

CELL THERAPEUTICS INC

Form 10-Q

May 02, 2013

[Table of Contents](#)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM 10-Q

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended: March 31, 2013

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____

Commission File Number 001-12465

CELL THERAPEUTICS, INC.

(Exact name of registrant as specified in its charter)

Edgar Filing: CELL THERAPEUTICS INC - Form 10-Q

Washington
(State or other jurisdiction of
incorporation or organization)

91-1533912
(I.R.S. Employer Identification No.)

3101 Western Avenue, Suite 600
Seattle, Washington
(Address of principal executive offices)

98121
(Zip Code)

(206) 282-7100

(Registrant's telephone number, including area code)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer Accelerated filer

Non-accelerated filer (Do not check if a smaller reporting company) Smaller reporting company

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes No

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date:

Class	Outstanding at April 26, 2013
Common Stock, no par value	112,634,581

Table of Contents

CELL THERAPEUTICS, INC.

TABLE OF CONTENTS

PART I - FINANCIAL INFORMATION	PAGE
ITEM 1: Financial Statements	
<u>Condensed Consolidated Balance Sheets at March 31, 2013 (unaudited) and December 31, 2012</u>	3
<u>Condensed Consolidated Statements of Operations Three Months Ended March 31, 2013 and 2012 (unaudited)</u>	4
<u>Condensed Consolidated Statements of Comprehensive Loss Three Months Ended March 31, 2013 and 2012 (unaudited)</u>	5
<u>Condensed Consolidated Statements of Cash Flows Three Months Ended March 31, 2013 and 2012 (unaudited)</u>	6
<u>Notes to Condensed Consolidated Financial Statements</u>	7
<u>ITEM 2: Management's Discussion and Analysis of Financial Condition and Results of Operations</u>	14
<u>ITEM 3: Quantitative and Qualitative Disclosures about Market Risk</u>	24
<u>ITEM 4: Controls and Procedures</u>	24
PART II - OTHER INFORMATION	
<u>ITEM 1: Legal Proceedings</u>	25
<u>ITEM 1A: Risk Factors</u>	28
<u>ITEM 2: Unregistered Sales of Equity Securities and Use of Proceeds</u>	48
<u>ITEM 3: Defaults Upon Senior Securities</u>	48
<u>ITEM 4: Mine Safety Disclosures</u>	48
<u>ITEM 5: Other Information</u>	49
<u>ITEM 6: Exhibits</u>	50
<u>Signatures</u>	53

Table of Contents**CELL THERAPEUTICS, INC.****CONDENSED CONSOLIDATED BALANCE SHEETS**

(In thousands, except share amounts)

	March 31, 2013 (unaudited)	December 31, 2012
ASSETS		
Current assets:		
Cash and cash equivalents	\$ 44,314	\$ 50,436
Accounts receivable	768	
Inventory	2,309	1,626
Prepaid expenses and other current assets	4,365	8,249
Total current assets	51,756	60,311
Property and equipment, net	6,643	6,785
Other assets	6,868	6,617
Total assets	\$ 65,267	\$ 73,713
LIABILITIES AND SHAREHOLDERS' EQUITY		
Current liabilities:		
Accounts payable	\$ 10,837	\$ 12,065
Accrued expenses	9,934	10,209
Warrant liability	541	
Other current liabilities	393	393
Total current liabilities	21,705	22,667
Long-term debt	8,066	
Other liabilities	5,935	4,641
Total liabilities	35,706	27,308
Commitments and contingencies		
Common stock purchase warrants	13,461	13,461
Shareholders' equity:		
Common stock, no par value:		
Authorized shares - 150,000,000		
Issued and outstanding shares - 112,639,301 and 109,823,748 at March 31, 2013 and December 31, 2012, respectively	1,875,284	1,872,885
Accumulated other comprehensive loss	(7,900)	(8,273)
Accumulated deficit	(1,849,444)	(1,830,060)
Total CTI shareholders' equity	17,940	34,552
Noncontrolling interest	(1,840)	(1,608)
Total shareholders' equity	16,100	32,944
Total liabilities and shareholders' equity	\$ 65,267	\$ 73,713

See accompanying notes.

Table of Contents**CELL THERAPEUTICS, INC.****CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS****(In thousands, except per share amounts)****(unaudited)**

	Three Months Ended March 31,	
	2013	2012
Revenues:		
Product sales, net	\$ 1,126	\$
Total revenues	1,126	
Operating costs and expenses:		
Cost of product sold	55	
Research and development	8,355	8,170
Selling, general and administrative	11,143	9,928
Total operating expenses	19,553	18,098
Loss from operations	(18,427)	(18,098)
Other income (expense):		
Investment and other income (expense), net	(367)	190
Interest expense	(48)	(5)
Amortization of debt discount and issuance costs	(23)	
Foreign exchange gain (loss)	(751)	384
Total other income (expense), net	(1,189)	569
Net loss before noncontrolling interest	(19,616)	(17,529)
Noncontrolling interest	232	83
Net loss	\$ (19,384)	\$ (17,446)
Basic and diluted net loss per common share	\$ (0.18)	\$ (0.43)
Shares used in calculation of basic and diluted net loss per common share	106,697	40,792

See accompanying notes.

Table of Contents

CELL THERAPEUTICS, INC.

CONDENSED CONSOLIDATED STATEMENTS OF COMPREHENSIVE LOSS

(In thousands)

(unaudited)

	Three Months Ended March 31,	
	2013	2012
Net loss before noncontrolling interest	\$ (19,616)	\$ (17,529)
Other comprehensive income (loss):		
Foreign currency translation adjustments	339	(237)
Net unrealized gain on securities available-for-sale	34	8
Other comprehensive income (loss)	373	(229)
Comprehensive loss	(19,243)	(17,758)
Comprehensive loss attributable to noncontrolling interest	232	83
Comprehensive loss attributable to CTI	\$ (19,011)	\$ (17,675)

See accompanying notes.

Table of Contents**CELL THERAPEUTICS, INC.****CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS****(In thousands)****(unaudited)**

	Three Months Ended March 31,	
	2013	2012
Operating activities		
Net loss	\$ (19,616)	\$ (17,529)
Adjustments to reconcile net loss to net cash used in operating activities:		
Depreciation and amortization	411	521
Equity-based compensation expense	2,428	1,983
Noncash interest expense	23	
Other	276	23
Changes in operating assets and liabilities:		
Accounts receivable	(791)	
Inventory	(750)	
Prepaid expenses and other current assets	3,905	(156)
Other assets	(388)	(198)
Accounts payable	(367)	(274)
Accrued expenses	(481)	(3,049)
Other liabilities	2	(313)
Total adjustments	4,268	(1,463)
Net cash used in operating activities	(15,348)	(18,992)
Investing activities		
Purchases of property and equipment	(1,018)	(214)
Proceeds from sales of property and equipment	46	
Net cash used in investing activities	(972)	(214)
Financing activities		
Proceeds from issuance of long-term debt, net	9,764	
Other	(126)	(87)
Net cash provided by (used in) financing activities	9,638	(87)
Effect of exchange rate changes on cash and cash equivalents	560	(379)
Net decrease in cash and cash equivalents	(6,122)	(19,672)
Cash and cash equivalents at beginning of period	50,436	47,052
Cash and cash equivalents at end of period	\$ 44,314	\$ 27,380
Supplemental disclosure of cash flow information		
Cash paid during the period for interest	\$ 5	\$ 5
Cash paid for taxes	\$	\$

Supplemental disclosure of noncash financing and investing activities

Conversion of Series 14 preferred stock to common stock	\$	\$ 6,736
---	----	----------

See accompanying notes.

Table of Contents**CELL THERAPEUTICS, INC.****NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS****(unaudited)****1. Description of Business and Summary of Significant Accounting Policies***Description of Business*

Cell Therapeutics, Inc., also referred to in this Quarterly Report on Form 10-Q as CTI, the Company, we, us or our, is a biopharmaceutical company focused on the acquisition, development and commercialization of less toxic and more effective ways to treat cancer. Our goal is to build a profitable company by generating income from products we develop and commercialize, either also quarter for which such information is available, will become payable in cash within 30 days following such change in control. If at least six full calendar months of any fiscal year have elapsed, the entire fiscal year shall be deemed to have elapsed. In event of a change in control of the Company, awards may be reduced (but not below zero) so that the present value, as determined in accordance with Section 280G(d)(4) of the Internal Revenue Code (the "Code"), of such payments plus any other payments relating to a participant under Section 280G(b)(2)(A)(ii) of the Code shall not, in the aggregate, exceed 2.99 times such participant's "base amount" as defined in Section 280G(b)(3) of the Code. No such reduction, however, shall be applied to any payments which do not constitute "excess parachute payments" within the meaning of the Code. A participant's rights in, and performance units granted under, the SVIP may not be assigned or transferred except by will or the laws of descent and distribution. A participant's benefits under the SVIP are reflected on the Company's books as general, unsecured and unfunded obligations of the Company, and the SVIP does not give any person any right or security interest in any asset of the Company, nor does it imply a trust or segregation of assets by the Company. The compensation committee or the board of directors may terminate or amend the SVIP at any time, provided no such amendment may adversely affect or impair previously granted performance units and the termination of the SVIP shall have no impact on previously granted performance units. The board of directors recommends that the stockholders vote FOR the re-approval of the 1994 Shareholder Value Incentive Plan, as Amended.

37 New Plan Benefits The table below contains information regarding (i) the number of units that were granted, subject to shareholder approval, under the 1994 Shareholder Value Incentive Plan, as amended, and (ii) the number of options that will be granted on January 23, 2003 if the 2003 Stock Option Plan for Non-Employee Directors is approved by stockholders. If stockholders do not approve the 1994 Shareholder Value Incentive Plan, as amended, the number of units granted will remain the same but the Company's TSR will be based upon the Class A common stock rather than the Class B common stock. 1994 Shareholder 2003 Stock Option Plan Value Incentive Plan for Non-Employee Directors ----- Number of Name and Position SVIP Units/(1)/ Stock Options/(2)/

----- Leonard H. Lavin	600	0	Chairman
----- Bernice E. Lavin	250	0	Vice Chairman, Secretary and Treasurer
----- Howard B. Bernick	725	0	President and Chief Executive Officer
----- Carol L. Bernick	340	0	Vice Chairman, Assistant Secretary, and President
----- Alberto-Culver Consumer Products Worldwide			
----- Michael H. Renzulli	340	0	President, Sally Beauty Company, Inc. Executive Group (Eight persons including the above) ...
----- 2,490	0		Non-Executive Director Group
----- 0	17,500		Non-Executive Officer Employee Group
----- 2,210	0	(1)	Awards under the SVIP are made in the form of performance units, each unit having a payout value of \$250 if the threshold performance level is attained, \$1,000 if the target performance level is attained and \$2,000 if the maximum performance level is attained. Units will have no value if the threshold performance level is not attained. In the event of a change in control, payouts of awards may be reduced (but not below zero) under certain circumstances, so as not to constitute "excess parachute payments" within the meaning of the Code. (2) The exercise price per share of each stock option automatically granted to non-employee directors would be 100% of the price per share of the Class B common stock on the date of grant of such option.

38 Approval of Amendments to the Company's Restated Certificate of Incorporation General The board of directors of the Company has approved, and recommends that the stockholders approve, the amendment and restatement of the Company's Restated Certificate of Incorporation (the "Current Certificate"). Copies of the Restated Certificate of Incorporation as amended and restated (the "Proposed Certificate") and the Current Certificate are attached as Annex A and Annex B to this Proxy Statement, respectively. The primary purposes of the amendments approved by the board are: . to increase flexibility by increasing the authorized capital stock of the Company, . eliminate Article 12 of the Current Certificate, which the board of directors believes is no longer necessary in light of other available takeover protections and which may unduly hinder desirable transactions, and . to generally reflect developments in Delaware corporate law, otherwise update and clarify certain provisions and eliminate unnecessary provisions. When determining the content of the Proposed Certificate, the board of directors considered the document in its entirety. The Company's certificate of incorporation was first adopted in 1961 and has been amended from time to time since then without being revisited as a whole. The goal of the board was to propose to the stockholders a certificate of incorporation that is clear, concise, cohesive and consistent with current Delaware corporate law. As a result, all of the amendments to the Current Certificate are dependent upon the approval by the stockholders of the Proposed Certificate in its entirety. Amendments The following discussion summarizes the more significant amendments to the Current Certificate. In addition to the changes described below, there are other non-material clarifications, deletions and changes contained in the Proposed Certificate.

Article 4 - Increase Authorized Capital Stock The board proposes to increase the authorized capital stock of the Company from 150 million shares of common stock consisting of 75 million Class A

shares and 75 million Class B shares to 300 million shares of common stock consisting of 150 million Class A shares and 150 million Class B shares. On November 29, 2002, ___ shares of common stock were outstanding consisting of ___ shares of Class A common stock and ___ shares of Class B common stock. 39 Although the board of directors has not made a decision to do so, having 75 million additional authorized shares of each of Class A and Class B common stock would increase flexibility by, among other things, enabling the board of directors to effect a 100% stock dividend on both classes and/or to convert the Class A common stock into Class B common stock. While the increase in authorized shares of Class A and Class B common stock is not being proposed for this reason, the availability of the additional shares could be used to render more difficult or discourage a merger, tender offer or proxy contest, the assumption of control by a holder of a large block of the Company's securities, or the removal of incumbent management by increasing the aggregate outstanding shares, and thus, the number of shares required to accomplish such a transaction. Except for certain transactions involving the issuance of stock for which the New York Stock Exchange rules require prior stockholder approval, the board of directors may approve the issuance of previously authorized shares of common stock at such times and to such persons as it may determine to be in the best interest of the Company and its stockholders without prior approval of or ratification by the stockholders. The proposed amendment therefore may have the effect of discouraging unsolicited takeover attempts, even if the transaction were favored by the current stockholders. The board of directors is not aware of any attempt to take control of the Company. The issuance of additional shares could also have a dilutive effect on earnings per share and, because the stockholders of the Company have no preemptive rights, on the equity ownership of the present holders of common stock. In addition to increasing the capital stock of the Company, the Proposed Certificate also contains other amendments to Article 4 designed to clarify the procedure by which a conversion would be implemented and the operation of the provisions of Article 4 of the Proposed Certificate after a conversion. The calculation of the fair market value of fractional shares has also been updated in order to reflect the current operations of the markets. Elimination of Article 12 The board proposes to eliminate Article 12 of the Current Certificate. Article 12 was approved by the stockholders of the Company in 1979 and provides that the affirmative vote of 75% of the outstanding voting stock (on a share-for-share basis) is required for a merger or consolidation of the Company or any of its subsidiaries with, or sale of assets to, or issuance or delivery of its shares to, any other corporation, person or entity (a "Prior Holder"), or any of its affiliates, subsidiaries or associates, which owns or controls directly or indirectly, 5% or more of the Company's outstanding voting shares, unless the transaction has been approved by the Company's board of directors prior to the acquisition of ownership or control of such 5%. Certain mergers or consolidations with subsidiaries of the Company are also covered by these provisions. Article 12 provides that the Company's board of directors has the power to determine who is a Prior Holder. Article 12 renders more difficult an attempt by another corporation, person or entity, through acquisition of a substantial number of shares of the Company's stock, to acquire control of the Company 40 with a view to imposing a merger, consolidation, sale of the Company's assets or other similar transaction which might not be in the best interests of all of the stockholders. However, Article 12 also gives the board of directors of the Company the ability to make a merger, consolidation, sale of the Company's assets or other similar transaction more difficult to achieve, even though the particular transaction might be favored by holders of a majority of the voting power of the Company's shares. The board could choose not to approve a transaction prior to a person becoming a Prior Holder, thus forcing that person to receive 75% approval and possibly assisting the board of directors and management in retaining their positions with the Company. In addition, because of the high threshold for stockholder approval, a minority of stockholders might be able to defeat or delay a combination which both management and the other stockholders consider favorable to the Company and its stockholders. The board of directors has concluded that Article 12 is no longer necessary in light of the subsequent adoption of Section 203 ("Section 203") of the Delaware General Corporation Law ("DGCL") and the other takeover protections already included in the Current Certificate. These provisions include the following: a provision for classification of the board of directors into three classes, a requirement that the number of directors, as fixed by our bylaws, may not be changed except by a vote of stockholders holding at least 75% of the voting power of the Company or by a two-thirds vote of directors then in office, a prohibition on the removal of directors other than for cause and a prohibition of stockholder action by written consent. In addition, the Company's dual class capital structure in which Class B shares are entitled to one vote per share and Class A shares are entitled to one-tenth of one vote per share may also provide takeover protection since members of management control almost 29% of the outstanding Class B common stock and almost 28% of the voting power of the Company, while owning just over 22% of the equity of the Company (assuming the exercise of all vested stock options). Section 203, which was added to the DGCL after the adoption of Article 12, provides many of the protections afforded by Article 12. Under Section 203 certain "business combinations" between a Delaware corporation, whose stock is listed on a national securities exchange, authorized for quotation on the NASDAQ Stock Market or held of record by more than 2,000 stockholders, and an "interested stockholder" (defined generally as those stockholders who become beneficial owners of 15% or more of the voting power of a Delaware corporation's voting stock) are prohibited for a three-year period following the date that stockholder became an interested stockholder, unless . the transaction in which the person became interested or the business combination was approved by the board of directors before such person became an interested stockholder, . upon consummation of the transaction that made it an interested stockholder, the interested stockholder owned at least 85% of the voting power of the voting stock of the corporation outstanding at the commencement of the transaction (excluding voting stock owned by directors who are also officers or held in employee benefit plans in which the employees do not have a confidential right to tender or vote stock held by the plan), or 41 . the business combination is approved by the board of directors of the corporation and ratified by two-thirds of the voting power of the voting stock which the interested stockholder does not own. The term "business combination" is defined generally to include, among other things, mergers or consolidations between a Delaware corporation and an interested stockholder, certain transactions with an interested stockholder involving the assets or stock of the corporation or its majority-owned subsidiaries, and transactions which increase an interested stockholder's percentage ownership of stock. The purpose of Section 203 is to require a potential acquiror to negotiate with the board of directors. In addition, the existence of Article 12 may be an impediment to the board of directors ability to convert all of the Class A common stock into Class B common stock, and thus may be in conflict with the later adopted provisions of the Current Certificate. While the board of directors believes that a shareholder vote would not be required in connection with a conversion, the issue is sufficiently ambiguous that the board of directors concluded that the elimination of Article 12 would be desirable. Although the board has not decided at this time to declassify the two classes of common stock, as recently as the spring of 2002 it undertook a serious review of a possible declassification. No action or board vote was undertaken in that regard, but it was the sense of the board that a declassification would have significant merit, except that it may not have been

Edgar Filing: CELL THERAPEUTICS INC - Form 10-Q

advisable and in the best interests of the Company and its shareholders at that time because of a difficult accounting issue, which had arisen as a result of recently issued accounting guidance. That accounting issue arises from the fact that (i) employee stock options and restricted stock have been granted in shares of Class A common stock and (ii) pursuant to Issue 41 of the FASB's EITF Issue No. 00-23 (effective January 24, 2002), a declassification may result in either "variable accounting" treatment or a new "measurement date" for outstanding options and unvested restricted stock in shares of Class A common stock, either of which would materially reduce reported net earnings with a non-cash charge in the period of declassification and in each quarter of the remaining vesting periods of the outstanding options and restricted stock. In order to reduce or eliminate an earnings charge related to a potential future declassification, the board has asked for stockholder approval of three new plans to issue stock options and restricted stock grants in shares of Class B common stock rather than Class A common stock. See "Approval of the Employee Stock Option Plan of 2003", "Approval of the 2003 Stock Option Plan for Non-Employee Directors" and "Approval of the 2003 Restricted Stock Plan" above. Other Amendments Article 3 - Powers and Purposes. The board proposes to simplify the statement of the purposes and powers of the Company by eliminating the extensive list of specific powers and purposes and replacing it with the general statement that the nature of the business or purpose to be conducted or promoted by the Company is to engage in any lawful act or activity to which corporations may be organized under the DGCL. The board of directors believes that the current version of Article 3 is unnecessarily wordy and antiquated.

42 Article 8 - Corporate Governance. The current version of Article 8 sets forth a number of provisions intended to govern the powers of the Company, the directors and the stockholders. The provisions the board proposes to eliminate are either unnecessary because they are covered by Delaware law or are now inconsistent with Delaware law and therefore are unenforceable as written or more restrictive than required in the absence of such a provision. Generally, the proposed changes do not change the operation of the Company or powers of the board of directors. However, as a result of the elimination of paragraph j of Article 8, it will be clear that the board may delegate the granting of options to officers of the Company provided that such a delegation would be consistent with any applicable option or incentive plan and the DGCL. Articles 9 and 10 - Voting Requirement. Pursuant to Section C of Article 4 of the Proposed Certificate, all references to a majority or other proportion of stock refer to such majority or other proportion of the votes of such stock. This same provision is contained in the Current Certificate, although its applicability to certain provisions, which provisions are not contained in the Proposed Certificate, is unclear. The board proposes that the necessary vote be clarified in the Proposed Certificate rather than relying upon the interpretation of the general statement. To that end, the Proposed Certificate specifies more precisely the required vote in clause (i) of Article 9 and in Article 10. Article 11 - Board of Directors. The board proposes to eliminate the definition of "cause" for the removal of a director contained in the second paragraph of Article 11 and to eliminate unnecessary provisions regarding the classification of the board of directors contained in the first paragraph of Article 11. The Company has been advised that the definition of "cause" for the removal of directors included in the Current Certificate may be unenforceable because "cause" for this purpose can only be defined by reference to Delaware law. The changes made to paragraph 1 of Article 11 merely eliminate unnecessary references to the date the board of directors was classified into three classes and the first dates after such classification each class of directors would be elected by the stockholders. Effectiveness and Required Vote If the Proposed Certificate is adopted, it will become effective upon filing of a Certificate of Amendment to the Company's Current Certificate with the Delaware Secretary of State. Seventy-five percent of the total voting power of the Company, seventy-five percent of the combined total number of outstanding shares of Class A and Class B common stock, and a majority of the total outstanding shares of each of the Class A common stock and Class B common stock voting separately as a class, in each case, are required to approve the Proposed Certificate. Accordingly, withheld votes, broker non-votes and abstentions will all have the effect of a vote against the approval of the Proposed Certificate. The board of directors recommends that the stockholders vote FOR the amendment to the Company's Restated Certificate of Incorporation. 43 Section 16(a) Beneficial Ownership Reporting Compliance Section 16(a) of the Securities Exchange Act of 1934 requires the Company's executive officers, directors and persons who beneficially own more than 10% of a registered class of the Company's equity securities to file reports of ownership and changes in ownership with the Securities and Exchange Commission, the New York Stock Exchange and the Company. Based solely on its review of such reports received by it, the Company believes that during fiscal year 2002 its executive officers, directors and greater than 10% beneficial owners complied with all such filing requirements, except that Mr. Allan B. Muchin reported a purchase on a Form 4 after the required filing date and Mr. Michael H. Renzulli reported an option exercise on Form 4 after the required filing date. Independent Public Accountants The audit committee has selected KPMG LLP as independent public accountants for the Company for the fiscal year ending September 30, 2003. KPMG LLP has served the Company in the capacity of independent public accountants since 1955. Representatives of that firm are expected to be present at the annual meeting of stockholders, with an opportunity to make a statement if they so desire, and will be available to respond to appropriate questions presented at the meeting by stockholders. Other Business Management knows of no other matters which will be brought before the meeting. However, if other matters are properly brought before the meeting, the persons named in the enclosed proxy will vote in accordance with their judgment on such matters. For business to be properly brought before the meeting by a stockholder, other than stockholder proposals covered by the following paragraph, notice in proper written form must be given to the Secretary not more than 120 days and not less than 90 days in advance of the anniversary date of the immediately preceding annual meeting and otherwise be in compliance with the Company's Bylaws. Stockholder Proposals Any stockholder proposals intended to be included in the Company's 2003 proxy materials must be received by August 14, 2003 and must otherwise comply with the requirements of Rule 14a-8 of the Securities and Exchange Commission. Cost and Method of Proxy Solicitation The cost of soliciting proxies will be borne by the Company. We have engaged Morrow & Co. to assist with the solicitation of proxies for an estimated fee of \$20,000 plus expenses. In addition to solicitation by mail, brokerage houses, nominees and other custodians and fiduciaries will be requested to send the proxy materials to their principals and the Company will reimburse them for their reasonable expenses. By Order of the Board of Directors BERNICE E. LAVIN Secretary 44 ANNEX A PROPOSED CERTIFICATE RESTATED CERTIFICATE OF INCORPORATION OF ALBERTO-CULVER COMPANY The original Certificate of Incorporation of Alberto-Culver Company was filed in the Office of Secretary of State of Delaware on January 30, 1961. This Restated Certificate of Incorporation was duly adopted in accordance with the provisions of Section 245 of the Delaware General Corporation Law. 1. Name. The name of the Corporation is ALBERTO-CULVER COMPANY (hereinafter called the "Corporation"). 2. Registered Office and Agent. The registered office of the Corporation in the State of Delaware is to be located at Corporate Trust Center, 1209 Orange Street, in the City of Wilmington, County of New Castle, State of Delaware. The name of its registered agent is The Corporation Trust Company, and the address of said registered

agent is Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. 3. Nature of Business; Purpose. The nature of the business or purpose to be conducted or promoted by the Corporation is to engage in any lawful act or activity to which corporations may be organized under the General Corporation Law of the State of Delaware, as amended (the "DGCL"). 4. Capital Stock. The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is Three Hundred Million (300,000,000), One Hundred and Fifty Million (150,000,000) of which shall be "Class A Common Stock," \$.22 par value per share, and One Hundred and Fifty Million (150,000,000) of which shall be "Class B Common Stock," \$.22 par value per share. The Class A Common Stock and the Class B Common Stock are hereinafter sometimes called collectively the "Common Stock." The powers, preferences and relative, participating, optional or other special rights of the Common Stock and the qualifications, limitations or restrictions thereof are fixed as follows: A. Dividends. Subject to the next paragraph, so long as there are any shares of Class A common stock outstanding, whenever a dividend is paid to the holders of Class B Common Stock, the Corporation also shall pay to the holders of Class A Common Stock a dividend per share at least equal to the dividend per share paid to the holders of the Class B Common Stock. Subject to the next paragraph, so long as there are any shares of Class A Common Stock outstanding, the Corporation may pay dividends to holders of Class A Common Stock in excess of dividends paid, or without paying dividends, to holders of Class B Common Stock. Dividends shall be payable only as and when declared by the Board of Directors. B. Share Distributions. If at any time a distribution is to be paid in Class B Common Stock, Class A Common Stock or any other securities of the Corporation (hereinafter sometimes called a "share distribution"), such share distribution may be declared and paid only as follows: (i) a share distribution consisting of Class A Common Stock to holders of Class A Common Stock and Class B Common Stock, on an equal per share basis; or to holders of Class A Common Stock only, but in any such event there shall also be simultaneous share distribution to holders of Class B Common Stock consisting of shares of Class B Common Stock on an equal per share basis; (ii) a share distribution consisting of Class B Common Stock to holders of Class B Common Stock only, but in any such event there shall also be a simultaneous share distribution to holders of Class A Common Stock consisting of shares of Class A Common Stock on an equal per share basis; and (iii) a share distribution consisting of any other class of securities of the Corporation, other than Common Stock, to the holders of such class of securities only, or to the holders of such class of securities, the holders of Class A Common Stock and the holders of Class B Common Stock (on an equal per share basis, in the case of the Class A Common Stock and the Class B Common Stock). Unless otherwise approved by the holders of a majority of each class of Common Stock voting separately, the Corporation shall not reclassify, subdivide or combine one class of its Common Stock without reclassifying, subdividing or combining the other class of Common Stock, on an equal per share basis. Notwithstanding the foregoing provisions of this Article 4(B), from and after the date of any conversion pursuant to the second paragraph of Article 4(E), the foregoing provisions of this Article 4(B) shall be of no further force or effect. C. Voting. So long as there are any shares of Class A Common Stock outstanding, the holders of the Class A Common Stock and the holders of the Class B Common Stock shall be entitled to vote as separate classes on such matters as may be required by law to be submitted to such holders voting as separate classes. On all other matters, holders of Common Stock shall vote together as a single class, provided that the holders of Class B Common Stock shall have one vote per share and so long as there are any shares of Class A Common Stock outstanding the holders of Class A Common Stock shall have one-tenth of a vote per share. Every reference in the Corporation's Restated Certificate of Incorporation or Bylaws to a majority or other proportion of stock shall refer to such majority or other proportion of the votes of such stock. D. Liquidation and Mergers. Unless otherwise approved by the holders of a majority of each class of common stock voting separately, the holders of Class A Common Stock and the holders of Class B Common Stock shall share equally, on a share for share basis, on any distribution of the Corporation's assets upon any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, after payment or provision for payment of the debts and other liabilities of the Corporation, and shall have equal rights, on a share for share basis, in the event of any merger or 2 consolidation in which shares of Common Stock of the Corporation are converted into cash, securities or other property. Notwithstanding the foregoing provisions of this Article 4(D), from and after the date of any conversion pursuant to the second paragraph of Article 4(E), the foregoing provisions of this Article 4(D) shall be of no further force or effect. E. Conversion. Unless the Corporation has converted all the issued Class A Common Stock into Class B Common Stock as provided in the next paragraph, each holder of record of Class B Common Stock may at any time or from time to time in such holder's sole discretion and at such holder's option, convert any or all of such holder's shares of Class B Common Stock into fully paid and non-assessable Class A Common Stock at the rate of one share of Class A Common Stock for each share of Class B Common Stock surrendered for conversion. Any such conversion may be effected by any holder of Class B Common Stock surrendering such holder's certificate or certificates for the Class B Common Stock to be converted, duly endorsed, at the office of the Corporation or any transfer agent for the Class B Common Stock, together with a written notice to the Corporation at such office that such holder elects to convert all or a specified number of shares of Class B Common Stock to be issued. If so required by the Corporation, any certificate for shares surrendered for conversion shall be accompanied by instruments of transfer, in form satisfactory to the Corporation, duly executed by the holder of such shares or the duly authorized representative of such holder. Promptly thereafter, the Corporation shall issue and deliver to such holder or such holder's nominee or nominees, a certificate or certificates for the number of shares of Class A Common Stock to which such holder shall be entitled as herein provided. Such conversion shall be deemed to have been made at the close of business on the date of receipt by the Corporation or any such transfer agent of the documentation required to be delivered by the holder of such Class B Common Stock, and the person or persons entitled to receive the Class A Common Stock issuable on such conversion shall be treated for all purposes as the record holder or holders of such Class A Common Stock on that date. The Corporation by action of its Board of Directors may at any time in its sole discretion and its option, convert all and not less than all of the issued Class A Common Stock into fully-paid and non-assessable Class B Common Stock at the rate of one share of Class B Common Stock for each share of Class A Common Stock. Such conversion shall be effected by resolution of the Board of Directors of the Corporation, which resolution shall require notice by the Corporation to each holder of record of Class A Common Stock that such conversion has occurred, and which notice shall specify the date of conversion and that certificates for Class A Common Stock shall thereafter represent certificates for that number of shares of Class B Common Stock equal to the number of shares of Class A Common Stock formerly represented by such certificates. Any holder of certificates for Class A Common Stock may at any time thereafter surrender such holder's certificate or certificates for the Class A Common Stock pursuant to the same procedures specified in the preceding paragraph and receive from the Corporation certificates for the appropriate number of shares of Class B Common Stock. Upon conversion of Class B Common Stock into Class A Common Stock at the option of the holder, the Class B Common

Stock so converted shall, upon retirement by the Board of Directors, become authorized but unissued Class B Common Stock. Upon conversion of all of the issued Class 3 A Common Stock into Class B Common Stock by the Board of Directors pursuant to the preceding paragraph, the Class A Common Stock so converted shall, upon retirement by the Board of Directors, become authorized but unissued Class A Common Stock. Following such conversion, no shares of Class A Common Stock shall be issued or disposed of by the Company. The issuance of certificates for shares of Common Stock issuable upon the conversion of either class of Common Stock shall be made without charge to the converting holder for any tax imposed on the Corporation in respect of the issue thereof. The Corporation shall not, however, be required to pay any tax which may be payable with respect to any transfer involved in the issue and delivery of any certificate in a name other than that of the holder of the shares being converted, and the Corporation shall not be required to issue or deliver any such certificate unless and until the person requesting the issue thereof shall have paid to the Corporation the amount of such tax or has established to the satisfaction of the Corporation that such tax has been paid. Upon any conversion of shares of Common Stock of one class into shares of Common Stock of the other class pursuant hereto, no adjustment with respect to dividends shall be made; provided, however, that if a share shall be converted subsequent to the record date for the payment of a dividend or other distribution on the share converted but prior to such payment, the registered holder of such share at the close of business on such record date shall be entitled to receive the dividend or other distribution payable on such share on such date notwithstanding the conversion thereof or the Corporation's default in payment of the dividend due on such date; and only those dividends shall be payable on shares of the class of Common Stock issued upon such conversion as may be declared and may be payable to holders of record of shares of Common Stock of that class on or after such conversion date. No fraction of a share of Common Stock shall be issued on conversion of any Common Stock but, in lieu thereof, the Corporation shall pay in cash therefore the fair market value of any such fraction. Such fair market value shall be based, in the case of securities listed on a national securities exchange or authorized for quotation on the Nasdaq Stock Market and designated as a National Market System security, on the last sale price for such securities on the trading day next prior to the date such fair market value is to be determined (or, in the event no sale is made on that day, the average of the closing bid and asked prices for that day) on the principal stock exchange or market system on which such class of Common Stock is listed or authorized for quotation or, if such class of Common Stock is not then listed or authorized for quotation on any national securities exchange or designated as a National Market System security on the Nasdaq Stock Market but is traded over-the-counter, the average of the closing bid and asked prices for that day as reported on the Nasdaq Stock Market or any successor thereto, or the Electronic Bulletin Board or on the National Daily Quotation Sheets, as applicable, or, in case there is no public trading market for such securities, the fair market value on that day determined by a qualified independent appraiser, expert in evaluating securities and appointed by the Board of Directors of the Corporation. Any such determination of fair market value shall be final and binding on the Corporation and on each holder of such class of Common Stock.

5. Directors. A. Stockholders. Directors need not be stockholders of the Corporation. Elections of directors need not be by ballot. 4 B. Committees. The Board of Directors may, by resolution or resolutions passed by a majority of the whole board, designate one or more committees, each committee to consist of two or more of the directors of the Corporation, which to the extent provided in said resolution or resolutions or in the Bylaws of the Corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the Corporation to the full extent permitted by law, and may authorize the seal of the Corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be stated in the Bylaws of the Corporation or as may be determined from time to time by resolution adopted by the Board of Directors. C. Bylaws. The Board of Directors shall have power to make, alter, amend or repeal the Bylaws of the Corporation.

6. Creditors. 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 in a summary way of this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this Corporation under 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 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 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 of this Corporation, 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 on all the stockholders or class of stockholders, of this Corporation, as the case may be, and also on this Corporation.

7. Preemptive Rights. No holder of shares of capital stock of the Corporation of any class shall have any preemptive right or be entitled as a matter of right to subscribe for or purchase any part of any new or additional issue of stock or any securities of any kind whatsoever, whether now or hereafter authorized.

8. Stockholder Action Without a Meeting. No corporate action of stockholders of the Corporation may be taken without a meeting and vote of stockholders.

9. Classified Board of Directors/Removal. The number of directors which shall constitute the whole board of directors of the Corporation shall be the number from time to time fixed by the bylaws of the Corporation, and such number of directors so fixed in such bylaws may be changed only by receiving the affirmative vote of (i) at least 75% of the votes entitled to be cast in the election of directors, voting as one class, or (ii) two-thirds of the directors in office at the time of vote. The Board of Directors shall be divided into three classes: class I, class II, and class III. Such classes shall be as nearly equal in number as possible. At each annual election, the directors chosen to succeed those whose 5 terms are expiring shall be identified as being of the same class as the directors whom they succeed and shall be elected for a term expiring at the third succeeding annual meeting of stockholders or thereafter in each case when their respective successors are elected and qualified. When the number of directors is changed, any increase or decrease in the number of directorships shall be apportioned by resolution of the Board of Directors among the classes so as to make all classes as nearly equal in number as possible. A director may be removed by the holders of a majority of the shares of the Corporation entitled to vote in the election of directors, voting as one class, but only for cause.

10. Amendment or Repeal of Articles 8, 9 or 10. The amendment or repeal of Articles 8, 9 or 10 of this Restated Certificate of Incorporation shall require the approval of at least 75% of the votes entitled to be cast in the election of directors, voting as one class.

11. Personal Liability. A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent provided by applicable law (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for

acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the DGCL, or (iv) for any transaction from which the director derived an improper personal benefit. Neither the amendment nor repeal of this Article 11 nor the adoption of any provision of the Restated Certificate of Incorporation inconsistent with this Article 11, shall eliminate or reduce the effect of this Article in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article 11 would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision. 12. Registered Holders. The Corporation shall be entitled to treat the person in whose name any share of stock or any warrant, right or option is registered as the owner thereof for all purposes and shall not be bound to recognize any equitable or other claim to, or interest in, such share, warrant, right or option on the part of any other person, whether or not the Corporation shall have notice thereof, save as may be expressly provided otherwise by law. 6 ANNEX B CURRENT CERTIFICATE RESTATED CERTIFICATE OF INCORPORATION OF ALBERTO-CULVER COMPANY The original Certificate of Incorporation of Alberto-Culver Company was filed in the Office of Secretary of State of Delaware on January 30, 1961. This Restated Certificate of Incorporation was duly adopted by the Board of Directors of Alberto-Culver Company in accordance with the provisions of Section 245 of the Delaware General Corporation Law. This Restated Certificate only restates and integrates and does not further amend the provisions of the Certificate of Incorporation of Alberto-Culver Company as theretofore amended or supplemented, and there is no discrepancy between those provisions and the provisions of the Restated Certificate. 1. The name of the Corporation is ALBERTO-CULVER COMPANY (hereinafter called the "Corporation"). 2. The registered office of the Corporation in the State of Delaware is to be located at Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, County of New Castle, State of Delaware. The name of its registered agent is The Corporation Trust Company, and the address of said registered agent is Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. 3. The nature of the business, or objects or purposes to be transacted, promoted or carried on are: a. To manufacture, produce, develop, formulate, process, purchase and otherwise acquire, own, hold, use, sell, distribute, trade and otherwise deal in, with or dispose of hair and beauty preparations and cosmetics and proprietary products of every nature and description and any other goods or articles in any way connected therewith. b. To establish, transact, maintain and conduct, any industrial, manufacturing, merchandising, drilling, engineering, mining, oil and/or gas business. c. To apply for, obtain, register, purchase, lease or otherwise acquire, hold, use, exercise, develop, exploit, sell, assign, transfer, grant licenses in respect of, mortgage, pledge, lease or otherwise dispose of, domestic and foreign patents, patent rights, patent applications, copyrights, licenses to manufacture, use or sell, formulae, inventions, improvements, processes, patented or copyrighted things or articles, trademarks, trade-names and similar items. d. To acquire, hold, own, invest in, assign, transfer, sell or otherwise dispose of, pledge, mortgage, hypothecate and deal in and with, as principal, agent, broker or otherwise, stocks, bonds, notes, debentures and other securities of every kind and description, and choses in action generally, and all kinds of commodities, goods, wares, merchandise and property of every kind and description; to invest and deal with the monies of the Corporation in any lawful manner; insofar as may be permitted by law, to purchase and otherwise acquire shares of its own stock, bonds, debentures, notes and other securities issued by it, and to hold, sell, assign, transfer, pledge, mortgage, hypothecate and re-issue any or all thereof. e. To purchase, buy or otherwise acquire, rent, lease, hold for investment or otherwise, own, maintain, operate, improve, farm, repair, develop, deal in, sell (for cash or in any other manner), mortgage, exchange or otherwise profitably use, real estate (including farms and farm properties) of every kind and description, improved or unimproved, situated in any part of the world, and any right or interest therein, as principal, agent, broker, or otherwise, and on commission or otherwise; to conduct the business of farming in all its departments and branches, including growing, dairying, stock raising and gardening. f. To borrow money and contract debts; to make, issue and dispose of bonds, debentures, notes and other obligations, secured or unsecured; to secure the same by mortgage, deed of trust, pledge, or other lien, upon any or all of the property of the Corporation wheresoever situated, acquired or to be acquired; to confer upon the holders of any bonds, debentures, notes or other obligations of the Corporation, secured or unsecured, the right to convert the same into classes of stock of any series of the Corporation, now or hereafter to be issued, upon such terms as shall be fixed by the Board of Directors subject to the provisions hereof. g. To organize or cause to be organized under the laws of any state or other government, corporations, companies, associations, trusts, partnerships and other organizations for any lawful purpose, and to dissolve, liquidate, wind up, reorganize, merge or consolidate the same or cause the same to be dissolved, liquidated, wound up, reorganized, merged or consolidated; to sell, exchange, convey, assign, lease, transfer or otherwise dispose of, to any individual, corporation, company, association, trust partnership or other organization, any part of the properties of the Corporation, less than the whole thereof, and to receive in payment therefor, in whole or in part, stock, bonds, debentures, notes or other securities or obligations of any individual, corporation, company, association, trust, partnership or other organization, upon such terms and conditions as the Board of Directors shall determine; to guarantee the payment of dividends on, or the payment of the principal of or interest on, any stocks, bonds, notes, debentures, or other securities or obligations of any individual, corporation, company, association, trust, partnership or other organization; to become surety for and to guarantee the carrying out or performance of contracts of every kind and character of any individual, corporation, company, association, trust, partnership or other organization; and to aid in any lawful manner any individual, corporation, company, association, trust, partnership or other organization. h. To execute and deliver general or special powers of attorney to individuals, corporations, companies, associations, trusts, partnerships or other organizations, as the Board of Directors shall determine. i. To conduct business and to have one or more offices in the State of Delaware, other states, the District of Columbia, the territories and possessions of the United States, and in foreign countries. 2 j. To engage in and carry on any other business of the same general nature as those above referred to and any other business which the Board of Directors of the Corporation may deem advisable to enhance the value of any of the Corporation's properties, privileges or rights; to enter into and carry out all kinds of lawful contracts and agreements; and generally to do all things incidental to or connected with any business above referred to and all things necessary and proper for the purposes of the Corporation's business, either alone or in association with other individuals, corporations, companies, associations, trusts, partnerships or other organizations, to the same extent and as fully as individuals might or could do. k. To have and to exercise all the powers now or hereafter conferred by the laws of the State of Delaware upon corporations organized under the laws under which the Corporation is organized and any and all Acts heretofore or hereafter passed amendatory thereof or supplemental thereto; provided, however that the Corporation shall not, by any implication or construction, be deemed to possess the power of issuing bills, notes, or other evidences of debt for circulation as money, or the power of carrying on the business of discounting bills and notes or buying and selling bills of exchange, or the power of carrying on the business of buying gold and silver bullion or foreign coins, or of constructing, maintaining, or operating public utilities within the State of Delaware, nor shall the

Corporation have power to confer academic or honorary degrees. The foregoing clauses shall be construed both as objects and powers, and the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of the Corporation. 4. The total number of shares which the Corporation shall have authority to issue is One Hundred Fifty Million (150,000,000), par value \$0.22 per share, Seventy-Five Million (75,000,000) of which shall be "Class A Common Stock" and Seventy-Five Million (75,000,000) of which shall be "Class B Common Stock." The Class A Common Stock and the Class B Common Stock are hereinafter sometimes called collectively the "Common Stock." The powers, preferences and relative, participating, optional or other special rights of the Common Stock and the qualifications, limitations or restrictions thereof, are fixed as follows: a. Dividends. Subject to the next paragraph, whenever a dividend is paid to the holders of Class B Common Stock, the Corporation also shall pay to the holders of Class A Common Stock a dividend per share at least equal to the dividend per share paid to the holders of the Class B Common Stock. Subject to the next paragraph, the Corporation may pay dividends to holders of Class A Common Stock in excess of dividends paid, or without paying dividends, to holders of Class B Common Stock. Dividends shall be payable only as and when declared by the Board of Directors. b. Share Distributions. If at any time a distribution is to be paid in Class B Common Stock, Class A Common Stock or any other securities of the Corporation (hereinafter sometimes called a "share distribution"), such share distribution may be declared and paid only as follows: (i) a share distribution consisting of Class A Common Stock to holders of Class A Common Stock and Class B Common Stock, on an equal per share basis; or to holders of Class A 3 Common Stock only, but in any such event there shall also be simultaneous share distribution to holders of Class B Common Stock consisting of shares of Class B Common Stock on an equal per share basis; (ii) a share distribution consisting of Class B Common Stock to holders of Class B Common Stock only, but in any such event there shall also be a simultaneous share distribution to holders of Class A Common Stock consisting of shares of Class A Common Stock on an equal per share basis; and (iii) a share distribution consisting of any other class of securities of the Corporation, other than Common Stock, to the holders of such class of securities only, or to the holders of such class of securities, the holders of Class A Common Stock and the holders of Class B Common Stock (on an equal per share basis, in the case of the Class A Common Stock and the Class B Common Stock). The Corporation shall not reclassify, subdivide or combine one class of its Common Stock without reclassifying, subdividing or combining the other class of Common Stock, on an equal per share basis. c. Voting. The holders of the Class A Common Stock and the holders of the Class B Common Stock shall be entitled to vote as separate classes on such matters as may be required by law to be submitted to such holders voting as separate classes. On all other matters, holders of Common Stock shall vote together as a single class, provided that the holders of Class A Common Stock shall have one-tenth of a vote per share and the holders of Class B Common Stock shall have one vote per share. Every reference in the Corporation's Certificate of Incorporation, as amended, or By-Laws to a majority or other proportion of stock shall refer to such majority or other proportion of the votes of such stock. d. Liquidation and Mergers. The holder of Class A Common Stock and the holders of Class B Common Stock shall share equally, on a share for share basis, in any distribution of the Corporation's assets upon any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, after payment or provision for payment of the debts and other liabilities of the Corporation, and shall have equal rights, on a share for share basis, in the event of any merger or consolidation of the Corporation in which shares of Common Stock of the Corporation are converted into cash, securities or other property. e. Conversion. Unless the Corporation has converted all the issued Class A Common Stock into Class B Common Stock as provided in the next paragraph, each holder of record of Class B Common Stock may at any time or from time to time, but only from and after March 1, 1987, in such holder's sole discretion and at such holder's option, convert any or all of such holder's shares of Class B Common Stock into fully paid and non-assessable Class A Common Stock at the rate of one share of Class A Common Stock for each share of Class B Common Stock surrendered for conversion. Any such conversion may be effected by any holder of Class B Common Stock surrendering such holder's certificate or certificates for the Class B Common Stock to be converted, duly endorsed, at the office of the Corporation or any transfer agent for the Class B Common Stock, together with a written notice to the Corporation at such office that such holder elects to convert all or a specified number of shares of Class B Common Stock and stating the name or names in which such holder desires the certificate or 4 certificates for such Class A Common Stock to be issued. If so required by the Corporation, any certificate for shares surrendered for conversion shall be accompanied by instruments of transfer, in form satisfactory to the Corporation, duly executed by the holder of such shares or the duly authorized representative of such holder. Promptly thereafter, the Corporation shall issue and deliver to such holder or such holder's nominee or nominees, a certificate or certificates for the number of shares of Class A Common Stock to which such holder shall be entitled as herein provided. Such conversion shall be deemed to have been made at the close of business at the date of receipt by the Corporation or any such transfer agent, and the person or persons entitled to receive the Class A Common Stock issuable on such conversion shall be treated for all purposes as the record holder or holders of such Class A Common Stock on that date. The Corporation by action of its Board of Directors may at any time in its sole discretion and its option, convert all and not less than all of the issued Class A Common Stock into fully-paid and non-assessable Class B Common Stock at the rate of one share of Class B Common Stock for each share of Class A Common Stock. Such conversion shall be effected by resolution of the Board of Directors of the Corporation, which resolution shall require notice by the Corporation to each holder of record of Class A Common Stock that such conversion has occurred, and which notice shall specify the date of conversion and that certificates for Class A Common Stock shall thereafter represent certificates for that number of shares of Class B Common Stock equal to the number of shares of Class A Common Stock formerly represented by such certificates. Any holder of certificates for Class A Common Stock may at any time thereafter surrender such holder's certificate or certificates for the Class A Common Stock pursuant to the same procedures specified in the preceding paragraph and receive from the Corporation certificates for the appropriate number of shares of Class B Common Stock. The issuance of certificates for shares of Common Stock issuable upon the conversion of either class of Common Stock shall be made without charge to the converting holder for any tax imposed on the Corporation in respect of the issue thereof. The Corporation shall not, however, be required to pay any tax which may be payable with respect to any transfer involved in the issue and delivery of any certificate in a name other than that of the holder of the shares being converted, and the Corporation shall not be required to issue or deliver any such certificate unless and until the person requesting the issue thereof shall have paid to the Corporation the amount of such tax or has established to the satisfaction of the Corporation that such tax has been paid. Upon any conversion of shares of Common Stock of one class into shares of Common Stock of the other class pursuant hereto, no adjustment with respect to dividends shall be made; provided, however, that if a share shall be converted subsequent to the record date for the payment of a dividend or other distribution on the share converted but prior to such payment, the registered holder of such share at the close of business on

such record date shall be entitled to receive the dividend or other distribution payable on such share on such date notwithstanding the conversion thereof or the Corporation's default in payment of the dividend due on such date; and only those dividends shall be payable on shares of the class of Common Stock issued upon such conversion as may be declared and may be payable to holders of record of shares of Common Stock of that class on or after such conversion date. No fraction of a share of Common Stock shall be issued on conversion of any Common Stock but, in lieu thereof, the Corporation shall pay in cash therefor the fair market value of any such fraction. Such fair market value shall be based, in the case of securities traded on a national securities exchange, 5 on the last sale price for such securities on the trading day next prior to the date such fair market value is to be determined (or, in the event no sale is made on that day, the average of the closing bid and asked prices for that day) on the principal stock exchange on which such class of Common Stock is traded or, if such class of Common Stock is not then listed on any national securities exchange, the average of the closing bid and asked prices for that day quoted by the NASDAQ system or, in case there is no public trading market for such securities, the fair market value on that day determined by a qualified independent appraisal expert in evaluating securities and appointed by the Board of Directors of the Corporation. Any such determination of fair market value shall be final and binding on the Corporation and on each holder of such class of Common Stock.

5. The names and places of residence of each of the incorporators are as follows: Place of Name Residence ---- S. H. Livesay Wilmington, Delaware L. A. Schoonmaker Wilmington, Delaware S. S. Galaska Wilmington, Delaware

6. The Corporation is to have perpetual existence.

7. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

8. The following additional provisions are inserted for the management of the business and for the conduct of the affairs of the Corporation, and for the creation, definition, limitation and regulation of the powers of the Corporation, the directors and the stockholders:

a. Directors need not be stockholders of the Corporation. Elections of directors need not be by ballot.

b. In the absence of fraud, no contracts or other transaction between this Corporation and any other entity or person (including directors, officers and stockholders of this Corporation) shall be affected or invalidated by the fact that any of the directors, officers or stockholders of this Corporation are pecuniarily or otherwise interested in or are directors, members or officers of such other entity or person or are parties to or are pecuniarily or otherwise interested in such contract or other transaction or in any way connected with any such entity or person, pecuniarily or otherwise interested therein; any director may be counted in determining the existence of a quorum at any meeting of the Board of Directors of this Corporation for the purpose of authorizing any such contract or transaction with like force and effect as if he were not so interested, or were not a director, member or officer of such other entity or person.

6 Any contract or other transaction that shall be approved or ratified by the vote of the holders of a majority of a quorum of the stock of the Corporation at the time having voting powers for the election of directors present, in person or by proxy, at any annual or special meeting of stockholders (provided that a lawful quorum of such stockholders be there present in person or by proxy) shall, except as otherwise provided by law, be as valid and as binding upon the Corporation and upon all its stockholders as though it had been approved or ratified by every stockholder of the Corporation.

c. The Board of Directors may, by resolution or resolutions, passed by a majority of the whole board, designate one or more committees, each committee to consist of two or more of the directors of the Corporation, which to the extent provided in said resolution or resolutions or in the By-Laws of the Corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be stated in the By-Laws of the Corporation or as may be determined from time to time by resolution adopted by the Board of Directors.

d. The Board of Directors shall also have power to make, alter, amend and repeal the By-Laws of the Corporation; to authorize and cause to be executed and delivered mortgages and instruments of pledge, and any other instruments creating liens, on the real and personal property of the Corporation; to fix the times for the declaration and payment of dividends; to set apart out of any of the funds of the Corporation available for dividends a reserve or reserves for any proper purpose and to abolish any such reserve; and to make and determine the use and disposition of any surplus (whether capital, earned or other surplus) or net profits over and above the capital of the Corporation, and in its discretion, the Board of Directors may use and apply any such surplus or net profits in purchasing or acquiring shares of its own stock to such extent and in such manner and upon such terms as the Board of Directors shall deem expedient. The shares of such stock so purchased or acquired may be resold, except as otherwise provided by law.

e. The business of the Corporation shall be managed by the Board of Directors, except as otherwise provided by the General Corporation Law of the State of Delaware or herein. The Board of Directors, in addition to the powers and authority expressly conferred upon it herein, by law, by the By-Laws and otherwise, is hereby empowered to exercise all such powers as may be exercised by the Corporation; subject, nevertheless, to the provisions of the laws of the State of Delaware, of this Certificate of Incorporation, and of any amendments thereto, and to the By-Laws.

f. The Board of Directors shall have power to keep the books, documents and accounts of the Corporation outside of the State of Delaware, except that the original or a duplicate stock ledger shall at all times be kept within the State of Delaware.

g. Except as otherwise expressly provided by the laws of the State of Delaware and by this Certificate of Incorporation, or any amendment thereto, and except as authorized by the directors or the stockholders, (i) no stockholder shall have any right to inspect any book, document or account of the Corporation, and (ii) the Board of Directors may determine whether and to what extent and at what times and places and under what conditions and regulations the books, documents and accounts of the Corporation (other than the original or a duplicate stock ledger), or any of them, shall be open to the inspection of stockholders.

h. A director, or a member of any committee designated by the Board of Directors pursuant to authority hereinbefore conferred, shall, in the performance of his duties, be fully protected in relying in good faith upon the books of account or reports made to the Corporation, its stockholders, its Board of Directors or any such committee, by any of its officials, or by an independent certified public accountant, or by an appraiser selected with reasonable care by the Board of Directors or by any such committee, or in relying in good faith upon other records of the corporation. Without prejudice to the generality of the foregoing, a director shall be fully protected in relying in good faith upon the books of account of the Corporation or statements prepared by any of its officials as to the value and amount of the assets, liabilities and/or net profits of the Corporation, or any other facts pertinent to the existence and amount of surplus or other funds from which dividends might properly be declared and paid.

i. The Corporation reserves the right to increase or decrease its authorized capital stock, or to create new classes or series thereof, or to increase or decrease any class or series thereof, or to classify and/or reclassify the same, and to amend, alter, change or repeal any provision contained in the Certificate of Incorporation under which the Corporation is organized or in any amendment thereto, in the manner now or hereafter prescribed by law, and all rights conferred upon stockholders in said Certificate of Incorporation or any amendment thereto are granted subject to this reservation.

j. The Corporation, by resolution or resolutions of its Board of

Edgar Filing: CELL THERAPEUTICS INC - Form 10-Q

Directors, shall have power to create and issue, whether or not in connection with the issue and sale of any shares of stock or any other securities of the Corporation, rights or options entitling the holders thereof to purchase from the Corporation any shares of its capital stock of any class or classes or any other securities of the Corporation, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the Board of Directors. The terms upon which, the time or times, which may be limited or unlimited in duration, at or within which, and the price or prices at which any such rights or options may be issued and any such share or other securities may be purchased from the Corporation upon the exercise of any such right or option shall be such as shall be fixed and stated in the resolution or resolutions of the Board of Directors providing for the creation and issue of such rights or options. In the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive. The price or prices to be received for shares of stock of the Corporation to be issued upon the exercise of such rights or options shall be not less than the minimum amount prescribed by law. k. The Corporation shall not be required to issue certificates representing any fraction or fractions of a share of stock of any class, but may issue in lieu thereof one or more non-dividend bearing and non-voting scrip certificates in such form or forms as shall be approved by the Board of Directors, each representing a fractional interest in respect of one share of stock. Such scrip certificates upon presentation together with similar scrip certificates representing in the aggregate an interest in respect of one or more full shares of stock shall entitle the holders thereof to receive one or more full shares of stock of the class and series, if any, specified in such scrip certificate. Such scrip certificates may contain such terms and conditions as shall be fixed by the Board of Directors, and may become void 8 and of no effect after a period to be determined by the Board of Directors and to be specified in such scrip certificates. l. The Corporation shall be entitled to treat the person in whose name any share of stock or any warrant, right or option is registered as the owner thereof for all purposes and shall not be bound to recognize any equitable or other claim to, or interest in, such share, warrant, right or option on the part of any other person, whether or not the Corporation shall have notice thereof, save as may be expressly provided otherwise by the laws of the State of Delaware. 9. 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 in a summary way 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 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 of this corporation, 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 on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation. 10. No holder of shares of stock of the Corporation of any class shall have any preemptive right or be entitled as a matter of right to subscribe for or purchase any part of any new or additional issue of stock or any securities of any kind whatsoever, whether now or hereafter authorized. 11. The number of directors which shall constitute the whole board of directors of the Corporation shall be the number from time to time fixed by the by-laws of the Corporation, and such number of directors so fixed in such by-laws may be changed only by receiving the affirmative vote of (i) the holders of at least 75% of all the securities of the Corporation then entitled to vote on such change, or (ii) two-thirds of the directors in office at the time of vote. At the time of the Corporation's annual meeting of stockholders in 1979, the Board of Directors shall be divided into three classes: class I, class II, and class III. Such classes shall be as nearly equal in number as possible. The term of office of the initial class I directors shall expire at the annual meeting of the stockholders in 1980; the term of office of the initial class II directors shall expire at the annual meeting of stockholders in 1981; and the term of office of the initial class III directors shall expire at the annual meeting of stockholders in 1982, or thereafter in each case when their respective successors are elected and qualified. At each annual election held after 1979, the directors chosen to succeed those whose terms are expiring shall be identified as being of the same class as the directors whom they succeed and shall be elected for a term expiring at the third succeeding annual meeting of stockholders or thereafter in each case when their respective successors are elected and qualified. When the number of directors is changed, any increase 9 or decrease in the number of directorships shall be apportioned among the classes so as to make all classes as nearly equal in number as possible. A director may be removed by the holders of a majority of the shares then entitled to vote at an election of directors, but only for cause. Except as may otherwise be provided by law, cause for removal shall be construed to exist only if the director whose removal is proposed has been convicted of a felony by a court of competent jurisdiction and such conviction is no longer subject to direct appeal, or has been adjudged by a court of competent jurisdiction to be liable for negligence, or misconduct, in the performance of his duty to the Corporation in a matter of substantial importance to the Corporation, and such adjudication is no longer subject to direct appeal. 12. a. The affirmative vote of not less than 75% of the outstanding shares of the Corporation entitled to vote shall be required, except as otherwise expressly provided in paragraph b of this Article 12, in order for any of the following actions or transactions to be effected by the Corporation, or approved by the Corporation as stockholder of any subsidiary of the Corporation, if, as of the record date for the determination of the stockholders entitled to vote thereon or consent thereto, any Prior Holder (as hereinafter defined) owns or controls, directly or indirectly, 5% or more of the outstanding shares of the Corporation entitled to vote: (i) any merger or consolidation of the Corporation or any of its subsidiaries with or into such Prior Holder or any of its affiliates, subsidiaries or associates, or any merger or consolidation of the Corporation with or into any subsidiary of the Corporation, except a merger with a subsidiary of the Corporation in which the Corporation is the surviving corporation, or a subsidiary of the Corporation is the surviving corporation and, following such merger, the certificate or articles of incorporation of such subsidiary contains provisions substantially the same in substance as those in Article 11, 12, 13 and 14 of this Certificate of Incorporation, or (ii) any sale, lease, exchange or other disposition of all or any substantial part of the assets of the Corporation or any of its subsidiaries to or with such Prior Holder or any of its affiliates, subsidiaries or associates, or (iii) any issuance or delivery of any voting securities of the Corporation or any of its subsidiaries to such Prior Holder or any of its affiliates, subsidiaries or associates in exchange for cash, other assets or securities, or a combination thereof, or (iv) any dissolution of the Corporation. b. The vote of stockholders specified in paragraph a of this Article 12 shall not apply to any action or transaction described in such paragraph, if the Board of Directors of the Corporation shall have approved the action or

Edgar Filing: CELL THERAPEUTICS INC - Form 10-Q

transaction before direct or indirect ownership or control of 5% or more of the outstanding shares of stock of the Corporation entitled to vote is acquired by the Prior Holder. c. For the purpose of this Article 12 and guidance to the Board of Directors for the purpose of paragraph d hereof, (i) "Prior Holder" shall mean any corporation, person or entity other than 10 the Corporation or any of its subsidiaries; (ii) a Prior Holder shall be deemed to own or control, directly or indirectly, any outstanding shares of stock of the Corporation (x) which it has the right to acquire pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise, or (y) which are owned, directly or indirectly (including shares deemed owned through application of clause (x) above), by any other corporation, person or other entity which is its subsidiary, affiliate or associate or with which it or any of its subsidiaries, affiliates or associates has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting or disposing of stock of the Corporation (or, with or without such an agreement, arrangement or understanding, acts in concert); (iii) "outstanding shares of the Corporation entitled to vote" and "voting securities" shall mean such shares as are entitled to vote in the election of directors, considered as one class; (iv) "subsidiary" shall mean any corporation of which another corporation owns, directly or indirectly, 50% or more of the voting stock, an "associate" and "affiliate" shall have the same meanings as set forth in the General Rules and Regulations under the Securities Exchange Act of 1934 on December 1, 1978, and (v) "substantial part of the assets" shall mean assets then having a fair market value, in the aggregate, of more than \$5,000,000. d. The Board of Directors of the Corporation shall have the power and duty to determine for the purposes of this Article 12, on the basis of information then known to the Board of Directors, (i) who shall constitute a Prior Holder, (ii) whether any Prior Holder owns or controls, directly or indirectly, 5% or more of the outstanding shares of the Corporation entitled to vote, and what entities are its subsidiaries, affiliates or associates, and (iii) whether any proposed sale, lease, exchange or other disposition involves a substantial part of the assets of the Corporation or any of its subsidiaries. Any such determination by the Board shall be conclusive and binding for all purposes. 13. No corporate action of stockholders of the Corporation may be taken without a meeting and vote of stockholders. 14. The amendment or repeal of Article 11, 12, 13 or 14 of this Certificate of Incorporation shall require the approval of the holders of shares representing at least 75% of the shares of the Corporation entitled to vote in the election of directors, voting as one class. 15. A director of the corporation shall not be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent provided by applicable law (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit. Neither the amendment nor repeal of this Article 15 nor the adoption of any provision of the certificate of incorporation inconsistent with this Article 15, shall eliminate or reduce the effect of this Article in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article 15 would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision. 11 December 12, 2002 Dear Benefit Plan Participant: The Annual Meeting of Stockholders of Alberto-Culver Company (the "Company") will be held on January 23, 2003. The record date for determining stockholders entitled to vote at the meeting was November 29, 2002. Through your participation in the Alberto-Culver Company Employees' Profit Sharing Plan, the Alberto-Culver 401(k) Savings Plan and/or the Sally Beauty 401(k) Savings Plan (collectively, the "Retirement Plans"), you are the beneficial owner of the Company's Class B Common Stock and may instruct CIGNA Bank & Trust Company, the trustee of each of the Retirement Plans, how to vote your shares. Through your participation in the Alberto-Culver Company Employee Stock Purchase Plan (the "ESPP"), you are the beneficial owner of the Company's Class A and/or B Common Stock and may instruct Computershare, the record keeper of the ESPP, how to vote your shares. The number of Class A and/or B shares in your benefit plan(s) appears at the top of the enclosed proxy card and are identified by a suffix beginning with the following letters: "PS" (Alberto-Culver Company Employees' Profit Sharing Plan), "SB" (Sally Beauty 401(k) Savings Plan), "AC" (Alberto-Culver 401(k) Savings Plan) or "ES" (Alberto-Culver Company Employee Stock Purchase Plan). If you are the registered shareholder of either Class A or Class B Common Stock outside of the Plans, these shares will be identified on your proxy card by a suffix: "CLA" (Class A Common Stock) and "CLB" (Class B Common Stock). Please read the enclosed Notice of Meeting and Proxy Statement carefully. Please mark your choices, sign the enclosed proxy card and return the card in the enclosed postage-paid envelope to the Company's transfer agent, EquiServe, Proxy Department P.O. Box 9381, Boston, MA 02205-9381 so that the card is received before January 17, 2003. The trustee of the Retirement Plans and the record keeper for the ESPP will have the voting instructions of each participant in the plans tabulated and will vote the shares of the participants by submitting a final proxy card for inclusion in the tally at the Annual Meeting. Sincerely, Kent E. Madlinger Sr. Manager, Compensation and Benefits PROXY ALBERTO-CULVER COMPANY Annual Meeting, January 23, 2003 Proxy Solicited by the Board of Directors The undersigned hereby appoints WILLIAM J. CERNUGEL, BERNICE E. LAVIN and GARY P. SCHMIDT each with power of substitution, to vote all shares which the undersigned stockholder would be entitled to vote if personally present and, if applicable, hereby directs the trustee of each of the Alberto-Culver Company Employees' Profit-Sharing Plan, the Alberto-Culver 401(k) Savings Plan and the Sally Beauty 401(k) Savings Plan to vote the shares of stock of Alberto-Culver Company allocated to the account of the undersigned which the undersigned is entitled to vote pursuant to such employee benefit plan at the Annual Meeting of Stockholders of Alberto-Culver Company to be held on January 23, 2003, and at any adjournment thereof. WHEN PROPERLY EXECUTED, THIS PROXY WILL BE VOTED IN THE MANNER DIRECTED HEREIN BY THE UNDERSIGNED STOCKHOLDER. IF NO DIRECTION IS GIVEN, THIS PROXY WILL BE VOTED "FOR" THE ELECTION OF THE FOUR NOMINEES FOR DIRECTOR SET FORTH ON THE REVERSE SIDE, "FOR" THE APPROVAL OF THE COMPANY'S EMPLOYEE STOCK OPTION PLAN OF 2003, "FOR" THE APPROVAL OF THE COMPANY'S 2003 STOCK OPTION PLAN FOR NON-EMPLOYEE DIRECTORS, "FOR" THE APPROVAL OF THE COMPANY'S 2003 RESTRICTED STOCK PLAN, "FOR" THE RE-APPROVAL OF THE COMPANY'S 1994 SHAREHOLDER VALUE INCENTIVE PLAN, AS AMENDED, AND "FOR" THE APPROVAL OF THE COMPANY'S RESTATED CERTIFICATE OF INCORPORATION, AS AMENDED. ----- SEE REVERSE (CONTINUED AND TO BE SIGNED ON REVERSE SIDE) SEE REVERSE SIDE SIDE ----- ALBERTO-CULVER COMPANY C/O EQUISERVE P.O. BOX 43068 PROVIDENCE, RI 02940 [X] Please mark votes as in this example. The Board of Directors recommends a vote FOR all of the following Proposals. 1. Election of directors Nominees: (01) Carol L. Bernick, (02) James Edgar, (03) Leonard H. Lavin and (04) Robert H. Rock FOR WITHHELD [] [] MARK HERE [] FOR ADDRESS [] CHANGE AND ----- NOTE BELOW For all nominees except as noted above FOR AGAINST ABSTAIN 2. Approval of the Company's Employee Stock Option Plan of 2003. [] [] [] 3. Approval of the Company's 2003 Stock Option Plan for

Edgar Filing: CELL THERAPEUTICS INC - Form 10-Q

Non-Employee Directors. 4. Approval of the Company's 2003 Restricted Stock Plan. 5. Re-Approval of the Company's 1994 Shareholder Value Incentive Plan, as Amended. 6. Approval of the Company's Restated Certificate of Incorporation, as Amended. 7. In the discretion of the board of directors, on any other matters that may properly come before the meeting. Please sign here exactly as your name (or names) appear on this proxy. Persons signing as executors, administrators, trustees, guardians, or attorneys should so indicate when signing. Where there is more than one owner, each must sign. Signature: Date: Signature: Date: -----