

U.S. Patent & TMO/TM Mail Rcpt Dt. #34

1. Name of conveying party(ies):
JOBDIRECT, INC.

Individuals(s) Association
 General Partnership Limited Partnership
 Corporation-State Delaware
 Other _____

Additional names(s) of conveying party(ies) attached Yes No

3. Nature of conveyance:
 Assignment Merger
 Security Agreement Change of Name
 Other _____

Execution Date: May 28, 1999

2. Name and address of receiving party(ies)
 Name: JobDirect.com, Inc.

Internal Address: _____

Street Address: 201 Summer Street

City: Stamford State: CT Zip: 06901

Individual(s) citizenship _____
 Association _____
 General Partnership _____
 Limited Partnership _____
 Corporation-State Delaware
 Other _____

If assignee is not domiciled in the United States, a domestic representative designation is attached: Yes No

Additional names(s) & address(es) attached? Yes No

4. Application numbers(s) or patent numbers(s):

A. Trademark Application No.(s)
75/695,867; 75/695,866; 75/694,847;
75/342,585

B. Trademark Registration No.(s)
2,230,274; 2,103,488;
2,043,897; 2,046,139

Additional numbers attached? Yes No

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

Name: William H. Brewster

Internal Address: Kilpatrick Stockton LLP

Suite 2800

Street Address: 1100 Peachtree Street

City: Atlanta State: GA Zip: 30309-4530

6. Total number of applications and registrations involved: **8**

7. Total fee (37 CFR 3.41).....\$ 215.00

Enclosed

Authorized to be charged to deposit account

The Commissioner is authorized to charge any deficiency in the required fee or credit any over payment to Deposit Account No. 11-0860.

8. Deposit account number: _____

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Statement and signature.
 To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Valetta A. Northcutt Signature 4/18/00 Date

Name of Person Signing

Total number of pages including cover sheet, attachments, and document **24**

Office of the Secretary of State PAGE 1

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "JOBDIRECT INC.", CHANGING ITS NAME FROM "JOBDIRECT INC." TO "JOBDIRECT.COM, INC.", FILED IN THIS OFFICE ON THE TWENTY-EIGHTH DAY OF MAY, A.D. 1999, AT 9 O'CLOCK A.M.

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



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Handwritten signature of Edward J. Freel in cursive script.

Edward J. Freel, Secretary of State

AUTHENTICATION: 9775101

DATE: 05-28-99

EXHIBIT A

**AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
JOBDIRECT.COM, INC.**

ARTICLE FIRST: The name of the corporation (herein called the "Corporation") is **JOBDIRECT.COM, INC.**

ARTICLE SECOND: The address of the registered office of the Corporation in the State of Delaware is 1013 Centre Road, Wilmington, New Castle County, Delaware 19805. The name of the registered agent of the Corporation at such address is Corporation Service Company.

ARTICLE THIRD: The purpose of the 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 "Delaware Statute").

ARTICLE FOURTH:

A. The Corporation is authorized to issue two (2) classes of capital stock, to be designated, respectively, Preferred Stock ("Preferred Stock") and Common Stock ("Common Stock"). The total number of shares of capital stock which the Corporation is authorized to issue is 34,500,000. The total number of shares of Preferred Stock which the Corporation shall have the authority to issue is 17,500,000. The total number of shares of Common Stock which the Corporation shall have the authority to issue is 17,000,000. The Preferred Stock shall have a par value of \$0.001 per share and the Common Stock shall have a par value of \$0.001 per share. Each share of Common Stock shall be identical in all respects and for all purposes and entitled to: one vote in all proceedings in which action may or is required to be taken by shareholders of the Corporation; participate equally in all dividends payable with respect to the Common Stock, as, if and when declared by the Board of Directors of the Corporation (the "Board"), subject to any dividend preference in favor of Preferred Stock; and share ratably in all distributions of assets of the Corporation in the event of any voluntary or involuntary liquidation, or winding up of the affairs of the Corporation, subject to any liquidation rights and preferences in favor of Preferred Stock.

B. The Preferred Stock shall be divided into series. The first series consists of 4,350,000 shares of Series A Convertible Preferred Stock ("Series A Preferred Stock"), the second series consists of 2,290,000 shares of Series A-1 Non-Voting Convertible Preferred Stock ("Series A-1 Preferred Stock"), the third series consists of 360,000 shares of Series A-2 Convertible Preferred Stock ("Series A-2 Preferred Stock"), and the third series consists of 560 shares of Series B Convertible Preferred Stock ("Series B Preferred Stock"). The remaining shares of Preferred Stock may be issued from time to time in one or more series. The Board is authorized, subject to limitations prescribed by law and the provisions of this Article FOURTH, to provide for the issuance of all or any of the remaining shares of

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shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock had been converted to shares of Common Stock immediately prior to the declaration of such dividend.

2. **Liquidation Preference: Distribution of Any Remaining Assets or Funds.** Except as otherwise provided by this Certificate of Incorporation or in the resolution or resolutions providing for the issue of shares of Preferred Stock pursuant to Section B of this Article FOURTH, in the event of any liquidation, dissolution, or winding up of the Corporation, either voluntary or involuntary, distributions to the shareholders of the Corporation shall be made in the following manner:

(a) **Series A Liquidation Preference.** The holders of the Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock shall be entitled to receive, prior to and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Series B Preferred Stock or the Common Stock, by reason of their ownership of such stock, (i) the amount of \$1.3148 per share (the "Series A Original Cost") for each share of Series A Preferred Stock and Series A-1 Preferred Stock then held by them or the amount of \$1.40 per share (the "Series A-2 Original Cost") for each share of Series A-2 Preferred Stock, plus (ii) an amount equal to any accrued but unpaid dividends on each such share of Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock; provided, however, that (x) holders of Series A Preferred Stock and holders of Series A-1 Preferred Stock shall not be entitled to receive any distribution pursuant to this Section 2(a) if, assuming the occurrence of a Series A Hypothetical Distribution (as defined below), the proceeds available for distribution for each share of the Series A Preferred Stock and Series A-1 Preferred Stock would be equal to or greater than \$6.57 and (y) holders of Series A-2 Preferred Stock shall not be entitled to receive any distribution pursuant to this Section 2(a) if, assuming the occurrence of a Series A Hypothetical Distribution (as defined below), the proceeds available for distribution for each share of the Series A-2 Preferred Stock would be equal to or greater than \$7.00. All distributions pursuant to this Section 2(a) shall be paid pro rata among the Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock.

(b) **Series B Liquidation Preference.** The holders of the Series B Preferred Stock shall be entitled to receive out of any assets and funds remaining after the distributions contemplated by Section 2(a) and prior to and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Common Stock, by reason of their ownership of such stock, the amount of \$2,500 per share (the "Series B Original Cost") for each share of Series B Preferred Stock then held by them; provided, however, that such holders shall not be entitled to receive any distribution pursuant to this Section 2(b) if, assuming the occurrence of a Series B Hypothetical Distribution (as defined below), the proceeds available for distribution for each share of the Series B Preferred Stock would be equal to or greater than \$2,500.

(c) **Participation.** If, upon the completion of any distributions contemplated by Sections 2(a) and 2(b), assets and funds remain available for distribution by the Corporation (such remaining assets and funds, the "Participation Funds"), then:

(i) **Series A Participation: Series B Participation.**

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(A) the holders of Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock shall be entitled to receive out of the Participation Funds, by reason of their ownership of such stock, the amount per share equal to the product of (1) the amount of the Participation Funds and (2) the Preferred Share Percentage (as defined below) for each share of Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock then held by them: and

(B) the holders of the Series B Preferred Stock shall be entitled to receive out of the Participation Funds, by reason of their ownership of such stock, the amount per share equal to the product of (1) the amount of the Participation Funds and (2) the Preferred Share Percentage for each share of Series B Preferred Stock held by them.

(ii) **Series B Additional Participation.** If the holders of Series B Preferred Stock do not receive any distributions pursuant to Section 2(b) and, assuming the occurrence of a Series B Hypothetical Distribution, the proceeds available for distribution to each share of Series B Preferred Stock would be less than \$6,250 then, in addition to any amounts payable pursuant to Section 2(c)(i)(B), the holders of the Series B Preferred Stock shall be entitled to receive by reason of their ownership of such stock the amount per share equal to the Series B Participation Preference Amount (as defined below) for each share of Series B Preferred Stock then held by them.

(iii) **Common Stock Participation.** The holders of the Common Stock shall be entitled to receive an aggregate amount equal to (A) the amount of the Participation Funds less (B) the sum of the amounts payable under Sections 2(c)(i) and (ii), such aggregate amount to be distributed among the holders of Common Stock in proportion to the shares of Common Stock then held by them on the record date of such distribution.

(iv) All distributions pursuant to this Section 2(e) shall be pari passu and no distribution to any class of the Corporation's capital stock pursuant to this Section 2(e) shall have a priority or a preference as among any distribution to any other class of the Corporation's capital stock pursuant to this Section 2(c).

(d) For purposes of this Section 2, (i) any reorganization of the Corporation by means of merger of the Corporation with or into any other corporation or other entity or person or other form of corporate reorganization in which the Corporation shall not be the continuing or surviving entity of such merger or reorganization (other than a mere reincorporation transaction) or a transaction in which the Corporation is the surviving entity but the shares of the Corporation's capital stock outstanding immediately prior to the transaction are exchanged or converted by virtue of the transaction into other property, whether in the form of securities, cash or otherwise, (ii) a sale of all or substantially all of the assets of the Corporation, or (iii) the sale (in one or a series of related transactions) of the outstanding capital stock of the Company, such transaction shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Preferred Stock to receive, at closing, cash in the amounts as specified in Sections 2(a) - (c) hereaf.

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(c) Whenever the distribution provided for in this Section 2 shall be payable in securities or property other than cash, the "fair value" of the assets or property to be distributed in such event shall be determined in good faith by the Board of Directors of the Corporation.

(f) Whenever a value per share of capital stock of the Corporation is expressed in this Section 2, such value shall be adjusted for any combinations, consolidations, stock splits, or stock distributions or stock dividends with respect to such shares.

(g) **Definitions.** As used in this Section 2, the following terms shall have the following meanings.

(i) "Preferred Share Percentage" shall equal a fraction, the numerator of which is (i) the number of shares of Common Stock into which such share of Preferred Stock is convertible pursuant to Section 4(a) hereof on the record date of such distribution and the denominator of which is (ii) the total number of shares of Common Stock then outstanding (assuming the conversion of all shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock then outstanding).

(ii) "Series A Hypothetical Distribution" means the hypothetical event (for determining the applicability of the provisions set forth in Section 2(a)) wherein all of the assets and funds available for distribution by the Corporation are deemed distributed among the holders of the Common Stock, the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock and the Series B Preferred Stock in proportion to the shares of the Common Stock then held by the holders of the Common Stock and the shares of Common Stock into which the outstanding shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock, respectively, are convertible pursuant to Section 4(a) hereof on the record date of such distribution.

(iii) "Series B Hypothetical Distribution" means the hypothetical event (for determining the applicability of any provision set forth in Sections 2(b) and 2(c)) following the distributions contemplated by Section 2(a), if any, wherein all of the remaining assets and funds are deemed distributed among the holders of the Common Stock, the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock and the Series B Preferred Stock in proportion to the shares of the Common Stock then held by the holders of the Common Stock and the shares of Common Stock into which the outstanding shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock, respectively, are convertible pursuant to Section 4(a) hereof on the record date of such distribution.

(iv) "Series B Participation Preference Amount" shall equal the product of (i) \$2,500 and (ii) the quotient obtained by dividing (A) the sum of (w) the number of shares of Common Stock then outstanding (without giving effect to the conversion of any shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock then outstanding) plus (x) the number of shares of _____

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Common Stock into which the shares of Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock are convertible pursuant to Section 4(a) hereof by (B) the sum of (y) the number of shares of Common Stock then outstanding plus (z) the number of shares of Common Stock into which the shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock are convertible pursuant to Section 4(a) hereof. (Each amount referred to in this definition to be determined on the record date of such distribution.)

3. Voting Rights.

(a) The holder of each share of Series A Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which each share of Preferred Stock could be converted on the record date for the vote or consent of stockholders and, except as otherwise required by law, shall have voting rights and powers equal to the voting rights and powers of the Common Stock. Holders of Series A-1 Preferred Stock shall have no voting rights except as otherwise required by law. With respect to any vote that is limited to the holders of Preferred Stock and does not include the holders of Common Stock, the holder of each share of Preferred Stock (other than Series A-1 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 on the record date for such vote. The holder of each share of Preferred Stock (other than Series A-1 Preferred Stock) shall be entitled to notices of any shareholders' meeting in accordance with the bylaws of the Corporation and shall vote with holders of the Common Stock upon the election of directors and upon any other matter submitted to a vote of stockholders, except those matters required by law to be submitted to a class vote. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares of Common Stock into which shares of Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half rounded upward to one). Notwithstanding the foregoing, the holders of shares of Series A-1 Preferred Stock shall be entitled to receive all notices delivered by the Corporation to holders of its Common Stock.

(b) Notwithstanding the provisions of Section 242(b)(2) of the Delaware Statute, the holders of Common Stock shall vote together with the holders of each series of Preferred Stock as a single class with respect to any proposed amendments herein that would increase the number of authorized shares of Common Stock or Preferred Stock with each such share being entitled to such number of votes per share as is provided in this Article FOURTH, and the holders of Common Stock shall not be entitled to a separate class vote with respect thereto.

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

(a) Right to Convert/Automatic Conversions.

(i) Each share of Series A Preferred Stock and Series A-1 Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for the Series A Preferred Stock and Series A-1 Preferred Stock, into such number of fully paid

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and nonassessable shares of Common Stock as is determined by dividing the Series A Original Cost by the Series A Conversion Price (as defined below) then in effect. The "Series A Conversion Price" shall initially be the Series A Original Cost. The initial Series A Conversion Price shall be subject to adjustment from time to time as hereinafter provided. Each share of Series A-2 Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for the Series A-2 Preferred Stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Series A-2 Original Cost by the Series A-2 Conversion Price (as defined below) then in effect. The Series A-2 Conversion Price shall initially be the Series A-2 Original Cost. The initial Series A-2 Conversion Price shall be subject to adjustment from time to time as hereinafter provided. Each share of Series B Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for the Series B Preferred Stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Series B Original Cost by the Series B Conversion Price. The "Series B Conversion Price" shall be \$1.40. The Series B Conversion Price shall be subject to adjustment from time to time as hereinafter provided. No amount shall be payable by a stockholder in respect of the conversion of any share of Series A Preferred Stock, Series A-1 Preferred Stock or Series B Preferred Stock.

(ii) Upon the consummation of a firmly underwritten public offering of shares of Common Stock of the Corporation pursuant to the Securities Act of 1933, as amended (the "Act"), with aggregate proceeds to the Corporation of \$20,000,000 at a price per share to the public equal to or in excess of \$3.9444 per share of Common Stock (as constituted on the Original Issue Date) (the "Series A Event of Conversion"), all shares of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock then outstanding shall, by virtue of and simultaneously with the occurrence of the Series A Event of Conversion and without any action on the part of the holder thereof, be deemed automatically converted into such number of fully paid and nonassessable shares of Common Stock determined in accordance with Section 4(a)(i).

(b) **Mechanics of Conversion.** No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of a fraction of a share of Common Stock, the Corporation shall, in lieu of issuing any fractional shares to which the holder would be otherwise entitled, pay cash equal to the fair market value of such fractional share on the date of conversion, which fair market value shall be determined in good faith by the Board of Directors. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock pursuant to Section 4(a)(i) and to receive certificates therefor, or, in the case of a conversion pursuant to Section 4(a)(ii), be entitled to receive certificates for Common Stock, such holder shall surrender the certificate or certificates for the Preferred Stock being converted, as the case may be, duly endorsed, at the office of the Corporation or of any transfer agent for the Preferred Stock, as the

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Corporation pursuant to an arrangement approved by the Board of Directors of the Corporation:

(E) in connection with a Series A Event of Conversion;

(F) in connection with a stock dividend in lieu of a cash dividend, as contemplated by Sections 1(a)(i) and (ii) hereof;

(G) in connection with the issuance of warrants to purchase shares of Series A Preferred Stock issued to Interactive Capital Partners, LLC on the Original Issue Date;

(H) in connection with the option to purchase shares of Series B Preferred Stock held by Douglas Milne on the Original Issue Date; or

(I) in connection with options or warrants outstanding as of the Original Issue Date.

(ii) Deemed Issue of Additional Common Shares.

(1) Options and Convertible Securities. In the event the Corporation, at any time or from time to time after the Original Issue Date, 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 of Common Stock (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Common Shares 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 Additional Common Shares are deemed to be issued:

(A) no further adjustment in the Series A Conversion Price or Series A-2 Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(B) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase or decrease in the consideration payable to the Corporation, or in the number of shares of Common Stock issuable upon the exercise, conversion or exchange thereof, the Series A Conversion Price and/or Series A-2 Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any

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(E) in the case of any Options which expire by their terms not more than 60 days after the date of issue thereof, an adjustment of the Series A Conversion Price or Series A-2 Conversion Price shall be made until the expiration or exercise of all such Options.

(2) **Stock Dividends.** In the event the Corporation, at any time or from time to time after the Original Issue Date, shall declare or pay any dividend or other distribution on the Common Stock payable in shares of Common Stock, then and in any such event, Additional Common Shares shall be deemed to have been issued immediately after the close of business on the record date for the determination of holders of any class of securities entitled to receive such dividend or other distribution for purposes of adjusting the Series A Conversion Price, the Series A-2 Conversion Price or the Series B Conversion Price; provided, however, that if such record date is fixed and such dividend or other distribution is not fully paid, the only Additional Common Shares deemed to have been issued shall be the number of shares of Common Stock actually issued as of the close of business on such record date, and the Series A Conversion Price, the Series A-2 Conversion Price or the Series B Conversion Price shall be recomputed accordingly.

(iii) **Adjustment of Conversion Price Upon Issuance of Additional Common Shares.** If, and only if, the Corporation, at any time after the Original Issue Date shall issue Additional Common Shares (including Additional Common Shares deemed to be issued pursuant to Section 4(e)(ii)) without consideration or for a consideration per share less than the Series A Conversion Price and/or Series A-2 Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, the Series A Conversion Price and/or Series A-2 Conversion Price, as applicable, shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying the Series A Conversion Price and/or Series A-2 Conversion Price, as applicable, by a fraction (expressed as a decimal), the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Company for the total number of Additional Shares of Common Stock so issued would purchase at the Series A Conversion Price and/or Series A-2 Conversion Price, as applicable, in effect immediately prior to such issuance, and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such Additional Shares of Common Stock so issued. For the purpose of the above calculation, the number of shares of Common Stock outstanding immediately prior to such issue shall be calculated on a fully diluted basis, as if all shares of Preferred Stock and all Convertible Securities had been fully converted into shares of Common Stock immediately prior to such issuance and any outstanding warrants, options or other rights for the purchase of shares of stock or convertible securities had been fully exercised immediately prior to such issuance (and the resulting securities fully converted into shares of Common Stock, if so convertible) as of such date, but not including in such calculation any additional shares of Common Stock issuable with respect to shares of Preferred Stock, Convertible Securities, or outstanding options, warrants or other rights for the purchase of shares of stock or convertible securities, solely as a result of the adjustment of the Conversion Price (or other

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conversion rates) resulting from the issuance of the Additional Shares of Common Stock causing the adjustment in question.

(iv) **Determination of Consideration.** For purposes of this Section 4(c), the consideration received by the Corporation for the issue of any Additional Common Shares 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, excluding amounts paid or payable for any accrued interest or accrued dividends;

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

(C) in the event Additional Common Shares are issued together with other shares or securities or other assets of the Corporation for consideration so received, be computed as provided in clause (A) and (B) above, as determined in good faith by the Board of Directors.

(2) **Options and Convertible Securities.** The consideration per share received by the Corporation for Additional Common Shares deemed to have been issued pursuant to Section 4(a)(ii)(1), relating to Options and Convertible Securities, shall be determined by dividing:

(x) 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

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

(3) **Stock Dividends.** Any Additional Common Shares deemed to have been issued relating to stock dividends or distributions shall be deemed to have been issued for no consideration.

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(v) Adjustments for Subdivisions, Combinations or Consolidation of Common Stock. In the event the outstanding Common Stock shall be subdivided (by split or otherwise), into a greater number of shares of Common Stock, the Series A Conversion Price, the Series A-2 Conversion Price and the Series B Conversion Price then in effect shall, concurrently with the effectiveness of such subdivision, be proportionately adjusted. In the event the outstanding Common Stock shall be combined or consolidated, by reclassification or otherwise, into a lesser number of shares of Common Stock, the Series A Conversion Price, the Series A-2 Conversion Price and the Series B Conversion Price then in effect shall, concurrently with the effectiveness of such combination or consolidation, be proportionately increased.

(vi) Adjustments for Other Distributions. In the event the Corporation at any time or from time to time makes, or fixes a record date for the determination of holders of Common Stock entitled to receive any distribution payable in securities or other property of the Corporation other than Common Stock and other than as otherwise adjusted in this Section 4, then and in each such event provision shall be made so that the holders of the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock and the Series B Preferred Stock shall receive upon conversion thereof, in addition to the number of shares of Common Stock receivable thereupon, the amount of securities and other property of the Corporation which they would have received had their shares of the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock and the Series B Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the date of conversion, retained such securities and other property receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Section 4 with respect to the rights of the holders of the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock and the Series B Preferred Stock.

(vii) Adjustments for Reclassification, Exchange and Substitution. If the Common Stock issuable upon conversion of the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock or the Series B 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 or otherwise (other than a subdivision or combination of shares provided for above), the Series A Conversion Price, the Series A-2 Conversion Price and the Series B Conversion Price then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted such that the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock or the Series B Preferred Stock, as applicable, shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, that number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of the Series A Preferred Stock, the Series A-1 Preferred Stock, the Series A-2 Preferred Stock or the Series B Preferred Stock immediately before that change.

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(viii) **Reorganizations, Mergers, Consolidations or Sales of Assets.** If at any time or from time to time, there is a capital reorganization of the Common Stock (other than a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section 4(e), as a part of such capital reorganization, provision shall be made so that the holders of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock shall thereafter be entitled to receive upon conversion of Series A Preferred Stock, Series A-1 Preferred Stock, or Series B Preferred Stock the number of shares of stock or other securities or property of the Corporation to which a holder of the number of shares of Common Stock deliverable upon conversion of such series of Preferred Stock would have been entitled on such capital reorganization, subject to adjustment in respect of such stock or securities by the terms thereof. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4(e) with respect to the rights of the holders of Preferred Stock after the capital reorganization to the end that the provisions of this Section 4 hereof (including adjustment of the Series A Conversion Price, the Series A-2 Conversion Price and the Series B Conversion Price then in effect and the number of shares issuable upon conversion of the Preferred Stock) shall be applicable after that event and be as nearly equivalent as practicable.

(d) **No Impairment.** The Corporation shall not, by amendment of its Certificate of Incorporation or through any reorganization, 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 shall at all times in good faith assist in the carrying out of all the provisions of this Section 4 hereof 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 the Preferred Stock against impairment.

(e) **Certificates as to Adjustments.** Upon the occurrence of each adjustment or readjustment of the Series A Conversion Price, the Series A-2 Conversion Price or the Series B Conversion Price pursuant to this Section 4 hereof, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of shares of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in reasonable 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 Series A Conversion Price at the time in effect, (iii) the Series A-2 Conversion Price at the time in effect, (iv) the Series B Conversion Price at the time in effect, and (v) 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 shares of Preferred Stock.

(f) **Notice of Record Date.** In the event that the Corporation shall propose at any time:

(i) to declare any dividend or distribution upon its Common Stock, whether or not a regular cash dividend or a dividend payable in shares of Common Stock, and whether or not out of earnings or earned surplus;

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(ii) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights;

(iii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock, or effect a Series A Event of Conversion; or

(iv) to merge or consolidate with or into any other corporation, or sell, lease or convey all or substantially all its property or business, or to liquidate, dissolve or wind up or to enter into any other transaction contemplated by Section 2(c)(i) or (ii);

then, in connection with each such event, the Corporation shall send to the holders of the Preferred Stock:

(1) at least 20 days' prior written notice of the date on which a record shall be taken for such dividend, distribution or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote in respect of the matters referred to in (ii) and (iv) above; and

(2) in the case of the matters referred to in (iii) and (iv) above, in the event a record date is taken with respect to any such matter, at least 20 days' prior written notice of such record date or, if no such record date is taken, at least 20 days' prior written notice of the date when such matters shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their shares of Common Stock for securities or other property deliverable upon the occurrence of such event).

Each such written notice shall be delivered personally or sent by first class mail, postage prepaid, addressed to the holders of Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock at the address for each such holder as shown on the books of the Corporation.

(g) **Series A-1 Preferred Stock.** Any holder of Series A-1 Preferred Stock may convert all or any portion of the shares of Series A-1 Preferred Stock (including any fraction of a share) held by such holder into an identical number of shares of Series A Preferred Stock only upon the occurrence of any of (i) any sale, lease, assignment, transfer or other conveyance of all or substantially all of the assets of the Company or any consolidation or merger involving the Company in which the Company is not the surviving entity, or any reclassification or other change of any stock, or any recapitalization, or any dissolution, liquidation or winding up of the Company, (ii) any sale, transfer or other conveyance of Series A-1 Preferred Stock pursuant to any co-sale rights granted to holders of Series A-1 Preferred Stock in any agreement among stockholders of the Company, or (iii) any issuance by the Company of additional Equity Securities (defined below) such that the total number of all Equity Securities having voting rights held by each holder of Series A Preferred Stock (together with the number of shares of Series A-1 Preferred Stock to be converted by such holder into shares of Series A Preferred Stock following such issuance) shall constitute less than twenty percent (20%) of all of the Company's issued and outstanding Equity Securities having voting rights (including such converted shares

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of Series A-1 Preferred Stock). "Equity Security" means any stock or similar security, including without limitation, securities containing equity features and securities containing profit participation features, or any security convertible or exchangeable, with or without consideration, into or for any stock or similar security, or any security carrying any warrant or right to subscribe for or purchase any stock or similar security, or any such warrant or right.

(h) Issue Taxes. The Corporation shall pay any and all issue and other taxes that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of Series A Preferred Stock, Series A-1 Preferred Stock, Series A-2 Preferred Stock and Series B Preferred Stock pursuant hereto; provided, however, that the Corporation shall not be obligated to pay any transfer taxes resulting from any transfer requested by any holder in connection with any such conversion.

(i) 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 outstanding shares of the Preferred Stock and such number of shares of Series A Preferred Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A-1 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 of the then outstanding shares of the Preferred Stock, the Corporation shall 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, including, without limitation, utilizing its best efforts to obtain the requisite stockholder approval of any necessary amendment to the Certificate of Incorporation.

5. Redemption of Series A, Series A-1 and Series A-2 Preferred Stock.

(a) Each holder of the Series A Preferred Stock, Series A-1 Preferred Stock and Series A-2 Preferred Stock may elect to require that the Company redeem all (but not less than all) shares of such series of Preferred Stock owned by such holder on the fifth anniversary of the Original Issue Date (the "Series A Redemption Date") in accordance with the terms of this Section 5 (a) "Series A Redemption" as the applicable Redemption Date (as set forth in this Section); provided, however, that the Corporation shall not be obligated to effect any Series A Redemption if on or prior to November 28, 2003, a Series A Event of Conversion has occurred.

(b) Notice of any required redemption shall be delivered to the Corporation by such requesting holders not less than 90 nor more than 180 days prior to the Series A Redemption Date and shall state the number of such series of Preferred Stock to be so redeemed.

(c) The Redemption Price shall be (i) the Series A Original Cost plus all accrued but unpaid dividends for any share of Series A Preferred Stock or Series A-1 Preferred Stock and (ii) the Series A-2 Original Cost plus accrued but unpaid dividends for any share of Series A-2 Preferred Stock (in each case, as adjusted for any combinations, consolidations, or stock distributions or stock dividends with respect to such shares).

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(b) **Definitions.** As used in this Section 5, the following terms shall have the following meanings:

(i) "Affiliate" with respect to any Person shall mean any Person that directly or indirectly controls, or is under common control with, or is controlled by such Person. As used in this definition, "control" (including with its correlative meanings, "controlled by" and "under common control with") shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person (whether through ownership of securities or partnerships or other ownership interests, by contract or otherwise).

(ii) "Person" shall mean an individual, a partnership, a corporation, an association, a joint stock company, a trust, a joint venture, an unincorporated organization and a governmental entity or any department, agency or political subdivision thereof.

6. **Redemption of Series B Preferred Stock**

(a) The Series B Preferred Stock may not be redeemed at the option of the Corporation prior to December 31, 2001, except as set forth below. The Series B Preferred Stock may be redeemed, in whole or in part, at the option of the Corporation, on or after December 31, 2001, at a price in cash equal to \$2,500 per share (as adjusted for any combinations, consolidations, or stock distributions or stock dividends with respect to such shares) (the "Series B Redemption Price").

(b) In case of redemption of less than all of the shares of Series B Preferred Stock at the time outstanding, the shares to be redeemed shall be selected pro rata or by lot as determined by the Corporation in its sole discretion.

(c) Notice of any redemption shall be sent by or on behalf of the Corporation not less than 30 nor more than 60 days prior to the date specified for redemption in such notice (the "Series B Redemption Date"), by first class mail, postage prepaid, to all holders of record of the Series B Preferred Stock at their last addresses as they shall appear on the books of the Corporation; provided, however, that no failure to give such notice of any defect therein or in the mailing thereof shall affect the validity of the proceedings for the redemption of any shares of Series B Preferred Stock except as to the holder to whom the Corporation has failed to give notice or except as to the holder to whom notice was defective. In addition to any information required by law such notice shall state: (i) the Series B Redemption Date; (ii) the Series B Redemption Price; (iii) the number of shares of Series B Preferred Stock to be redeemed and, if less than all shares held by such holder are to be redeemed, the number of such shares to be redeemed; and (iv) the place or places where certificates for such shares are to be surrendered for payment of the Series B Redemption Price, including any procedures applicable to redemptions to be accomplished through book-entry transfers. Upon the mailing of any such notice of redemption, the Corporation shall become obligated to redeem at the time of redemption specified therein all shares called for redemption (unless any such shares are converted by the holder thereof prior to the Redemption Date in accordance with Section 4(a)(i) hereof).

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(d) If notice has been mailed in accordance with Section 6(c) above and provided that on or before the Series B Redemption Date specified in such notice, all funds necessary for such redemption shall have been set aside by the Corporation, separate and apart from its other funds in trust for the ~~the~~ benefit of the holders of the shares so called for redemption, so as to be, and to continue to be available therefor, then, from and after the Series B Redemption Date, said shares shall no longer be deemed to be outstanding and shall not have the status of shares of Series B Preferred Stock, and all rights of holders thereof as stockholders of the Corporation (except the right to receive from the Corporation the Series B Redemption Price) shall cease. Upon surrender, in accordance with said notice, of the certificates for any shares so redeemed (properly endorsed or assigned for transfer, if the Corporation shall so require and the notice shall so state), such shares shall be redeemed by the Corporation at the Series B Redemption Price. In case fewer than all of the shares represented by any such certificate are redeemed, a new certificate or certificates shall be issued representing the unredeemed shares without cost to the holder thereof. Nothing in this Section 6 shall limit the right of the holders of shares of Series B Preferred Stock which have been called for redemption to exercise conversion rights pursuant to Section 4(a)(i) prior to the Redemption Date.

(e) Any funds deposited with a bank or trust company for the purpose of redeeming Series B Preferred Stock shall be irrevocable except that:

(i) the Corporation shall be entitled to receive from such bank or trust company the interest or other earnings, if any, earned on any money so deposited in trust, and the holders of any shares redeemed shall have no claim to such interest or other earnings; and

(ii) any balance of moneys so deposited by the Corporation and unclaimed by the holders of the Series B Preferred Stock entitled thereto at the expiration of two years from the applicable Redemption Date shall be repaid, together with any interest or other earnings earned thereon to the Corporation, and after any such repayment, the Holders of the shares entitled to the funds so repaid to the Corporation shall look only to the Corporation for payment without interest or other earnings.

(f) No Series B Preferred Stock may be redeemed except with funds legally available for such purpose.

7. **No Reissuance of Preferred Stock.** No shares of Preferred Stock acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be reissued, and any such shares shall be canceled, retired, and eliminated from the shares which the Corporation shall be authorized to issue; ~~provided, however,~~ that any such redeemed or purchased shares of Preferred Stock shall be eliminated from the shares which the Corporation shall be authorized to issue only upon the filing with the Secretary of State of the State of Delaware of a certificate of amendment of the Certificate of Incorporation of the Corporation in compliance with the Delaware Statute.

ARTICLE FIFTH: 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, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of

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