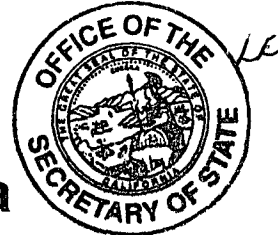


## TRADEMARK ASSIGNMENT

Electronic Version v1.1  
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SUBMISSION TYPE:	NEW ASSIGNMENT																										
NATURE OF CONVEYANCE:	MERGER																										
EFFECTIVE DATE:	06/22/2007																										
CONVEYING PARTY DATA																											
<table border="1"> <thead> <tr> <th>Name</th> <th>Formerly</th> <th>Execution Date</th> <th>Entity Type</th> </tr> </thead> <tbody> <tr> <td>ShoreTel, Inc.</td> <td></td> <td>06/22/2007</td> <td>CORPORATION: CALIFORNIA</td> </tr> </tbody> </table>				Name	Formerly	Execution Date	Entity Type	ShoreTel, Inc.		06/22/2007	CORPORATION: CALIFORNIA																
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Registration Number:	3272772	SHORETEL																									
CORRESPONDENCE DATA																											
<p>Fax Number: 8013550160  <i>Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent via US Mail.</i></p> <p>Phone: 8012589832        Email: htruong@patentlawworks.net        Correspondent Name: Hoang-chi Truong        Address Line 1: 165 South Main Street, Second Floor        Address Line 4: Salt Lake City, UTAH 84111</p>																											
ATTORNEY DOCKET NUMBER:	10002-00502-00019 US																										
NAME OF SUBMITTER:	Hoang-chi Truong																										

Signature:	/hoangchitruong/
Date:	01/23/2013
<p>Total Attachments: 30</p> <p>source=ShoreTel CA-DE merger#page1.tif source=ShoreTel CA-DE merger#page2.tif source=ShoreTel CA-DE merger#page3.tif source=ShoreTel CA-DE merger#page4.tif source=ShoreTel CA-DE merger#page5.tif source=ShoreTel CA-DE merger#page6.tif source=ShoreTel CA-DE merger#page7.tif source=ShoreTel CA-DE merger#page8.tif source=ShoreTel CA-DE merger#page9.tif source=ShoreTel CA-DE merger#page10.tif source=ShoreTel CA-DE merger#page11.tif source=ShoreTel CA-DE merger#page12.tif source=ShoreTel CA-DE merger#page13.tif source=ShoreTel CA-DE merger#page14.tif source=ShoreTel CA-DE merger#page15.tif source=ShoreTel CA-DE merger#page16.tif source=ShoreTel CA-DE merger#page17.tif source=ShoreTel CA-DE merger#page18.tif source=ShoreTel CA-DE merger#page19.tif source=ShoreTel CA-DE merger#page20.tif source=ShoreTel CA-DE merger#page21.tif source=ShoreTel CA-DE merger#page22.tif source=ShoreTel CA-DE merger#page23.tif source=ShoreTel CA-DE merger#page24.tif source=ShoreTel CA-DE merger#page25.tif source=ShoreTel CA-DE merger#page26.tif source=ShoreTel CA-DE merger#page27.tif source=ShoreTel CA-DE merger#page28.tif source=ShoreTel CA-DE merger#page29.tif source=ShoreTel CA-DE merger#page30.tif</p>	



**State of California**  
Secretary of State

I, DEBRA BOWEN, Secretary of State of the State of California, hereby certify:

That the attached transcript of 29 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

JUN 25 2007

*Debra Bowen*

DEBRA BOWEN  
Secretary of State

# Delaware

PAGE 1

*The First State*

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AGREEMENT OF MERGER, WHICH MERGES:

"SHORETEL, INC.", A CALIFORNIA CORPORATION,

WITH AND INTO "SHORETEL, INC." UNDER THE NAME OF "SHORETEL, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE TWENTY-SECOND DAY OF JUNE, A.D. 2007, AT 10:49 O'CLOCK A.M.

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

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

JUN 22 2007

4251261 8100M

070739891



*Harriet Smith Windsor*

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 5783752

DATE: 06-22-07

TRADEMARK  
REEL: 004947 FRAME: 0776

## AGREEMENT AND PLAN OF MERGER

THIS AGREEMENT AND PLAN OF MERGER (this "*Merger Agreement*") is entered into as of June 22, 2007, by and between ShoreTel, Inc., a California corporation ("*ShoreTel California*"), and ShoreTel, Inc., a Delaware corporation ("*ShoreTel Delaware*"). ShoreTel California and ShoreTel Delaware are hereinafter sometimes collectively referred to as the "*Constituent Corporations*".

### RECITALS

A. ShoreTel California was incorporated on September 17, 1996. Its current authorized capital stock consists of: (i) 400,000,000 shares of Common Stock, no par value ("*ShoreTel California Common Stock*"), of which 101,125,435 shares are issued and outstanding; and (ii) 235,862,612 shares of Preferred Stock, no par value ("*ShoreTel California Preferred Stock*"), of which 233,164,369 shares are issued and outstanding (consisting of 31,789,550 shares of Series E Preferred Stock, 134,090,064 shares of Series F Preferred Stock, 20,114,943 shares of Series G Preferred Stock and 47,169,812 shares of Series H Preferred Stock).

B. ShoreTel Delaware was incorporated on January 18, 2007. Its authorized capital stock consists of one thousand (1,000) shares of Common Stock, with a par value of \$0.001 per share ("*ShoreTel Delaware Common Stock*"), of which one thousand (1,000) shares are issued and outstanding.

C. The respective Boards of Directors of ShoreTel California and ShoreTel Delaware deem it advisable and to the advantage of each of the Constituent Corporations that ShoreTel California merge with and into ShoreTel Delaware upon the terms and subject to the conditions set forth in this Merger Agreement for the purpose of effecting a change of the state of incorporation of ShoreTel California from California to Delaware.

D. The Boards of Directors of each of the Constituent Corporations have approved this Merger Agreement.

**NOW, THEREFORE**, the parties do hereby adopt the plan of reorganization set forth in this Merger Agreement and do hereby agree that ShoreTel California shall merge with and into ShoreTel Delaware on the following terms, conditions and other provisions:

1. **Merger and Effective Time.** At the Effective Time (as defined below), ShoreTel California shall be merged with and into ShoreTel Delaware (the "*Merger*"), and ShoreTel Delaware shall be the surviving corporation of the Merger (the "*Surviving Corporation*"). The Merger shall become effective upon filing of a duly executed copy of this Merger Agreement, along with all required officers' certificates, with the Secretary of State of the State of Delaware (such time and date, the "*Effective Time*").

2. **Effect of Merger.** At the Effective Time, the separate corporate existence of ShoreTel California shall cease; the corporate identity, existence, powers, rights and immunities of ShoreTel Delaware as the Surviving Corporation shall continue unimpaired by the Merger; and ShoreTel Delaware shall succeed to and shall possess all the assets, properties, rights,

privileges, powers, franchises, immunities and purposes, and be subject to all the debts, liabilities, obligations, restrictions and duties of ShoreTel California, all without further act or deed.

3. **Name: Governing Documents.** At the Effective Time, (i) the name of ShoreTel Delaware shall be ShoreTel, Inc., (ii) the Certificate of Incorporation of ShoreTel Delaware in effect immediately prior to the Effective Time shall be amended and restated by virtue of the Merger to read as set forth in full in Exhibit A hereto (the "*Restated Certificate*"), and (iii) the Bylaws of ShoreTel Delaware in effect immediately prior to the Effective Time shall be amended and restated by virtue of the Merger as approved by the Board of Directors of ShoreTel Delaware.

4. **Directors and Officers.** At the Effective Time, the directors of ShoreTel Delaware shall be and become the directors of the Surviving Corporation, and the officers of ShoreTel Delaware shall be and become the officers (holding the same offices) of the Surviving Corporation, and after the Effective Time shall serve in accordance with the Restated Certificate and Bylaws of the Surviving Corporation.

5. **Conversion of Shares of ShoreTel California.** At the Effective Time, by virtue of the Merger and without any further action on the part of the Constituent Corporations or their shareholders, (i) each share of ShoreTel California Common Stock issued and outstanding immediately prior thereto shall be automatically converted into one fully paid and nonassessable share of ShoreTel Delaware Common Stock, (ii) each share of ShoreTel California Series E Preferred Stock outstanding immediately prior thereto shall be automatically converted into one fully paid and nonassessable share of ShoreTel Delaware Series E Preferred Stock, (iii) each share of ShoreTel California Series F Preferred Stock outstanding immediately prior thereto shall be automatically converted into one fully paid and nonassessable share of ShoreTel Delaware Series F Preferred Stock, (iv) each share of ShoreTel California Series G Preferred Stock outstanding immediately prior thereto shall be automatically converted into one fully paid and nonassessable share of ShoreTel Delaware Series G Preferred Stock, and (v) each share of ShoreTel California Series H Preferred Stock outstanding immediately prior thereto shall be automatically converted into one fully paid and nonassessable share of ShoreTel Delaware Series H Preferred Stock.

6. **Cancellation of Shares of ShoreTel Delaware.** At the Effective Time, by virtue of the Merger and without any further action on the part of the Constituent Corporations or their shareholders, all of the previously issued and outstanding shares of ShoreTel Delaware Common Stock that were issued and outstanding immediately prior to the Effective Time shall be automatically canceled without consideration and returned to the status of authorized but unissued shares.

7. **Stock Certificates.** At and after the Effective Time, all of the outstanding certificates that, prior to that date, represented shares of ShoreTel California Common Stock shall be deemed for all purposes to evidence ownership of and to represent the number of shares of ShoreTel Delaware Common Stock into which such shares of ShoreTel California Common Stock are converted as provided herein. At and after the Effective Time, all of the outstanding certificates that, prior to that date, represented shares of a series of ShoreTel California Preferred Stock shall be deemed for all purposes to evidence ownership of and to represent the number of

shares of the series of shares of ShoreTel Delaware Preferred Stock, into which such shares of ShoreTel California Preferred Stock are converted as provided herein. The registered owner on the books and records of ShoreTel California of any such outstanding stock certificate for ShoreTel California Common Stock or ShoreTel California Preferred Stock shall, until such certificate is surrendered for transfer or otherwise accounted for to ShoreTel Delaware or its transfer agent, be entitled to exercise any voting and other rights with respect to, and to receive any dividend and other distributions upon, the shares of ShoreTel Delaware Common Stock or ShoreTel Delaware Preferred Stock evidenced by such outstanding certificate as provided above.

8. **Fractional Shares.** No fractional shares of ShoreTel Delaware Common Stock or ShoreTel Delaware Preferred Stock will be issued in connection with the Merger.

9. **Option Plan and Other Employee Benefit Plans.** At the Effective Time, ShoreTel Delaware shall adopt and assume the 2007 Equity Incentive Plan (the "*Existing Plan*"). At the Effective Time, the obligations of ShoreTel California under or with respect to every plan, trust, program and benefit, including the Existing Plan, then in effect or administered by ShoreTel California for the benefit of the directors, officers and employees of ShoreTel California or any of its subsidiaries shall become the lawful obligations of ShoreTel Delaware and shall be implemented and administered in the same manner and without interruption until the same are amended or otherwise lawfully altered or terminated. Effective at the Effective Time, ShoreTel Delaware hereby expressly adopts and assumes all obligations of ShoreTel California under such employee benefit plans.

10. **Assumption of Options and Warrants.** At the Effective Time, all outstanding and unexercised portions of all options to purchase ShoreTel California Common Stock under the Existing Plan or ShoreTel California's 1997 Stock Option Plan, as applicable, and all other outstanding options to purchase ShoreTel California Common Stock, shall be assumed by ShoreTel Delaware and become options to purchase the same number of shares of ShoreTel Delaware Common Stock at the same exercise price per share but otherwise shall, to the extent permitted by law and otherwise reasonably practicable, have the same term, exercisability, vesting schedule, status as an "incentive stock option" under Section 422 of the Internal Revenue Code of 1986, as amended (the "*Code*"), if applicable, and all other material terms and conditions (including but not limited to the terms and conditions applicable to such options by virtue of the Existing Plan or ShoreTel California's 1997 Stock Option Plan, as applicable). Continuous employment with ShoreTel California will be credited to an optionee for purposes of determining the vesting of the number of shares of ShoreTel Delaware Common Stock subject to exercise under an assumed ShoreTel California option at the Effective Time. Additionally, at the Effective Time, all outstanding and unexercised portions of all warrants to purchase or acquire ShoreTel California Series E Preferred Stock and Series F Preferred Stock and ShoreTel California Common Stock shall be assumed by ShoreTel Delaware and become warrants to purchase or acquire the same number of shares of ShoreTel Delaware Series E Preferred Stock, Series F Preferred Stock or Common Stock, as the case may be, at the same exercise price per share but otherwise with the same term, exercisability, and all other material terms and conditions.

11. **Further Assurances.** From time to time, as and when required by the Surviving Corporation or by its successors or assigns, there shall be executed and delivered on behalf of ShoreTel California such deeds, assignments and other instruments, and there shall be taken or

caused to be taken by it all such further action, as shall be appropriate, advisable or necessary in order to vest, perfect or confirm, of record or otherwise, in the Surviving Corporation the title to and possession of all property, interests, assets, rights, privileges, immunities, powers, franchises and authority of ShoreTel California, and otherwise to carry out the purposes of this Merger Agreement. The officers and directors of the Surviving Corporation are fully authorized in the name of and on behalf of ShoreTel California, or otherwise, to take any and all such actions and to execute and deliver any and all such deeds and other instruments as may be necessary or appropriate to accomplish the foregoing.

12. **Condition.** The consummation of the Merger is subject to the approval of this Merger Agreement and the Merger contemplated hereby by the shareholders of ShoreTel California and by the sole stockholder of ShoreTel Delaware, prior to or at the Effective Time.

13. **Abandonment.** At any time before the Effective Time, this Merger Agreement may be terminated and the Merger abandoned by the Board of Directors of ShoreTel California or ShoreTel Delaware, notwithstanding approval of this Merger Agreement by the shareholders of ShoreTel California and the sole stockholder of ShoreTel Delaware.

14. **Amendment.** At any time before the Effective Time, this Merger Agreement may be amended, modified or supplemented by the Boards of Directors of the Constituent Corporations, notwithstanding approval of this Merger Agreement by the shareholders of ShoreTel California and the sole stockholder of ShoreTel Delaware; provided, however, that any amendment made subsequent to the adoption of this Merger Agreement by the shareholders of ShoreTel California or the sole stockholder of ShoreTel Delaware shall not: (i) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or upon conversion of any shares of any class or series of ShoreTel California; (ii) alter or change of any of the terms of the Certificate of Incorporation of the Surviving Corporation to be effected by the Merger; or (iii) alter or change any of the terms or conditions of this Merger Agreement if such alteration or change would adversely affect the holders of any shares of any class or series of ShoreTel California or ShoreTel Delaware.

15. **Tax-Free Reorganization.** The Merger is intended to be a tax-free plan of reorganization within the meaning of Section 368(a)(1)(F) of the Code.

16. **Governing Law.** This Merger Agreement shall be governed by and construed under the internal laws of the State of California as applied to agreements among California residents entered into and to be performed entirely within California, without reference to the principles of conflicts of law or choice of laws, except to the extent that the laws of the State of Delaware would apply in matters relating to the internal affairs of ShoreTel Delaware and the Merger.

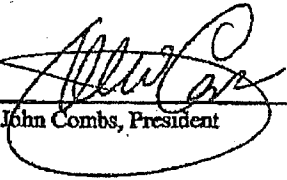
17. **Counterparts.** In order to facilitate the filing and recording of this Merger Agreement, it may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

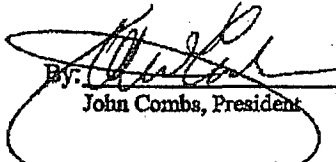


IN WITNESS WHEREOF, the parties hereto have caused this Merger Agreement to be duly executed on the date and year first above written.

SHORETEL, INC. a California corporation

SHORETEL, INC. a Delaware corporation

By:   
John Combs, President

By:   
John Combs, President

By:   
Michael Healy, Secretary

By:   
Michael Healy, Secretary

[Signature Page to Agreement and Plan of Merger]

23215/00018/DOCS/1680150.3

TRADEMARK  
REEL: 004947 FRAME: 0781

**EXHIBIT A**

**FIRST AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION**

23215/00018/DOCS/1680150.3

**TRADEMARK  
REEL: 004947 FRAME: 0782**

**FIRST RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
SHORETEL, INC.**

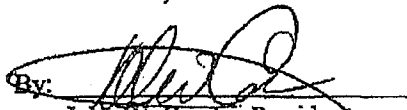
(Originally incorporated on January 18, 2007)

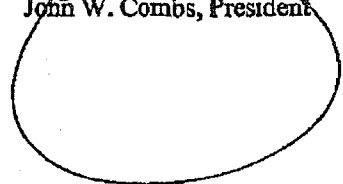
ShoreTel, Inc., a Delaware corporation, hereby certifies that the First Restated Certificate of Incorporation of the corporation attached hereto as Exhibit "A", which is incorporated herein by this reference, has been duly adopted by the corporation's Board of Directors and stockholders in accordance with Sections 242 and 245 of the Delaware General Corporation Law, with the approval of the corporation's stockholders having been given by written consent without a meeting in accordance with Section 228 of the Delaware General Corporation Law.

IN WITNESS WHEREOF, said corporation has caused this First Restated Certificate of Incorporation to be signed by its by duly authorized officer.

Dated: June 22, 2007

SHORETEL, INC.

By:   
John W. Combs, President



23215/00018/DOCS/1680149.1

TRADEMARK  
REEL: 004947 FRAME: 0783

**FIRST RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
SHORETEL, INC.**

**ARTICLE I**

The name of the corporation is ShoreTel, Inc. (hereinafter, the "*Company*").

**ARTICLE II**

The address of the registered office of the corporation in the State of Delaware is 3500 South Dupont Highway, Dover, County of Kent, DE 19901. The name of its registered agent at that address is Incorporating Services, Ltd.

**ARTICLE III**

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.

**ARTICLE IV**

The total number of shares of all classes of stock which the corporation has authority to issue is Six Hundred Thirty-Five Million Eight Hundred Sixty-Two Thousand Six Hundred Twelve (635,862,612) shares, consisting of two classes: Four Hundred Million (400,000,000) shares of Common Stock, \$0.001 par value per share, and Two Hundred Thirty-Five Million Eight Hundred Sixty-Two Thousand Six Hundred Twelve (235,862,612) shares of Preferred Stock, \$0.001 par value per share. Of the Two Hundred Thirty-Five Million Eight Hundred Sixty-Two Thousand Six Hundred Twelve (235,862,612) shares of Preferred Stock, par value \$0.001, authorized to be issued by the corporation, Thirty-Three Million Eight Hundred Sixty-Four Thousand One Hundred Eighteen (33,864,118) shares are hereby designated "Series E Preferred Stock", One Hundred Thirty-Four Million, Seven Hundred Thirteen Thousand Seven Hundred Thirty-Nine (134,713,739) shares are hereby designated "Series F Preferred Stock", Twenty Million One Hundred Fourteen Thousand Nine Hundred Forty-Three (20,114,943) shares are hereby designated "Series G Preferred Stock", and Forty-Seven Million One Hundred Sixty-Nine Thousand Eight Hundred Twelve (47,169,812) shares are hereby designated "Series H Preferred Stock." The rights, preferences, privileges and restrictions granted to and imposed upon the respective classes and series of the corporation's capital stock are set forth below:

**1. Definitions.** For purposes of this Article IV, the following definitions apply:

(a) "*Acquisition*" shall mean (i) a merger or consolidation of the Company with or into any other entity or entities, (ii) a sale, transfer, lease or other conveyance of all or substantially all of the Company's assets, (iii) grant by the Company of an exclusive license to use and resell of all or substantially all of the Company's material intellectual property

assets, or (iv) sale, transfer or other conveyance of 50% or more of the Common Stock (assuming for such purposes the conversion of the Preferred Stock at the then-applicable Conversion Prices) or 50% or greater voting control of the Company, but excluding (A) any sale of shares by the Company in an equity financing unanimously approved by the Board and such stockholders as may be required by Section 7 of this Article IV, (B) a merger or consolidation effected solely for the purpose of reincorporating the Company in another jurisdiction and (C) a merger or consolidation following which the stockholders of the Company immediately prior to such transaction (1) own more than 50% of the voting securities of the surviving entity which are outstanding immediately following such transaction in substantially the same proportions as such stockholders owned immediately prior to such transaction and (2) have the power to elect at least a majority of the members of the board of directors of the surviving entity.

(b) “*Board*” shall mean the Board of Directors of the Company.

(c) “*Common Stock Dividend*” shall mean a stock dividend declared and paid on the Common Stock that is payable solely in shares of Common Stock.

(d) “*Common Stock Event*” shall mean (i) the issuance by the Company of additional shares of Common Stock as a dividend or other distribution on outstanding Common Stock, (ii) a subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock, or (iii) a combination of the outstanding shares of Common Stock into a smaller number of shares of Common Stock.

(e) “*Distribution*” shall mean the transfer of cash or property by the Company to one or more of its stockholders without consideration, whether by dividend or otherwise (except a Common Stock Dividend). A Permitted Repurchase (defined below) is not a Distribution.

(f) “*Dividend Rate*” shall mean, with respect to the Preferred Stock, an amount equal to 8% of the Original Issue Price per share of such Preferred Stock per annum (as adjusted to the extent necessary to reflect any Preferred Stock Event (as defined below) applicable to such Preferred Stock).

(g) “*Effective Date*” shall mean the effective date of the filing of this First Restated Certificate of Incorporation with the Delaware Secretary of State.

(h) “*Original Issue Price*” shall mean (A) with respect to the Series E Preferred Stock, \$0.62914 per share, (B) with respect to the Series F Preferred Stock, \$0.08017 per share, (C) with respect to the Series G Preferred Stock, \$0.174 per share, and (D) with respect to the Series H Preferred Stock, \$0.212 per share (in each case as adjusted to the extent necessary to reflect any Preferred Stock Event (as defined below) applicable to such series of Preferred Stock).

(i) "**Permitted Repurchases**" shall mean the repurchase by the Company of shares of Common Stock held by employees, officers, directors, consultants, independent contractors, advisors, or other persons performing services for the Company or a subsidiary that are subject to restricted stock purchase agreements or stock option exercise agreements approved by the Board under which the Company has the option to repurchase such shares: (A) at cost, upon the occurrence of certain events, such as the termination of employment or services; or (B) at any price pursuant to the Company's exercise of a right of first refusal to repurchase such shares.

(j) "**Preferred Stock Event**" shall mean, as to each series of Preferred Stock, any of the following events occurring after the Effective Date: (A) the issuance by the Company of additional shares of such series of Preferred Stock as a dividend or other distribution on the outstanding shares of such series of Preferred Stock; (B) a subdivision of the outstanding shares of such series of Preferred Stock into a greater number of shares of such series of Preferred Stock; (C) a combination of the outstanding shares of such series of Preferred Stock into a small number of shares of such series of Preferred Stock; and (D) the conversion or exchange of the outstanding shares of such series of Preferred Stock into a different number of shares of some other class or classes of stock whether by recapitalization, reclassification or otherwise, *provided, however*, that in no event shall a Preferred Stock Event be deemed to include any liquidation, dissolution or winding up of the Company provided for in Section 3, any conversion or other adjustment event described in Section 5.

(k) "**Qualified IPO**" shall mean the first firm commitment underwritten public offering pursuant to an effective registration statement filed under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock principally for the account of the Company in which the aggregate public offering price (before deduction of underwriters' discounts and commissions) equals or exceeds \$20,000,000 and the public offering price per share of which equals or exceeds \$0.645 (such price per share of Common Stock to be appropriately adjusted to reflect Common Stock Events).

(l) "**Subsidiary**" shall mean any entity of which at least 50% of the outstanding voting stock is at the time owned directly or indirectly by the Company or by one or more of such subsidiary entities.

## 2. Dividend Rights.

2.1 Dividend Preference. In each calendar year, the holders of the then outstanding Preferred Stock shall be entitled to receive, when, as and if declared by the Board, out of any funds and assets of the Company legally available therefor, noncumulative dividends at the Dividend Rate for the Preferred Stock, prior and in preference to the payment of any dividends or other Distribution on the Common Stock in such calendar year (other than a Common Stock Dividend). No dividends (other than a Common Stock Dividend) shall be paid, and no Distribution shall be made, with respect to the Common Stock during any calendar year unless dividends in the total amount of the Dividend Rate for the Preferred Stock shall have first been paid or declared and set apart for payment to the holders of the Preferred Stock during that

calendar year; provided, however, that this restriction shall not apply to Permitted Repurchases. Payments of any dividends to the holders of Preferred Stock shall be paid pro rata, on an equal priority, pari passu basis. Dividends on the Preferred Stock shall not be mandatory or cumulative, and no rights or interest shall accrue to the holders of Preferred Stock by reason of the fact that the Company shall fail to declare or pay dividends on the Preferred Stock in the amount of the Dividend Rate or in any other amount in any calendar year or any fiscal year of the Company, whether or not the earnings of the Company in any calendar year or fiscal year were sufficient to pay such dividends in whole or in part.

2.2 Participation Rights. If, after dividends in the full preferential amount specified in Section 2.1 for the Preferred Stock have been paid or declared and set apart in any calendar year of the Company, the Board shall declare any additional dividends out of funds legally available therefor in that calendar year, then any such dividends shall be declared pro rata on the Common Stock and the Preferred Stock on a pari passu basis according to the number of shares of Common Stock held by such holders, where each holder of shares of Preferred Stock is to be treated for this purpose as holding the greatest whole number of shares of Common Stock then issuable upon conversion of all shares of Preferred Stock held by such holder pursuant to Section 5.

2.3 Non-Cash Dividends. Whenever a dividend or Distribution provided for in this Section 2 shall be payable in property other than cash, the value of such dividend or Distribution shall be deemed to be the fair market value of such property as determined in good faith by the Board.

2.4 Payment on Conversion. If the Company shall have declared any unpaid dividends with respect to any Preferred Stock, then immediately prior to, and upon a conversion of any of the Preferred Stock as provided in Section 5, the Company shall, subject to the legal availability of funds and assets therefor, pay in cash to the holder of the shares of Preferred Stock being converted the full amount of any dividends declared and unpaid on such shares; provided, however, that this subsection shall not apply in the case of any automatic conversion of Preferred Stock under Section 5.2. In the event that the Company does not have funds or assets sufficient to lawfully pay such dividends when due under this Section 2.4, then such dividends shall be paid as soon as funds and assets are legally available therefor.

2.5 Notice. In the event of 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 (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property, or to receive any other right, the Company shall mail to each holder of Preferred Stock, at least 20 days prior to the date specified therein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right. This right to notice may be waived, in whole or in part, upon the written consent by the holders of at least a majority of the shares of Preferred Stock then outstanding.

3. **Liquidation Rights.** In the event of any liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, the funds and assets that may be legally distributed to the Company's stockholders (the "*Available Funds and Assets*") shall be distributed to stockholders in the following manner:

3.1 **Liquidation Preferences.** The holders of each share of Preferred Stock then outstanding shall be entitled to be paid, out of the Available Funds and Assets, and prior and in preference to any payment or distribution (or any setting apart of any payment or distribution) of any Available Funds and Assets on any shares of Common Stock, an amount per share equal to the Original Issue Price for the applicable series of Preferred Stock, plus all declared but unpaid dividends thereon. If, upon any liquidation, dissolution or winding up of the Company, the Available Funds and Assets shall be insufficient to permit the payment to holders of the Preferred Stock of their full preferential amounts described in this subsection, then all of the Available Funds and Assets shall be distributed among the holders of the then outstanding Preferred Stock pro rata, on an equal priority, pari passu basis, according to the respective liquidation preferences, as applicable, for each series as set forth herein.

3.2 **Participation Rights.** If there are any Available Funds and Assets remaining after the payment or distribution (or the setting aside for payment or distribution) to the holders of the Preferred Stock of their full preferential amounts described in Section 3.1, then all such remaining Available Funds and Assets shall be distributed among the holders of the then outstanding Common Stock and the Preferred Stock pro rata according to the number of shares of Common Stock held by such holders, where, for this purpose, holders of shares of Preferred Stock will be deemed to hold (in lieu of their Preferred Stock) the greatest whole number of shares of Common Stock then issuable upon conversion in full of such shares of Preferred Stock pursuant to Section 5, until such time as each holder of Preferred Stock shall have received an amount per share equal to one-half of the Original Issue Price for the applicable series of Preferred Stock (excluding amounts received pursuant to distributions made pursuant to Section 3.1 above). Thereafter, the remaining Available Funds and Assets, if any, shall be distributed ratably to the holders of the Common Stock based on the number of shares of Common Stock held by each.

3.3 **Acquisition.** An Acquisition shall be deemed to be a liquidation, dissolution or winding up of the Company (as those terms are used in this Section 3).

3.4 **Non-Cash Consideration.** If any assets of the Company distributed to stockholders in connection with any liquidation, dissolution or winding up of the Company are other than cash, then the value of such assets shall be their fair market value as determined in good faith by the Board, except that any securities to be distributed to stockholders in a liquidation, dissolution or winding up of the Company shall be valued as follows:

(a) The method of valuation of securities not subject to investment letter or other similar restrictions on free marketability shall be as follows:



(i) if the securities are then traded on a national securities exchange or the Nasdaq National Market (or a similar national quotation system), then the value shall be deemed to be the average of the closing prices of the securities on such exchange or system over the 30 trading day period ending three (3) days prior to the distribution; and

(ii) if actively traded over-the-counter, then the value shall be deemed to be the average of the closing bid prices over the 30 trading day period ending three (3) days prior to the distribution; and

(iii) if there is no active public market, then the value shall be the fair market value thereof, as determined in good faith by the Board.

(b) The method of valuation of securities subject to investment letter or other restrictions on free marketability shall be to make an appropriate discount from the market value determined as above in subparagraphs (a)(i), (ii) or (iii) of this subsection to reflect the approximate fair market value thereof, as determined in good faith by the Board.

3.5 Notice. The Company shall give each holder of record of Preferred Stock written notice of any such impending transaction not later than 20 days prior to the stockholders' meeting called to approve any liquidation, dissolution or winding up of the Company, or 20 days prior to the closing of any such transaction or event, whichever is earlier, and shall also subsequently notify such holders in writing of the final approval of such transaction. The first of such notices shall describe the material terms and conditions of the impending transaction and the provisions of this Section 3, and the Company shall thereafter give such holders prompt notice of any material changes. This right to notice may be waived, or such notice period may be shortened, upon the written consent by the holders of at least a majority of the shares of Preferred Stock then outstanding.

#### 4. Voting Rights.

4.1 Common Stock. Each holder of shares of Common Stock shall be entitled to one (1) vote for each share thereof held.

4.2 Preferred Stock. Each holder of shares of Preferred Stock shall be entitled to the number of votes equal to the number of whole shares of Common Stock into which such shares of Preferred Stock could be converted pursuant to the provisions of Section 5 below at the record date for the determination of the stockholders entitled to vote on such matters or, if no such record date is established, the date such vote is taken or any written consent of stockholders is solicited.

4.3 General. Subject to the foregoing provisions of this Section 4, each holder of Preferred Stock shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled to notice of any stockholders' meeting in accordance with the Company's Bylaws (as in effect at the time in question) and applicable law,

and shall be entitled to vote, together with the holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote, except as may be otherwise provided by applicable law. Except as otherwise expressly provided herein or as required by law, the holders of Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

4.4 Board of Directors.

(a) Size. The authorized number of directors of the Board shall be not less than six (6) nor more than eleven (11), with the exact number of directors to be specified in the Bylaws of the Corporation.

(b) Election.

(i) Preferred Stock Directors. So long as at least 30,000,000 shares of Preferred Stock are outstanding, the holders of the Preferred Stock, voting together as a single class, shall be entitled to elect three (3) directors to the Board. If less than 30,000,000 shares of Preferred Stock are outstanding, holders of Preferred Stock and Common Stock, voting together as a single class on an as-converted basis, will be entitled to elect such directors to the Board.

(ii) Common Stock Directors. Holders of Common Stock, voting as a class, shall be entitled to elect two (2) directors to the Board.

(iii) Preferred Stock and Common Stock Directors. Holders of Common Stock and Preferred Stock, voting together as a single class on an as-converted basis, shall be entitled to elect all remaining directors to the Board.

(c) Quorum; Required Vote.

(i) Quorum. At any meeting held for the purpose of electing directors, the presence in person or by proxy of the holders of a majority of the shares of the Preferred Stock then outstanding shall constitute a quorum of the Preferred Stock for the election of any directors to be elected solely by the holders of the Preferred Stock pursuant to subsection 4.4(b)(i). The holders of Common Stock representing a majority of the voting power of all the then-outstanding shares of Common Stock shall constitute a quorum for the election of any directors to be elected by the holders of the Common Stock pursuant to subsection 4.4(b)(ii). The holders of Common Stock and Preferred Stock representing a majority of the voting power of all the then-outstanding shares of Common Stock and Preferred Stock shall constitute a quorum for the election of any directors to be elected by the holders of the Common Stock and Preferred Stock pursuant to subsection 4.4(b)(iii).

(ii) Required Vote. With respect to the election of any directors by the holders of the outstanding shares of a specified class or classes of stock

given the right to elect such directors pursuant to subsection 4.4(b) above ("*Specified Stock*"), those candidates shall be elected who either: (i) in the case of any such vote conducted at a meeting of the holders of such Specified Stock, receive the highest number of affirmative votes of the outstanding shares of such Specified Stock, up to the number of directors to be elected by such Specified Stock; or (ii) in the case of any such vote taken by written consent without a meeting, are elected by the unanimous written consent of the holders of shares of such Specified Stock, except that, if such vote is to fill a vacancy on the Board other than a vacancy created by removal of a director, such vacancy may be filled by election by the written consent of the holders of a majority of the outstanding shares of such Specified Stock.

(d) Vacancy. If there shall be any vacancy in the office of a director elected by the holders of any Specified Stock pursuant to subsection 4.4(b), then a successor to hold office for the unexpired term of such director may be elected by the required vote of holders of the shares of such Specified Stock specified in subsection 4.4(c)(ii) above that are entitled to elect such director under subsection 4.4(b).

(e) Removal. Subject to Section 141 of the Delaware General Corporation Law, any director who shall have been elected to the Board by the holders of any Specified Stock pursuant to subsection 4.4(b) or by any director or directors elected by holders of any Specified Stock as provided in subsection 4.4(d), may be removed during his or her term of office, without cause, by the affirmative vote of shares representing a majority of the voting power of all the outstanding shares of such Specified Stock entitled to vote, given either at a meeting of such stockholders duly called for that purpose or pursuant to a written consent of stockholders without a meeting, and any vacancy created by such removal may be filled only in the manner provided in subsection 4.4(d).

(e) Procedures. Any meeting of the holders of any Specified Stock, and any action taken by the holders of any Specified Stock by written consent without a meeting, in order to elect or remove a director under this subsection 4.4, shall be held in accordance with the procedures and provisions of the Company's Bylaws, the Delaware General Corporation Law and applicable law regarding stockholder meetings and stockholder actions by written consent, as such are then in effect (including but not limited to procedures and provisions for determining the record date for shares entitled to vote).

(f) Termination. Notwithstanding anything in this subsection 4.4 to the contrary, the provisions of this subsection 4.4 shall cease to be of any further force or effect upon the closing of an Acquisition. Furthermore, notwithstanding anything in this subsection 4.4 to the contrary, the provisions of this subsection 4.4 shall cease to be of any further force or effect with respect to the election of directors solely by the Preferred Stock (i.e. the first sentence of Section 4.4(b)(i)) on the first date on which the total number of outstanding shares of Preferred Stock is less than 30,000,000 shares.

5. Conversion Rights. The outstanding shares of Preferred Stock shall be convertible into Common Stock as follows:

5.1 Optional Conversion.

(a) At the option of the holder thereof, each share of Preferred Stock shall be convertible, at any time or from time to time prior to the close of business on the business day before any date fixed for redemption of such share, into fully paid and nonassessable shares of Common Stock as provided herein.

(b) Each holder of Preferred Stock who elects to convert the same into shares of Common Stock shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or its transfer agent, and shall give written notice to the Company at such office that such holder elects to convert the same and shall state therein the number of shares of Preferred Stock being converted. Thereupon, there shall be issued and delivered to such holder promptly at such office and in such name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock to which such holder is entitled upon such conversion. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the certificate or certificates representing the shares of Preferred Stock to be converted, and the person entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Common Stock on such date.

5.2 Automatic Conversion.

(a) Initial Public Offering. Each share of Preferred Stock shall automatically be converted into fully paid and nonassessable shares of Common Stock as provided herein immediately prior to the closing of a Qualified IPO.

(b) By Consent of Majority. Each share of Preferred Stock shall automatically be converted into fully paid and nonassessable shares of Common Stock as provided herein upon the Company's receipt of the written consent of the holders of not less than a majority of the then outstanding shares of Preferred Stock, voting together as a single class and not as a separate series and on an as-converted basis, to the conversion of all then outstanding shares of Preferred Stock under this Section 5.

(c) Upon the occurrence of any event specified in subparagraph 5.2(a) or (b) above, the outstanding shares of each applicable series of Preferred Stock shall be converted into Common Stock automatically without the need for 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 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 such Preferred Stock shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Preferred Stock or 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 Common Stock into which the shares of Preferred Stock surrendered were convertible on the date on which such automatic conversion occurred.

5.3 Conversion Price. Each share of Preferred Stock shall be convertible in accordance with Sections 5.1 or 5.2 above into the number of shares of Common Stock which results from dividing the Original Issue Price for such series of Preferred Stock by the conversion price for such series of Preferred Stock that is in effect at the time of conversion (the "Conversion Price"). The initial Conversion Price for each series of Preferred Stock shall be the Original Issue Price for such series of Preferred Stock. The Conversion Price for each series of Preferred Stock shall be subject to adjustment from time to time as provided below.

5.4 Adjustment Upon Common Stock Event. Upon the occurrence of a Common Stock Event at any time on or after the Effective Date, the Conversion Price of each series of Preferred Stock shall, simultaneously with the happening of such Common Stock Event, be adjusted by multiplying the Conversion Price of such series of Preferred Stock in effect immediately prior to such Common Stock Event by a fraction, (i) the numerator of which shall be the number of shares of Common Stock issued and outstanding immediately prior to such Common Stock Event, and (ii) the denominator of which shall be the number of shares of Common Stock issued and outstanding immediately after such Common Stock Event, and the product so obtained shall thereafter be the Conversion Price for such series of Preferred Stock. The Conversion Price for a series of Preferred Stock shall be readjusted in accordance herewith upon the occurrence of each subsequent Common Stock Event.

5.5 Adjustments for Other Dividends and Distributions. If at any time or from time to time on or after the Effective Date the Company pays a dividend or makes another distribution to the holders of the Common Stock payable in securities of the Company other than shares of Common Stock, then in each such event provision shall be made so that the holders of each series of Preferred Stock shall receive upon conversion thereof, in addition to the number of shares of Common Stock receivable upon conversion thereof, the amount of securities of the Company which they would have received had their Preferred Stock been converted into Common Stock on the date of such event (or such record date, as applicable) and had they thereafter, during the period from the date of such event (or such record date, as applicable) to and including the conversion date, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Section 5 with respect to the rights of the holders of the Preferred Stock or with respect to such other securities by their terms.

5.6 Adjustment for Recapitalization, Reclassification, Exchange and Substitution. If, at any time or from time to time on or after the Effective Date, the Common

Stock issuable upon the conversion of all or any series 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, exchange, substitution or otherwise (other than by a Common Stock Event or a stock dividend, reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 5), then in any such event each holder of such 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, exchange, substitution or other change by holders of the number of shares of Common Stock into which such shares of Preferred Stock could have been converted immediately prior to such recapitalization, reclassification, exchange, substitution or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

5.7 Reorganizations, Mergers and Consolidations. If at any time or from time to time on or after the Effective Date there is a reorganization of the Company (other than a recapitalization, subdivision, combination, reclassification, substitution or exchange of shares provided for elsewhere in this Section 5) or a merger or consolidation of the Company with or into another corporation (except an event which is governed under Section 3), then, as a part of such reorganization, merger or consolidation, provision shall be made so that the holders of the Preferred Stock thereafter shall be entitled to receive, upon conversion of the Preferred Stock, the number of shares of stock or other securities or property of the Company, or of such successor corporation resulting from such reorganization, merger or consolidation, to which a holder of Common Stock deliverable upon conversion would have been entitled on such reorganization, merger or consolidation. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 5 with respect to the rights of the holders of the Preferred Stock after the reorganization, merger or consolidation to the end that the provisions of this Section 5 (including adjustment of the Conversion Price then in effect and number of shares issuable upon conversion of the Preferred Stock) shall be applicable after that event and be as nearly equivalent to the provisions hereof as may be practicable. This subsection 5.7 shall similarly apply to successive reorganizations, mergers and consolidations.

5.8 Sale of Shares Below Conversion Price.

(a) Broad-based Weighted Average Adjustment Formula. If at any time or from time to time on or after the Effective Date the Company issues or sells, or is deemed by the provisions of subparagraph 5.8(c) to have issued or sold, Additional Shares of Common Stock (as hereinafter defined), otherwise than in connection with an event for which adjustment is provided in subsections 5.4, 5.5, 5.6 or 5.7, for an Effective Price (as hereinafter defined) that is less than (i) with respect to the Series E Preferred Stock and Series F Preferred Stock, the Conversion Price for the Series F Preferred Stock in effect immediately prior to such issue or sale, (ii) with respect to the Series G Preferred Stock, the Conversion Price for the Series G Preferred Stock in effect immediately prior to such issue or sale and (iii) with respect to the Series H Preferred Stock, the Conversion Price for the Series H Preferred Stock in effect immediately prior to such issue or sale, then the Conversion Price for each applicable series of Preferred Stock shall be reduced,

as of the close of business on the date of such issue or sale, to the price obtained by multiplying the Conversion Price for such series by a fraction:

(A) The numerator of which shall be the sum of (x) the number of Common Stock Equivalents Outstanding (as hereinafter defined) immediately prior to such issue or sale of Additional Shares of Common Stock plus (y) the quotient obtained by dividing the Aggregate Consideration Received (as hereinafter defined) by the Company for the total number of Additional Shares of Common Stock so issued or sold (or deemed so issued and sold) by the Conversion Price for such series of Preferred Stock in effect immediately prior to such issue or sale; and

(B) The denominator of which shall be the sum of (x) the number of Common Stock Equivalents Outstanding immediately prior to such issue or sale plus (y) the number of Additional Shares of Common Stock so issued or sold (or deemed so issued and sold).

(b) Certain Definitions. For the purpose of making any adjustment required under this subsection 5.8 (except as noted below):

(i) "*Additional Shares of Common Stock*" shall, for purposes of making any adjustment under subparagraph 5.8(a), and as such term is used in this subparagraph 5.8(b) and in subparagraph 5.8(c) with respect to adjustments made pursuant to subparagraph 5.8(a), mean all shares of Common Stock issued by the Company (or deemed to have been issued pursuant to subparagraph 5.8(c)), whether or not subsequently reacquired or retired by the Company, other than:

(A) shares of Common Stock (and/or options, warrants and/or rights therefor) granted, issued or sold to employees, consultants, advisors, directors or officers of the Company or any Subsidiary pursuant to stock grant, stock purchase and/or stock option plans, warrants, stock bonuses or awards, or any other stock incentive program, agreement or arrangement approved by the Board;

(B) shares of Common Stock or Preferred Stock issuable upon exercise of any options, warrants or rights to purchase any securities of the Company outstanding as of the Effective Date and any securities issuable upon the conversion thereof;

(C) shares of Common Stock or Preferred Stock (and/or options, warrants and/or rights therefor) issued by the Company as part of bona fide acquisitions by the Company of all or substantially all of the assets or shares of other companies or entities whether through a merger, exchange, reorganization or the like, in each case which transaction is approved by the Board;

(D) shares of Common Stock or Preferred Stock (and/or options, warrants and/or rights therefor) issued by the Company to financial institutions or lessors in connection with commercial credit arrangements, equipment financing or leasing arrangements, leases of real or personal property, or in connection with strategic transactions involving the Company (including without limitation joint ventures, manufacturing, marketing and distribution arrangements, and technology transfer and development arrangements), in each case which transaction or arrangement is approved by the Board and the principal purpose thereof is not to raise additional equity capital for the Company;

(E) shares of Common Stock or Preferred Stock, Options, Convertible Securities or other securities issued in or pursuant to the merger of ShoreTel, Inc., a California corporation, with and into the Company;

(F) shares of Common Stock or other securities issued or issuable upon conversion of any shares of Preferred Stock outstanding as of the Effective Date;

(G) shares of Common Stock or Preferred Stock (and/or options, warrants and/or rights therefor) issued in connection with any stock split, stock dividend, recapitalization or similar event with respect to the outstanding Common Stock; and

(H) shares of Common Stock or Preferred Stock (and/or options, warrants and/or rights therefor) issued or issuable after the Effective Date that are expressly approved by (i) the Board, and (ii) the vote of the holders of a majority of the Preferred Stock then outstanding, voting together as a single class and not as a separate series and on an as-converted basis, as being excluded from the definition of "Additional Shares of Common Stock" under this subparagraph 5.8(b).

(ii) The "*Aggregate Consideration Received*" by the Company for any issue or sale (or deemed issue or sale) of securities shall (A) to the extent it consists of cash, be computed at the gross amount of cash received by the Company before deduction of any underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale and 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; and (C) if Additional Shares of Common Stock, Convertible Securities or Rights or Options to purchase either Additional Shares of 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 to be allocable to such Additional Shares of Common Stock, Convertible Securities or Rights or Options.



(iii) "*Common Stock Equivalents Outstanding*" shall mean the number of shares of Common Stock that is equal to the sum of (A) all shares of Common Stock then outstanding, plus (B) all shares of Common Stock issuable upon conversion of all shares of Preferred Stock or other Convertible Securities then outstanding, plus (C) all shares of Common Stock that are issuable upon the exercise of Rights or Options then outstanding (other than shares issuable upon exercise of unvested options issued pursuant to a plan or plans approved by the Board) assuming the full conversion or exchange into Common Stock of all such Rights or Options that are Rights or Options to purchase or acquire Convertible Securities into or for Common Stock.

(iv) "*Convertible Securities*" shall mean stock or other securities directly or indirectly convertible into or exchangeable for shares of Common Stock.

(v) The "*Effective Price*" of Additional Shares of Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Common Stock issued or sold, or deemed to have been issued or sold, by the Company under this subsection 5.8, into the Aggregate Consideration Received, or deemed to have been received, by the Company under this subsection 5.8, for the issue of such Additional Shares of Common Stock.

(vi) "*Rights or Options*" shall mean warrants, options or other rights to purchase or acquire shares of Common Stock or Convertible Securities.

(c) Deemed Issuances. For the purpose of making any adjustment to the Conversion Price of any series of Preferred Stock required under this subsection 5.8, if the Company issues or sells any Rights or Options or Convertible Securities and if the Effective Price of the shares of Common Stock issuable upon exercise of such Rights or Options and/or the conversion or exchange of Convertible Securities (computed without reference to any additional or similar protective or antidilution clauses) is less than the Conversion Price then in effect for such series of Preferred Stock, then the Company shall be deemed to have issued, at the time of the issuance of such Rights, Options or Convertible Securities, that number of Additional Shares of Common Stock that is equal to the maximum number of shares of Common Stock issuable upon exercise or conversion of such Rights, Options or Convertible Securities upon their issuance (assuming the satisfaction of any conditions to exercisability, including without limitation, the passage of time) and to have received, as the Aggregate Consideration Received for the issuance of such shares, an amount equal to the total amount of the consideration, if any, received by the Company solely 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 in full 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 or exchange thereof; provided, however, that:

(i) if the minimum amounts of such consideration cannot be ascertained, but are a function of antidilution or similar protective clauses, then the Company shall be deemed to have received the minimum amounts of consideration without reference to such clauses;

(ii) if the minimum amount of consideration payable to the Company upon the exercise of Rights or Options or the conversion or exchange of Convertible Securities is reduced over time or upon the occurrence or non-occurrence of specified events other than by reason of antidilution or similar protective adjustments, then the Effective Price shall be recalculated using the figure to which such minimum amount of consideration is reduced; and

(iii) if the minimum amount of consideration payable to the Company upon the exercise of such Rights or Options or the conversion or exchange of Convertible Securities is subsequently increased, then the Effective Price shall again be recalculated using the increased minimum amount of consideration payable to the Company upon the exercise of such Rights or Options or the conversion or exchange of such Convertible Securities.

No further adjustment of the Conversion Price, adjusted upon the issuance of such Rights or Options or Convertible Securities, shall be made as a result of the actual issuance of shares of Common Stock on the exercise of any such Rights or Options or the conversion or exchange of any such Convertible Securities. If any such Rights or Options or the conversion rights represented by any such Convertible Securities shall expire without having been fully exercised, then the Conversion Price as adjusted upon the issuance of such Rights or Options or Convertible Securities shall be readjusted to the Conversion Price which would have been in effect had an adjustment been made on the basis that the only shares of Common Stock so issued were the shares of Common Stock, if any, that were actually issued or sold on the exercise of such Rights or Options or rights of conversion or exchange of such Convertible Securities, and such shares of 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 all such Convertible Securities actually converted or exchanged, 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 or exchange of such Convertible Securities, provided that such readjustment shall not apply to prior conversions of Preferred Stock.

5.9 Certificate of Adjustment. In each case of an adjustment or readjustment of the Conversion Price for a series of Preferred Stock, the Company, at its expense, shall cause its Chief Financial Officer or similar officer to 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 the Preferred Stock at the holder's address as shown in the Company's books.

5.10 Fractional Shares. No fractional shares of Common Stock shall be issued upon any conversion of Preferred Stock. In lieu of any fractional share to which the holder would otherwise be entitled, the Company shall pay the holder cash equal to the product of such fraction multiplied by the fair market value of one share of Common Stock as determined in good faith by the Board as of the date of conversion.

5.11 Reservation of Stock Issuable Upon Conversion. The Company 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 if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

5.12 Notices. Any notice required by the provisions of this Section 5 to be given to the holders of shares of the Preferred Stock shall be deemed given upon the earlier of actual receipt or deposit in the United States mail, by certified or registered mail, return receipt requested, postage prepaid, addressed to each holder of record at the address of such holder appearing on the books of the Company.

5.13 No Impairment. The Company shall not, without the appropriate vote of the stockholders under the Delaware General Corporation Law or as set forth in this Certificate of Incorporation, avoid or seek 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 impairment.

6. Redemption.

(a) At any time beginning on October 14, 2007, each series of Preferred Stock may make a written request for redemption of such series of Preferred Stock (the "*Redemption Request*"), upon consent of a majority of the then-outstanding shares of such series of Preferred Stock, such series of Preferred Stock voting as a single class. The Company shall effect such redemption, from any source of funds legally available therefor, in four (4) equal installments, with the first such installment being made forty-five (45) days after receiving the Redemption Request, and, thereafter, in three (3) equal installments on each of the following three anniversaries of the initial Redemption Date (each payment date being referred to herein as a "*Redemption Date*"), by paying in cash in exchange for the shares of Preferred Stock to be redeemed a sum equal to the applicable Series Redemption Price (as defined below) per share of Preferred Stock being redeemed plus all declared but unpaid dividends on that share. For each series of Preferred Stock, the number of shares of Preferred Stock that the Company shall be required under this Section 6 to redeem on any one

Redemption Date shall be equal to the amount determined by dividing (i) the aggregate number of shares of each series of Preferred Stock outstanding immediately prior to the Redemption Date by (ii) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). Any redemption of a series of Preferred Stock effected pursuant to this Section 6(a) shall be made ratably among the holders of such series of Preferred Stock in proportion to the aggregate Series Redemption Price each such holder of Preferred Stock would otherwise be entitled to receive on the applicable Redemption Date. For purposes of this Section 6, "*Series Redemption Price*" shall mean, for the Series E Preferred Stock, \$0.62914 per share, for the Series F Preferred Stock, \$0.08017 per share, for the Series G Preferred Stock, \$0.174 per share and, for the Series H Preferred Stock, \$0.212 per share (in each case as adjusted to the extent necessary to reflect any Preferred Stock Event applicable to such series of Preferred Stock).

(b) At least fifteen (15) but no more than thirty (30) days prior to each Redemption Date, the Company shall mail, first class postage prepaid, written notice to each holder of record (at the close of business on the business day next preceding the day on which notice is given) of shares of Preferred Stock to be redeemed, at the address last shown on the records of the Company for such holder, notifying such holder of the redemption to be effected, specifying the number of shares of Preferred Stock to be redeemed from such holder, the Redemption Date, the applicable Series Redemption Price, the place at which payment may be obtained and calling upon such holder to surrender to the Company in the manner and at the place designated, his or her certificate or certificates representing the shares to be redeemed (the "*Redemption Notice*"). Except as provided in Section 6(c), on or after the Redemption Date each holder of shares of Preferred Stock to be redeemed shall surrender to this Company the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the applicable Series Redemption Price of such shares of Preferred Stock 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 any such certificate or certificates are redeemed, a new certificate shall be issued representing the unredeemed shares.

(c) From and after each Redemption Date, unless there shall have been a default in payment of the aggregate Series Redemption Price, in which case the holders of Preferred Stock shall not be required to redeem any outstanding Preferred Stock and shall retain all rights as holders of such shares, all rights of the holders of Preferred Stock designated for redemption in the Redemption Notice (except the right to receive the aggregate Series Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Company or be deemed to be outstanding for any purpose whatsoever. If the funds of the Company legally available for redemption of Preferred Stock on any Redemption Date are insufficient to redeem the total number of shares of Preferred Stock to be redeemed on such date, those funds which are legally available will be used to redeem the maximum possible number of such shares ratably among the holders of such shares to be redeemed based upon the amounts of the applicable Series Redemption Prices which would have been payable to them if the funds of the Company legally available

therefor had been sufficient to redeem all such shares. The shares of Preferred Stock not redeemed shall remain outstanding and entitled to all the rights and preferences provided herein. At any time thereafter when additional funds of the Company are legally available for the redemption of Preferred Stock, such funds will immediately be used to redeem the balance of the shares which the Company has become obliged to redeem on any Redemption Date, but which it has not redeemed.

(d) On or prior to each Redemption Date, the Company shall deposit the aggregate Series Redemption Prices of all shares of Preferred Stock designated for redemption in the Redemption Notice and not yet redeemed, with a bank or trust corporation having aggregate capital and surplus in excess of \$100,000,000 as a trust fund for the benefit of the respective holders of the shares designated for redemption and not yet redeemed, with irrevocable instructions and authority to the bank or trust corporation to pay the aggregate Series Redemption Prices for such shares to their respective holders on or after such Redemption Date upon receipt of notification from the Company that such holder has surrendered his share certificate to the Company pursuant to Section 6(b) above. As of each Redemption Date, the deposit shall constitute full payment of the shares to their holders, and from and after such Redemption Date the shares so called for redemption shall be redeemed and shall be deemed to be no longer outstanding, and the holders thereof shall cease to be stockholders with respect to such shares and shall have no rights with respect thereto except the rights to receive from the bank or trust corporation payment of the Series Redemption Price of the shares, without interest, upon surrender of their certificates therefor. Such instructions shall also provide that any moneys deposited by the Company pursuant to this Section 6(d) for the redemption of shares thereafter converted into shares of Common pursuant to Section 5 prior to the applicable Redemption Date shall be returned to the Company forthwith upon such conversion. The balance of any moneys deposited by the Company pursuant to this Section 6(d) remaining unclaimed at the expiration of two (2) years following the Redemption Date shall thereafter be returned to the Company upon its request expressed in a resolution of the Board.

7. **Protective Provisions.** So long as at least 30,000,000 shares of Preferred Stock remain outstanding, the Company shall not (whether effected directly or through any amendment, merger, consolidation or similar event), without the approval, by vote or written consent, of the holders of a majority of the shares of Preferred Stock then outstanding, voting together as a single class and not as a separate series and on an as-converted basis:

- (a) repurchase or redeem any shares of Preferred Stock;
- (b) repurchase any shares of Common Stock (other than Permitted Repurchases);
- (c) authorize, create or issue any other equity security having rights or preferences senior to or on a parity with any series of Preferred Stock (including any debt instrument convertible into or exchangeable for any such equity security) other than the issuance of any authorized but unissued shares of Preferred Stock designated in this First

Restated Certificate of Incorporation (including any security convertible into or exercisable for such shares of Preferred Stock);

(d) declare or pay any dividend, or make any other distribution of cash or assets of the Company, with respect to any shares of Common Stock (other than Permitted Repurchases);

(e) consummate an Acquisition;

(f) permit a Subsidiary to sell shares of capital stock or other equity securities of such Subsidiary to any third party;

(g) increase or decrease (other than by redemption or conversion) the number of authorized shares of Preferred Stock;

(h) materially and adversely alter or change any of the rights, preferences, privileges or restrictions of any series of Preferred Stock (including by way of an Acquisition or other similar transaction); provided that for the purposes of this Section 7(h), in the event of an amendment to this First Restated Certificate of Incorporation which changes the rights, preferences, privileges and restrictions of a particular series of Preferred Stock in a manner that materially and adversely affects such series in a different manner than other the series of Preferred Stock then outstanding, such amendment shall also require the vote or written consent of the holders of a majority of the shares of such series of Preferred Stock then outstanding, voting as a separate series;

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

(j) liquidate or dissolve the Company or voluntarily file for bankruptcy.

## 8. Miscellaneous.

8.1 No Reissuance of Preferred Stock. No share or shares of Preferred Stock acquired by the Company by reason of purchase, conversion or otherwise (including, without limitation, pursuant to Section 6) shall be reissued, and all such shares shall be cancelled, retired and eliminated from the shares which the Company shall be authorized to issue.

8.2 Adjustments for Stock Splits, Etc. Except as otherwise required by law, wherever in Article IV of this First Restated Certificate of Incorporation there is a reference to a specific number of shares of Common Stock or Preferred Stock (including any particular series of Preferred Stock), then, upon the occurrence of any Common Stock Event or Preferred Stock Event, the specific number of shares so referenced in Article IV of this First Restated Certificate of Incorporation shall automatically be proportionally adjusted to reflect the effect on the outstanding shares of such class or series of stock by such Common Stock Event or Preferred Stock Event, as applicable.

#### ARTICLE V

The Board of Directors of the corporation shall have the power to adopt, amend or repeal the Bylaws of the corporation.

#### ARTICLE VI

Election of directors need not be by written ballot unless the Bylaws of the corporation shall so provide.

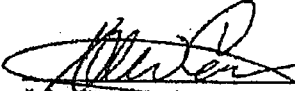
#### ARTICLE VII

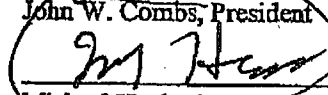
To the fullest extent permitted by law, no director of the corporation shall be personally liable for monetary damages for breach of fiduciary duty as a director. Without limiting the effect of the preceding sentence, if the Delaware General Corporation Law is hereafter amended to authorize the further elimination or limitation of the liability of a director, then the liability of a director of the corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Neither any amendment nor repeal of this Article VII, nor the adoption of any provision of this Certificate of Incorporation inconsistent with this Article VII, shall eliminate, reduce or otherwise adversely affect any limitation on the personal liability of a director of the corporation existing at the time of such amendment, repeal or adoption of such an inconsistent provision.

We further declare under penalty of perjury under the laws of the States of California and Delaware that the matters set forth in this certificate are true and correct of our own knowledge.

Dated: June 22, 2007

  
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John W. Combs, President

  
\_\_\_\_\_  
Michael Healy, Secretary



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