on any Redemption Date all shares of Series A Preferred Stock required to be redeemed on such Redemption Date from Requesting Holders, the Corporation shall redeem a pro rata portion of each Requesting Holder's redeemable shares of such stock out of funds legally available therefor, based on the respective amounts that would otherwise be payable in respect of the shares to be redeemed if the legally available funds were sufficient to redeem all such shares. At any time thereafter when additional funds of the Corporation become legally available for the redemption of Series A Preferred Stock, such funds will be used, at the end of the next succeeding fiscal quarter, to redeem the balance of the shares that the Corporation was theretofore obligated to redeem, ratably on the basis set forth in the preceding sentence.

(d) Unless there shall have been a default in payment of the Redemption Price, on the Redemption Date all rights of the holder of each share redeemed on such date as a stockholder of the Corporation by reason of the ownership of such share will cease, except the right to receive the Redemption Price of such share, without interest, upon presentation and surrender of the certificate representing such share, and such share will not from and after such Redemption Date be deemed to be outstanding.

(e) Any shares of Preferred Stock which are redeemed or otherwise acquired by the Corporation or any of its subsidiaries shall be automatically and immediately canceled 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.

7. Treatment of Series A Preferred Stock; Prohibition on Distributions Constituting Taxable Events.

(a) The Corporation shall take the position for federal, state and local income tax purposes that the accrual of Accruing Dividends does not represent a distribution taxable to holder of the Series A Preferred Stock under Section 305 of the Internal Revenue Code of 1986, as amended, or the regulations thereunder, and shall file all tax returns (including information returns, if any) consistent with that position.

(b) Notwithstanding anything to the contrary in this Article Fourth, the Corporation shall not, without the written approval of the holders of at least a majority of the shares of the Series A Preferred Stock then outstanding or, if there is no Series A Preferred Stock then outstanding, the holders of at least a majority of the shares of Series A Preferred Stock outstanding at the time such shares of Series A Preferred Stock were converted into Common Stock, pay any dividend or make any other distribution on any share of capital stock or other security or interest in the Corporation other than Series A Preferred Stock, or take any other action, so long as any share of Series A Preferred Stock is outstanding and for three years thereafter, if the effect of such dividend, distribution or action might be to make any of (a) an increase in Accruing Dividends, (b) a conversion of the Series A Preferred Stock into Common Stock or (c) an adjustment of the Series A Conversion Price, a taxable event to the holders of Series A Preferred Stock. No amendment to the provisions of this Section 7 shall be effective without the prior written consent of the holders of at least a majority of the shares of Series A Preferred Stock then outstanding or, if there is no Series A Preferred Stock then outstanding, the

holders of at least a majority of the shares of Series A Preferred Stock outstanding at the time such shares of Series A Preferred Stock were converted into Common Stock.

8. Waiver. Any of the rights, powers or preferences of the holders of Series A Preferred Stock or Junior Preferred Stock set forth herein may be defeated by the affirmative consent or vote of the holders of at least a majority of the shares of Series A Preferred Stock or Junior Preferred Stock, respectively, then outstanding.

FIFTH: The Corporation is to have perpetual existence.

SIXTH: In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware:

A. The Board of Directors of the Corporation is expressly authorized to adopt, amend or repeal the Bylaws of the Corporation

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

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

SEVENTH: A director of the Corporation shall not be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent that exculpation from liability is not permitted under the General Corporation Law as now in effect or as it may hereafter be amended. No amendment or repeal of this Article Seventh shall apply to or have any effect on the liability or alleged liability of any director of the Corporation for or with respect to any acts or omissions of such director occurring prior to such amendment or repeal.

EIGHTH: The Corporation shall, to the maximum extent permitted from time to time under the law of the State of Delaware, indemnify and upon request shall advance expenses to any person who is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit, proceeding or claim, whether civil, criminal, administrative or investigative, by reason of the fact that such person is or was or has agreed to be a director or officer of the Corporation or while a director or officer is or was serving at the request of the Corporation as a director, officer, partner, member, trustee, employee or agent of any corporation, partnership, joint venture, trust or other enterprise, including, without limitation, service with respect to employee benefit plans, against expenses (including, without limitation, attorney's fees and expenses), judgments, fines, penalties and amounts paid in settlement incurred in connection with the investigation, preparation to defend or defense of such action, suit, proceeding or claim; provided, however, that the foregoing shall not require the Corporation to indemnify or advance expenses to any person in connection with any action, suit, proceeding, claim or counterclaim initiated by or on behalf of such person. Such indemnification and advancement of expenses shall not be exclusive of other indemnification rights arising as a matter of law, under any Bylaw, agreement, vote of directors or stockholders or otherwise, both

as to action in such person's official capacity and as to action in another capacity while holding such office, and shall inure to the benefit of the heirs and legal representatives of such person. Any person seeking indemnification under this Article Eighth shall be deemed to have met the standard of conduct required for such indemnification unless the contrary shall be established. Any repeal or modification of the foregoing provisions of this Article Eighth shall not adversely affect any right or protection of a director or officer of the Corporation with respect to any acts or omissions of such director or officer occurring prior to such repeal or modification.

The Corporation shall have the power to purchase and maintain, at its expense, insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against any expense, liability or loss asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the General Corporation Law or the terms of the Certificate of Incorporation.

NINTH: To the maximum extent permitted from time to time under the law of the State of Delaware, the Corporation renounces any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, business opportunities that are from time to time presented to its officers, directors or stockholders or the affiliates of the foregoing, other than those officers, directors, stockholders or affiliates who are employees of the Corporation. No amendment or repeal of this Article Ninth shall apply to or have any effect on the liability or alleged liability of any such officer, director, stockholder or affiliate for or with respect to any business opportunities of which such officer, director, stockholder or affiliate becomes aware prior to such amendment or repeal.

TENTH: In accordance with Section 203(b)(1) of the General Corporation Law relating to the application of Section 203 thereof, the Corporation shall not be governed by Section 203 of the General Corporation Law.

ELEVENTH: The Corporation reserves the right to amend or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon a stockholder herein are granted subject to this reservation.

* * *

IN WITNESS WHEREOF, the undersigned has caused this Amended and Restated Certificate of Incorporation to be executed by Robert M. Manning, its President, this 10th day of May, 2004.

KAON SYSTEMS, INC.

By: /s/ Robert M. Manning
Robert M. Manning
President