

Form PTO-1595 (Rev. 08/05)
OMB No. 0651-0027 (exp. 6/30/2008)

U.S. DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

RECORDATION FORM COVER SHEET PATENTS ONLY

To the Director of the U.S. Patent and Trademark Office: Please record the attached documents or the new address(es) below.

1. Name of conveying party(ies):

Nano-Tex, LLC

Additional name(s) of conveying party(ies) attached? ☐ Yes ☒ No

2. Name and address of receiving party(ies)

Name: Nano-Tex, Inc.

Internal Address: _____

Street Address: _____

2220 Livingston Street, Suite 201

City: Oakland

State: California

Country: United States of America Zip: 94606

Additional name(s) & address(es) attached? ☐ Yes ☒ No

3. Nature of conveyance/Execution Date(s):

Execution Date(s): February 7, 2005

☐ Assignment ☒ Merger ☐ Change of Name

☐ Security Agreement ☐ Joint Research Agreement

☐ Government Interest Assignment

☐ Executive Order 9424, Confirmatory License

☐ Other _____

4. Application or patent number(s):

A. Patent Application No.(s)

☐ This document is being filed together with a new application.

B. Patent No.(s)

6,599,327 B2

Additional numbers attached? ☐ Yes ☒ No

5. Name and address to whom correspondence concerning document should be mailed:

Name: Kimberly A. Bolin
MORRISON & FOERSTER LLP

Internal Address: Atty. Dkt.: 400752000112

Street Address: 755 Page Mill Road

City: Palo Alto

State: CA Zip: 94304-1018

Phone Number: (650) 813-5740

Fax Number: (650) 494-0792

Email Address: KBolin@mofo.com

6. Total number of applications and patents involved:

1

7. Total fee (37 CFR 1.21(h) & 3.41) \$ 40.00

- ☐ Authorized to be charged by credit card
☒ Authorized to be charged to deposit account
☐ Enclosed
☐ None required (government interest not affecting title)

8. Payment Information

- a. Credit Card Last 4 Numbers _____
Expiration Date _____
b. Deposit Account Number 03-1952
Authorized User Name Kimberly A. Bolin

9. Signature:

Signature

January 8, 2007

Date

Kimberly A. Bolin - 44,546

Name of Person Signing

Total number of pages including cover sheet, attachments, and documents:

27

CH \$40.00 031952 6599327

09/15/2005 12:31 FAX

NANO-TEX, INC.

002/021

Delaware

PAGE 1

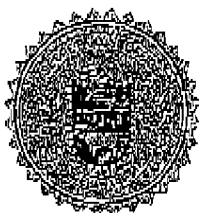
The First State

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 AGREEMENT OF MERGER, WHICH MERGES:

"NANO-TEX, LLC", A CALIFORNIA LIMITED LIABILITY COMPANY,

WITH AND INTO "NANO-TEX, INC." UNDER THE NAME OF "NANO-TEX, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE SEVENTH DAY OF FEBRUARY, A.D. 2005, AT 1:20 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



3916937 8100M

050097787

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 3667873

DATE: 02-07-05

PATENT
REEL: 018731 FRAME: 0851

09/18/2005 12:31 FAX

NANO-TEX, INC

003/021

State of Delaware
Secretary of State
Division of Corporations
Delivered 01:30 PM 02/07/2005
FILED 01:20 PM 02/07/2005
SRV 050097787 - 3916937 FILE

AGREEMENT AND PLAN OF MERGER
OF NANO-TEX, INC.
A DELAWARE CORPORATION,
and
NANO-TEX, LLC
A CALIFORNIA LIMITED LIABILITY COMPANY

This Agreement and Plan of Merger dated as of February 7, 2005 (the "Agreement") is between Nano-Tex, LLC, a California limited liability company ("Nano-Tex-California"), and Nano-Tex, Inc., a Delaware corporation ("Nano-Tex-Delaware"). Nano-Tex-Delaware and Nano-Tex-California are sometimes referred to in this Agreement as the "Constituent Corporations."

RECITALS

A. Nano-Tex-Delaware is a corporation duly organized and existing under the laws of the State of Delaware and has an authorized capital of 1,000 shares, 1,000 of which are designated "Common Stock," \$0.001 par value. As of February 7, 2005, 1,000 shares of Nano-Tex-Delaware Common Stock were issued and outstanding, all of which are held by Nano-Tex-California, and no shares of Preferred Stock were issued and outstanding.

B. Nano-Tex-California is a limited liability company duly organized and existing under the laws of the State of California. As of February 7, 2005, 14,588,975 common units and 4,579,114 preferred units were issued and outstanding.

C. The Board of Directors of Nano-Tex-California has determined that, for the purpose of effecting the reincorporation of Nano-Tex-California in the State of Delaware and for the purpose of converting to a corporation, it is advisable and in the best interests of Nano-Tex-California that Nano-Tex-California merge with and into Nano-Tex-Delaware upon the terms and conditions provided in this Agreement.

D. The respective Boards of Directors of Nano-Tex-Delaware and Nano-Tex-California have approved this Agreement and have directed that this Agreement be submitted to a vote of their respective equity holders and executed by the undersigned officers.

AGREEMENT

In consideration of the mutual agreements and covenants set forth herein, Nano-Tex-Delaware and Nano-Tex-California hereby agree, subject to the terms and conditions hereinafter set forth, as follows:

1. Merger.

1.1 Merger. In accordance with the provisions of this Agreement, the Delaware General Corporation Law and the California General Corporation Law, Nano-Tex-California shall be merged with and into Nano-Tex-Delaware (the "Merger"), the separate existence of Nano-Tex-California shall cease and Nano-Tex-Delaware shall be, and is

DOC95F1093418.5
15010-2 872

09/16/2005 12:31 FAX

NANO-TEX, INC

004/027

sometimes referred to below as, the "Surviving Corporation," and the name of the Surviving Corporation shall be Nano-Tex, Inc.

1.2 Filing and Effectiveness. The Merger shall become effective upon completion of the following actions:

(a) Adoption and approval of this Agreement and the Merger by the equity holders of each Constituent Corporation in accordance with the applicable requirements of the Delaware General Corporation Law and the California General Corporation Law;

(b) The satisfaction or waiver of all of the conditions precedent to the consummation of the Merger as specified in this Agreement; and

(c) The filing with the Secretary of State of Delaware of an executed Certificate of Merger or an executed counterpart of this Agreement meeting the requirements of the Delaware General Corporation Law.

The date and time when the Merger becomes effective is referred to in this Agreement as the "Effective Date of the Merger."

1.3 Effect of the Merger. Upon the Effective Date of the Merger, the separate existence of Nano-Tex-California shall cease and Nano-Tex-Delaware, as the Surviving Corporation, (a) shall continue to possess all of its assets, rights, powers and property as constituted immediately prior to the Effective Date of the Merger, (b) shall be subject to all actions previously taken by its and Nano-Tex-California's Board of Directors, (c) shall succeed, without other transfer, to all of the assets, rights, powers and property of Nano-Tex-California in the manner more fully set forth in Section 259 of the Delaware General Corporation Law, (d) shall continue to be subject to all of the debts, liabilities and obligations of Nano-Tex-Delaware as constituted immediately prior to the Effective Date of the Merger, and (e) shall succeed, without other transfer, to all of the debts, liabilities and obligations of Nano-Tex-California in the same manner as if Nano-Tex-Delaware had itself incurred them, all as more fully provided under the applicable provisions of the Delaware General Corporation Law and the California General Corporation Law.

2. Charter Documents, Directors and Officers.

2.1 Certificate of Incorporation. The Amended and Restated Certificate of Incorporation of Nano-Tex-Delaware attached hereto as Exhibit A shall become in full force and effect as the Certificate of Incorporation of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.2 Bylaws. The Bylaws of Nano-Tex-Delaware as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Bylaws of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.3 Directors and Officers. The directors and officers of Nano-Tex-Delaware immediately prior to the Effective Date of the Merger shall be the directors

DOC53F1793412.5
13010-2 SP2

08/16/2005 12:32 FAX

NANO-TEX, INC

005/021

and officers of the Surviving Corporation until their successors shall have been duly elected and qualified or as otherwise provided by law, the Certificate of Incorporation of the Surviving Corporation or the Bylaws of the Surviving Corporation.

3. Manner of Conversion of Units.

3.1 Nano-Tex-California Units. Upon the Effective Date of the Merger, each common unit of Nano-Tex-California issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such unit or any other person, be converted into and exchanged for one fully paid and nonassessable share of Common Stock, \$0.001 par value, of the Surviving Corporation, and each preferred unit of Nano-Tex-California issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such unit or any other person, be converted into and exchanged for one fully paid and non-assessable share of Series A Preferred Stock, \$0.001 par value, of the Surviving Corporation. No fractional share interests of the Surviving Corporation shall be issued.

3.2 Nano-Tex-California Options.

(a) Each outstanding and unexercised option for Nano-Tex-California common units (an "Option") shall become an option for the Surviving Corporation's Common Stock, on the basis of one share of the Surviving Corporation's Common Stock, as the case may be, for each Nano-Tex-California common unit issuable pursuant to any such Option, on the same terms and conditions and at an exercise price equal to the exercise price applicable to any such Nano-Tex-California Option at the Effective Date of the Merger. This paragraph 3.2(a) shall not apply to Nano-Tex-California common or preferred units. Such units are subject to paragraph 3.1 hereof.

(b) A number of shares of the Surviving Corporation's Common Stock shall be reserved for issuance upon the exercise or conversion of Options equal to the number of Nano-Tex-California common units so reserved immediately prior to the Effective Date of the Merger.

3.3 Nano-Tex-Delaware Common Stock. Upon the Effective Date of the Merger, each share of Common Stock, \$0.001 par value, of Nano-Tex, Inc. issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by Nano-Tex-Delaware, the holder of such shares or any other person, be canceled and returned to the status of authorized but unissued shares.

3.4 Exchange of Certificates. After the Effective Date of the Merger, each holder of an outstanding certificate representing common or preferred units of Nano-Tex-California may be asked to surrender the same for cancellation to an exchange agent, whose name will be delivered to holders prior to any requested exchange (the "Exchange Agent"), and each such holder shall be entitled to receive in exchange therefor a certificate or certificates representing the number of shares of the appropriate class and series of the Surviving Corporation's capital stock into which the surrendered units were converted as herein provided. Until so surrendered, each outstanding certificate theretofore representing common or preferred

08/10/2007 14:26 FAX

NANO-TEX, INC.

00000001

units of Nano-Tex-California shall be deemed for all purposes to represent the number of whole shares of the appropriate class and series of the Surviving Corporation's capital stock into which such common or preferred units of Nano-Tex-California were converted in the Merger.

The registered owner on the books and records of the Surviving Corporation or the Exchange Agent of any such outstanding certificate shall, until such certificate shall have been surrendered for transfer or conversion or otherwise accounted for to the Surviving Corporation or the Exchange Agent, have and be entitled to exercise any voting and other rights with respect to and to receive dividends and other distributions upon the shares of capital stock of the Surviving Corporation represented by such outstanding certificate as provided above.

Each certificate representing capital stock of the Surviving Corporation so issued in the Merger shall bear the same legends, if any, with respect to the restrictions on transferability as the certificates of Nano-Tex-California so converted and given in exchange therefor, unless otherwise determined by the Board of Directors of the Surviving Corporation in compliance with applicable laws.

If any certificate for shares of Surviving Corporation's stock is to be issued in a name other than that in which the certificate surrendered in exchange therefor is registered, it shall be a condition of issuance thereof that the certificate so surrendered shall be properly endorsed and otherwise in proper form for transfer, that such transfer otherwise be proper and comply with applicable securities laws and that the person requesting such transfer pay to the Exchange Agent any transfer or other taxes payable by reason of the issuance of such new certificate in a name other than that of the registered holder of the certificate surrendered or establish to the satisfaction of the Surviving Corporation that such tax has been paid or is not payable.

4. General.

4.1 Covenants of Nano-Tex-Delaware. Nano-Tex-Delaware covenants and agrees that it will, on or before the Effective Date of the Merger:

(a) Qualify to do business as a foreign corporation in the State of California and irrevocably appoint an agent for service of process as required under the provisions of Section 2105 of the California General Corporation Law.

(b) File any and all documents with the California Franchise Tax Board necessary for the assumption by Nano-Tex, Inc. Delaware of all of the franchise tax liabilities of Nano-Tex-California; and

(c) Take such other actions as may be required by the California General Corporation Law.

4.2 Further Assurances. From time to time, as and when required by Nano-Tex-Delaware or by its successors or assigns, there shall be executed and delivered on behalf of Nano-Tex-California such deeds and other instruments, and there shall be taken or caused to be taken by it such further and other actions, as shall be appropriate or necessary in order to vest or perfect in or conform of record or otherwise by Nano-Tex-Delaware the title to and possession of all the property, interests, assets, rights, privileges, immunities, powers,

09/18/2005 12:32 FAX

NANO-TEX, INC

001/021

franchise and authority of Nano-Tex-California and otherwise to carry out the purposes of this Agreement, and the officers and directors of Nano-Tex-Delaware are fully authorized in the name and on behalf of Nano-Tex-California or otherwise to take any and all such action and to execute and deliver any and all such deeds and other instruments.

4.3 Abandonment. At any time before the Effective Date of the Merger, this Agreement may be terminated and the Merger may be abandoned for any reason whatsoever by the Board of Directors of either Nano-Tex-California or Nano-Tex-Delaware, or both, notwithstanding the approval of this Agreement by the members of Nano-Tex-California or by the sole stockholder of Nano-Tex-Delaware, or by both.

4.4 Amendment. The Boards of Directors of the Constituent Corporations may amend this Agreement at any time prior to the filing of this Agreement (or certificate in lieu thereof) with the Secretary of State of the State of Delaware, provided that an amendment made subsequent to the adoption of this Agreement by the equity holders of either Constituent Corporation shall not: (a) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the units or shares of any class or series thereof of such Constituent Corporation, (b) alter or change any term of the Certificate of Incorporation of the Surviving Corporation to be effected by the Merger, or (c) alter or change any of the terms and conditions of this Agreement if such alteration or change would adversely affect the holders of any class of units or shares or series of capital stock of such Constituent Corporation.

4.5 Registered Office. The address of the Surviving Corporation's registered office in the State of Delaware is 1209 Orange Street, in the City of Wilmington, County of New Castle, Delaware 19801. The name of its registered agent at such address is The Corporation Trust Company.

4.6 Agreement. Executed copies of this Agreement will be on file at the principal place of business of the Surviving Corporation at 5770 Shellmound Street, Emeryville, California 94608 and copies thereof will be furnished to any stockholder of either Constituent Corporation, upon request and without cost.

4.7 Governing Law; Jurisdiction. This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of Delaware, without giving effect to principles of conflicts of law.

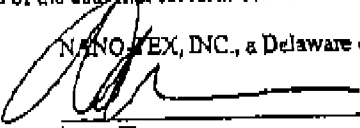
4.8 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

09/16/2005 12:32 FAX

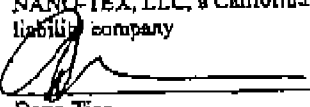
NANO-TEX, INC

008/027

The undersigned authorized representatives of the Constituent Corporations have executed and acknowledged this Agreement as of the date first set forth above.


NANO-TEX, INC., a Delaware corporation

Donn Tice,
President and Chief Executive Officer


NANO-TEX, LLC, a California limited liability company

Donn Tice,
President and Chief Executive Officer

SIGNATURE PAGE TO AGREEMENT AND PLAN OF MERGER

09/16/2005 12:32 FAX

NANO-TEX, INC

003/027

NANO-TEX, INC.

A Delaware Corporation

OFFICERS' CERTIFICATE OF APPROVAL OF MERGER

Donn Tice and Keith Milne certify that:

They are the President and the Secretary, respectively, of Nano-Tex, Inc., a corporation organized under the laws of the State of Delaware.


There are 1,000 shares of Common Stock outstanding and entitled to vote on the Agreement and Plan of Merger attached hereto (the "Merger Agreement"). There are no shares of Preferred Stock outstanding.


The principal terms of the Merger Agreement were approved by the Board of Directors and by the vote of a number of shares of each class and series of stock which equaled or exceeded the vote required.

The percentage vote required was more than 50% of the votes entitled to be cast by holders of outstanding shares of Common Stock.

Donn Tice and Keith Milne further declare under penalty of perjury under the laws of the States of Delaware and California that each has read the foregoing certificate and knows the contents thereof and that the same is true and correct of each's own knowledge.

Executed in Emeryville, California February 7, 2007.



Donn Tice, President


Keith Milne, Secretary

DOCSBFI 793418.3

007 1072000 12.06 P00

NANO-TEX, LLC

007 1072000

NANO-TEX, LLC

A California Limited Liability Company

OFFICERS' CERTIFICATE OF APPROVAL OF THE MERGER

Donn Tice and Keith Milne certify that:

They are the President and the Secretary, respectively, of Nano-Tex, LLC a limited liability company organized under the laws of the State of California.

The company has authorized two classes of equity interests, designated "Common Units" and "Preferred Units".

There were 14,588,975 Common Units and 4,579,114 Preferred Units outstanding as of the record date (the "Record Date") and entitled to vote by written consent of the holders whereby the Agreement and Plan of Merger attached hereto (the "Merger Agreement") was approved.

The principal terms of the Merger Agreement were approved by the Board of Directors and by the vote of a number of shares of each class and series of stock which equaled or exceeded the vote required.

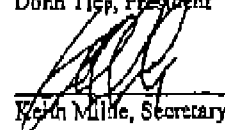
The percentage vote required was more than 50% of the outstanding Common Units and more than 50% of the outstanding Preferred Units.

Donn Tice and Keith Milne further declare under penalty of perjury under the laws of the States of California and Delaware that each has read the foregoing certificate and knows the contents thereof and that the same is true and correct of his own knowledge.

Executed in Emeryville, California on February 7, 2005,



Donn Tice, President



Keith Milne, Secretary

DOC35F1:793416.1

09/16/2006 12:32 FAX

NANO-TEX, INC

011/027

EXHIBIT A
FORM OF DELAWARE
AMENDED AND RESTATED CERTIFICATE OF INCORPORATION

(See attached)

DOCS5P1:793418.5
15018-2 3P2

08/16/2005 12:32 FAX

NANO-TEX, INC

012/021

EXHIBIT A
AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
NANO-TEX, INC.

The undersigned, Donn Tice and Keith Milnt, hereby certify that:

1. They are the duly elected and acting President and Secretary, respectively, of Nano-Tex, Inc., a Delaware corporation.
2. The Certificate of Incorporation of this corporation was originally filed with the Secretary of State of Delaware on January 25, 2005.
3. The Certificate of Incorporation of this corporation shall be amended and restated to read in full as follows:

ARTICLE I

"The name of this corporation is Nano-Tex, Inc. (the "Corporation").

ARTICLE II

The address of the Corporation's registered office in the State of Delaware is 1209 Orange Street, in the city of Wilmington, County of New Castle, Delaware 19801. The name of its registered agent at such address is The Corporation Trust Company.

ARTICLE III

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law.

ARTICLE IV

(A) Classes of Stock. The Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the Corporation is authorized to issue is one-hundred million (100,000,000) shares, each with a par value of \$0.01 per share. Eighty-five million (85,000,000) shares shall be Common Stock and fifteen million (15,000,000) shares shall be Preferred Stock, which may be issued in one or more series, the preferences, limitations, and relative rights of each such series to be determined from time to time hereafter by the board of directors.

(B) Rights, Preferences and Restrictions of Preferred Stock. The first series of Preferred Stock shall be designated "Series A Preferred Stock" and shall consist of eleven million nine hundred twelve thousand four hundred and forty-eight (11,912,448) shares. The

000585117962904
13010-2 SP2

09/16/2005 12:33 FAX

NANO-TEX, INC

019/027

rights, preferences, privileges, and restrictions granted to and imposed on the Series A Preferred Stock are as set forth below in this Article IV(B).

1. **Dividend Provisions.** The holders of shares of Series A Preferred Stock shall be entitled to receive dividends declared or paid on the Common Stock, out of any assets legally available therefor, pro rata based on the number of shares of Common Stock then held by each holder (assuming conversion of all such Series A Preferred Stock into Common Stock).

2. **Liquidation.**

(a) **Preference.** In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the holders of the Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the holders of Common Stock, by reason of their ownership thereof, an amount equal to \$3.00 per share (as adjusted for stock splits, stock dividends, reclassification and the like) for each share of Series A Preferred Stock then held by them, plus declared but unpaid dividends. If, upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

(b) **Remaining Assets.** Upon the completion of the distribution required by Section 2(a) above, if assets remain in the Corporation, the holders of the Common Stock of the Corporation shall receive all of the remaining assets of the Corporation.

(c) **Certain Acquisitions.**

(i) **Deemed Liquidation.** For purposes of this Section 2, unless otherwise agreed by the holders of at least 75% of the Series A Preferred Stock, a liquidation, dissolution, or winding up of the Corporation shall be deemed to occur if the Corporation shall sell, convey, or otherwise dispose of all or substantially all of its property or business or merge with or into or consolidate with any other corporation, limited liability company or other entity (other than a wholly-owned subsidiary of the Corporation) (any such transaction, a "Liquidation Transaction"), provided that none of the following shall be considered a Liquidation Transaction: (x) a merger effected exclusively for the purpose of changing the domicile of the Corporation, or (y) a transaction in which the stockholders of the Corporation immediately prior to the transaction own more than 50% of the voting power of the surviving entity following the transaction.

(ii) **Valuation of Consideration.** In the event of a deemed liquidation as described in Section 2(c)(i) above, if the consideration is other than cash, its value will be its fair market value as determined in good faith by the Board of Directors; provided that any securities shall be valued as follows:

(A) Securities not subject to investment letter or other similar restrictions on free marketability:

DOC5871 2062004
13010-2 SP2

09/18/2005 12:39 FAX

NANO-TEX, INC

014/027

(1) If traded on a securities exchange or The Nasdaq Stock Market ("Nasdaq"), the value shall be based on a formula approved by the Board of Directors and derived from the closing prices of the securities on such exchange or Nasdaq over a specified time period;

(2) If actively traded over-the-counter, the value shall be based on a formula approved by the Board of Directors and derived from the closing bid or sales prices (whichever is applicable) of such securities over a specified time period; and

(3) 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.

(B) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as specified above in Section 2(c)(ii)(A) to reflect the approximate fair market value thereof, as determined in good faith by the Board of Directors.

(iii) Notice of Liquidation Transaction. The Corporation shall give each holder of record of Series A Preferred Stock written notice of any impending Liquidation Transaction not later than 10 days prior to the stockholders' meeting called to approve such Liquidation Transaction, or 10 days prior to the closing of such Liquidation Transaction, whichever is earlier, and shall also notify such holders in writing of the final approval of such Liquidation Transaction. The first of such notices shall describe the material terms and conditions of the impending Liquidation Transaction and the provisions of this Section 2, and the Corporation shall thereafter give such holders prompt notice of any material changes. Unless such notice requirements are waived, the Liquidation Transaction shall not take place sooner than 10 days after the Corporation has given the first notice provided for herein or sooner than 10 days after the Corporation has given notice of any material changes provided for herein. Notwithstanding the other provisions of this Amended and Restated Certificate of Incorporation (the "Restated Certificate"), all notice periods or requirements in this Restated Certificate may be shortened or waived, either before or after the action for which notice is required, upon the written consent of the holders of a majority of the voting power of the outstanding shares of Series A Preferred Stock that are entitled to such notice rights.

(iv) Effect of Noncompliance. In the event the requirements of this Section 2(c) are not complied with, the Corporation shall forthwith either cause the closing of the Liquidation Transaction to be postponed until the requirements of this Section 2 have been complied with, or cancel such Liquidation Transaction, in which event the rights, preferences, privileges and restrictions of the holders of Series A Preferred Stock shall revert to and be the same as such rights, preferences, privileges and restrictions existing immediately prior to the date of the first notice referred to in Section 2(c)(iii).

3. Redemption. The Series A Preferred Stock is not redeemable.

DOC#5511796290.1
1501002 SP2

08/16/2005 12:33 FAX

NANU-TEX, INC

010/021

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

(a) **Right to Convert on or After 4(b)(i) Date.** Subject to Section 4(c), each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time on or after February 1, 2006, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$3.00 by the Conversion Price applicable to such share, determined as hereafter provided, in effect on the date the certificate is surrendered for conversion. The Conversion Price per share of Series A Preferred Stock for conversions under this Section 4(a) or Sections 4(b)(ii) or 4(b)(iii) shall be \$3.00. Such initial Conversion Price shall be subject to adjustment as set forth in Sections 4(d).

(b) **Automatic Conversion.** Subject to Section 4(c), each share of Series A Preferred Stock shall automatically be converted into shares of Common Stock upon the earlier of (i) the Corporation's sale, on or before January 31, 2006, of its Common Stock in a firm commitment underwritten public offering pursuant to said registration statement under the Securities Act of 1933, as amended (the "Securities Act") and which results in aggregate cash proceeds to the Corporation of not less than \$30,000,000 (net of underwriting discounts and commissions) and following which the Common Stock is listed or registered for trading on a recognized exchange, such as the New York Stock Exchange, American Stock Exchange or the Nasdaq National Market System, at a Conversion Price equal to 60% of the public offering price set forth in the final registration statement, (ii) the Corporation's sale of its Common Stock, on or after February 1, 2006, in a firm commitment underwritten public offering pursuant to a registration statement under the Securities Act which results in aggregate cash proceeds to the Corporation of not less than \$30,000,000 (net of underwriting discounts and commissions) and following which the Common Stock is listed or registered for trading on a recognized exchange, such as the New York Stock Exchange, American Stock Exchange or the Nasdaq National Market System, at the Conversion Price at the time in effect for such share immediately upon such sale or (iii) the date specified by written consent or agreement of the holders, on or after February 1, 2006, of all of the holders of the then outstanding shares of the Series A Preferred Stock at the Conversion Price at the time in effect for such share immediately prior to such date.

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

DOC#SF1 196250.1
15010-2 SP2

09/16/2005 12:33 FAX

NANO-TEX, INC

016/027

connection with an underwritten public offering of securities registered pursuant to the Securities Act the conversion may, at the option of any holder tendering such Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event any persons entitled to receive Common Stock upon conversion of such Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

(d) Conversion Price Adjustments of Preferred Stock for Certain Dilutive Issuances, Splits and Combinations. The Conversion Price of the Series A Preferred Stock shall be subject to adjustment from time to time as follows:

(i) Issuance of Additional Stock below Purchase Price. If the Corporation should issue, at any time after the date upon which any shares of Series A Preferred Stock were first issued (the "Purchase Date" with respect to such series), any Additional Stock (as defined below) without consideration or for a consideration per share less than the Conversion Price for such series in effect immediately prior to the issuance of such Additional Stock, the Conversion Price for such series in effect immediately prior to each such issuance shall automatically be adjusted as set forth in this Section 4(d)(i), unless otherwise provided in this Section 4(d)(i).

(A) Adjustment Formula. Whenever the Conversion Price is adjusted pursuant to this Section 4(d)(i), the new Conversion Price shall be determined by multiplying the Conversion Price then in effect by a fraction, (x) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance (the "Outstanding Common") plus the number of shares of Common Stock that the aggregate consideration received by the Corporation for such issuance would purchase at such Conversion Price; and (y) the denominator of which shall be the number of shares of Outstanding Common plus the number of shares of such Additional Stock. For purposes of the foregoing calculation, the term "Outstanding Common" shall include shares of Common Stock deemed issued pursuant to Section 4(d)(i)(E) below.

(B) Definition of "Additional Stock". For purposes of this Section 4(d)(i), "Additional Stock" shall mean any shares of Common Stock issued (or deemed to have been issued pursuant to Section 4(d)(i)(E)) by the Corporation after the Purchase Date) other than:

(1) Shares of Common Stock issued or issuable to employees, consultants or directors of the Corporation directly or pursuant to a stock option plan or restricted stock plan or other compensatory plan or arrangement approved by the Board of Directors of the Corporation;

(2) Shares of Common Stock issued or issuable in a firm commitment underwritten public offering;

(3) Shares of Common Stock issued or issuable upon conversion of the Series A Preferred Stock;

09/18/2005 12:33 FAX

NANO-TEX, INC

01/02/

(4) Shares of Common Stock issued or issuable upon conversion or exercise of outstanding options, warrants, convertible notes or other convertible securities outstanding as of the date of this Amended and Restated Certificate of Incorporation;

(5) Common Stock issued pursuant to stock dividends, stock splits or similar transactions, as described in Section 4(d)(ii) hereof;

(6) Capital stock, or options or warrants to purchase capital stock, issued to financial institutions or lessors in connection with commercial credit arrangements, equipment financings, commercial property lease transactions or similar transactions, the terms of which are approved by the Board of Directors of the Corporation;

(7) Capital stock, or warrants or options to purchase capital stock, issued in connection with bona fide acquisitions, mergers or similar transactions, the terms of which are approved by the Board of Directors of the Corporation; and

(8) Capital stock issued or issuable to an entity as a component of any business relationship with such entity for the purpose of (A) joint venture, technology licensing or development activities, (B) distribution, supply or manufacture of the Corporation's products or services or (C) any other arrangements involving corporate partners that are primarily for purposes other than raising capital, the terms of which business relationship with such entity are approved by the Board of Directors.

(C) No Fractional Adjustments. No adjustment of the Conversion Price for the Series A Preferred Stock shall be made in an amount less than one cent per share, provided that any adjustments which are not required to be made by reason of this sentence shall be carried forward and shall be either taken into account in any subsequent adjustment made prior to three years from the date of the event giving rise to the adjustment being carried forward, or shall be made at the end of three years from the date of the event giving rise to the adjustment being carried forward.

(D) Determination of Consideration. In the case of the issuance of Common Stock for cash, the consideration shall be deemed to be the amount of cash paid therefor before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with the issuance and sale thereof. In the case of the issuance of the Common Stock for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined by the Board of Directors irrespective of any accounting treatment.

(E) Deemed Issuances of Common Stock. In the case of the issuance (whether before, on or after the applicable Purchase Date) of securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock (the "Common Stock Equivalents"), the following provisions shall apply for all purposes of this Section 4(d)(i):

DOCSER11796290.4
15010-2 SP1

08/16/2005 12:33 FAX

NANO-TEX, INC

018/027

(1) The aggregate maximum number of shares of Common Stock deliverable upon conversion, exchange or exercise (assuming the satisfaction of any conditions to convertibility, exchangeability or exercisability, including, without limitation, the passage of time, but without taking into account potential antidilution adjustments) of any Common Stock Equivalents and subsequent conversion, exchange or exercise thereof shall be deemed to have been issued at the time such securities were issued or such Common Stock Equivalents were issued and for a consideration equal to the consideration, if any, received by the Corporation for any such securities and related Common Stock Equivalents (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by the Corporation (without taking into account potential antidilution adjustments) upon the conversion, exchange or exercise of any Common Stock Equivalents (the consideration in each case to be determined in the manner provided in Section 4(d)(i)(D)).

(2) In the event of any change in the number of shares of Common Stock deliverable or in the consideration payable to the Corporation upon conversion, exchange or exercise of any Common Stock Equivalents, other than a change resulting from the antidilution provisions thereof, the Conversion Price of the Series A Preferred Stock, to the extent in any way affected by or computed using such Common Stock Equivalents, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Common Stock or any payment of such consideration upon the conversion, exchange or exercise of such Common Stock Equivalents.

(3) Upon the termination or expiration of the convertibility, exchangeability or exercisability of any Common Stock Equivalents, the Conversion Price of the Series A Preferred Stock, to the extent in any way affected by or computed using such Common Stock Equivalents, shall be recomputed to reflect the issuance of only the number of shares of Common Stock (and Common Stock Equivalents that remain convertible, exchangeable or exercisable) actually issued upon the conversion, exchange or exercise of such Common Stock Equivalents.

(4) The number of shares of Common Stock deemed issued and the consideration deemed paid therefor pursuant to Section 4(d)(i)(E)(1) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either Section 4(d)(i)(E)(2) or 4(d)(i)(E)(3).

(F) No Increased Conversion Price. Notwithstanding any other provisions of this Section 4(d)(i), except to the limited extent provided for in Sections 4(d)(i)(E)(2) and 4(d)(i)(E)(3), no adjustment of the Conversion Price pursuant to this Section 4(d)(i) shall have the effect of increasing the Conversion Price above the Conversion Price in effect immediately prior to such adjustment.

(ii) Stock Splits and Dividends. In the event the Corporation should at any time after the Purchase Date fix a record date for the effectuation of a split or subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or Common Stock Equivalents without payment of any consideration by such

DOCSPP11796290.4
15910-2 SP2

09/16/2005 12:34 FAX

NANO-TEX, INC

018/021

holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date (or the date of such dividend distribution, split or subdivision if no record date is fixed), the Conversion Price of the Series A Preferred Stock shall be appropriately 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 of the aggregate of shares of Common Stock outstanding and those issuable with respect to such Common Stock Equivalents with the number of shares issuable with respect to Common Stock Equivalents determined from time to time in the manner provided for deemed issuances in Section 4(d)(i)(E).

(iii) Reverse Stock Splits. If the number of shares of Common Stock outstanding at any time after the Purchase Date is decreased by a combination of the outstanding shares of Common Stock, then, following the record date of such combination, the Conversion Price for the Series A Preferred Stock shall be appropriately 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 outstanding shares.

(e) Other Distributions. In the event the Corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in Section 4(d)(i) or 4(d)(ii), then, in each such case for the purpose of this Section 4(e), the holders of Series A Preferred Stock shall be entitled to a proportionate share of any such distribution as though they were the holders of the number of shares of Common Stock of the Corporation into which their shares of Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

(f) Recapitalizations. If at any time or from time to time there shall be a recapitalization of the Common Stock (other than a subdivision, combination or merger or sale of assets transaction provided for elsewhere in this Section 4 or in Section 2) provision shall be made so that the holders of the Series A Preferred Stock shall thereafter be entitled to receive upon conversion of such Preferred Stock the number of shares of stock or other securities or property of the Corporation or otherwise, to which a holder of Common Stock deliverable upon conversion would have been entitled on such recapitalization. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4 with respect to the rights of the holders of such Preferred Stock after the recapitalization to the end that the provisions of this Section 4 (including adjustment of the Conversion Price then in effect and the number of shares purchasable upon conversion of such Preferred Stock) shall be applicable after that event and be as nearly equivalent as practicable.

(g) No Impairment. The Corporation will not, through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of Preferred Stock against impairment.

DXX 55F1 746190.4
15010-2 SP2

08/16/2005 12:34 FAX

NANU-TEX, INC

020/021

(h) No Fractional Shares and Certificate as to Adjustments.

(i) No fractional shares shall be issued upon the conversion of any share or shares of the Series A Preferred Stock, and the number of shares of Common Stock to be issued shall be rounded down to the nearest whole share. The number of shares 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 number of shares of Common Stock issuable upon such aggregate conversion. If the conversion would result in any fractional share, the Corporation shall, in lieu of issuing any such fractional share, pay the holder thereof an amount in cash equal to the fair market value of such fractional share on the date of conversion, as determined in good faith by the Board of Directors.

(ii) Upon the occurrence of each adjustment or readjustment of the Conversion Price of Series A Preferred Stock pursuant to this Section 4, the Corporation, at its expense, shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of such Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Series A Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Conversion Price for the Series A Preferred Stock at the time in effect, and (C) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of a share of the Series A Preferred Stock.

(i) **Notices of Record Date.** In the event of any taking by the Corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property, or to receive any other right, the Corporation shall mail to each holder of Series A Preferred Stock, at least 10 days prior to the date specified therein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right.

(j) **Reservation of Stock Issuable Upon Conversion.** The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series A Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of such series of 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 such series of Preferred Stock, in addition to such other remedies as shall be available to the holder of such Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this Restated Certificate.

08/16/2005 12:34 FAX

NANO-TEX, INC

021/021

(k) Notices. Any notice required by the provisions of this Section 4 to be given to the holders of shares of Series A Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of the Corporation.

5. Voting Rights. Except as expressly provided by this Restated Certificate or as provided by law, the holders of Series A Preferred Stock shall have the same voting rights as the holders of Common Stock and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation, and the holders of Common Stock and the Series A Preferred Stock shall vote together as a single class on all matters. Each holder of Common Stock shall be entitled to one vote for each share of Common Stock held, and each holder of Series A Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Series A Preferred Stock is convertible (regardless of whether the Series A Preferred Stock is converted at the time) at the time of any such vote. Fractional votes shall not, however, be permitted and any fractional voting rights available on an as-converted basis (after aggregating all shares into which shares of Series A Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

6. Protective Provisions. So long as at least 2,500,000 shares of the Series A Preferred Stock are outstanding (as adjusted for stock splits, stock dividends, reclassification and the like), the Corporation shall not (by amendment, merger, consolidation or otherwise) without first obtaining the approval (by vote or written consent, as provided by law) of the holders of at least a majority of the then outstanding shares of Series A Preferred Stock which holders must include, for purposes of this Section 6, International Textile Holdings, Inc. and its Affiliated Entities, if transferred, and at least two (2) of the following four holders of Series A Preferred Stock: (i) Firelake Strategic Technology Fund, L.P. and its Affiliated Entities, (ii) Masters Capital Nanotechnology, LLC and its Affiliated Entities, (iii) Norwest Venture Partners IX, L.P. and its Affiliated Entities, and (iv) Howard Hughes Medical Institute and its Affiliated Entities:

(a) declare, pay or set aside for payment any dividends on Common Stock;

(b) redeem, purchase or otherwise acquire (or pay into or set funds aside for a sinking fund for such purpose) any share or shares of the Series A Preferred Stock or Common Stock, provided that such repurchase is approved by the Board of Directors; provided, further, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for the Corporation or any subsidiary pursuant to agreements under which the Corporation has the option to repurchase such shares upon the occurrence of certain events, such as the termination of employment, or through the exercise of any right of first refusal;

(c) effect a Liquidation Transaction, confess any judgment against the Corporation, or file any bankruptcy petition or similar filing on behalf of the Corporation;

DOC#55F1796290.4
13010-2 8/2

08/16/2005 12:34 FAX

NANO-TEX, INC

022/027

(d) authorize or issue any other equity security including any security convertible into or exercisable for any equity security having a preference over, or being on a parity with, the Series A Preferred Stock with respect to voting, dividends, redemption, conversion or upon liquidation (other than the pari passu voting and dividend rights of Common Stock);

(e) amend the Certificate of Incorporation or Bylaws of the Corporation;

(f) increase or decrease the size of the Board of Directors of the Corporation;

(g) unless approved by a majority the Board of Directors which must include International Textile Holdings, Inc. and its Affiliated Entities, if transferred: (i) mortgage or pledge, or create a security interest in, permit any subsidiary to mortgage, pledge or create a security interest in, all or substantially all of the property of the Corporation or such subsidiary; (ii) own, or permit any subsidiary to own, any stock or other securities of any subsidiary or other corporation, partnership or entity unless it is wholly owned by the Corporation; or (iii) make guarantees except in ordinary course of business;

(h) increase the pool of shares available for issuance under all equity plans above 2,850,000 shares in the aggregate;

(i) terminate the Chief Executive Officer or hire a new Chief Executive Officer, or

(j) alter or change the rights, preferences or privileges of the shares of Series A Preferred Stock; provided, however, it shall require the unanimous consent of all Series A Preferred Stockholders to alter the liquidation preferences in Section 2(a) or the Automatic Conversion terms set forth in Section 4(b), the Conversion Price Adjustment terms set forth in Section 4(d) or the designation of any series of Preferred Stock.

"Affiliated Entities" of a person, for purposes of this Section 6, shall include (i) any subsidiary, parent, partner, limited partner, retired partner, member, retired member or holder of capital stock of such person (ii) any affiliated fund or entity of such person, which means with respect to a limited liability company or a limited liability partnership, a fund or entity managed by the same manager or managing member or general partner or management company or by an entity controlling, controlled by, or under common control with such manager or managing member or general partner or management company or (iii) any entity directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person, as applicable. The term "control," as used in the immediately preceding sentence, shall mean with respect to a corporation or limited liability company the right to exercise, directly or indirectly, more than fifty percent (50%) of the voting rights attributable to the controlled corporation or limited liability company, and, with respect to any individual, partnership, trust, other entity or association, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of the controlled entity. Notwithstanding the foregoing, Affiliated Entities of International Textile Holdings, Inc., if transferred, shall include, without limitation, WR Recovery Fund II, L.P., Absolute Recovery

08/16/2005 12:34 FAX

NANO-TEX, INC

023/027

Hedge Fund Limited and Absolute Recovery Hedge Fund, L.P. and Affiliated Entities of Masters Capital Nanotechnology, LLC shall include, without limitation, Masters Capital Nanotechnology Fund, L.P., Masters Capital Management, LLC, Masters Fund LP, Marlin Fund, LP, Marlin Fund II, LP, Marlin Fund Offshore, Ltd, and Marlin Fund Offshore, LDC.

7. **Affiliate Agreements.** The Corporation shall not (by amendment, merger, consolidation or otherwise) without first obtaining the approval (by vote or written consent, as provided by law) of a majority of the directors other than any director or directors appointed by International Textile Holdings, Inc. ("ITH") or its successors or assigns;

(a) enter into cash compensation arrangements with employees or consultants of the Corporation in excess of \$50,000 per year who are also employees of ITH or any affiliate thereof, unless such arrangements are determined to be, after due inquiry, on terms no less favorable to the Corporation than the terms on which such arrangements could have been made with unaffiliated third parties;

(b) make payments over \$100,000 per year to ITH or any affiliate thereof, by contract or otherwise, unless such payments are determined to be, after due inquiry, on terms no less favorable to the Corporation than the terms on which such services could have been obtained from unaffiliated third parties;

(c) amend the Commercialization Agreement between International Textile Group, Inc. ("ITG") and the Corporation dated January 29, 1999, as amended from time to time, or any other agreement between the Corporation and ITH or any affiliate thereof resulting in a transfer of property, assets or other value in excess of \$100,000 or the amendment in a manner adverse to the Corporation of any non-monetary term of such agreements;

(d) amend the terms of the License Agreement between the Corporation and ITG dated as of January 1, 2001, as amended from time to time; or

(e) amend the terms of Agreement Regarding Modification and Assumption of Executory Contracts by and among the Corporation, ITG and other ITH affiliates dated November 1, 2003, as amended from time to time.

This provision shall terminate upon an initial public offering.

8. **Board Deadlock.** In the event that the Board of Directors shall deadlock in making any determination that the Board of Directors is authorized to make, after meaningful, good faith discussion of such pending determination at the meeting at which such deadlock occurs the matter shall be resolved by the vote of a majority of the directors designated by International Textile Holdings, Inc. or its Affiliated Entities or its assigns pursuant to that certain Voting Agreement dated as of February 7, 2005, taken as a whole, present at such meeting.

9. **Status of Converted Stock.** In the event any shares of the Series A Preferred Stock shall be converted pursuant to Section 4 hereof, the shares so converted shall be cancelled and shall not be issuable by the Corporation. This Restated Certificate shall be

DOCSSP1:796290.4
15010-2 SP2

08/18/2005 12:34 FAX

NANO-TEX, INC

024/021

appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

(C) Common Stock.

1. **Dividend Rights.** Subject to the prior rights of holders of all classes of stock at the time outstanding having prior rights as to dividends, the holders of the Common Stock shall be entitled to receive, when and as declared by the Board of Directors, out of any assets of the Corporation legally available therefor, such dividends as may be declared from time to time by the Board of Directors.

2. **Liquidation Rights.** Upon the liquidation, dissolution or winding up of the Corporation, or the occurrence of a Liquidation Transaction, the assets of the Corporation shall be distributed as provided in Section 2 of Article IV(B).

3. **Redemption.** The Common Stock is not redeemable.

4. **Voting Rights.** Each holder of Common Stock shall have the right to one vote per share of Common Stock, and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation, and shall be entitled to vote upon such matters and in such manner as may be provided by law. 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 which holders must include, for purposes of this Section 4, International Textile Holdings, Inc. and its Affiliated Entities, 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 Delaware General Corporation Law.

ARTICLE V

The Board of Directors of the Corporation is expressly authorized to make, alter or repeal Bylaws of the Corporation.

ARTICLE VI

Elections of directors need not be by written ballot unless otherwise provided in the Bylaws of the Corporation.

ARTICLE VII

(A) To the fullest extent permitted by the Delaware General Corporation Law, as the same exists or as may hereafter be amended, 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.

(B) The Corporation shall indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he, his testator or intestate is or was a

09/18/2005 12:34 FAX

NANO-TEK, INC

025/027

director or officer of the Corporation or any predecessor of the Corporation, or serves or served at any other enterprise as a director or officer at the request of the Corporation or any predecessor to the Corporation.

(C) Neither any amendment nor repeal of this Article VII, nor the adoption of any provision of the Corporation's Certificate of Incorporation inconsistent with this Article VII, shall eliminate or reduce the effect of this Article VII in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this Article VII, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision."

* * *

DOCSEP1:796290.4
15010-2 SP2

14

09/18/2005 12:34 FAX

NAND-TEX, INC

026/027

The foregoing Amended and Restated Certificate of Incorporation has been duly adopted by this corporation's Board of Directors and stockholders in accordance with the applicable provisions of Sections 228, 242 and 245 of the Delaware General Corporation Law.

Executed at Emeryville, California, February 7, 2005.



Donn Fiedler, President

Keith Milbe, Secretary

SIGNATURE PAGE TO THE AMENDED AND RESTATED CERTIFICATE OF
INCORPORATION

09/16/2005 12:35 FAX

NANO-TEX, INC

027/027

The undersigned authorized representatives of the Constituent Corporations have executed and acknowledged this Agreement as of the date first set forth above.

NANO-TEX, INC., a Delaware corporation



Donn Tice,
President and Chief Executive Officer

NANO-TEX, LLC, a California limited liability company



Donn Tice,
President and Chief Executive Officer

SIGNATURE PAGE TO AGREEMENT AND PLAN OF MERGER