

Form PTO-1594 (Rev. 10/02) OMB No. 0651-0027 (exp. 6/30/2005)

RECORDATION FORM COVER SHEET TRADEMARKS ONLY

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):

Xanodyne Pharmacal, Inc.

- Individual(s), Association, General Partnership, Limited Partnership, Corporation-State, 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: 2/6/04

2. Name and address of receiving party(ies)

Name: Xanodyne Pharmaceuticals, Inc.

Internal Address: Suite 300

Street Address: 7300 Turfway Road

City: Florence State: KY Zip: 41042

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

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

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

A. Trademark Application No.(s) 76/501361; 76/501362; 76/436666; 76/386963

B. Trademark Registration No.(s) 0,729,648; 2,733,288; 2,639,572; 2,559,752;

Additional number(s) attached Yes No

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

Name: Kurt A. Summe

Internal Address: Wood, Herron & Evans, LLP 2700 Carew Tower

Street Address: 441 Vine Street

City: Cincinnati State: OH Zip: 45202

6. Total number of applications and registrations involved:

11

7. Total fee (37 CFR 3.41): \$ 290.00

- Enclosed, Authorized to be charged to deposit account

along with any deficiencies or credits.

8. Deposit account number:

23-3000

DO NOT USE THIS SPACE

9. Signature.

Kurt A. Summe Name of Person Signing

[Signature] Signature

June 23, 2004 Date

Total number of pages including cover sheet, attachments, and document: 21

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

CH \$290.00 233000 76501361

4. Application/patent numbers - Continued

A. 76/386,964

B. 0,738,956
2,765,408

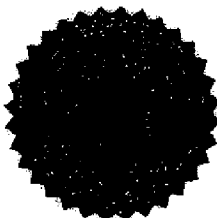
Delaware

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 RESTATED CERTIFICATE OF "XANODYNE PHARMACAL, INC.", CHANGING ITS NAME FROM "XANODYNE PHARMACAL, INC." TO "XANODYNE PHARMACEUTICALS, INC.", FILED IN THIS OFFICE ON THE SIXTH DAY OF FEBRUARY, A.D. 2004, AT 1:02 O'CLOCK P.M.

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



Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

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AUTHENTICATION: 2916670

DATE: 02-06-04

TRADEMARK

REEL: 002878 FRAME: 0266

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NO. 7485 P. 3.

State of Delaware
Secretary of State
Division of Corporations
Delivered 01:09 PM 02/06/2004
FILED 01:02 PM 02/06/2004
SRV 040083599 - 3236996 FILE

RESTATED CERTIFICATE OF INCORPORATION
OF
XANODYNE PHARMACAL, INC.

It is hereby certified that:

1. The present name of the corporation (hereinafter called the "Corporation" or the "Company") is Xanodyne Pharmacal, Inc., which was originally incorporated under the name UBE PHARMACEUTICALS, INC., and the date of filing the original certificate of incorporation of the Corporation with the Secretary of State of the State of Delaware was May 31, 2000.

2. This restated certificate of incorporation amends and restates in its entirety the provisions of the certificate of incorporation of the Corporation.

3. The provisions of the certificate of incorporation of the Corporation heretofore amended and/or supplemented, and as herein amended, are hereby restated and integrated into the single instrument which is hereinafter set forth, and which is entitled Restated Certificate of Incorporation of Xanodyne Pharmacal, Inc., without any further amendments other than the amendments herein certified and without any discrepancy between the provisions of the certificate of incorporation as heretofore amended and supplemented and the provisions of the said single instrument hereinafter set forth.

4. The amendments and the restatement of the certificate of incorporation herein certified have been duly adopted by the stockholders in accordance with the provisions of Sections 228, 242, and 245 of the General Corporation Law of the State of Delaware.

5. The text of the certificate of incorporation of the Corporation is hereby amended and restated in its entirety to read as follows:

RESTATED CERTIFICATE OF INCORPORATION
OF
XANODYNE PHARMACEUTICALS, INC.

FIRST: The name of the corporation is Xanodyne Pharmaceuticals, Inc.

SECOND: The address of its registered office in the State of Delaware is 1209 Orange Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

THIRD: The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

FOURTH:

4.1 Authorization of Stock.

(a) The total number of shares of Common Stock which the Corporation is authorized to issue shall be 55,000,000 shares of Common Stock, with a par value of \$.001 per share, of which 54,800,000 are of a class designated as Series C-V Common Stock ("Voting Common Stock"), with a par value of \$.001 per share, and 200,000 are of a class designated as Series C-NV Common Stock ("Nonvoting Common Stock"), with a par value of \$.001 per share, (collectively, the Voting Common Stock and the Nonvoting Common Stock are referred to as "Common Stock" or "Common"). All shares of Common Stock issued and outstanding on the date on which this Restated Certificate is filed with the Secretary of State of the State of Delaware shall be deemed to be shares of Voting Common Stock.

(b) The total number of shares of Preferred Stock which the Corporation is authorized to issue shall be 33,827,373 shares of Preferred Stock, with a par value of \$.001 per share, of which 17,000,000 are of a class designated as Series A Convertible Preferred Stock, with a par value of \$.001 per share (the "Series A Preferred Stock"); 2,266,667 are of a class designated as Series B Convertible Preferred Stock, with a par value of \$.001 per share (the "Series B Preferred Stock"); 4,500,000 are of a class designated as Series W Convertible Preferred Stock, with a par value of \$.001 per share (the "Series W Preferred Stock"); 2,875,000 are of a class designated as Series X Convertible Preferred Stock, with a par value of \$.001 per share (the "Series X Preferred Stock"); 1,912,000 are of a class designated as Series Y Convertible Preferred Stock, with a par value of \$.001 per share (the "Series Y Preferred Stock"); and 5,273,706 are of a class designated as Series Z Convertible Preferred Stock, with a par value of \$.001 per share (the "Series Z Preferred Stock") (the Series A Preferred Stock, the Series B Preferred Stock, the Series W Preferred Stock, the Series X Preferred Stock, the Series Y Preferred Stock and the Series Z Preferred Stock are collectively referred to as "Preferred Stock").

The above referenced Common and Preferred shares of stock shall be subject to the powers, rights, preferences and restrictions as detailed in the remainder of this Article Fourth.

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4.2 Powers and Qualifications of Common Stock. The powers, preferences and rights, and the qualifications, restrictions or limitations, of the Common are as follows:

4.2.1 Voting Rights, Directors. Except as otherwise required by law or expressly provided in this Certificate of Incorporation, each share of Voting Common Stock (including any fractional share) shall entitle the holder thereof to vote on each matter submitted to a vote of the shareholders of the Company and to have one vote for each full share of Voting Common Stock (or the applicable fraction of one vote, for a fraction of a share). Except as otherwise required by law or expressly provided in this Certificate of Incorporation, the holders of shares of Voting Common Stock and Preferred shall vote together and not as separate classes or series. The holders of shares of Nonvoting Common Stock shall have no voting rights.

4.2.2 Dividends. Subject to the rights of holders of Preferred set forth in Section 4.3.2(c) of this Certificate of Incorporation and except as otherwise provided herein, the holders of Common shall be entitled to receive dividends out of funds legally available therefor at such times and in such amounts as the Board of Directors may determine in its sole discretion.

4.2.3 Liquidation. Upon the dissolution, liquidation or winding up of the Company, whether voluntary or involuntary, the assets of the Company available for distribution to shareholders after and in addition to any distribution of any preferential amounts pursuant to Section 4.3.3(a) of this Certificate of Incorporation, shall be distributed ratably to all holders of Common and Preferred in accordance with the provisions of Section 4.3.3(c) of this Certificate of Incorporation.

4.3 Powers and Qualifications of Preferred Stock. The powers, preferences and rights, and the qualifications, restrictions or limitations, of the Preferred are as follows:

4.3.1 Voting Rights, Directors. Except as otherwise required by law or expressly provided in this Certificate of Incorporation, each share of Preferred (including any fractional share) shall entitle the holder thereof to vote on each matter submitted to a vote of the shareholders of the Company and to have the number of votes equal to the number (including any fraction) of shares of Voting Common Stock into which such share of Preferred is then convertible pursuant to the provisions hereof at the record date for the determination of shareholders entitled to vote on such matter or, if no such record date is established, at the date such vote is taken or any written consent of shareholders becomes effective. Except as otherwise required by law or expressly provided in this Certificate of Incorporation or that certain Shareholders Agreement, effective on, about, or around December 31, 2002, as it may be amended from time to time, the holders of shares of Voting Common Stock and Preferred shall vote together and not as separate classes or series.

4.3.2 Dividends.

(a) The holders of the Preferred shall be entitled to receive dividends only when, as and if declared by the Board of Directors and shall be cumulative.

(b) No dividends shall be paid on any share of Common, unless a dividend (including the amount of any dividends accrued on behalf of the Preferred) is paid with respect to all

outstanding shares of Preferred. In the event any dividend or other distribution payable in cash or other property (other than securities of the Company the issuance of which gives rise to adjustments pursuant to Section 4.3.4(e) of this Certificate of Incorporation) is declared on any Common Stock, each holder of shares of Preferred on the record date for such dividend or distribution shall be entitled to receive, in addition to any dividend separately declared under 4.3.2(a), on the date of payment or distribution of such dividend or other distribution the same cash or other property which such holder would have received on such record date if such holder were the holder of record of the number (including any fraction) of shares of Voting Common Stock into which the shares of Preferred then held by such holder are then convertible.

4.3.3 Liquidation Rights.

(a) Subject to the restrictions and defeasance provisions set forth below, if the Company shall be voluntarily or involuntarily liquidated, dissolved or wound up, the holder of each share of Preferred then outstanding (including any fractional shares) shall be entitled to receive out of the assets of the Company available for distribution to shareholders, and before any payment or declaration and setting apart for payment of any amount shall be made with respect to the Common, an amount equal to 100% of the original cost of such share (such amount to be adjusted proportionately in the event the shares of Preferred are subdivided into a greater number or combined into a lesser number), plus an amount equal to any dividends on such share which are unpaid but accrued as of such liquidation, dissolution or winding up of the Company.

(b) If, upon any liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, the assets to be distributed to the holders of Preferred shall be insufficient to permit the payment, if any, of the full preferential amount pursuant to Section 4.3.3(a) of this Certificate of Incorporation, then all of the assets of the Company to be distributed shall be distributed ratably to the holders of Preferred.

(c) Upon the dissolution, liquidation or winding up of the Company, whether voluntary or involuntary, the assets of the Company available for distribution to shareholders after and in addition to the distribution of any preferential amounts pursuant to Section 4.3.3(a) of this Certificate of Incorporation, shall be distributed ratably to all holders of Common and Preferred, with the holder of each share of Preferred treated as though such holder were the holder of record of the number of shares of Common into which such share is then convertible.

(d) For purposes of this Section 4.3.3 and unless waived by the holders of two-thirds of the shares of Preferred outstanding on an as-converted basis, (i) any acquisition of the Company by means of merger or other form of corporate reorganization in which outstanding shares of the Company are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring corporation or its subsidiary (other than a transaction resulting in ownership of more than 60% of the equity of the acquiring corporation by shareholders of the Company) or (ii) a sale of all or substantially all of the assets of the Company (collectively, the events described in (i) and (ii) are referred to as a "Sales Transaction"), shall be treated as a liquidation, dissolution or winding up of the Company and shall entitle the holders of Preferred and Common to receive at the closing in cash, securities or other property (valued as provided in Section 4.3.3(e) below) amounts as specified in Sections 4.3.3(a) through 4.3.3(c) above.

(e) Notwithstanding anything to the contrary herein, if, in connection with a Sales Transaction (including the sale of substantially all of the assets of the Company followed by a liquidation), the amount per share that would be received in such transaction by the holder of any share of Preferred if such share of Preferred was converted into Common Stock immediately prior to the consummation of such transaction (the "As-Converted Amount") is at least 300% of the original issuance cost of such share of Preferred, then the amount that such holder shall be entitled to receive in such transaction on account of such share of Preferred shall be equal to the As-Converted Amount.

(f) Whenever the distribution provided for in this Section 4.3.3 shall be payable in securities or property other than cash, the value of such distribution shall be the fair market value of such securities or other property as determined in good faith by the Board of Directors.

4.3.4 Conversion.

(a) *Terms of Conversion.*

(i) **Series A Preferred.** The holder of each share of Series A Preferred Stock shall have the right (the "Series A Conversion Right"), at any time, at such holder's option, to convert such share at any time, without cost and otherwise on the terms of this Section 4.3.4, into the number of fully paid and non-assessable shares of Voting Common Stock that results from dividing:

(A) \$1.00 (such amount to be adjusted proportionately in the event the shares of Preferred are subdivided into a greater number or combined into a lesser number),

by:

(B) the Conversion Price in effect at the time of conversion.

The "Series A Conversion Price" shall initially be \$1.00 and shall be subject to adjustment from time to time as provided in this Section 4.3.4.

(ii) **Series B Preferred.** The holder of each share of Series B Preferred Stock shall have the right (the "Series B Conversion Right"), at any time, at such holder's option, to convert such share at any time, without cost and otherwise on the terms of this Section 4.3.4, into the number of fully paid and non-assessable shares of Voting Common Stock that results from dividing:

(A) \$2.25 (such amount to be adjusted proportionately in the event the shares of Preferred are subdivided into a greater number or combined into a lesser number),

by:

(B) the Conversion Price in effect at the time of conversion.

The "Series B Conversion Price" shall initially be \$2.25 and shall be subject to adjustment from time to time as provided in this Section 4.3.4.

(iii) Series W Preferred. The holder of each share of Series W Preferred Stock shall have the right (the "Series W Conversion Right"), at any time, at such holder's option, to convert such share at any time, without cost and otherwise on the terms of this Section 4.3.4, into the number of fully paid and non-assessable shares of Voting Common Stock that results from dividing:

(A) \$1.00 (such amount to be adjusted proportionately in the event the shares of Preferred are subdivided into a greater number or combined into a lesser number).

by:

(B) the Conversion Price in effect at the time of conversion.

The "Series W Conversion Price" shall initially be \$1.00 and shall be subject to adjustment from time to time as provided in this Section 4.3.4.

(iv) Series X Preferred. The holder of each share of Series X Preferred Stock shall have the right (the "Series X Conversion Right"), at any time, at such holder's option, to convert such share at any time, without cost and otherwise on the terms of this Section 4.3.4, into the number of fully paid and non-assessable shares of Voting Common Stock that results from dividing:

(A) \$4.00 (such amount to be adjusted proportionately in the event the shares of Preferred are subdivided into a greater number or combined into a lesser number),

by:

(B) the Conversion Price in effect at the time of conversion.

The "Series X Conversion Price" shall initially be \$2.15 and shall be subject to adjustment from time to time as provided in this Section 4.3.4.

(v) Series Y Preferred. The holder of each share of Series Y Preferred Stock shall have the right (the "Series Y Conversion Right"), at any time, at such holder's option, to convert such share at any time, without cost and otherwise on the terms of this Section 4.3.4, into the number of fully paid and non-assessable shares of Voting Common Stock that results from dividing:

(A) \$4.50 (such amount to be adjusted proportionately in the event the shares of Preferred are subdivided into a greater number or combined into a lesser number),

by:

(B) the Conversion Price in effect at the time of conversion.

The "Series Y Conversion Price" shall initially be \$2.15 and shall be subject to adjustment from time to time as provided in this Section 4.3.4.

(vi) **Series Z Preferred.** The holder of each share of Series Z Preferred Stock shall have the right (the "Series Z Conversion Right"), at any time, at such holder's option, to convert such share at any time, without cost and otherwise on the terms of this Section 4.3.4, into the number of fully paid and non-assessable shares of Voting Common Stock that results from dividing:

(A) \$1.52 (such amount to be adjusted proportionately in the event the shares of Preferred are subdivided into a greater number or combined into a lesser number),

by:

(B) the Conversion Price in effect at the time of conversion.

The "Series Z Conversion Price" shall initially be \$1.52 and shall be subject to adjustment from time to time as provided in this Section 4.3.4.

The Series A Conversion Price, the Series B Conversion Price, the Series W Conversion Price, the Series X Conversion Price, the Series Y Conversion Price and the Series Z Conversion Price are sometimes referred to collectively in this Restated Certificate of Incorporation, in the singular as a "Conversion Price" and in the plural as the "Conversion Prices." The Series A Conversion Right, the Series B Conversion Right, the Series W Conversion Right, the Series X Conversion Right, the Series Y Conversion Right and the Series Z Conversion Right are sometimes referred to collectively in this Restated Certificate of Incorporation, in the singular as a "Conversion Right" and in the plural as the "Conversion Rights."

(b) *Mechanics of Conversion.* A holder of any share of Preferred may exercise the Conversion Right of such share by surrendering the certificate therefor, duly endorsed, at the office of the Company or of any transfer agent for the Preferred, together with a written notice to the Company which states:

- (i) that such holder elects to convert the same,
- (ii) the number of shares of Preferred being converted, and
- (iii) the name or names in which such holder wishes the certificate or certificates for shares of Voting Common Stock to be issued.

Thereupon the Company shall promptly issue and deliver to the holder of such shares, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of

Voting Common Stock to which such holder shall be entitled. If the certificate evidencing the Preferred being converted shall also evidence shares of Preferred not being converted, then the Company shall also deliver to the holder of such certificate, or to the nominee or nominees of such holder, a new stock certificate evidencing the Preferred not converted. Any dividends or distributions unpaid but accrued at the time of conversion with respect to a share of Preferred so converted shall be payable ratably to the shares of the Voting Common Stock issued upon such conversion.

(c) *Effective Date of Conversion.* Subject to Section 4.3.4(e) below, the conversion of any shares of Preferred shall be deemed to have been made immediately prior to the close of business on the date that the shares to be converted are surrendered to the Company together with the notice required by Section 4.3.4(b), and the person or persons entitled to receive the shares of Voting Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Voting Common Stock on such date.

(d) *Automatic Conversion.* Notwithstanding anything to the contrary herein, each share of Preferred Stock shall automatically be converted into shares of Voting Common Stock at its respective Conversion Price then in effect immediately upon the closing of a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended.

(e) *Adjustment of Conversion Price.*

(i) *Subdivision or Combination of Shares.* If the Company at any time subdivides or combines the outstanding Common after the filing of this Certificate of Incorporation, the Conversion Prices shall be decreased, in the case of a subdivision, or increased, in the case of a combination, in the same proportions as the Common is subdivided or combined, effective automatically as of the date the Company shall take a record of the holders of its Common for the purpose of the subdivision or combination (or if no such record is taken, as of the effectiveness of the subdivision or combination).

(ii) *Stock Dividends.* If the Company at any time pays a dividend, or makes any other distribution, to holders of Common payable in shares of Common, or fixes a record date for the determination of holders of Common entitled to receive a dividend or other distribution payable in shares of Common, the Conversion Prices shall each be decreased by multiplying it by a fraction:

(A) the numerator of which shall be the total number of shares of Common outstanding immediately prior to such dividend or distribution, and

(B) the denominator of which shall be the total number of shares of Common outstanding immediately after such dividend or distribution (plus, if the Company paid cash instead of fractional shares otherwise issuable in such dividend or distribution, the number of additional shares which would have been outstanding had the Company issued fractional shares instead of cash),

effective automatically as of the date the Company shall take a record of the holders of its Common for the purpose of receiving such dividend or distribution (or if no such record is taken, as of the effectiveness of such dividend or distribution).

(iii) *Reclassification, Consolidation or Merger.* If at any time, as a result of:

(A) a capital reorganization or reclassification (other than a subdivision, combination or dividend which gives rise to adjustment of the Conversion Price pursuant to clauses 4.3.4(e)(i) or 4.3.4(e)(ii) of this Section 4.3.4(c)), or

(B) a merger or consolidation of the Company with another corporation (whether or not the Company is the surviving corporation),

The Voting Common Stock issuable upon the conversion of the Preferred shall be changed into or exchanged for the same or a different number of shares of any class or classes of stock of the Company or any other corporation, or other securities convertible into such shares, then, as a part of such reorganization, reclassification, merger or consolidation, appropriate adjustments shall be made in the terms of the Preferred (or of any securities into which the Preferred is changed or for which the Preferred is exchanged), so that:

(y) the holders of Preferred or of such substitute securities shall thereafter be entitled to receive, upon conversion of the Preferred or of such substitute securities, the kind and amount of shares of stock, other securities, money and property which such holders would have received at the time of such capital reorganization, reclassification, merger, or consolidation, if such holders had converted their Preferred into Voting Common Stock immediately prior to such capital reorganization, reclassification, merger, or consolidation, and

(z) the Preferred or such substitute securities shall thereafter be adjusted on terms as nearly equivalent as may be practicable to the adjustments theretofore provided in this Section 4.3.4(e).

The provisions of this Section 4.3.4(e)(iii) shall similarly apply to successive capital reorganizations, reclassifications, mergers, and consolidations.

(iv) *Additional Shares of Common.*

(A) "Additional Shares of Common" means all shares of Common issued by the Company after the date of adoption by the shareholders of the Company of this Restated Certificate of Incorporation, whether or not subsequently reacquired or retired by the Company, other than:

(1) shares of Common issued in transactions giving rise to adjustments under Section 4.3.4(e)(i), 4.3.4(e)(ii), or 4.3.4(e)(iii), and

(2) shares of Common issued in any merger of Integrity Pharmaceutical Corporation with and into the Company, and

(3) up to 200,000 shares of Common issued to Mikart, Inc. in connection with the acquisition of certain products, and

(4) shares of Common issued upon conversion of shares of Preferred, and

(5) shares of Common issued in connection with certain warrants for 35,715 shares of Series Z Preferred Stock (the successor to the Series D Convertible Preferred Stock of Integrity Pharmaceutical Corporation) issued to Silicon Valley Bank pursuant to a certain Loan and Security Agreement dated on or around April 2003 (such warrants shall not be a "Convertible Security" as defined in Section 4.3.4(e)(v) hereafter), and

(6) up to 1,800,000 shares of Common issued upon exercise of certain Exchange Rights granted by the Company, and

(7) up to 7,402,001 shares (such amount to be adjusted proportionately in the event the shares of Common are subdivided into a greater number or combined into a lesser number) of Common issued upon the exercise of options granted or to be granted in the discretion of the Board of Directors of the Company to Company employees pursuant to the Company's Incentive Stock Ownership Plan, and

(8) shares of Common issued by the Board of Directors of the Company to consultants and advisors of the Company.

(B) Except as otherwise provided in Section 4.3.4(c)(v), if at any time the Company issues Additional Shares of Common without consideration or for a consideration per share less than any Conversion Price then in effect, then such Conversion Price shall be reduced, concurrently with such issuance, to a price (calculated to the nearest cent) equal to the consideration per share for which such Additional Shares of Common were issued.

(v) *Convertible Securities.*

(A) "Convertible Securities" means all rights or options for the purchase of, or stock or other securities convertible into, Additional Shares of Common or other Convertible Securities.

(B) The "Effective Price" with respect to any Convertible Securities means the result of dividing:

(1) the sum of (x) the total consideration, if any, received by the Company for the issuance of such Convertible Securities, plus (y) the minimum consideration, if any, payable to the Company upon exercise or conversion of such Convertible Securities, plus (z) the minimum consideration, if any, payable to the Company upon exercise or conversion of any Convertible Securities issuable upon exercise or conversion of such Convertible Securities,

by:

(2) the maximum number of Additional Shares of Common issuable upon exercise or conversion of such Convertible Securities or of any Convertible Securities issuable upon exercise or conversion of such Convertible Securities, but in any case not less than \$1.00.

(C) If at any time the Company issues any Convertible Securities with respect to which the Effective Price is less than the Series A Conversion Price in effect at such issuance, then the Series A Conversion Price shall be reduced, concurrently with such issuance, to a price (calculated to the nearest cent) equal to the Effective Price with respect to such Convertible Securities.

(D) If at any time the Company issues any Convertible Securities with respect to which the Effective Price is less than the Series B Conversion Price in effect at such issuance, then the Series B Conversion Price shall be reduced, concurrently with such issuance, to a price (calculated to the nearest cent) equal to the Effective Price with respect to such Convertible Securities.

(E) If at any time the Company issues any Convertible Securities with respect to which the Effective Price is less than the Series W Conversion Price in effect at such issuance, then the Series W Conversion Price shall be reduced, concurrently with such issuance, to a price (calculated to the nearest cent) equal to the Effective Price with respect to such Convertible Securities.

(F) If at any time the Company issues any Convertible Securities with respect to which the Effective Price is less than the Series X Conversion Price in effect at such issuance, then the Series X Conversion Price shall be reduced, concurrently with such issuance, to a price (calculated to the nearest cent) equal to the Effective Price with respect to such Convertible Securities.

(G) If at any time the Company issues any Convertible Securities with respect to which the Effective Price is less than the Series Y Conversion Price in effect at such issuance, then the Series Y Conversion Price shall be reduced, concurrently with such issuance, to a price (calculated to the nearest cent) equal to the Effective Price with respect to such Convertible Securities.

(H) If at any time the Company issues any Convertible Securities with respect to which the Effective Price is less than the Series Z Conversion Price in

effect at such issuance, then the Series Z Conversion Price shall be reduced, concurrently with such issuance, to a price (calculated to the nearest cent) equal to the Effective Price with respect to such Convertible Securities.

(I) If adjustments have been made under this Section 4.3.4(e)(v) upon the issuance of any Convertible Securities, then no further adjustment shall be made under Section 4.3.4(e)(iv) upon the actual issuance of Additional Shares of Common upon the exercise or conversion of such Convertible Securities, or upon the issuance of Convertible Securities issuable upon exercise or conversion of the original Convertible Securities.

(J) If adjustments have been made under this Section 4.3.4(e)(v) upon the issuance of any Convertible Securities and the rights, options or conversion privilege represented by such Convertible Securities (or by any Convertible Securities issued upon exercise or conversion of the original Convertible Securities) shall expire without having been exercised, the Conversion Price shall be readjusted, effective upon such expiration, to eliminate the effect of the adjustments previously made as a result of the issuance of the rights, options or conversion privileges which shall have expired (without affecting shares of Common already issued upon the conversion of any shares of Preferred already converted, and without affecting any other adjustments made under this Section 4.3.4(e).

(vi) *Valuation of Consideration.* For purposes of the operation of Sections 4.3.4(e)(iv) and 4.3.4(e)(v), the consideration received by the Company for any issue or sale of securities shall:

(A) to the extent it consists of cash, be computed as the aggregate amount of cash received 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 of the Company; and

(C) if Additional Shares of Common or Convertible Securities are issued or sold together with other stock or securities or other assets of the Company for a consideration that 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 of the Company to be allocable to such Additional Shares of Common or Convertible Securities.

(vii) *Liquidating Dividends.* If the Company, at any time while any of the Preferred is outstanding, shall make a distribution of its assets to the holders of its Common as a dividend in liquidation or partial liquidation or by way of return of capital or other than as a dividend payable out of funds legally available for dividends under the laws of the State of Delaware, the holders of the Preferred shall be entitled to receive,

without payment of any consideration therefor, the assets that would have been payable to them as owners of that number of shares of Common Stock receivable by exercise of such Conversion Rights, had they been the holders of record of such Common on the record date for such distribution, and an appropriate provision therefor shall be made a part of any such distribution in accordance with the preferential provisions of Section 4.3.3 of this Certificate of Incorporation.

(viii) *Other Action Affecting Common.* If at any time the Company takes any action affecting its Common, other than an action described in any of Sections 4.3.4(e)(i) through 4.3.4(e)(vii), which, in the opinion of a majority of shares of Preferred and Common Stock received by the holders of Preferred upon conversion, would have an adverse effect upon the Conversion Right of the Preferred, then the Conversion Prices or the kind of securities issuable upon the conversion of Preferred, or both, shall be adjusted in such manner and at such time as a majority of shares of Preferred on an as-converted basis may in good faith determine to be equitable in the circumstances.

(c) *Reservation of Shares.* The Company will take such corporate action as may be necessary from time to time so that at all times it will have authorized, and reserved out of its authorized but unissued Voting Common Stock for the sole purpose of issuance upon conversion of shares of Preferred, a sufficient number of shares of Voting Common Stock to permit the conversion in full of all outstanding shares of Preferred.

(f) *Full Consideration.* All shares of Voting Common Stock which shall be issued upon the conversion of any Preferred will, upon issuance, be fully paid and non-assessable. The Company will pay such amounts and will take such other action as may be necessary from time to time so that all shares of Voting Common Stock which shall be issued upon the exercise of the Conversion Right of any Preferred will, upon issuance and without cost to the recipient, be free from all preemptive rights, taxes, liens and charges with respect to the issue thereof.

(g) *Notice of Adjustment Events.* Whenever the Company contemplates the occurrence of an event which would give rise to adjustments under Section 4.3.4(c), the Company shall mail to each holder of Preferred, at least 30 days prior to the record date with respect to such event or, if no record date shall be established, at least 30 days prior to such event, a notice specifying (i) the nature of the contemplated event, and (ii) the date on which any such record is to be taken for the purpose of such event, and (iii) the date on which such event is expected to become effective, and (iv) the time, if any is to be fixed, when the holders of record of Common (or other securities) shall be entitled to exchange their shares of Common (or other securities) for securities or other property deliverable in connection with such event.

(h) *Notice of Adjustments.* Whenever the Conversion Prices or the kind of securities issuable upon the conversion of Preferred, or both, shall be adjusted pursuant to Section 4.3.4(e), the Company shall mail to each holder of Preferred, by first class mail postage prepaid, promptly after each adjustment, a certificate signed by its President or a Vice President and by its Chief Financial Officer, Secretary or Assistant Secretary, setting forth, in reasonable detail, the event requiring the adjustment, the amount of the adjustment, the method by which such adjustment was calculated (including a description of the basis on which the Board of Directors of the

Company made any determination hereunder), and the Conversion Prices and the kind of Securities issuable upon the conversion of Preferred after giving effect to such adjustment.

4.3.5 Redemptions.

(a) At any time on or after February 25, 2007, at the option of the holders of more than two-thirds of the shares of Preferred issued and outstanding, and upon the holders of such shares of Preferred written request for redemption ("Redemption Request") delivered to the Company, the Company shall redeem the number of shares of the Preferred ("Redeemed Shares") held by each Preferred shareholder as specified in the Redemption Request ("Exercising Holder"), by paying cash therefor, equal to the greater of the Conversion Price initially established in Section 4.3.4 above with respect to such Redeemed Shares or the initial purchase price of such Redeemed Shares (such amount to be adjusted proportionately in the event such shares of Preferred are subdivided into a greater number or combined into a lesser number and in the event the Company pays a dividend, or makes any other distribution, to holders of such Preferred payable in shares of Preferred) plus all accrued but unpaid dividends on such shares (the "Redemption Price").

(b) Notwithstanding the foregoing, the Company will not be obligated to redeem in any calendar year more than one-third of the shares of Preferred issued and outstanding as of the date of the Redemption Request. If pursuant to this subsection (b) the Company elects not to redeem all of the shares of Preferred necessary to satisfy the Redemption Request, then the offered shares of Preferred shall be redeemed, on a per Exercising Holder basis, in the proportion such Exercising Holder's shares of Preferred tendered in the Redemption Request bears to the total number of shares of Preferred tendered in the Redemption Request. To the extent that the Redemption Request is not fully satisfied in any calendar year, the Company shall redeem the remaining Redeemed Shares in the next calendar year, provided, however, that the terms of this subsection (b) shall continue to apply to the remaining Redeemed Shares.

(c) Within 7 days of the Redemption Request, the Company shall notify (the "Redemption Notice") each Exercising Holder of the number of shares of Preferred which shall be redeemed in accordance with the Redemption Request and subparagraph (b) above. Upon receipt of the Redemption Notice, each holder of shares of Preferred being redeemed shall surrender the certificate or certificates representing the shares stated in the Redemption Notice to the Company, at the Company's principal place of business. Upon such surrender, the Redemption Price for 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 and retired. If a certificate is surrendered and all the shares evidenced thereby are not being redeemed, the Company shall cause certificates evidencing the shares not being redeemed to be issued in the name of the registered owner of such shares and to be delivered to such person.

(d) If the funds of the Company legally available therefor shall be insufficient to discharge a Redemption Request in full, the holders of Preferred shall be permitted to appoint such number of additional directors to the Board of Directors of the Company to constitute a two-thirds majority. In such event the Board of Directors shall undertake to increase the size of

the Board of Directors of the Company to such a number that upon the Preferred holders' appointment of directors to such vacancies, the holders of the Preferred shall comprise a two-thirds majority of the Company Board of Director seats. Immediately upon the increase in the size of the Board provided for in the preceding sentence, the holders of Preferred shall appoint (by a two-thirds majority of the Preferred then outstanding) directors to fill the vacancies created by such increase. The Board shall remain comprised of such members until such time as the Company has the funds legally available to and does discharge the Redemption Request.

(e) Nothing in this Section 4.3.5 shall prevent any holder of shares of Preferred from exercising the Conversion Right of such shares at any time prior to the actual redemption of such shares.

4.3.6 Restricted Acts. As long as any shares of Preferred are outstanding, the Company shall not, without the affirmative vote or written consent of the holders of more than two-thirds of the Preferred then outstanding.

(a) authorize, create or issue any shares of any class of stock or other securities of the Company having any preference or priority as to dividends or assets, whether in liquidation or otherwise, superior to, or on a parity with, any such preference or priority of the Preferred; or

(b) issue any instrument or security exercisable for or convertible into shares of Preferred, or issue shares of Preferred other than the first 33,827,373 shares issued;

(c) enter into, or permit any subsidiary of the Company ("Subsidiary") to enter into, any agreement, indenture or other instrument which contains any provision restricting (a) the payment of dividends on the Preferred or the mandatory redemption of Preferred to the full extent required by this Certificate of Incorporation; or (b) the issuance by the Company of Voting Common Stock upon exercise of the Conversion Right of the Preferred; or

(d) effect any sale, lease, assignment, transfer or other conveyance of all or substantially all of the assets of the Company or any Subsidiary, or any consolidation or merger involving the Company or any Subsidiary, or any reclassification or other change of any stock, or any recapitalization of the Company; or

(e) redeem, purchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purpose) any share or shares of Preferred otherwise than by redemption in accordance with Section 4.3.5 hereof or by conversion in accordance with Section 4.3.4 hereof, or

(f) redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purpose) any shares of Common, provided, however, that this restriction shall not apply to the repurchase by resolution of the Board of Directors of the Company of shares of Common from employees, officers, directors, consultants or other persons performing services for the Company or any Subsidiary upon the occurrence of certain events, such as the termination of employment; or

(g) declare or pay any dividend other than pursuant to Section 4.3.2(a) of this Certificate of Incorporation; or

(h) amend its Certificate of Incorporation or Bylaws.

4.3.7 No Reissuance of Preferred. No share or shares of Preferred acquired by the Company by reason of redemption, purchase, conversion or otherwise shall be reissued, and all such shares shall be canceled, retired and eliminated from the shares which the Company shall be authorized to issue.

FIFTH: The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors. The Board of Directors need not be elected by written ballot. The number of directors may be either increased or decreased from time to time as provided for in the Bylaws of the Corporation.

SIXTH: In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the board of directors is authorized to make, amend or repeal the Bylaws of the Corporation.

SEVENTH: A director of the Corporation shall not be personally liable to the corporation or its stockholders for monetary damages for any losses, claims, damages or liabilities arising out of or in connection with such persons' actions as a director, except for any such loss, claim, damage or liability caused by the negligence or willful misconduct of such person or any other director of the Corporation.

EIGHTH: Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application of this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this corporation under the provisions of Section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 279 of Title 8 of the Delaware Code, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such a manner as the said court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or the stockholders or class of stockholders, as the case may be, and also on this Corporation.

IN WITNESS WHEREOF, the Corporation has caused this Certificate to be signed by
Thomas P. Jennings, its Secretary this 6th day of February, 2004.

By: *Thomas P. Jennings*

Print Name: Thomas P. Jennings

Its: Secretary