

PATENT ASSIGNMENT COVER SHEET

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Assignment ID: PATI37423

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| SUBMISSION TYPE: | NEW ASSIGNMENT |
| NATURE OF CONVEYANCE: | CHANGE OF NAME |
| CONVEYING PARTY DATA | |
| Name | Execution Date |
| Natel Energy, Inc. | 06/30/2023 |
| RECEIVING PARTY DATA | |
| Company Name: | UPSTREAM TECH, INC. |
| Street Address: | 2401 Monarch Street |
| City: | Alameda |
| State/Country: | CALIFORNIA |
| Postal Code: | 94501 |
| PROPERTY NUMBERS Total: 15 | |
| Property Type | Number |
| Patent Number: | 9248970 |
| Patent Number: | 10518977 |
| Patent Number: | 9908709 |
| Patent Number: | 10221830 |
| Patent Number: | 10167844 |
| Patent Number: | 11614065 |
| Patent Number: | 11078882 |
| Application Number: | 18115251 |
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| Application Number: | 17924506 |
| Application Number: | 29836823 |
| Application Number: | 63536264 |
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| CORRESPONDENCE DATA | |
| Fax Number: | 2023712540 |
| <i>Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.</i> | |
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ATTORNEY DOCKET NUMBER: 2851.0000000

NAME OF SUBMITTER: Lynette Miller

SIGNATURE: Lynette Miller

DATE SIGNED: 03/01/2024

Total Attachments: 24

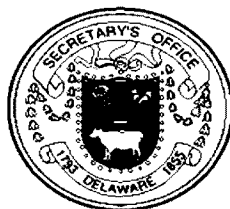
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Delaware

The First State

Page 1

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "NATEL ENERGY, INC.", CHANGING ITS NAME FROM "NATEL ENERGY, INC." TO "UPSTREAM TECH, INC.", FILED IN THIS OFFICE ON THE THIRTIETH DAY OF JUNE, A.D. 2023, AT 12:14 O`CLOCK P.M.




Jeffrey W. Bullock, Secretary of State

4046605 8100
SR# 20232901327

You may verify this certificate online at corp.delaware.gov/authver.shtml

Authentication: 203664356
Date: 06-30-23

PATENT
REEL: 066759 FRAME: 0905

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION OF
NATEL ENERGY, INC.

Natel Energy, Inc., a corporation organized and existing under the laws of the State of Delaware (the “*Corporation*”), certifies that:

1. The name of the Corporation is Natel Energy, Inc. The Corporation’s original Certificate of Incorporation was filed with the Delaware Secretary of State on June 16, 2009.

2. This Amended and Restated Certificate of Incorporation was duly adopted in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware, and has been duly approved by the written consent of the stockholders of the Corporation in accordance with Section 228 of the General Corporation Law of the State of Delaware.

3. The text of the Amended and Restated Certificate of Incorporation is amended and restated in its entirety to read as set forth in **EXHIBIT A** attached hereto.

IN WITNESS WHEREOF, Natel Energy, Inc. has caused this Amended and Restated Certificate of Incorporation to be signed by Marshall Moutenot, a duly authorized officer of the Corporation, on June 30, 2023.

/s/ Marshall Moutenot
Marshall Moutenot
Chief Executive Officer

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ACTIVE\299289460.7

State of Delaware
Secretary of State
Division of Corporations
Delivered 12:14 PM 06/30/2023
FILED 12:14 PM 06/30/2023

PATENT

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EXHIBIT A

ARTICLE I

The name of the corporation is Upstream Tech, Inc. (the "*Corporation*").

ARTICLE II

The purpose of this corporation 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 "*DGCL*").

ARTICLE III

The address of the Corporation's registered office in the State of Delaware is 251 Little Falls Drive, in the City of Wilmington, County of New Castle, 19808. The name of the registered agent at such address is Corporation Service Company.

ARTICLE IV

Capital Stock

The total number of shares of stock that the Corporation shall have authority to issue is (i) 105,722,706 shares of Common Stock, \$0.001 par value per share ("*Common Stock*"), and (ii) 88,855,044 shares of Preferred Stock, \$0.001 par value per share ("*Preferred Stock*").

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

A. **DEFINITIONS.** For purposes of this ARTICLE IV, the following definitions shall apply:

- (a) "*Board*" shall mean the Corporation's Board of Directors.
- (b) "*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.
- (c) "*Liquidation Event*" shall mean any (i) liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, or (ii) Change of Control (as defined below).
- (d) "*Options*" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.
- (e) "*Original Issue Date*" shall mean the date on which the first share of Series 2 Preferred Stock was issued.

(f) “**Original Issue Price**” shall mean (i) with respect to the Series 2 Preferred Stock \$0.81232, (ii) with respect to the Series 1 Preferred Stock \$0.70191 and (iii) with respect to the Series 1-A Preferred Stock \$1.13356.

(g) “**Recapitalization**” shall mean any stock dividend, stock split, combination of shares, reorganization, recapitalization, reclassification or other similar event.

B. COMMON STOCK.

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

2 **Voting.** The holders of the Common Stock are entitled to one vote for each share of Common Stock held at all meetings of stockholders (and written actions in lieu of meetings); provided, however, that, except as otherwise required by law, holders of Common Stock, as such, shall not be entitled to vote on any amendment to this Amended and Restated Certificate of Incorporation (“**Certificate of Incorporation**”) that relates solely to the terms of one or more outstanding series of Preferred Stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to the Certificate of Incorporation or pursuant to the DGCL. There shall be no cumulative voting. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by (in addition to any vote of the holders of one or more series of Preferred Stock that may be required by the terms of the Certificate of Incorporation) the affirmative vote of the holders of shares of capital stock of the Corporation representing a majority of the votes represented by all outstanding shares of capital stock of the Corporation entitled to vote, voting together as a single class on an as converted basis, and without a separate class vote by the Common Stock, irrespective of the provisions of Section 242(b)(2) of the DGCL.

C. PREFERRED STOCK.

1 **Authorization.** 59,098,393 shares of the authorized Preferred Stock of the Corporation are hereby designated “**Series 2 Preferred Stock**” with the following rights, preferences, privileges and restrictions, qualifications and limitations. 24,463,635 shares of the authorized Preferred Stock of the Corporation are hereby designated “**Series 1 Preferred Stock**” with the following rights, preferences, privileges and restrictions, qualifications and limitations. 5,293,016 shares of the authorized Preferred Stock of the Corporation are hereby designated “**Series 1-A Preferred Stock**” with the following rights, preferences, privileges and restrictions, qualifications and limitations. Unless otherwise indicated, references to “Sections” in this Part C of this ARTICLE IV refer to Sections of Part C of this ARTICLE IV.

2 Dividends.

(a) With respect to those shares of Series 1-A Preferred Stock, Series 1 Preferred Stock and Series 2 Preferred Stock issued and outstanding as of June 30, 2023 (collectively, the “**Turbine Preferred**”), the holders thereof shall be promptly paid in the following order: (i) first to the holders of such shares of Series 1 Preferred Stock and Series 2 Preferred Stock

on a pro rata basis until they have received the respective Original Issue Price per share of such outstanding stock; (ii) second to the holders of such shares of Series 1-A Preferred Stock on a pro rata basis until they have received the Original Issue Price per share of such outstanding stock; and (iii) then to the holders of such shares of Series 1-A Preferred Stock, Series 1 Preferred Stock and Series 2 Preferred Stock on a pro rata basis, any dividend, payment, or other proceeds the Corporation receives as a shareholder of Natel Energy Holdings, Inc. (the "***Turbine Proceeds***"). Notwithstanding anything to the contrary in the Certificate of Incorporation, no payment or distribution of Turbine Proceeds to the holders of Turbine Preferred shall require providing notice to or obtaining the consent of any holders of any class or series of the Corporation's capital stock other than providing notice to the holders of Turbine Preferred with respect to such payment or distribution. The right to Turbine Proceeds shall not be adversely modified, amended, or waived and no provision of the Certificate of Incorporation or the Bylaws of the Corporation shall be amended, altered or repealed in a manner that would adversely affect such right without the prior written consent of the holders of at least 60% of the outstanding shares of Turbine Preferred, voting together as a single class on an as converted basis, including at least one holder of shares of Series 1 Preferred Stock and/or Series 2 Preferred Stock with an aggregate Original Issue Price of not less than \$1,000,000 that is not a holder of Series 1-A Preferred Stock.

(b) Except as set forth in Section 2(a) above, the Corporation shall not declare, pay or set aside any dividends on shares of any other class or series of capital stock of the Corporation (other than dividends on shares of Common Stock payable in shares of Common Stock) unless (in addition to the obtaining of any consents required elsewhere in the Certificate of Incorporation) the holders of the Series 2 Preferred Stock and the Series 1 Preferred Stock (collectively, the "***Senior Preferred Stock***"), then outstanding shall first receive, or simultaneously receive, on a *pari passu* basis, a dividend on each outstanding share of Senior Preferred Stock in an amount at least equal to (i) in the case of a dividend on Common Stock or any class or series that is convertible into Common Stock, that dividend per share of Senior Preferred Stock, as would equal the product of (A) the dividend payable on each share of such class or series determined, if applicable, as if all shares of such class or series had been converted into Common Stock, and (B) the number of shares of Common Stock issuable upon conversion of a share of such series of Senior Preferred Stock, in each case calculated on the record date for determination of holders entitled to receive such dividend, or (ii) in the case of a dividend on any class or series that is not convertible into Common Stock, at a rate per share for Senior Preferred Stock determined by (A) dividing the amount of the dividend payable on each share of such class or series of capital stock by the original issuance price of such class or series of capital stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to such class or series), and (B) multiplying such fraction by an amount equal to the Original Issue Price of the applicable series of Senior Preferred Stock; provided that, if the Corporation declares, pays or sets aside, on the same date, a dividend on shares of more than one class or series of capital stock of the Corporation, the dividend payable to the holders of Senior Preferred Stock pursuant to this Section 2, respectively, shall be calculated based upon the dividend on the class or series of capital stock that would result in the highest dividend payable to such class or series of capital stock.

(c) The Corporation shall not declare, pay or set aside any dividends on shares of any Common Stock of the Corporation (other than dividends on shares of Common Stock

payable in shares of Common Stock) unless (in addition to the obtaining of any consents required elsewhere in the Certificate of Incorporation) the holders of the Series 1-A Preferred Stock then outstanding shall first receive, or simultaneously receive, after the payment of all amounts required to be paid first to the holders of shares of the Senior Preferred Stock, pursuant to Section 2(a) above, a dividend on each outstanding share of Series 1-A Preferred Stock in an amount at least equal to (i) in the case of a dividend on Common Stock or any class or series that is convertible into Common Stock, that dividend per share of Senior 1-A Preferred Stock as would equal the product of (A) the dividend payable on each share of such class or series determined, if applicable, as if all shares of such class or series had been converted into Common Stock, and (B) the number of shares of Common Stock issuable upon conversion of a share of such series of Series 1-A Preferred Stock, in each case calculated on the record date for determination of holders entitled to receive such dividend, or (ii) in the case of a dividend on any class or series that is not convertible into Common Stock, at a rate per share for each series of Series 1-A Preferred Stock determined by (A) dividing the amount of the dividend payable on each share of such class or series of capital stock by the original issuance price of such class or series of capital stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to such class or series), and (B) multiplying such fraction by an amount equal to the Original Issue Price (as defined below) of such series of Series 1-A Preferred Stock; provided that, if the Corporation declares, pays or sets aside, on the same date, a dividend on shares of more than one class or series of capital stock of the Corporation, the dividend payable to the holders of each series of Series 1-A Preferred Stock pursuant to this Section 2, respectively, shall be calculated based upon the dividend on the class or series of capital stock that would result in the highest dividend payable to such class or series of capital stock.

(d) ***Non-Cash Distributions.*** Whenever a Distribution provided for in this Section 2 shall be payable in property other than cash, the value of such Distribution shall be deemed to be the fair market value of such property as determined in good faith by the Board.

3 **Liquidation Rights.**

(a) ***Liquidation Preference of Senior Preferred Stock.*** In the event of a Liquidation Event, the holders of the Senior Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Corporation available for distribution to its stockholders before any payment shall be made to the holders of Series 1-A Preferred Stock or Common Stock by reason of their ownership thereof, an amount per share equal to the greater of (i) the applicable Original Issue Price for such share of Senior Preferred Stock, plus any dividends declared but unpaid thereon, or (ii) such amount per share as would have been payable with respect to the Common Stock issuable upon conversion of such share had all outstanding shares of Senior Preferred Stock been converted into Common Stock pursuant to Section 4 immediately prior to such Liquidation Event (the amount payable pursuant to this sentence is herein after referred to as the “***Senior Preferred Liquidation Amount***”). If upon a Liquidation Event, the assets of the Corporation legally available for distribution to the holders of the Senior Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(a), then the entire assets of the Corporation legally available for distribution shall be distributed with equal priority and *pro rata* among the holders of such Preferred Stock in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(a).

(b) **Liquidation Preference of Series 1-A Preferred Stock.** In the event of a Liquidation Event, after the payment of the Senior Preferred Liquidation Amount, the holders of the Series 1-A Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Corporation available for distribution to its stockholders before any payment shall be made to the holders of or Common Stock by reason of their ownership thereof, an amount per share equal to the greater of (i) the Original Issue Price of the Series 1-A Preferred Stock, plus any dividends declared but unpaid thereon, or (ii) such amount per share as would have been payable with respect to the Common Stock issuable upon conversion of such share had all outstanding shares of Series 1-A Preferred Stock been converted into Common Stock pursuant to Section 4 immediately prior to such Liquidation Event (the amount payable pursuant to this sentence is herein after referred to as the “**Series 1-A Liquidation Amount**”). If upon a Liquidation Event, the assets of the Corporation legally available for distribution to the holders of the Series 1-A Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(a), then the entire assets of the Corporation legally available for distribution shall be distributed with equal priority and *pro rata* among the holders of the Series 1-A Preferred Stock in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(b).

(c) **Distribution of Remaining Assets.** In the event of a Liquidation Event, after the payment or setting aside for payment to the holders of Senior Preferred Stock of the Senior Preferred Liquidation Amount (as provided in Section 3(a)), and the Series 1-A Preferred Stock of the Series 1-A Liquidation Amount (as provided in Section 3(b)), the entire remaining assets of the Corporation legally available for distribution shall be distributed with equal priority and *pro rata* among the holders of Common Stock in proportion to the number of shares of Common Stock held by them.

(d) **Shares not Treated as Both Preferred Stock and Common Stock.** Shares of Preferred Stock shall not be entitled to be converted into shares of Common Stock in order to participation in any distribution, or series of distributions, under this Section 3, as shares of Common Stock, without first foregoing participation in such distribution, or series of distributions, as shares of Preferred Stock.

(e) **Reorganization.**

(i) **Definition.** For purposes of this Section 3, a Liquidation Event shall be deemed to be occasioned by, or to include either:

(A) the acquisition of the Corporation by another entity by means of any transaction or series of related transactions to which the Corporation is party (including, without limitation, any stock acquisition, reorganization, merger or consolidation but excluding any sale or issuance of stock in a bona fide financing transaction for capital raising purposes) other than a transaction or series of related transactions in which the holders of the voting securities of the Corporation outstanding immediately prior to such transaction or series of related transactions retain, immediately after such transaction or series of related transactions, as a result of shares in the Corporation held by such holders prior to such transaction or series of related transactions, at least a majority of the total voting power represented by the outstanding

voting securities of the Corporation or such other surviving or resulting entity (or if the Corporation or such other surviving or resulting entity is a wholly-owned subsidiary immediately following such acquisition, its parent) or

(B) a sale, lease, transfer, license or other disposition (whether by merger, consolidation or otherwise) of all or substantially all of the assets of the Corporation and its subsidiaries, taken as a whole, by means of any transaction or series of related transactions, except where such sale, lease, transfer or other disposition is to a wholly-owned subsidiary of the Corporation

(each of clauses (A) and (B), a “**Change of Control**”). The treatment of any transaction or series of related transactions as a Liquidation Event may be waived by the consent or vote of the holders of at least 60% of the outstanding Series 1 Preferred Stock and Series 2 Preferred Stock, voting together as a single class, including at least one holder that purchased not less than \$1,000,000 of the Series 1 Preferred Stock and/ or Series 2 Preferred Stock and that is not a holder of Series 1-A Preferred Stock (the “**Preferred Majority**”). Notwithstanding the foregoing, a Liquidation Event shall not be occasioned by the sale or disposition of bonds or similar securities in the ordinary course of business.

(f) **Allocation of Escrow and Contingent Consideration.** In the event of a Liquidation Event, if any portion of the consideration payable to the stockholders of the Corporation is payable only upon satisfaction of contingencies (the “**Additional Consideration**”), the applicable transaction agreement shall provide that (a) the portion of such consideration that is not Additional Consideration (such portion, the “**Initial Consideration**”) shall be allocated among the holders of capital stock of the Corporation in accordance with Section 3(a), Section 3(b) and Section 3(c) as if the Initial Consideration were the only consideration payable in connection with such Liquidation Event; and (b) any Additional Consideration which becomes payable to the stockholders of the Corporation upon satisfaction of such contingencies shall be allocated among the holders of capital stock of the Corporation in accordance with Section 3(a), Section 3(b) and Section 3(c) after taking into account the previous payment of the Initial Consideration as part of the same transaction. For the purposes of this Section 3(f), consideration placed into escrow or retained as holdback to be available for satisfaction of indemnification or similar obligations in connection with such Liquidation Event shall be deemed to be Additional Consideration.

(g) **Valuation of Non-Cash Consideration.** If any assets of the Corporation distributed to stockholders in connection with any Liquidation Event are other than cash, then the value of such assets shall be their fair market value as determined in good faith by the Board of Directors, *except* that any publicly-traded securities to be distributed to stockholders in a Liquidation Event shall be valued as follows:

(i) if the securities are then traded on a national securities exchange, then the value of the securities shall be deemed to be the average of the closing prices of the securities on such exchange over the ten (10) trading day period ending five (5) trading days prior to the distribution; and

(ii) if the securities are actively traded over-the-counter, then the value of the securities shall be deemed to be the average of the closing bid prices of the securities over the ten (10) trading day period ending five (5) trading days prior to the distribution.

In the event of a merger or other acquisition of the Corporation by another entity, the distribution date shall be deemed to be the date such transaction closes.

For the purposes of this Section 3(h), “*trading day*” shall mean any day which the exchange or system on which the securities to be distributed are traded is open and “*closing prices*” or “*closing bid prices*” shall be deemed to be: (i) for securities traded primarily on the New York Stock Exchange, the American Stock Exchange or a Nasdaq market, the last reported trade price or sale price, as the case may be, at 4:00 p.m., New York time, on that day and (ii) for securities listed or traded on other exchanges, markets and systems, the market price as of the end of the regular hours trading period that is generally accepted as such for such exchange, market or system. If, after the date hereof, the benchmark times generally accepted in the securities industry for determining the market price of a stock as of a given trading day shall change from those set forth above, the fair market value shall be determined as of such other generally accepted benchmark times.

(h) ***Notional Conversion.*** Notwithstanding anything to the contrary in this Section 3, for purposes of determining the amount each holder of shares of Preferred Stock is entitled to receive with respect to a Liquidation Event, each such holder of shares of Preferred Stock shall be deemed to have converted (regardless of whether such holder actually converted) such holder’s shares of Preferred Stock into shares of Common Stock immediately prior to the Liquidation Event if, as a result of an actual conversion, such holder would receive, in the aggregate, an amount greater than the amount that would be distributed to such holder if such holder did not convert such shares of Preferred Stock into shares of Common Stock. If any such holder shall be deemed to have converted shares of Preferred Stock into Common Stock pursuant to this paragraph, then such holder shall not be entitled to receive any distribution that would otherwise be made to holders of Preferred Stock that have not converted (or have not been deemed to have converted) into shares of Common Stock.

(i) ***Option to Purchase.*** In the event that the Corporation determines to distribute to its stockholders the proceeds (cash or otherwise) resulting from any sale or other transfer of a significant portion of its assets (which would not be a Liquidation Event) or the proceeds from an option to acquire securities or assets of the Corporation, the proceeds resulting therefrom (including any ongoing payments, such as royalty or milestone payments) will be distributed in accordance with Section 3(a), Section 3(b), Section 3(c), Section 3(f) and Section 3(g) and not as a dividend under Section 2 hereof; provided, any such “partial” liquidation amounts distributed shall be deducted from any future liquidation payments owing under Section 3(a), Section 3(b) and Section 3(c), as applicable.

4 Preferred Stock Conversion.

(a) ***Right to Convert.*** Each share of Preferred Stock shall be convertible, at the option of the holder thereof, without payment of additional consideration by the holder thereof, into that number of fully-paid, nonassessable shares of Common Stock determined by dividing the

applicable Original Issue Price (except for the Series 1-A Preferred Stock, which shall use the Original Issue Price of the Series 1 Preferred Stock for the purposes of this Section 4) for such share of Preferred Stock by the Conversion Price (as defined below) in effect at the time of conversion. As of the date hereof, the “**Conversion Price**” shall equal the applicable Original Issue Price for such share of Preferred Stock (except for the Series 1-A Preferred Stock, which shall use the Original Issue Price of the Series 1 Preferred Stock for the purposes of this Section 4). Such initial Conversion Price and the rate at which shares of Preferred Stock may be converted into shares of Common Stock shall be subject to adjustment as provided below. The number of shares of Common Stock into which each share of Preferred Stock of a series may be converted is hereinafter referred to as the “**Conversion Rate**” for each such series. Upon any decrease or increase in the Conversion Price as described in this Section 4, the Conversion Rate for the Preferred Stock shall be appropriately increased or decreased; provided, for the purposes of clarity, for this Section 4 the Conversion Rate for the Series 1-A Preferred Stock shall be the same as that of the Series 1 Preferred Stock.

(b) **Automatic Conversion.** Each share of Preferred Stock shall automatically be converted into fully-paid, non-assessable shares of Common Stock at the then effective Conversion Rate for such share (i) immediately prior to the closing of a firm commitment underwritten initial public offering pursuant to an effective registration statement filed under the Securities Act of 1933, as amended (the “**Securities Act**”), covering the offer and sale of Common Stock, provided that (x) the price per share in such offering is at least five (5) times the Original Issue Price of the Series 2 Preferred Stock (subject to adjustments for stock dividends, splits, combinations or similar events), (y) the aggregate gross proceeds to the Corporation are not less than \$50,000,000 (net of underwriters’ discounts, concessions, commissions and expenses), and (z) the Corporation’s shares have been listed for trading on the New York Stock Exchange, NASDAQ Global Select Market or NASDAQ Global Market (a “**Qualified Offering**”), or (ii) pursuant to the vote or written consent, by the Preferred Majority, requesting such conversion, or, if later, the effective date for such conversion specified in such vote or written consent (each of the events referred to in (i) and (ii) are referred to herein as an “**Automatic Conversion Event**”).

(c) **Mechanics of Conversion.** No fractional shares of Common Stock shall be issued upon conversion of 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 then fair market value of a share of Common Stock as determined by the Board. For such purpose, all shares of Preferred Stock held by each holder of Preferred Stock shall be aggregated, and any resulting fractional share of Common Stock shall be paid in cash. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock, and to receive certificates therefor, such holder shall either (A) surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Preferred Stock or (B) notify the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and execute an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates, and shall give written notice to the Corporation at such office that he elects to convert the same; provided, however, that on the date of an Automatic Conversion Event, the outstanding shares of Preferred Stock shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent;

provided further, however, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion Event unless either the certificates evidencing such shares of Preferred Stock are delivered to the Corporation or its transfer agent as provided above, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. On the date of the occurrence of an Automatic Conversion Event, each holder of record of shares of Preferred Stock shall be deemed to be the holder of record of the Common Stock issuable upon such conversion, notwithstanding that the certificates representing such shares of Preferred Stock shall not have been surrendered at the office of the Corporation, that notice from the Corporation shall not have been received by any holder of record of shares of Preferred Stock, or that the certificates evidencing such shares of Common Stock shall not then be actually delivered to such holder.

The Corporation shall, as soon as practicable after such delivery, or after such agreement and indemnification, issue and deliver at such office to such holder of Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which the holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock, plus any declared and unpaid dividends on the converted Preferred Stock, provided that no accrued but unpaid cumulative dividends shall be included in such amount. 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 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 Common Stock on such date; provided, however, that if the conversion is in connection with an underwritten offer of securities registered pursuant to the Securities Act or a merger, sale, financing, or liquidation of the Corporation or other event, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing of such transaction or upon the occurrence of such event, in which case the person(s) entitled to receive the Common Stock issuable upon such conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such transaction or the occurrence of such event.

(d) ***Adjustments to Conversion Price for Diluting Issues.***

(i) ***Special Definition.*** For purposes of this Section 4(d), “***Additional Shares of Common***” shall mean all shares of Common Stock issued (or, pursuant to Section 4(d)(iii), deemed to be issued) by the Corporation after the filing of this Certificate of Incorporation, other than issuances or deemed issuances of ((1) through (12) below, “***Exempt Securities***”):

(1) shares of Common Stock, Options or Convertible Securities issued upon the conversion of the Preferred Stock or as a dividend or distribution on the Preferred Stock;

(2) shares of Series 2 Preferred Stock issued pursuant to the Purchase Agreement;

(3) shares of Common Stock, Options and Convertible Securities issued or issuable to employees, officers or directors of, or consultants or advisors to the Corporation or any subsidiary pursuant to stock grants, restricted stock purchase agreements, option plans, purchase plans, incentive programs or similar arrangements, Options, Convertible Securities or other rights to purchase Common Stock approved by the Board, including three (3) of the Preferred Directors;

(4) shares of Common Stock issued or issuable upon the exercise or conversion of Options or Convertible Securities;

(5) shares of Common Stock, Options or Convertible Securities issued by reason of dividend, stock split, split-up or other distribution or event for which adjustment is made pursuant to Section 4(e), 4(f) or 4(g) hereof;

(6) shares of Common Stock issued or issuable in a registered public offering under the Securities Act;

(7) shares of Common Stock issued or issuable in consideration for real estate leases, or to banks, equipment lessors or other financial institutions, venture lenders, advisors to the Corporation pursuant to a debt financing or commercial transaction approved by the Board;

(8) shares of Common Stock issued or issuable in consideration for the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets or other reorganization or to a joint venture agreement, provided, that such issuances are approved by the Board;

(9) shares of Common Stock issued or issuable in consideration for any settlement of any action, suit, proceeding or litigation approved by the Board;

(10) shares of Common Stock issued or issuable in consideration for any sponsored research, collaboration, joint ventures, development projects, marketing, acquisitions or other strategic transactions, in each case approved by the Board;

(11) shares of Common Stock issued or issuable to suppliers or third party service providers in consideration for the provision of goods or services pursuant to transactions approved by the Board; and

(12) shares of Common Stock for which the Preferred Majority agree to exclude from the definition of Additional Shares of Common.

(ii) ***No Adjustment of Conversion Price.*** No adjustment in the Conversion Price of a particular series of Preferred Stock shall be made in respect of the issuance of Additional Shares of Common unless the consideration per share (as determined pursuant to Section 4(d)(v)) for an Additional Share of Common issued or deemed to be issued by the Corporation is less than the Conversion Price in effect on the date of, and immediately prior to such issue, for such series of Preferred Stock.

(iii) ***Deemed Issue of Additional Shares of Common.*** In the event the Corporation at any time or from time to time after the date of the filing of this Certificate of Incorporation shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities, the conversion or exchange of such Convertible Securities or, in the case of Options for Convertible Securities, the exercise of such Options and the conversion or exchange of the underlying securities, shall be deemed to have been 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, provided that in any such case in which shares are deemed to be issued:

(1) no further adjustment in the Conversion Price of any series of Preferred Stock shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock in connection with the exercise of such Options or conversion or exchange of such Convertible Securities;

(2) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any change in the consideration payable to the Corporation or in the number of shares of Common Stock issuable upon the exercise, conversion or exchange thereof (other than a change pursuant to the anti-dilution provisions of such Options or Convertible Securities such as this Section 4(d) or pursuant to Recapitalization provisions of such Options or Convertible Securities such as Sections 4(e), 4(f) and 4(g) hereof), the Conversion Price of each series of Preferred Stock and any subsequent adjustments based thereon shall be recomputed to reflect such change as if such change had been in effect as of the original issue thereof (or upon the occurrence of the record date with respect thereto);

(3) no readjustment pursuant to clause (2) above shall have the effect of increasing the Conversion Price of a series of Preferred Stock to an amount above the Conversion Price that would have resulted from any other issuances of Additional Shares of Common and any other adjustments provided for herein between the original adjustment date and such readjustment date;

(4) upon the expiration of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised, the Conversion Price of each series of Preferred Stock computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto) and any subsequent adjustments based thereon shall, upon such expiration, be recomputed as if:

(a) in the case of Convertible Securities or Options for Common Stock, the only Additional Shares of Common issued were the shares of Common Stock, if any, actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities and the consideration received therefor was the consideration actually received by the Corporation for the issue of such exercised Options plus the consideration actually received by the Corporation upon such exercise or for the issue of all such Convertible Securities

which were actually converted or exchanged, plus the additional consideration, if any, actually received by the Corporation upon such conversion or exchange, and

(b) in the case of Options for Convertible Securities, only the Convertible Securities, if any, actually issued upon the exercise thereof were issued at the time of issue of such Options, and the consideration received by the Corporation for the Additional Shares of Common deemed to have been then issued was the consideration actually received by the Corporation for the issue of such exercised Options, plus the consideration deemed to have been received by the Corporation (determined pursuant to Section 4(d)(v)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised; and

(5) if such record date shall have been fixed and such Options or Convertible Securities are not issued on the date fixed therefor, the adjustment previously made in the Conversion Price which became effective on such record date shall be canceled as of the close of business on such record date, and thereafter the Conversion Price shall be adjusted pursuant to this Section 4(d)(iii) as of the actual date of their issuance.

(iv) ***Adjustment of Conversion Price Upon Issuance of Additional Shares of Common.*** In the event this Corporation shall at any time after the Original Issue Date issue Additional Shares of Common (including Additional Shares of Common deemed to be issued pursuant to Section 4(d)(iii)) without consideration or for a consideration per share less than the Conversion Price in effect immediately prior to such issue, then, the Conversion Price shall be reduced, concurrently with such issue, to a price (calculated to the nearest 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:

“CP₂” shall mean the Conversion Price in effect immediately after such issuance or deemed issuance of Additional Shares of Common;

“CP₁” shall mean the Conversion Price in effect immediately prior to such issuance or deemed issuance of Additional Shares of Common;

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

“B” shall mean the number of shares of Common Stock that would have been issued if such Additional Shares of Common had been issued or deemed issued at a price per share equal to CP₁ (determined by dividing the aggregate consideration received by the Corporation in respect of such issue by CP₁); and

“C” shall mean the number of such Additional Shares of Common issued in such transaction.

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

(v) **Determination of Consideration.** For purposes of this Section 4(d), the consideration received by the Corporation for the issue (or deemed issue) of any Additional Shares of Common shall be computed as follows:

(1) **Cash and Property.** Such consideration shall:

(a) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with such issuance;

(b) 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; and

(c) in the event Additional Shares of Common 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 (a) and (b) above, as reasonably determined in good faith by the Board.

(2) **Options and Convertible Securities.** The consideration per share received by the Corporation for Additional Shares of Common deemed to have been issued pursuant to Section 4(d)(iii) shall be determined by dividing

(y) 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

(z) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein

for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities.

(e) ***Multiple Closing Dates.*** In the event the Corporation shall issue on more than one date Additional Shares of Common that are a part of one transaction or a series of related transactions and that would result in an adjustment to the Conversion Price of a series of Preferred Stock pursuant to the terms of Section 4(d)(iv), and such issuance dates occur within a period of no more than ninety (90) days from the first such issuance to the final such issuance, then, upon the final such issuance, such Conversion Price shall be readjusted to give effect to all such issuances as if they occurred on the date of the first such issuance (and without giving effect to any additional adjustments as a result of any such subsequent issuances within such period).

(f) ***Adjustments for Subdivisions or Combinations of Common Stock.*** In the event the outstanding shares of Common Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Common Stock, the Conversion Price of each series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Common Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Common Stock, the Conversion Prices in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(g) ***Adjustments for Subdivisions or Combinations of Preferred Stock.*** In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Preferred Stock, the dividend rate, Original Issue Price and liquidation preference of the affected series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Preferred Stock, the dividend rate, Original Issue Price and liquidation preference of the affected series of Preferred Stock in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(h) ***Adjustment for Certain Dividends and Distributions.*** In the event the Corporation at any time 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:

(i) 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

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

Notwithstanding the foregoing, (a) if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the 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 (b) no such adjustment shall be made if the holders of Preferred Stock simultaneously receive a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock on the date of such event.

(i) ***Adjustments for Other Dividends and Distributions.*** In the event the Corporation at any time shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than a distribution of shares of Common Stock in respect of outstanding shares of Common Stock) or in other property and the provisions of Section 2 do not apply to such dividend or distribution, then and in each such event the holders of Preferred Stock shall receive, simultaneously with the distribution to the holders of Common Stock, a dividend or other distribution of such securities or other property in an amount equal to the amount of such securities or other property as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock on the date of such event.

(j) ***Adjustments for Reclassification, Exchange and Substitution.*** Subject to Section 3 ("Liquidation Rights"), if the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification, merger or otherwise (other than a subdivision or combination of shares provided for above), then, in any such event, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, each holder of such Preferred Stock shall have the right thereafter to convert such shares of Preferred Stock 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, all subject to further adjustment as provided herein with respect to such other shares and as determined in good faith by the Board.

(k) ***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 promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of 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 Preferred Stock, furnish

or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price at the time in effect and (iii) 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 Preferred Stock.

(l) ***Waiver of Adjustment of Conversion Price.*** Notwithstanding anything herein to the contrary, any downward adjustment of the Conversion Price may be waived by the consent or vote of the majority of holders of the series of Preferred Stock which is waiving such adjustment either before or after the issuance causing the adjustment. Any such waiver shall bind all future holders of shares of such series of Preferred Stock.

(m) ***Notices of Record Date.*** In the event that this Corporation shall propose at any time:

(i) to declare any dividend upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus;

(ii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or

(iii) to voluntarily liquidate or dissolve or to enter into any transaction deemed to be a Liquidation Event pursuant to Section 3(e);

then, in connection with each such event, this Corporation shall send to the holders of the Preferred Stock prior written notice of the date on which a record shall be taken for such dividend (and specifying the date on which the holders of Common Stock shall be entitled any such dividend) or for determining rights to vote in respect of the matters referred to in (ii) and (iii) above.

Such written notice shall be given by first class mail (or express courier), postage prepaid, addressed to the holders of Preferred Stock at the address for each such holder as shown on the books of the Corporation and shall be deemed given on the date such notice is mailed.

The notice provisions set forth in this section may be shortened or waived prospectively or retrospectively by the consent or vote of the Preferred Majority.

(n) ***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 Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

5 **Voting.**

(a) ***Restricted Class Voting.*** Except as otherwise expressly provided herein or as required by law, the holders of Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

(b) ***No Series Voting.*** Other than as provided herein or required by law, there shall be no series voting.

(c) ***Preferred Stock.*** Each holder of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares of Preferred Stock held by such holder could be converted as of the record date. The holders of shares of the Preferred Stock shall be entitled to vote on all matters on which the Common Stock shall be entitled to vote. Holders of Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted), shall be disregarded.

(d) ***Election of Directors.*** The holders of Senior Preferred Stock, voting together as a single series on an as converted basis, shall be entitled to elect four (4) members of the Board (the "***Preferred Directors***") at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors. The holders of Common Stock, voting as a separate class, shall be entitled to elect one (1) member of the Board at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors (the "***Common Director***"). Any additional members of the Board shall be elected by holders of Common Stock and Preferred Stock, voting together as a single class on an as-converted basis. If a vacancy on the Board is to be filled by the Board, only directors elected by the same class or classes of stockholders as those who would be entitled to vote to fill such vacancy shall vote to fill such vacancy. In the event that there are no remaining directors serving in such class or classes, any such vacancies may be filled pursuant to appointment by the Board and the remaining directors thereon.

(e) ***Adjustment in Authorized Preferred Stock.*** The number of authorized shares of Preferred Stock may be increased or decreased (but not below the number of shares of Preferred Stock then outstanding) by an affirmative vote of the holders of the Preferred Majority and without a vote of the holders of the Preferred Stock voting as a separate class, irrespective of the provisions of Section 242(b)(2) of the DGCL.

(f) ***California Section 2115.*** To the extent that Section 2115 of the California General Corporation Law makes Section 708 subdivisions (a), (b) and (c) of the California General Corporation Law applicable to the Corporation, the Corporation's stockholders shall have the right to cumulate their votes in connection with the election of directors as provided by Section 708 subdivisions (a), (b) and (c) of the California General Corporation Law.

6 **Amendments and Changes.**

(a) ***Preferred Stock Protective Provisions.*** For so long as any shares Senior Preferred Stock remain outstanding, the Corporation shall not (whether consummated by merger, reorganization, amendment or otherwise) take any of the actions or enter into any the transactions below, without first obtaining the approval (by vote or written consent as provided by law) of the Preferred Majority, in addition to any other vote or approval required by Section 2(a) or any other provision of this Certificate of Incorporation or the Bylaws of the Corporation, and any such act or transaction entered into without such approval shall be null and void *ab initio*, and of no force or effect:

- (i) liquidate, dissolve or wind-up the business and affairs of the Corporation, effect any merger or consolidation or any other Liquidation Event, or consent to any of the foregoing;
- (ii) authorize or effect the merger or consolidation of the Corporation with any other entity, sell, assign, exclusively license or dispose of any material portion of the assets, operating business, material technology or intellectual property of the Corporation or any of its subsidiaries, or any recapitalization, reorganization or reclassification of the capital stock of the Corporation;
- (iii) authorize or effect the acquisition in any manner, directly or indirectly, of the capital stock or a substantial portion of the assets of any entity by the Corporation;
- (iv) amend, alter or repeal any provision of this Certificate of Incorporation or the Bylaws of the Corporation in a manner that would adversely affect the rights, preferences, privileges, or powers of, or restrictions provided for the benefit of the Senior Preferred Stock;
- (v) authorize, designate or create (by reclassification, merger or otherwise) or issue or obligate itself to issue any new class or series of equity security having rights, preferences or privileges with respect to dividends or payments upon liquidation senior to or *pari passu* with the Senior Preferred Stock, or increase or decrease (other than for decreases resulting from conversion of the Preferred Stock) the authorized number of shares of Common Stock, Preferred Stock, or any series of Preferred Stock;
- (vi) redeem, purchase or otherwise acquire any shares of the Corporation's capital stock prior to the Senior Preferred Stock, other than as approved by the Board, including a majority of the Preferred Directors;

- (vii) create, or authorize the creation of, or issue, or authorize the issuance of any debt security, or incur any indebtedness for borrowed money if the aggregate indebtedness of the Corporation and its subsidiaries for borrowed money following such action would exceed \$500,000 in the aggregate, other than trade payables incurred in the ordinary course of business and indebtedness which has received prior approval of the Board;
- (viii) make any change in the inherent nature of the Corporation's business;
- (ix) create, or hold capital stock in, any subsidiary that is not wholly owned (either directly or through one or more other subsidiaries) by the Corporation, or sell, transfer or otherwise dispose of any capital stock of any direct or indirect subsidiary of the Corporation (other than Natel Energy Holdings, Inc. and its subsidiaries), or permit any direct or indirect subsidiary (other than Natel Energy Holdings, Inc. and its subsidiaries) to sell, lease, transfer, exclusively license or otherwise dispose (in a single transaction or series of related transactions) of all or substantially all of the assets or intellectual property of such subsidiary;
- (x) create any new stock option or stock incentive plan, or increase the number of shares or other rights reserved for issuance pursuant to or under the Corporation's stock incentive plan, other than the Option pool in existence at upon the date of the filing of this Certificate of Incorporation;
- (xi) increase or decrease the authorized number of members of the Board;
- (xii) enter into or be a party to any transaction with any director, officer, or employee of the Company or any "associate" (as defined in Rule 12b-2 promulgated under the Securities Exchange Act of 1934, as amended) of any such Person, except for (A) transactions contemplated by the Purchase Agreement, (B) ordinary course hiring decisions, including determining employee compensation (which shall not include C-level employees); (C) ordinary course transactions pursuant to reasonable requirements of the Company's business and upon fair and reasonable terms; or (D) transactions approved by the Board, including a majority of the disinterested directors then serving;
- (xiii) issue any Series 2 Preferred Stock other than pursuant to the Purchase Agreement; or

- (xiv) enter into any agreement to take any of the actions set forth in (i) to (xiii) hereof.

(b) **Series 2 Preferred Stock Protective Provisions.** For so long as any shares of Series 2 Preferred Stock remain outstanding, the Corporation shall not (whether consummated by merger, reorganization, amendment or otherwise) take any of the actions or enter into any the transactions below, without first obtaining the approval (by vote or written consent as provided by law) of the holders of a majority of the outstanding shares of Series 2 Preferred Stock, voting on an as-converted basis, in addition to any other vote or approval required under this Certificate of Incorporation or the Bylaws of the Corporation, and any such act or transaction entered into without such approval shall be null and void *ab initio*, and of no force or effect:

(i) amend, alter or repeal any provision of this Certificate of Incorporation or the Bylaws of the Corporation in a manner that would adversely affect the rights, preferences, privileges, or powers of, or restrictions provided for the benefit of the Series 2 Preferred Stock, and in a manner different than the other series of Preferred Stock; or

(ii) increase or decrease the total number of authorized shares of Series 2 Preferred Stock.

(c) **Series 1-A Preferred Stock Protective Provisions.** For so long as any shares of Series 1-A Preferred Stock remain outstanding, the Corporation shall not (whether consummated by merger, reorganization, amendment or otherwise) take any of the actions or enter into any the transactions below, without first obtaining the approval (by vote or written consent as provided by law) of the holders of a majority of the outstanding shares of Series 1-A Preferred Stock, voting on an as-converted basis, in addition to any other vote or approval required under this Certificate of Incorporation or the Bylaws of the Corporation, and any such act or transaction entered into without such approval shall be null and void *ab initio*, and of no force or effect:

(i) amend, alter or repeal any provision of this Certificate of Incorporation or the Bylaws of the Corporation in a manner that would adversely affect the rights, preferences, privileges, or powers of, or restrictions provided for the benefit of the Series 1-A Preferred Stock, and in a manner different than the Senior Preferred Stock; or

(ii) increase or decrease the total number of authorized shares of Series 1-A Preferred Stock.

7 **Redemption.** The Preferred Stock is not redeemable.

8 **Notices.** Any notice required by the provisions of this ARTICLE IV to be given to the holders of Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at such holder's address appearing on the books of the Corporation.

ARTICLE V

The Corporation is to have perpetual existence.

ARTICLE VI

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

ARTICLE VII

Unless otherwise set forth herein, the number of directors that constitute the Board of the Corporation shall be fixed by, or in the manner provided in, the Bylaws of the Corporation.

ARTICLE VIII

In furtherance and not in limitation of the powers conferred by statute, the Board of the Corporation is expressly authorized to adopt, amend or repeal the Bylaws of the Corporation.

ARTICLE IX

1 To the fullest extent permitted by the DGCL 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 a breach of fiduciary duty as a director. If the DGCL is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the DGCL, as so amended.

2 The Corporation shall have the power to indemnify, to the extent permitted by the DGCL, as it presently exists or may hereafter be amended from time to time, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (a "*Proceeding*") by reason of the fact that he or she 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, including service with respect to employee benefit plans, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with any such Proceeding.

3 Neither any amendment nor repeal of this ARTICLE IX, nor the adoption of any provision of this Certificate of Incorporation inconsistent with this ARTICLE IX, shall eliminate or reduce the effect of this ARTICLE IX, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this ARTICLE IX, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

ARTICLE X

Meetings of stockholders may be held within or outside of the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the statutes) outside of the State of Delaware at such place or places as may be designated from time to time by the Board or in the Bylaws of the Corporation.

ARTICLE XI

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