

06-15-2001



Form PTO-1594 (Rev. 03/01) OMB No. 0651-0027 (exp. 5/31/2002)

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

Tab settings

To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

6801

Paciolan Systems, Inc.

- Individual(s) Association General Partnership Limited Partnership Corporation-State California Other

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

3. Nature of conveyance:

- Assignment Merger Security Agreement Change of Name Other

Execution Date: May 24, 2001

2. Name and address of receiving party(ies)

Name: Paciolan, Inc.

Internal Address:

Address:

Street Address: 17305 Von Karman Ave.

City: Irvine State: CA Zip: 92614

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

If assignee is not domiciled in the United States, a domestic representative designation is attached: Yes No (Designations must be a separate document from assignment) Additional name(s) & address(es) attached? Yes No

4. Application number(s) or registration number(s):

A. Trademark Application No.(s)

75/589,051 76/203,698

B. Trademark Registration No.(s)

Additional number(s) attached Yes No

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

Name: Susan J. Barricella

Internal Address: Arter & Hadden LLP

Street Address: Five Park Plaza

Suite 1000

City: Irvine State: CA Zip: 92614

6. Total number of applications and registrations involved: 2

7. Total fee (37 CFR 3.41): \$ 65.00

- Enclosed Authorized to be charged to deposit account

8. Deposit account number:

(Attach duplicate copy of this page if paying by deposit account)

DO NOT USE THIS SPACE

9. 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.

Susan J. Barricella Name of Person Signing

Susan J. Barricella Signature

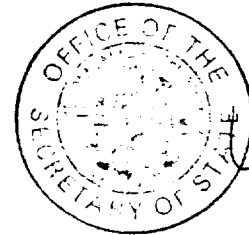
June 4, 2001 Date

Total number of pages including cover sheet, attachments, and document: 25

Mail documents to be recorded with required cover sheet information to: Commissioner of Patent & Trademarks, Box Assignments Washington, D.C. 20231

TRADEMARK REEL: 002313 FRAME: 0918

# State of California



*[Handwritten signature]*

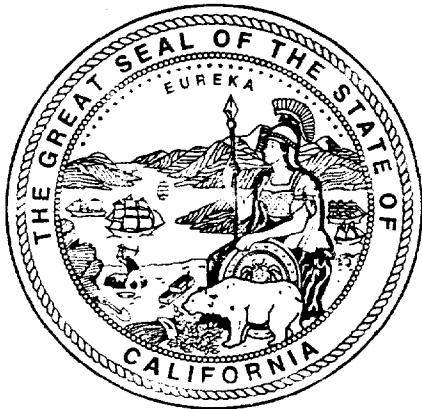
## SECRETARY OF STATE

I, *BILL JONES*, Secretary of State of the State of California, hereby certify:

That the attached transcript of 13 page(s) has been compared with the record on file in this office, of which it purports to be a copy, and that it is full, true and correct.

**IN WITNESS WHEREOF**, I execute this certificate and affix the Great Seal of the State of California this day of

11 15 2001



*Bill Jones*

Secretary of State

**AMENDED AND RESTATED  
ARTICLES OF INCORPORATION  
OF  
PACIOLAN SYSTEMS INC.**

**ENDORSED - FILED**  
in the office of the Secretary of State  
of the State of California

MAY 24 2001

BILL JONES, Secretary of State

Jane Kleinberger and Mark Adamson hereby certify that:

**ONE:** They are the duly elected and acting Chief Executive Officer and Secretary, respectively, of **PACIOLAN SYSTEMS INC.**, a California corporation (the "Corporation" or the "Company").

**TWO:** The Articles of Incorporation of this corporation are hereby amended and restated to read as follows:

**ARTICLE I**

The name of the Corporation is **PACIOLAN, INC.** (the "Corporation" or the "Company").

**ARTICLE II**

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.

**ARTICLE III**

**A.** This Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares of stock of all classes which the Corporation shall have the authority to issue is Fifty Million (50,000,000) shares. Forty-Three Million Six Hundred Ten Thousand Two Hundred Twenty-Four (43,610,224) shares shall be Common Stock and Six Million Three Hundred Eighty-Nine Thousand Seven Hundred Seventy-Six (6,389,776) shares shall be Preferred Stock.

**B.** The Common Stock shall consist of two series, Class A and Class B. Forty-Three Million Four Hundred Eighteen Thousand Eighty-Four (43,418,084) of the authorized shares are hereby designated "Class A Common Stock" (the "Class A Common Stock") and One Hundred Ninety-Two Thousand One Hundred Forty (192,140) of the authorized shares are hereby designated "Class B Common Stock" (the "Class B Common Stock"). The Preferred Stock shall consist of two series, Series A and Series B. Three Million One Hundred Ninety-Four Thousand Eight Hundred Eighty-Eight (3,194,888) authorized shares are hereby designated "Series A Preferred Stock" (the "Series A Preferred") and Three Million One Hundred Ninety-Four Thousand Eight Hundred Eighty-Eight (3,194,888) of the authorized shares are hereby designated "Series B Preferred Stock" (the "Series B Preferred").

Immediately upon the filing of this Amended and Restated Articles of Incorporation, each outstanding share of the Corporation's "Class A Common Stock" and "Class B Common Stock" shall be reclassified as one share of each series of "Class A Common Stock" and "Class B Common Stock," respectively. In addition, each outstanding share of the Corporation's "Series A Preferred Stock" shall be reclassified as one share of the series "Series A Preferred Stock."

B. The rights, preferences, privileges, restrictions and other matters relating to the Series A Preferred and Series B Preferred are as set forth in this Article III (B).

1. Dividend Rights.

(a) Holders of Series B Preferred, in preference to the holders of any other stock of the Company ("Junior Stock"), shall be entitled to receive, as set forth herein or at such earlier time as declared by the Board of Directors, but only out of funds that are legally available therefor, dividends at the rate of \$0.02 per share, plus ten percent (10%) of the Series B Original Issue Price (as defined below) per annum on each outstanding share of Series B Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares). The "Series B Original Issue Price" of the Series B Preferred shall be Three Dollars and Thirteen Cents (\$3.13). Such dividends shall be cumulative, whether or not declared, and shall be payable, at the election of the holder in either cash or additional shares of Series B Preferred, upon a Liquidation (as defined in Section 3 below) of the Company pursuant to Section 3 below (including, without limitation, a deemed Liquidation pursuant to Section 3(d) below), upon the conversion of the Series B Preferred pursuant to Section 4, or upon the redemption of the Series B Preferred pursuant to Section 5 below.

(b) Subject to the prior rights of holders of Series B Preferred Stock at the time outstanding as provided in subsection 1(a) above, the holders of Series A Preferred, in preference to the holders of any other Junior Stock, shall be entitled to receive, as set forth herein or at such earlier time as declared by the Board of Directors, but only out of funds that are legally available therefor, dividends at the rate of ten percent (10%) of the Series A Original Issue Price (as defined below) per annum on each outstanding share of Series A Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares). The "Series A Original Issue Price" of the Series A Preferred shall be Three Dollars and Thirteen Cents (\$3.13). Such dividends shall be cumulative, whether or not declared, and shall be payable, at the election of the holder in either cash or additional shares of Series A Preferred, upon a Liquidation of the Company pursuant to Section 3 below (including, without limitation, a deemed Liquidation pursuant to Section 3(d) below), upon the conversion of the Series A Preferred pursuant to Section 4 below, or upon the redemption of the Series A Preferred pursuant to Section 5 below.

(c) So long as any shares of Series A Preferred or Series B Preferred shall be outstanding, no dividend, whether in cash or property, shall be paid or declared, nor shall any other distribution be made, on any Junior Stock (other than the Series A Preferred), nor shall any shares of any Junior Stock of the Company be purchased, redeemed, or otherwise acquired for value by the Company (except for acquisitions of Class A Common Stock by the Company

pursuant to agreements which permit the Company to repurchase such shares upon termination of services to the Company or in exercise of the Company's right of first refusal upon a proposed transfer) until all dividends (set forth in Sections 1(a) and 1(b) above) on the Series A Preferred and Series B Preferred shall have been paid or declared and set apart. In the event dividends are paid on any share of Class A Common Stock, an additional dividend shall be paid with respect to all outstanding shares of Series A Preferred and Series B Preferred in an amount equal per share (on an as-if-converted to Class A Common Stock basis) to the amount paid or set aside for each share of Class A Common Stock. The provisions of this Section 1(c) shall not, however, apply to (i) a dividend payable in Class A Common Stock, (ii) the acquisition of shares of any Junior Stock in exchange for shares of any other Junior Stock, or (iii) any repurchase of any outstanding securities of the Company that is unanimously approved by the Company's Board of Directors. The holders of the Series A Preferred and Series B Preferred expressly waive their rights, if any, as described in Sections 502, 503 and 506 of the General Corporation Law of California as they relate to repurchase of shares upon termination of employment or service as a consultant or director.

## 2. Voting Rights.

(a) General Rights. Except as otherwise provided herein or as required by law, the Preferred Stock shall be voted equally with the shares of the Class A Common Stock of the Company and not as a separate class, at any annual or special meeting of shareholders of the Company, and may act by written consent in the same manner as the Class A Common Stock, in either case upon the following basis: each holder of shares of Preferred Stock shall be entitled to such number of votes as shall be equal to the whole number of shares of Class A Common Stock into which such holder's aggregate number of shares of Preferred Stock are convertible (pursuant to Section 4 hereof); provided, however, that with respect to determining the number of shares of Class A Common Stock into which such holder's Series B Preferred Stock is convertible for purposes of this Section 2 only, the Conversion Price of the Series B Preferred Stock shall be equal to the Series A Preferred Conversion Price.

(b) Separate Vote of Preferred Stock. For so long as any shares of Preferred Stock remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least a majority of the outstanding Preferred Stock, voting together as a single class, shall be necessary for effecting or validating the following actions:

(i) any amendment, alteration, or repeal of any provision of the Articles of Incorporation or the Bylaws of the Company that changes the authorized number of directors of the Company's Board of Directors or changes the voting powers, preferences, or other special rights or privileges, or restrictions of the Preferred Stock;

(ii) any increase in the authorized number of shares of Preferred Stock;

(iii) any sale, authorization or any designation, whether by reclassification or otherwise, of any new class or series of stock or any other securities

convertible into equity securities of the Company ranking on a parity with or senior to the Preferred Stock in rights of redemption, liquidation preference, voting or dividends or any increase in the authorized or designated number of any such new class or series;

(iv) any agreement by the Company or its shareholders regarding an Acquisition (as defined in Section 3(d)) or series of related acquisitions, in excess of \$1 million before August 4, 2002 and \$3 million thereafter;

(v) any agreement by the Company or its shareholders regarding an Asset Transfer (as defined in Section 3(d) below);

(vi) engaging in any business other than the business in which the Company or its subsidiaries are currently engaged; or

(vii) any Liquidation (as defined in Section 3 below).

(c) Election of Board of Directors. For so long as any shares of Preferred Stock remain outstanding (i) the holders of Preferred Stock, voting together as a single class, shall be entitled to elect two (2) members of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director; (ii) the holders of Class A Common Stock, voting as a separate class, shall be entitled to elect two (2) members of the Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors; and (iii) the holders of Class A Common Stock and Preferred Stock, voting together as a single class on an as-if-converted basis, shall be entitled to elect all remaining members of the Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors.

### 3. Liquidation Rights.

(a) Upon any liquidation, dissolution or winding up of the Company (collectively, a "Liquidation"), whether voluntarily or involuntarily, before any distribution or payment shall be made to the holders of Junior Stock, the holders of Series B Preferred shall be entitled to be paid out of the assets of the Company legally available therefor, an amount per share of Series B Preferred equal to the greater of either (i) the Series B Original Issue Price plus all accrued but unpaid dividends on such shares of Series B Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) for each share of Series B Preferred held by them; *provided, however,* that if, upon any such Liquidation, the assets of the Company shall be insufficient to make payment in full to all holders of Series B Preferred of the liquidation preference set forth in this Section 3(a)(i), then such assets shall be distributed among the holders of Series B Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled, or (ii) the product obtained by multiplying the Series B Original Issue Price by a factor (the

“Sales Price Factor”) as determined below, based upon the total proceeds which would be received by the Company (or the Company’s shareholders in the event of a deemed Liquidation pursuant to Section 3(d) below) upon such Liquidation as follows:

| <u>Proceeds from Liquidation</u> | <u>Factor</u> |
|----------------------------------|---------------|
| \$0 - \$20,000,000               | 1.000         |
| \$20,000,001 - \$25,000,000      | 0.933         |
| \$25,000,001 - \$30,000,000      | 0.867         |
| \$30,000,001 - \$35,000,000      | 0.800         |
| \$35,000,001 - \$40,000,000      | 0.733         |
| \$40,000,001 - \$45,000,000      | 0.667         |
| \$45,000,001 - \$50,000,000      | 0.600         |
| \$50,000,001 - \$55,000,000      | 0.533         |
| \$55,000,001 - \$60,000,000      | 0.467         |
| \$60,000,001 - \$65,000,000      | 0.400         |
| \$65,000,001 - \$70,000,000      | 0.333         |
| \$70,000,001 - \$75,000,000      | 0.267         |
| \$75,000,001 - \$80,000,000      | 0.200         |
| \$80,000,001 - \$85,000,000      | 0.133         |
| \$85,000,001 - \$90,000,000      | 0.067         |

,plus all accrued but unpaid dividends on such shares of Series B Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares).

(b) Upon the completion of the distribution to the holders of Series B Preferred required by Section 3(a) above, before any distribution or payment shall be made to the holders of other Junior Stock, the holders of Series A Preferred shall be entitled to be paid out of the remaining assets of the Company legally available therefor, if any, an amount per share of Series A Preferred equal to the greater of either (i) the Series A Original Issue Price plus all accrued but unpaid dividends on such shares of Preferred Stock (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) for each share of Series A Preferred held by them); *provided, however*, that if, upon any such Liquidation, the assets of the Company shall be insufficient to make payment in full to all holders of Series A Preferred of the liquidation preference set forth in this Section 3(b)(i), then such assets shall be distributed among the holders of Series A Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled, or (ii) the product obtained by multiplying the Series A Original Issue Price by the Sales Price Factor as determined in Section 3(a) above, based upon the total proceeds which would be received by the Company (or the Company’s shareholders in the event of a deemed Liquidation pursuant to Section 3(d) below) upon such Liquidation, plus all accrued but unpaid dividends on such shares of Series A Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares).

(c) Upon the completion of the distribution to the holders of Series B Preferred

of the Class A Common Stock, Class B Common Stock, Series A Preferred and Series B Preferred on an as-converted to Class A Common Stock basis; *provided, however*, that in the event that the aggregate amount payable pursuant to Sections 3(a), 3(b) and this Section 3(c) with respect to a share of Series A Preferred or Series B Preferred would be greater based on an aggregate "Proceeds from Liquidation" rounded down to the closest Five Million Dollar (\$5,000,000) category, then the amount payable to the Series A Preferred or Series B Preferred pursuant to Section 3(a)(ii) or 3(b)(ii), as applicable, shall be calculated by rounding down the "Proceeds from Liquidation" to the closest Five Million Dollar (\$5,000,000) category and the difference between the actual liquidation amount and the "Proceeds from Liquidation" as rounded down shall be distributed ratably to the holders of the Class A Common Stock and Class B Common Stock, on an as-converted to Class A Common Stock basis. For instance, a "Proceeds from Liquidation" of \$50,000,100 would be rounded down to \$50,000,000 for purposes of calculating the amount payable to the Series A Preferred.

For the purpose of calculating the amount payable to the Series A Preferred or Series B Preferred pursuant to Section 3(a)(ii) or 3(b)(ii), as applicable, in the event that the proceeds from such Liquidation are greater than \$90,000,000 such assets shall be distributed ratably to the holders of the Class A Common Stock, Class B Common Stock, Series A Preferred and Series B Preferred on an as-converted to Class A Common Stock basis, and any accrued but unpaid dividends shall not be payable nor considered in determining such pro rata allocation; *provided, however*, that if the amount to be received by the Series A Preferred or Series B Preferred would not be equal to at least \$7.52 per share of Series A Preferred or Series B Preferred, respectively (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares), then each share of the Series A Preferred or Series B Preferred, as applicable, shall be entitled to an amount per share equal to the product obtained by multiplying the Series A Original Issue Price or Series B Original Issue Price, as applicable, by 0.067 and after the payment of such amount, the remaining assets of the Company legally available for distribution, if any, shall be distributed ratably to the holders of the Class A Common Stock, Class B Common Stock, Series A Preferred and Series B Preferred on an as-converted to Class A Common Stock basis.

(d) The following events shall be considered a Liquidation under this Section 3:

(i) any consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, in which the shareholders of the Company immediately prior to such consolidation, merger or reorganization, own less than 50% of the Company's voting power immediately after such consolidation, merger or reorganization, or any transaction or series of related transactions to which the Company is a party in which in excess of fifty percent (50%) of the Company's voting power is transferred, excluding any consolidation or merger effected exclusively to change the domicile of the Company (an "Acquisition");

(ii) a sale, lease or other disposition of all or substantially all of the assets of the Company (an "Asset Transfer");

(iii) in any of such events, if the consideration received by this



(ii) a sale, lease or other disposition of all or substantially all of the assets of the Company (an "Asset Transfer");

(iii) in any of such events, if the consideration received by this corporation is other than cash, its value will be deemed its fair market value as determined in good faith by the Board of Directors. Any securities shall be valued as follows:

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

(1) If traded on a securities exchange or through the Nasdaq National Market, the value shall be deemed to be the average of the closing prices of the securities on such quotation system over the thirty (30) day period ending three (3) days prior to the closing;

(2) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the thirty (30) day period ending three (3) days prior to the closing; and

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

(B) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a shareholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in (A)(1), (2) or (3) to reflect the approximate fair market value thereof, determined by the Board of Directors in good faith.

#### 4. Conversion Rights.

The holders of the Preferred Stock shall have the following rights with respect to the conversion of the Preferred Stock into shares of Class A Common Stock (the "Conversion Rights"):

(a) Optional Conversion. Subject to and in compliance with the provisions of this Section 4, each share of Preferred Stock, plus all accrued but unpaid dividends on such shares of Preferred Stock, may, at the option of the holder, be converted at any time into fully-paid and nonassessable shares of Class A Common Stock; *provided, however*, that no dividend shall be payable upon such conversion which occurs within ninety (90) days following the Company's delivery of a notice to the holders of Preferred Stock that the Company intends to engage in a transaction that would constitute a Liquidation, with total proceeds to be received by the Company in excess of \$90,000,000. The number of shares of Class A Common Stock to which a holder of Preferred Stock shall be entitled upon conversion shall be the product obtained by multiplying the "Series A Preferred Conversion Rate" or "Series B Preferred Conversion Rate", as applicable, then in effect (determined as provided in Section 4(c) below) by the number of shares of Series A Preferred or Series B Preferred, as applicable, being converted.

**(b) Automatic Conversion.**

**(i)** Each share of Preferred Stock shall automatically be converted into shares of Class A Common Stock, based on the then-effective Series A Preferred Conversion Price or Series B Preferred Conversion Price, as applicable, upon the earlier of (A) the affirmative election of the holders of at least sixty-six and two-thirds percent (66 2/3%) of the outstanding shares of the Preferred Stock, voting together as a single class, (B) immediately upon the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Class A Common Stock for the account of the Company, the public offering price of which was not less than \$8.00 per share (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) and the gross proceeds of which to the Company (before underwriting discounts, commissions and fees) were at least \$25,000,000 in the aggregate, or (C) the transfer of shares of the Preferred Stock to a direct competitor of the Company (as determined by the Company's Board of Directors). Upon such automatic conversion pursuant to (A) or (B) above, any accrued and unpaid dividends shall be paid as follows:

- (1) If such automatic conversion occurs before August 4, 2003, no dividend shall be paid; or
- (2) If such automatic conversion occurs after August 4, 2003, dividends shall be paid unless the per share offering price exceeds 400% of the Series A Preferred Conversion Price or Series B Preferred Conversion Price, as applicable, in which case no dividend shall be paid.

Upon such automatic conversion pursuant to (C) above, any accrued and unpaid dividends on such shares of Preferred Stock shall also be converted into fully-paid and nonassessable shares of Class A Common Stock.

**(ii)** Upon the occurrence of any of the events specified in Section 4b(i) above, 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 Company or its transfer agent; *provided, however,* that the Company shall not be obligated to issue certificates evidencing the shares of Class A Common Stock issuable upon such conversion unless the certificates evidencing such shares of Preferred Stock are either delivered to the Company or its transfer agent as provided below, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement reasonably satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of the Preferred Stock, the holders of Preferred Stock shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Preferred Stock. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Class A Common Stock into which the

shares of Preferred Stock surrendered were convertible on the date on which such automatic conversion occurred, and any accrued and unpaid dividends shall be paid as set forth in Section 4(b)(i) above.

(c) Conversion Rate. The conversion rate in effect at any time for conversion of the Series A Preferred (the "Series A Preferred Conversion Rate") shall be the quotient obtained by dividing the Series A Original Issue Price of the Series A Preferred by the "Series A Preferred Conversion Price," calculated as provided in Section 4(d) below. The conversion rate in effect at any time for conversion of the Series B Preferred (the "Series B Preferred Conversion Rate") shall be the quotient obtained by dividing the Series B Original Issue Price of the Series B Preferred by the "Series B Preferred Conversion Price," calculated as provided in Section 4(d) below.

(d) Conversion Price. The conversion price for the Series A Preferred shall initially be the Series A Original Issue Price of the Series A Preferred (the "Series A Preferred Conversion Price"). The conversion price for the Series B Preferred shall initially be One Dollar and Thirty-Seven Cents (\$1.37) (the "Series B Preferred Conversion Price"). Such initial Series A Preferred Conversion Price and Series B Preferred Conversion Price shall be adjusted from time to time in accordance with this Section 4. All references to the Series A Preferred Conversion Price and the Series B Preferred Conversion Price herein shall mean the Series A Preferred Conversion Price and the Series B Preferred Conversion Price as so adjusted.

(e) Mechanics of Conversion. Each holder of Preferred Stock who desires to convert the same into shares of Class A Common Stock pursuant to this Section 4 shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Preferred Stock, and shall give written notice to the Company at such office that such holder elects to convert the same. Such notice shall state the number of shares of Preferred Stock being converted. Thereupon, the Company shall promptly issue and deliver at such office to such holder a certificate or certificates for the number of shares of Class A Common Stock to which such holder is entitled and shall promptly pay (i) in cash or, to the extent sufficient funds are not then legally available therefor or at such holder's election, in Class A Common Stock (at the Class A Common Stock's fair market value determined by the Board of Directors as of the date of such conversion or if conversion is pursuant to Section 4(b)(i)(B), at the price to public), any accrued and unpaid dividends on the shares of Preferred Stock being converted and (ii) in cash (at the Class A Common Stock's fair market value determined by the Board of Directors as of the date of conversion or if conversion is pursuant to Section 4(b)(i)(B), at the price to public) the value of any fractional share of Class A Common Stock otherwise issuable to any holder of Preferred Stock. Such conversion shall be deemed to have been made at the close of business on the date of such surrender of the certificates representing the shares of Preferred Stock to be converted, and the person entitled to receive the shares of Class A Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Class A Common Stock on such date.

(f) Adjustment for Stock Splits and Combinations. If the Company shall at any time or from time to time after the date that the first share of Series A Preferred is issued,

with respect to adjustments to the Series A Preferred Conversion Price, or after the date that the first share of Series B Preferred Stock is issued, with respect to adjustments to the Series B Preferred Conversion Price (the "Original Issue Date" with respect to each series) effect a subdivision of the outstanding Class A Common Stock without a corresponding subdivision of the Preferred Stock, the Series A Preferred Conversion Price and Series B Preferred Conversion Price in effect immediately before that subdivision shall be proportionately decreased. Conversely, if the Company shall at any time or from time to time after the Original Issue Date combine the outstanding shares of Class A Common Stock into a smaller number of shares without a corresponding combination of the Preferred Stock, the Series A Preferred Conversion Price and Series B Preferred Conversion Price in effect immediately before the combination shall be proportionately increased. Any adjustment under this Section 4(f) shall become effective at the close of business on the date the subdivision or combination becomes effective.

**(g) Adjustment for Class A Common Stock Dividends and Distributions.**

If the Company at any time or from time to time after the Original Issue Date makes, or fixes a record date for the determination of holders of Class A Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Class A Common Stock, in each such event the Series A Preferred Conversion Price and Series B Preferred Conversion Price that is then in effect shall be decreased as of the time of such issuance or, in the event such record date is fixed, as of the close of business on such record date, by multiplying the Series A Preferred Conversion Price and Series B Preferred Conversion Price then in effect by a fraction (i) the numerator of which is the total number of shares of Class A Common Stock and Class B 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 is the total number of shares of Class A Common Stock and Class B 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 Class A Common Stock issuable in payment of such dividend or distribution; *provided, however*, that if such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series A Preferred Conversion Price and Series B Preferred Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series A Preferred Conversion Price and Series B Preferred Conversion Price shall be adjusted pursuant to this Section 4(g) to reflect the actual payment of such dividend or distribution.

**(h) Adjustment for Reclassification, Exchange and Substitution.** If at any time or from time to time after the Original Issue Date, the Class A Common Stock issuable upon the conversion of the Preferred Stock is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification or otherwise (other than an Acquisition or Asset Transfer as defined in Section 3(d) above or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 4), in any such event each holder of Preferred Stock shall have the right thereafter to convert such stock into the kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification or other change by holders of the maximum number of shares of Class A Common Stock into which such shares of Preferred Stock could have been converted immediately prior to such recapitalization,

reclassification or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

(i) Adjustment for Reorganizations, Mergers or Consolidations. If at any time or from time to time after the Original Issue Date, there is a capital reorganization of the Class A Common Stock or the merger or consolidation of the Company with or into another corporation or another entity or person (other than an Acquisition or Asset Transfer as defined in Section 3(d) above or a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section 4), as a part of such capital reorganization, provision shall be made so that the holders of the Preferred Stock shall thereafter be entitled to receive upon conversion of the Preferred Stock the number of shares of stock or other securities or property of the Company to which a holder of the number of shares of Class A Common Stock deliverable upon conversion 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 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 (including adjustment of the Series A Preferred Conversion Price and the Series B Preferred 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.

(j) Sale of Shares Below Conversion Price.

(i) If at any time or from time to time after the Original Issue Date, the Company issues or sells, or is deemed by the express provisions of this subsection (j) to have issued or sold, Additional Shares of Class A Common Stock (as defined in subsection (j)(v) below), other than as a dividend or other distribution on any class of stock as provided in Section 4(g) above, and other than a subdivision or combination of shares of Class A Common Stock as provided in Section 4(f) above, for an Effective Price (as defined in subsection (j)(v) below) less than the then effective Series B Preferred Conversion Price, then and in each such case the then existing Series B Preferred Conversion Price shall be reduced, as of the opening of business on the date of such issue or sale, to a price equal to the consideration per share in such subsequent issuance.

(ii) If at any time or from time to time after the Original Issue Date, the Company issues or sells, or is deemed by the express provisions of this subsection (j) to have issued or sold, Additional Shares of Class A Common Stock (as defined in subsection (j)(v) below), other than as a dividend or other distribution on any class of stock as provided in Section 4(g) above, and other than a subdivision or combination of shares of Class A Common Stock as provided in Section 4(f) above, for an Effective Price (as defined in subsection (j)(v) below) less than the then effective Series A Preferred Conversion Price, then and in each such case the then existing Series A Preferred Conversion Price shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying the Series A Preferred Conversion Price by a fraction (i) the numerator of which shall be (A) the number of shares of Class A Common Stock and Class B Common Stock deemed outstanding (as defined below)

immediately prior to such issue or sale, plus (B) the number of shares of Class A Common Stock which the aggregate consideration received (as defined in subsection (j)(iii) below) by the Company for the total number of Additional Shares of Class A Common Stock so issued would purchase at such Series A Preferred Conversion Price, and (ii) the denominator of which shall be the number of shares of Class A Common Stock and Class B Common Stock deemed outstanding (as defined below) immediately prior to such issue or sale plus the total number of Additional Shares of Class A Common Stock so issued. For the purposes of the preceding sentence, the number of shares of Class A Common Stock and Class B Common Stock deemed to be outstanding as of a given date shall be the sum of (A) the number of shares of Class A Common Stock and Class B Common Stock actually outstanding, (excluding shares subject to repurchase by the Company at cost) (B) the number of shares of Class A Common Stock into which the then outstanding shares of Series A Preferred could be converted if fully converted on the day immediately preceding the given date, and (C) the number of shares of Class A Common Stock which could be obtained through the exercise or conversion of all other rights, options and convertible securities outstanding on the day immediately preceding the given date.

(iii) For the purpose of making any adjustment required under this Section 4(j), the consideration received by the Company for any issue or sale of securities shall (A) to the extent it consists of cash, be computed at the net amount of cash received by the Company after deduction of any underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale but without deduction of any expenses payable by the Company, (B) to the extent it consists of property other than cash, be computed at the fair value of that property as determined in good faith by the Board of Directors, and (C) if Additional Shares of Class A Common Stock, Convertible Securities (as defined in Section 4(j)(iv) below) or rights or options to purchase either Additional Shares of Class A Common Stock or Convertible Securities are issued or sold together with other stock or securities or other assets of the Company for a consideration which covers both, be computed as the portion of the consideration so received that may be reasonably determined in good faith by the Board of Directors to be allocable to such Additional Shares of Class A Common Stock, Convertible Securities or rights or options.

(iv) For the purpose of the adjustment required under this Section 4(j), if the Company issues or sells any (i) stock or other securities convertible into, Additional Shares of Class A Common Stock (such convertible stock or securities being herein referred to as "Convertible Securities") or (ii) rights or options for the purchase of Additional Shares of Class A Common Stock or Convertible Securities and if the Effective Price of such Additional Shares of Class A Common Stock is less than the Series A Preferred Conversion Price or Series B Preferred Conversion Price, as applicable, in each case the Company shall be deemed to have issued at the time of the issuance of such rights or options or Convertible Securities the maximum number of Additional Shares of Class A Common Stock issuable upon exercise or conversion thereof and to have received as consideration for the issuance of such shares an amount equal to the total amount of the consideration, if any, received by the Company for the issuance of such rights or options or Convertible Securities, plus, in the case of such rights or options, the minimum amounts of consideration, if any, payable to the Company upon the exercise of such rights or options, plus, in the case of Convertible Securities, the minimum

amounts of consideration, if any, payable to the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) upon the conversion thereof; *provided* that if in the case of Convertible Securities the minimum amounts of such consideration cannot be ascertained, but are a function of antidilution or similar protective clauses, the Company shall be deemed to have received the minimum amounts of consideration without reference to such clauses; *provided* further that if the minimum amount of consideration payable to the Company upon the exercise or conversion of rights, options or Convertible Securities is reduced over time or on the occurrence or non-occurrence of specified events other than by reason of antidilution adjustments, the Effective Price shall be recalculated using the figure to which such minimum amount of consideration is reduced; *provided* further that if the minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities is subsequently increased, the Effective Price shall be again recalculated using the increased minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities. No further adjustment of the Series A Preferred Conversion Price or Series B Preferred Conversion Price, as adjusted upon the issuance of such rights, options or Convertible Securities, shall be made as a result of the actual issuance of Additional Shares of Class A Common Stock on the exercise of any such rights or options or the conversion of any such Convertible Securities. If any such rights or options or the conversion privilege represented by any such Convertible Securities shall expire without having been exercised, the Series A Preferred Conversion Price or Series B Preferred Conversion Price, as adjusted upon the issuance of such rights, options or Convertible Securities shall be readjusted to the Series A Preferred Conversion Price or Series B Preferred Conversion Price which would have been in effect had an adjustment been made on the basis that the only Additional Shares of Class A Common Stock so issued were the Additional Shares of Class A Common Stock, if any, actually issued or sold on the exercise of such rights or options or rights of conversion of such Convertible Securities, and such Additional Shares of Class A Common Stock, if any, were issued or sold for the consideration actually received by the Company upon such exercise, plus the consideration, if any, actually received by the Company for the granting of all such rights or options, whether or not exercised, plus the consideration received for issuing or selling the Convertible Securities actually converted, plus the consideration, if any, actually received by the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) on the conversion of such Convertible Securities; *provided* that such readjustment shall not apply to prior conversions of Series A Preferred and Series B Preferred.

(v) "Additional Shares of Class A Common Stock" shall mean all shares of Class A Common Stock issued by the Company or deemed to be issued pursuant to this Section 4(j), whether or not subsequently reacquired or retired by the Company other than (A) shares of Class A Common Stock issued upon conversion of the Preferred Stock; (B) shares of Class A Common Stock and Class B Common Stock and/or options, warrants or other Class A Common Stock or Class B Common Stock purchase rights and the Class A Common Stock or Class B Common Stock issued pursuant to such options, warrants or other rights (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like) issuable or issued after the Original Issue Date to employees, officers, directors, consultants or advisors to the Company or any subsidiary pursuant to a stock option plan; employee stock purchase plan or other

arrangements that are approved by the Board (including at least one member elected by the holders of the Series A Preferred); (C) shares of Class A Common Stock issued pursuant to the exercise of options, warrants or convertible securities outstanding as of each Original Issue Date; (D) shares of Class A Common Stock issued and/or options, warrants or other Class A Common Stock purchase rights, and the Class A Common Stock issued pursuant to such options, warrants or other rights for consideration other than cash pursuant to a merger, consolidation, acquisition or similar business combination approved by the Board (including all representatives of the Preferred Stock); and (E) securities issued pursuant to a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, at a public offering price of not less than 300% of the then effective Series B Preferred Conversion Price and gross proceeds to the Company (before underwriting discounts, commissions and fees) of at least \$25,000,000 in the aggregate. References to Class A Common Stock in the subsections of this clause (v) above shall mean all shares of Class A Common Stock issued by the Company or deemed to be issued pursuant to this Section 4(j). The "Effective Price" of Additional Shares of Class A Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Class A Common Stock issued or sold, or deemed to have been issued or sold by the Company under this Section 4(j), into the aggregate consideration received, or deemed to have been received by the Company for such issue under this Section 4(j), for such Additional Shares of Class A Common Stock.

**(k) Certificate of Adjustment.** In each case of an adjustment or readjustment of the Series A Preferred Conversion Price or Series B Preferred Conversion Price, as applicable, for the number of shares of Class A Common Stock or other securities issuable upon conversion of the Preferred Stock, if the Preferred Stock is then convertible pursuant to this Section 4, the Company, at its expense, shall compute such adjustment or readjustment in accordance with the provisions hereof and prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage prepaid, to each registered holder of Preferred Stock at the holder's address as shown in the Company's books. The certificate shall set forth such adjustment or readjustment, showing in detail the facts upon which such adjustment or readjustment is based, including a statement of (i) the consideration received or deemed to be received by the Company for any Additional Shares of Class A Common Stock issued or sold or deemed to have been issued or sold, (ii) the Series A Preferred Conversion Price or Series B Preferred Conversion Price, as applicable, at the time in effect, (iii) the number of Additional Shares of Class A Common Stock, and (iv) the type and amount, if any, of other property which at the time would be received upon conversion of the Preferred Stock.

**(l) Notices of Record Date.** Upon (i) any taking by the Company of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend or other distribution, or (ii) any Acquisition (as defined in Section 3(d) above, or other capital reorganization of the Company, any reclassification or recapitalization of the capital stock of the Company, any merger or consolidation of the Company with or into any other corporation, or any Asset Transfer (as defined in Section (3d) above), or any voluntary or involuntary Liquidation of the Company, the Company shall mail to each holder of Preferred Stock at least ten (10) days prior to the record date specified therein (or



such shorter period approved by a majority of the outstanding Preferred Stock) a notice specifying (A) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (B) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer or Liquidation is expected to become effective, and (C) the date, if any, that is to be fixed as to when the holders of record of Class A Common Stock (or other securities) shall be entitled to exchange their shares of Class A Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer or Liquidation.

(m) Fractional Shares. No fractional shares of Class A Common Stock shall be issued upon conversion of Preferred Stock. All shares of Class A 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 any fractional share, the Company shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Class A Common Stock's fair market value (as determined by the Board of Directors) on the date of conversion.

(n) Reservation of Stock Issuable Upon Conversion. The Company shall at all times reserve and keep available out of its authorized but unissued shares of Class A Common Stock, solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Class A Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Preferred Stock. If at any time the number of authorized but unissued shares of Class A Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Class A Common Stock to such number of shares as shall be sufficient for such purpose.

(o) Notices. Any notice required by the provisions of this Section 4 shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed telex or facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Company.

(p) Payment of Taxes. The Company will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to the issue or delivery of shares of Class A Common Stock upon conversion of shares of Preferred

Stock, excluding any tax or other charge imposed in connection with any transfer involved in the issue and delivery of shares of Class A Common Stock in a name other than that in which the shares of Preferred Stock so converted were registered.

(q) No Dilution or Impairment. Without the consent of the holders of the then outstanding Preferred Stock, as required under Section 2(b) above, the Company shall not amend its Restated Articles of Incorporation or participate in any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or take any other voluntary action, for the purpose of avoiding or seeking to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Company, but shall at all times in good faith assist in carrying out all such action as may be reasonably necessary or appropriate in order to protect the conversion rights of the holders of the Preferred Stock against dilution or other impairment.

5. Redemption.

(a) The Company shall be obligated to redeem the Preferred Stock as follows:

(i) The holders of at least a majority of the then outstanding shares of Preferred Stock, voting together as a single class, may require the Company by a written notice given on or after August 4, 2005 (the "Investors' Redemption Notice"), to the extent the Company may lawfully do so, to redeem the Preferred Stock on any date on or after August 4, 2005, but in no event earlier than 120 days after the Investors' Redemption Notice (the "Redemption Date"). The Company shall effect such redemption in eight (8) equal quarterly installments commencing on the Redemption Date (each such payment date being referred to herein as an "Installment Date") by paying in cash in exchange for the shares of Preferred Stock to be redeemed a sum equal to the greater of (the "Redemption Price") (A) the Series A Original Issue Price or Series B Original Issue Price, as applicable, per share of Series A Preferred or Series B Preferred, as applicable (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares), plus accrued and unpaid dividends with respect to such shares through the Redemption Date, or (B) the Fair Market Value per share of Series A Preferred or Series B Preferred, as applicable, as of the date of the Investors' Redemption Notice (determined as set forth in Section 5(e) below) plus accrued and unpaid dividends with respect to such share since August 4, 2005 until the Redemption Date; *provided, however,* that in the event the Company fails to redeem the Preferred Stock in accordance with the terms of the installment redemption stated above, the Company shall pay interest on the full unpaid balance of the Redemption Price. Such interest shall accrue, through the period there remains an unpaid balance due and payable pursuant to this Section 5(a)(i), at the rate of ten percent (10%) per annum, compounded annually and payable in equal quarterly installments over the remainder of the Installment Dates. For instance, if a quarterly installment is nine (9) days past due, then the interest would equal  $9/365$  times ten percent (10%) of the full unpaid balance of the Redemption Price. Shares subject to redemption pursuant to this Section 5(a) shall be redeemed from each holder of Preferred Stock on a *pro rata* basis.

(ii) At least thirty (30) days but no more than sixty (60) days prior to the Redemption Date, the Company shall send a notice (a "Company Redemption Notice") to all holders of Preferred Stock to be redeemed setting forth (A) the Redemption Price for the shares to be redeemed; and (B) the place at which such holders may obtain payment of the Redemption Price upon surrender of their share certificates. If the Company does not have sufficient funds legally available to redeem all shares to be redeemed at the Redemption Date (including, if applicable, those to be redeemed at the option of the Company), then it shall redeem from each holder of Series B Preferred shares of Series B Preferred on a *pro rata* basis (based on the portion of the aggregate Redemption Price payable to them) to the extent possible prior to any redemption of the Series A Preferred. If after the redemption from each holder of Series B Preferred there shall remain sufficient funds legally available, the Company shall redeem from each holder of Series A Preferred shares of Series A Preferred on a *pro rata* basis (based on the portion of the aggregate Redemption Price payable to them) to the extent possible. The Company shall in good faith use all reasonable efforts as expeditiously as possible to eliminate, or obtain an exception, waiver or exemption from, any and all restrictions under applicable law that prevented the Company from redeeming all of the shares of Preferred Stock to be redeemed hereunder. At any time thereafter when additional funds of the Company are available by law for the redemption of shares of Preferred Stock, such funds will be used, at the end of the next succeeding fiscal quarter, to redeem the balance of such shares, or such portion thereof for which funds are available, on the basis set forth above.

(b) On or prior to the Redemption Date, the Company shall deposit the Redemption Price of all shares to be redeemed with a bank or trust company having aggregate capital and surplus in excess of \$100,000,000, as a trust fund, with irrevocable instructions and authority to the bank or trust company to pay, on and after such Redemption Date, the Redemption Price of the shares to their respective holders upon the surrender of their share certificates. Any moneys deposited by the Company pursuant to this Section 5(b) for the redemption of shares thereafter converted into shares of Class A Common Stock pursuant to Section 4 above no later than the fifth (5th) day preceding the Redemption Date shall be returned to the Company forthwith upon such conversion. The balance of any funds deposited by the Company pursuant to this Section 5(b) remaining unclaimed at the expiration of one (1) year following the final quarterly installment of such Redemption Date shall be returned to the Company promptly upon its written request.

(c) On or after the Redemption Date, each holder of shares of Preferred Stock to be redeemed shall surrender such holder's certificates representing such shares to the Company in the manner and at the place designated in the Company Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be canceled. In the event less than all the shares represented by such certificates are redeemed, a new certificate shall be issued representing the unredeemed shares. From and after the Redemption Date, unless there shall have been a default in payment of the Redemption Price or the Company is unable to pay the Redemption Price due to not having sufficient legally available funds, all rights of the holders of such shares as holders of Preferred Stock (except the right to receive the Redemption Price without interest upon surrender of their certificates), shall

cease and terminate with respect to such shares; *provided* that in the event that shares of Preferred Stock are not redeemed due to a default in payment by the Company or because the Company does not have sufficient legally available funds, such shares of Preferred Stock shall remain outstanding and shall be entitled to all of the rights and preferences provided herein.

(d) In the event of a call for redemption of any shares of Preferred Stock, the Conversion Rights (as defined in Section 4 above) for such Preferred Stock shall terminate as to the shares designated for redemption at the close of business on the fifth (5th) day preceding the Redemption Date, unless default is made in payment of the Redemption Price.

(e) For purposes of this Section 5, Fair Market Value shall be determined by mutual agreement of the Company and the holders of Preferred Stock, each of whom will consult with an independent nationally recognized investment bank of their choice at the Company's expense, and deliver their determination of the Fair Market Value (the "Bank Opinions") to the other party within forty-five (45) days of the date of the Investors' Redemption Notice. If the Company and the holders of Preferred Stock are unable to agree upon the Fair Market Value within thirty (30) days of the date the last Bank Opinion is rendered, such valuation will be determined by Houlihan Lokey Howard & Zukin, located in Southern California and will be binding upon the parties. For purposes hereof, "Fair Market Value" shall mean the per share cash price determined by the Company and the holders of Preferred Stock, or Houlihan Lokey Howard & Zukin, as applicable, that a strategically motivated and financially able purchaser would pay in an acquisition of all of the issued and outstanding capital stock of the Company.

6. No Reissuance of Preferred Stock.

No share or shares of Preferred Stock acquired by the Company by reason of redemption, purchase, conversion or otherwise shall be reissued; and in addition, the Articles of Incorporation shall be appropriately amended to effect the corresponding reduction in the Company's authorized stock.

D. Class A and Class B Common Stock.

1. Dividend Rights. Subject to the prior rights of holders of all classes of stock at the time outstanding having prior rights as to dividends, the holders of the Class A Common Stock shall be entitled to receive, when and as declared by the Board of Directors, out of any assets of the corporation legally available therefor, such dividends as may be declared from time to time by the Board of Directors, with the holders of Class B Common Stock being deemed for such purposes as holding the number of shares of Class A Common Stock into which such holders' shares of Class B Common Stock are convertible into as of the record date for such dividends.

2. Voting Rights.

(a) Class A Common Stock. Each holder of Class A Common Stock shall be entitled to one vote for each share thereof held. Except as otherwise required by law, the

holders of Class B Common Stock shall vote together as one class with the holders of the Class A Common Stock and not as a separate class.

**(b) Class B Common Stock.** Except as otherwise required by law, the holders of the Class B Common Stock shall be voted equally with the shares of the Class A Common Stock of the Company and not as a separate class, at any annual or special meeting of shareholders of the Company, and may act by written consent in the same manner as the Class A Common Stock, in either case upon the following basis: each holder of shares of Class B Common Stock shall be entitled to such number of votes as shall be equal to one-fourth (1/4) of one full vote per share, requiring four shares to equal the one vote to which each share of Class A Common Stock is entitled immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent.

3. Liquidation Rights. Upon a Liquidation, the assets of the Corporation shall be distributed as provided in Section C. 3.

4. Conversion Rights.

**(a) Automatic Conversion.** Each share of Class B Common Stock shall automatically be converted into one fully paid and nonassessable share of Class A Common Stock, subject to adjustment as provided in this Section 4 immediately upon the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Class A Common Stock for the account of the Company, the public offering price of which was not less than \$8.00 per share (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) and the gross proceeds of which to the Company (before underwriting discounts, commissions and fees) were at least \$25,000,000 in the aggregate.

(i) Upon the automatic conversion specified in Section 4(a) above, the outstanding shares of Class B Common 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 Company or its transfer agent; *provided, however,* that the Company shall not be obligated to issue certificates evidencing the shares of Class A Common Stock issuable upon such conversion unless the certificates evidencing such shares of Class B Common Stock are either delivered to the Company or its transfer agent as provided below, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of the Class B Common Stock, the holders of Class B Common Stock shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Class B Common Stock. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Class A Common Stock into which the shares of Class B Common Stock surrendered were convertible on the date on which such automatic conversion occurred.

**(b) Mechanics of Conversion.** Each holder of Class B Common Stock who is required to convert the same into shares of Class A Common Stock pursuant to this Section 4 shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Class B Common Stock, and shall give written notice to the Company at such office that such holder elects to convert the same. Such notice shall state the number of shares of Class B Common Stock being converted. Thereupon, the Company shall promptly issue and deliver at such office to such holder a certificate or certificates for the number of shares of Class A Common Stock to which such holder is entitled and shall promptly pay (i) in cash or, to the extent sufficient funds are not then legally available therefor or at such holder's election, in Class A Common Stock (at the price to public), any accrued and unpaid dividends on the shares of Class B Common Stock being converted and (ii) in cash (at the price to public) the value of any fractional share of Class A Common Stock otherwise issuable to any holder of Class B Common Stock. Such conversion shall be deemed to have been made at the close of business on the date of such surrender of the certificates representing the shares of Class B Common Stock to be converted, and the person entitled to receive the shares of Class A Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Class A Common Stock on such date.

**(c) Adjustment for Stock Splits, Dividends and Combinations.** If the Company shall at any time or from time to time after the date that the first share of Class B Common Stock is issued (the "Class B Original Issue Date") effect a subdivision of the outstanding Class A Common Stock without a corresponding subdivision of the Class B Common Stock or the determination of holders of Class A Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Class A Common Stock, the outstanding Class B Common Stock shall be appropriately increased so that the number of shares of Class A Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase of the aggregate of shares of Class A Common Stock outstanding and those issuable with respect to such additional shares of Class A Common Stock. Conversely, if the Company shall at any time or from time to time after the Class B Original Issue Date combine the outstanding shares of Class A Common Stock into a smaller number of shares without a corresponding combination of the Class B Common Stock, the outstanding Class B Common Stock shall be appropriately decreased so that the number of shares of Class A Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in outstanding shares. Any adjustment under this Section 4(c) shall become effective at the close of business on the date the subdivision, dividend or combination becomes effective.

**(d) Adjustment for Reclassification, Exchange and Substitution.** If at any time or from time to time after the Class B Original Issue Date, the Class A Common Stock issuable upon the conversion of the Class B Common Stock is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification or otherwise (other than an Acquisition or Asset Transfer as defined in Section C.3(c) or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 4), in any such event each holder of Class B Common Stock shall have the right thereafter to convert such stock into the

kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification or other change by holders of the maximum number of shares of Class A Common Stock into which such shares of Class B Common Stock could have been converted immediately prior to such recapitalization, reclassification or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

(e) Adjustment for Reorganizations, Mergers or Consolidations. If at any time or from time to time after the Class B Original Issue Date, there is a capital reorganization of the Class A Common Stock or the merger or consolidation of the Company with or into another corporation or another entity or person (other than an Acquisition or Asset Transfer as defined in Section C.3(d) or a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section 4), as a part of such capital reorganization, provision shall be made so that the holders of the Class B Common Stock shall thereafter be entitled to receive upon conversion of the Class B Common Stock the number of shares of stock or other securities or property of the Company to which a holder of the number of shares of Class A Common Stock deliverable upon conversion 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 with respect to the rights of the holders of Class B Common Stock after the capital reorganization to the end that the provisions of this Section 4 shall be applicable after that event and be as nearly equivalent as practicable.

(f) Fractional Shares. No fractional shares of Class A Common Stock shall be issued upon conversion of Class B Common Stock. All shares of Class A Common Stock (including fractions thereof) issuable upon conversion of more than one share of Class B Common 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 any fractional share, the Company shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Class A Common Stock's fair market value (as determined by the Board of Directors) on the date of conversion.

(g) Reservation of Stock Issuable Upon Conversion. The Company shall at all times reserve and keep available out of its authorized but unissued shares of Class A Common Stock, solely for the purpose of effecting the conversion of the shares of the Class B Common Stock, such number of its shares of Class A Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Class B Common Stock. If at any time the number of authorized but unissued shares of Class A Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Class B Common Stock, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Class A Common Stock to such number of shares as shall be sufficient for such purpose.

#### ARTICLE IV.

A. The liability of the directors of the Corporation for monetary damages shall be eliminated to the fullest extent permissible under California law.

B. The Corporation is authorized to provide indemnification of agents (as defined in Section 317 of the General Corporation Law of California) for breach of duty to the Corporation and its shareholders through bylaw provisions or through agreements with agents, or both, in excess of the indemnification otherwise permitted by Section 317 of the General Corporation Law of California, subject to the limits on such excess indemnification set forth in Section 204 of the General Corporation Law of California. If, after the effective date of this Article, California law is amended in a manner which permits a corporation to limit the monetary or other liability of its directors or to authorize indemnification of, or advancement of such defense expenses to, its directors or other persons, in any such case to a greater extent than is permitted on such effective date, the references in this Article to "California law" shall to that extent be deemed to refer to California law as so amended.

C. Any repeal or modification of this Article shall only be prospective and shall not effect the rights under this Article in effect at the time of the alleged occurrence of any action or omission to act giving rise to liability."

**THREE:** The foregoing amendment and restatement of the Articles of Incorporation has been duly approved by the Board of Directors of this Corporation.

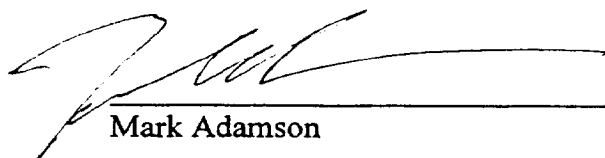
**FOUR:** The foregoing amendment and restatement of the Articles of Incorporation has been duly approved by the required vote of shareholders in accordance with Sections 902 and 903 of the California General Corporation Law. The total number of outstanding shares of each class entitled to vote with respect to the foregoing amendment was 7,098,343 shares of Class A Common Stock, 192,140 shares of Class B Common Stock and 3,194,888 shares of Series A Preferred Stock. The number of shares voting in favor of the foregoing amendment equaled or exceeded the vote required, such required vote being a majority of the outstanding shares of Class A Common Stock, Class B Common Stock and Series A Preferred Stock (voting on an as-converted basis) and a majority of the outstanding shares of each of the Common Stock and the Series A Preferred Stock.



The undersigned, Jane Kleinberger and Mark Adamson, the Chief Executive Officer and Secretary, respectively, of **PACIOLAN SYSTEMS INC.**, declare under penalty of perjury under the laws of the State of California that the matters set out in the foregoing certificate are true and correct of their own knowledge.

Executed at Irvine, California, on May 24, 2001.

  
Jane Kleinberger

  
Mark Adamson



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RECORDED: 06/08/2001

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