

HEARTLAND EXPRESS INC

Form 8-K

April 20, 2011

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported):

April 20, 2011

HEARTLAND EXPRESS, INC.

(Exact name of registrant as specified in its charter)

Nevada
(State of other Jurisdiction
of Incorporation)

000-15087
(Commission
File Number)

93-0926999
(IRS Employer
Identification No.)

901 NORTH KANSAS AVE, NORTH LIBERTY, IA
(Address of Principal Executive Offices)

52317
(Zip Code)

(319) 626-3600

Registrant's Telephone Number (including area code):

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 2.02. Results of Operations and Financial Condition.

On April 20, 2011, Heartland Express, Inc. announced its financial results for the quarter ended March 31, 2011. The press release is attached as Exhibit 99.1 to this Form 8-K and is incorporated herein by reference.

Item 9.01. Financial Statements and Exhibits

(d) Exhibits

EXHIBIT NUMBER	EXHIBIT DESCRIPTION
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99.1	Heartland Express, Inc. press release dated April 20, 2011 with respect to the Company's financial results for the quarter ended March 31, 2011
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The information contained in this report (including Items 2.02 and 9.01) and the exhibit hereto shall not be deemed “filed” for purposes of Section 18 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), or incorporated by reference in any filing under the Securities Act of 1933, as amended (the “Securities Act”), or the Exchange Act, except as shall be expressly set forth by specific reference in such a filing.

The information in this report and the exhibit hereto may contain “forward-looking statements” within the meaning of Section 27A of the Securities Act and Section 21E of the Exchange Act. Such statements are made based on the current beliefs and expectations of the Company's management and are subject to significant risks and uncertainties. Actual results or events may differ from those anticipated by forward-looking statements. Please refer to the paragraph following the financial and operating information in the attached press release and various disclosures by the Company in its press releases, stockholder reports, and filings with the Securities and Exchange Commission for information concerning risk, uncertainties, and other factors that may affect future results.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on behalf by the undersigned thereunto duly authorized.

HEARTLAND EXPRESS, INC.

Date: April 20, 2011

BY:/s/John P. Cosaert
John P. Cosaert
Executive Vice President - Finance,
Chief Financial Officer and Treasurer

EXHIBIT INDEX

EXHIBIT
NUMBER

EXHIBIT DESCRIPTION

99.1 Heartland Express, Inc. press release dated April 20, 2011 with respect to the Company's financial results for the quarter ended March 31, 2011

64,750	97,125		
Michael A. Bent			
11/10/09	60,000	0.450	11,172
N/A	63,000	94,500	

(1) Based on targeted bonus multiplied by the percentage cap in our 2010 Management Incentive Plan (MIP) for Named Executive Officers. Our 2010 MIP is designed with a cap of approximately \$1.5 million on total payouts, or 150% of projected targeted bonuses. Our 2010 MIP gives our Compensation Committee discretion as to how any payouts will be distributed and the ability to

make total
payouts above
the cap level.
Accordingly,
although our
Compensation
Committee has
never awarded
an MIP Payout
to an employee
greater than the
employee's
targeted bonus
multiplied by
the applicable
percentage cap,
our
Compensation
Committee has
the ability to
make 2010 MIP
Payouts to
Executive
Officers in
excess of that
amount, which
is reported as
maximum in
this column.

- (2) One-forty-eighth
(1/48th) of the
total options
granted become
vested and
exercisable each
month from the
grant date until
options granted
have vested in
full on the
four-year
anniversary of
the grant date.
Each option was
granted with an
exercise price
equal to 100%
of the fair
market value of
our stock on the

date of grant as determined by our Compensation Committee, and has a term of ten years, subject to earlier termination in certain events related to termination of employment.

- (3) Grant date fair value of option awards are based on valuation techniques required by Option Accounting Rules. Like any estimate prepared in good faith, the underlying assumptions we use under Option Accounting Rules may vary from our actual future results. The option valuations used for accounting and/or financial reporting purposes do not necessarily represent the value any individual recipient would place on an option award. In addition, Option Accounting Rules prohibit

some valuation techniques which may be useful in certain circumstances. A more detailed description of our option valuation techniques and assumptions can be found in our Annual Report on Form 10-K/A for the year ended December 31, 2009 in our Note 6 of the Notes to Consolidated Financial Statements.

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	40,000		1.060	2/5/2012
	14,000		1.140	4/26/2011
	3,000		2.000	8/2/2010
Jason A. Napolitano	2,917	137,083	0.450	11/09/2019
	35,208	94,792	0.440	11/04/2018
	55,000	55,000	1.830	12/31/2017
	90,000		1.717	11/17/2016
	260,000		1.250	12/15/2015
	195,000		0.880	3/30/2015
	130,000		2.300	1/5/2014
	29,166		0.700	1/31/2013
	476,086		0.700	5/31/2012
	70,802		0.810	4/30/2012
	431		0.940	8/31/2011
	7,869		0.940	8/24/2011
G. Lynn Snodgrass	625	29,375	0.450	11/09/2019
	13,542	36,458	0.440	11/04/2018
	20,000	20,000	1.830	12/31/2017
	40,000		1.717	11/17/2016
	40,000		1.250	12/15/2015
	10,000		1.590	5/18/2014
	20,000		1.840	4/30/2014
	6,000		0.950	4/10/2013
	7,500		1.060	2/5/2012
	1,000		1.140	4/26/2011
Michael A. Bent	1,250	58,750	0.450	11/09/2019
	13,542	36,458	0.440	11/04/2018
	15,000	15,000	1.830	12/31/2017
	30,000		1.717	11/17/2016
	75,000		1.250	12/15/2015
	80,000		0.880	3/30/2015
	65,000		1.590	1/5/2014
	45,000		0.700	1/31/2013
	30,000		0.340	1/6/2013
	26,000		0.990	4/12/2012
	32,000		1.060	2/5/2012
	12,000		1.140	4/26/2011

- (1) Options are subject to earlier termination in certain events related to termination of service.

Table of Contents**Aggregated Option Exercises in Last Fiscal Year and Fiscal Year-End Option Values**

The following table shows aggregate exercises of options to purchase our common stock in the fiscal year ended December 31, 2009 by the Named Executive Officers.

Option Exercises and Stock Vested

Name	Option Awards		Stock Awards	
	Number of Shares	Value Realized	Number of Shares	Value Realized
	Acquired on Exercise (#)	on Exercise (\$)	Acquired on Vesting (#)	On Vesting (\$)
Robert B. Grieve				
Michael J. McGinley				
Jason A. Napolitano				
G. Lynn Snodgrass				
Michael A. Bent				

Potential Payments Upon Termination or Change-in-Control

The following table summarizes the potential payments and benefits payable to each of the Named Executive Officers upon termination of employment or a change-in-control under each situation listed below, assuming, in each situation, that our Named Executive Officers were terminated on December 31, 2009 as determined under the terms of our plans and arrangements as in effect on December 31, 2009.

Payments Upon Termination (Without a Change-in-Control). Pursuant to an employment agreement with each of Dr. Grieve, Dr. McGinley and Messrs. Napolitano and Bent, in the event he is involuntarily terminated, he is entitled to receive amounts earned during his term of employment. Such amounts include: base salary and the cost of health insurance premiums as set forth in the table below. Pursuant to his employment agreement, upon an involuntary termination not for cause, Dr. Grieve is entitled to accelerated vesting of all stock options, an extension of the term of all outstanding stock options and a bonus payment as set forth in the table below. Further, pursuant to his employment agreement, upon termination for good reason Dr. Grieve is entitled to the payments set forth below.

Payments Upon Change-in-Control. Pursuant to an employment agreement with each of Dr. Grieve, Dr. McGinley and Messrs. Napolitano and Bent, in the event he is terminated upon a change-in-control he is entitled to receive amounts earned during the term of his employment. Such amounts include: base salary and the cost of health insurance premiums as set forth in the table below. Pursuant to his employment agreement, each of Dr. Grieve and Mr. Napolitano are entitled to accelerated vesting of all stock options and Dr. Grieve is entitled to an extension of the term of all outstanding stock options in certain circumstances. Further, pursuant to his employment agreement, upon an involuntary termination not for cause, Dr. Grieve is entitled to a bonus payment as set forth in the table below. Further, upon termination for good reason, Dr. Grieve is entitled to the payments set forth below.

Payments Upon Death or Disability. In the event of death or disability, Dr. Grieve is entitled to the same benefits as in the event of termination without a change in control and is also entitled to receive the death benefits under our life insurance plan or the disability benefits under our disability plan, as appropriate, as set forth below. In the event of death or disability, Dr. McGinley and Messrs. Napolitano, Snodgrass and Bent, are each entitled to receive the death benefits under our life insurance plan or the disability benefits under our disability plan, as appropriate, as set forth below.

Table of Contents**Potential Payments Upon Termination or Change-in-Control (1)**

Executive Benefits and Payments Upon Termination	Other Than in Connection With a Change-in-Control		In Connection With a Change-in-Control		Death (\$)	Disability (\$)
	Voluntary Termination or Termination for Cause (\$)	Involuntary Termination for Good Cause (\$)	Termination for Good Cause (\$)	Termination for Good Cause (\$)		
Robert B. Grieve						
<i>Base Salary</i>		420,000	420,000	840,000	420,000	420,000
<i>Bonus</i>		180,182	180,182	360,364	180,182	180,182
<i>Medical continuation</i>		13,848	13,848	27,696	13,848	13,848
<i>Death benefits</i>					300,000	
<i>Monthly disability benefits</i>						15,300
<i>Value of accelerated stock options (2)</i>		11,600	11,600	38,871		
Michael J. McGinley						
<i>Base Salary</i>		115,500		230,000		
<i>Bonus</i>						
<i>Medical continuation</i>		6,924		6,924		
<i>Death benefits</i>					300,000	
<i>Monthly disability benefits</i>						8,000
<i>Value of accelerated stock options (2)</i>				20,832		
Jason A. Napolitano						
<i>Base Salary</i>		121,500		243,000		
<i>Bonus</i>						
<i>Medical continuation</i>		6,924		13,848		
<i>Death benefits</i>					300,000	
<i>Monthly disability benefits</i>						8,000
<i>Value of accelerated stock options (2)</i>				18,918		
G. Lynn Snodgrass						
<i>Base Salary</i>						
<i>Bonus</i>						
<i>Medical continuation</i>						
<i>Death benefits</i>					300,000	
<i>Monthly disability benefits</i>						7,600
<i>Value of accelerated stock options (2)</i>				5,467		
Michael A. Bent						
<i>Base Salary</i>		86,000		172,000		

<i>Bonus</i>				
<i>Medical continuation</i>	6,924	6,924		
<i>Death benefits</i>			300,000	
<i>Monthly disability benefits</i>				8,000
<i>Value of accelerated stock options (2)</i>		7,743		

(1) Based on 2009 salary and cost information.

(2) Calculated based on December 31, 2009 closing price of \$0.5275 per share.

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The following Compensation Committee Report and related disclosure shall not be deemed incorporated by reference by any general statement incorporating this proxy statement into any filing under the Securities Act of 1933, as amended, or under the Securities Exchange Act of 1934, as amended, except to the extent that the Company specifically incorporates this information by reference, and shall not otherwise be deemed filed under such Acts.

COMPENSATION COMMITTEE REPORT

The Compensation Committee of the Company has reviewed and discussed the Compensation Discussion and Analysis required by Item 402(b) of Regulation S-K and, based on such review and discussions, the Compensation Committee recommended to the Board that the Compensation Discussion and Analysis be included in this Proxy Statement.

THE COMPENSATION COMMITTEE

April 5, 2010

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Table of Contents**COMPENSATION COMMITTEE INTERLOCKS AND INSIDER PARTICIPATION**

Our Compensation Committee consists of non-employee Directors only. No interlocking relationship existed during 2009 between our Executive Officers, members of our Board of Directors or members of our Compensation Committee, and the Executive Officers, members of the Board of Directors or members of the Compensation Committee of the Board of Directors of any other company.

AUDITOR FEES AND SERVICES

EKS&H was our independent registered public accountant for fiscal 2008 and 2009. The following table sets forth the aggregate fees billed by EKS&H for audit services rendered in connection with the consolidated financial statements and reports for fiscal years 2008 and 2009, respectively, and for other services rendered during 2008 and 2009 on behalf of Heska and its subsidiaries, as well as all out-of-pocket costs incurred in connection with these services which have been billed to Heska and its subsidiaries. Our Audit Committee has approved all of the below fees.

	EKS&H	
	2008	2009
Audit Fees (1)	\$ 287,280	\$ 255,198
Audit Related Fees (2)	16,750	16,750
Tax Fees (3)	66,375	80,325
All Other Fees		
Total	\$ 370,103	\$ 352,273

- (1) Audit fees represent fees for the audit of our annual financial statements, review of financial statements included in our Form 10-Q Quarterly Reports and services that are normally provided by the independent auditors in connection with statutory and regulatory filings including consents for historical audit opinions.
EKS&H 2008

fees include an audit of the Company's internal control over financial reporting.

- (2) Audit related fees are fees for the assurance and related services by the independent auditors that are reasonably related to the performance of the audit or review of our financial statements and are not reported above under Audit Fees. The services for fees disclosed under this category include the annual audit of our 401(k) Retirement Plan. 2009 data is an estimate.

- (3) 2009 data contains certain estimates.

Pre-Approval Policy. Our Audit Committee pre-approves all auditing services and non-audit services not prohibited by law to be performed by our independent registered public accountant. Our Audit Committee also pre-approves all associated fees, except for *de minimis* amounts for non-audit services, which are approved by our Audit Committee prior to the completion of the audit. In February 2009, our Audit Committee approved EKS&H as our primary provider of tax compliance and return preparation services.

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The following Report of our Audit Committee and related disclosure shall not be deemed incorporated by reference by any general statement incorporating this proxy statement into any filing under the Securities Act of 1933, as amended, or under the Securities Exchange Act of 1934, as amended, except to the extent that the Company specifically incorporates this information by reference, and shall not otherwise be deemed filed under such Acts.

REPORT OF OUR AUDIT COMMITTEE

The ultimate responsibility for good corporate governance rests with Heska Corporation's Board of Directors (the Board), whose primary roles are oversight, counseling and direction to Heska Corporation's management in the best long-term interests of Heska Corporation (Heska or the Company) and its stockholders. The Audit Committee of the Board (the Audit Committee) has been established for the purpose of overseeing the accounting and financial reporting processes of the Company and audits of Heska's financial statements.

The Audit Committee operates under a written charter, a copy of which is available on Heska's website at www.heska.com. As described more fully in its charter, the purpose of the Audit Committee is to assist the Board in its oversight and monitoring of Heska's financial reporting, internal controls and audit function. Management is responsible for the preparation, presentation and integrity of Heska's financial statements; accounting and financial reporting principles; internal controls; and procedures designed to ensure compliance with accounting standards, applicable laws and regulations. The Audit Committee has hired an independent registered public accountant, who is responsible for performing an independent audit of the Company's consolidated financial statements in accordance with generally accepted auditing standards. In accordance with the Sarbanes-Oxley Act of 2002, the Audit Committee has ultimate authority and responsibility to select, direct, compensate, evaluate and, when appropriate, replace Heska's independent registered public accountant.

The Audit Committee members are not professional accountants or auditors, and their functions are not intended to duplicate or to certify the activities of management and the independent registered public accountant, nor can the Audit Committee certify that the independent registered public accountant is independent under applicable rules. The Audit Committee serves a board-level oversight role, in which it provides advice, counsel and direction to management on the basis of the information it receives, discussions with management and the independent registered public accountant, and the experience of the Audit Committee's members in business, financial and accounting matters. The Audit Committee has the authority to engage its own outside advisers, including experts in particular areas of accounting, as it determines appropriate, apart from counsel or advisers hired by management.

In this context, during the year 2009, we met and held discussions with management and Ehrhardt Keefe Steiner & Hottman PC (EKS&H), Heska's independent registered public accountant. Management represented to us that Heska's consolidated financial statements were prepared in accordance with generally accepted accounting principles, and we have reviewed and discussed the consolidated financial statements with management and EKS&H. In Audit Committee meetings with EKS&H, we discussed matters as required by Statement of Auditing Standards No. 61 (Communication with Audit Committees). Our review included a discussion with management of the quality, not merely the acceptability, of Heska's accounting principles, the reasonableness of significant estimates and judgments and the disclosure in Heska's consolidated financial statements.

We received from EKS&H the written disclosures required by the applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the Audit Committee concerning independence and discussed with EKS&H its independence. In reliance on the reviews and discussions noted above, and the report of the independent registered public accountant, we recommended to the Board that the Company's audited financial statements be included in its Annual Report on Form 10-K/A for the year ended December 31, 2009 (the Company's 2009 10-K), and be filed with the Securities and Exchange Commission.

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Heska was not required to have an audit of its internal control over financial reporting in 2009 as the Securities and Exchange Commission did not require registrants in Heska's market value category to do so. We discussed the advisability of obtaining a voluntary audit of internal control over financial reporting with management and EKS&H. Ultimately, Heska decided not to proceed with a voluntary audit. This decision is a key factor in the year-over-year decline in audit fees from 2008 to 2009. Tax fees increased from 2008 to 2009 as the Company expects to be charged for more hours in this area in 2009 than in 2008, and because the Company is to pay EKS&H for quarterly tax estimates, a service the Company obtained from another provider in 2008.

Submitted by the Audit Committee of Heska's Board of Directors:

April 5, 2010

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ADDITIONAL INFORMATION

Householding of Proxy Materials

The SEC has adopted rules that permit companies and intermediaries such as brokers to satisfy delivery requirements for proxy statements with respect to two or more stockholders sharing the same address by delivering a single proxy statement addressed to those stockholders. This process, which is commonly referred to as householding, potentially provides extra convenience for stockholders and cost savings for companies. Heska and some brokers household proxy materials, delivering a single proxy statement to multiple stockholders sharing an address unless contrary instructions have been received from the affected stockholders. Once you have received notice from your broker or us that they or we will be householding materials to your address, householding will continue until you are notified otherwise or until you revoke your consent. If, at any time, you no longer wish to participate in householding and would prefer to receive a separate proxy statement, or if you are receiving multiple copies of the proxy statement and wish to receive only one, please notify your broker if your shares are held in a brokerage account or us if you hold registered shares. You can notify us by sending a written request to Investor Relations, Heska Corporation, 3760 Rocky Mountain Avenue, Loveland, Colorado 80538.

OTHER MATTERS

Our Board knows of no other matters to be presented for stockholder action at our 2010 Annual Meeting. However, if other matters do properly come before our Annual Meeting or any adjournments or postponements thereof, our Board intends that the persons named in the proxies will vote upon such matters in accordance with their best judgment.

BY ORDER OF THE BOARD OF DIRECTORS

Jason A. Napolitano
*Executive Vice President, Chief Financial Officer
and Secretary
Heska Corporation*

Loveland, Colorado
April 5, 2010

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Appendix A

**CERTIFICATE OF AMENDMENT
TO RESTATED
CERTIFICATE OF INCORPORATION
OF
HESKA CORPORATION**

Heska Corporation, a corporation organized and existing under the laws of the State of Delaware, (the Corporation), does hereby certify that:

1. This Amendment to the Corporation's Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware.
2. This Amendment to the Corporation's Restated Certificate of Incorporation amends Article IV of the Corporation's Restated Certificate of Incorporation, by deleting the existing Article IV in its entirety and substituting therefor a new Article IV to read in its entirety as follows:

ARTICLE IV

A. Authorized Stock. The total authorized stock of the Corporation, which shall be an aggregate of 175,000,000 shares, shall consist of three classes: (i) a class consisting of 75,000,000 shares of existing Common Stock having a par value of \$0.001 per share (the Original Common Stock); (ii) a second class consisting of 75,000,000 shares of NOL Restricted Common Stock having a par value of \$0.001 per share (the Common Stock , and together with the Original Common Stock, the Common Stock Securities); and (iii) a third class consisting of 25,000,000 shares of Preferred Stock having a par value of \$0.001 per share (the Preferred Stock).

B. Preferred Stock. The Preferred Stock may be issued in any number of series, as determined by the Board of Directors. The Board of Directors may by resolution fix the designation and number of shares of any such series, and may determine, alter, or revoke the rights, preferences, privileges and restrictions granted to or imposed upon any wholly unissued series. The Board of Directors may thereafter in the same manner, within the limits and restrictions stated in any resolution or resolutions of the Board of Directors originally fixing the number of shares constituting any series, increase or decrease the number of shares of any such series (but not below the number of shares of that series then outstanding). In case the number of shares of any series shall be decreased, the shares constituting such decrease shall resume the status which they had prior to the adoption of the resolution originally fixing the number of shares of such series.

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C. Common Stock Securities.

1. Relative Rights of Preferred Stock and Common Stock Securities. All preferences, voting powers, relative, participating, optional or other special rights and privileges, and qualifications, limitations or restrictions of the Common Stock Securities are expressly made subject and subordinate to those that may be fixed with respect to any shares of the Preferred Stock.
2. Relative Rights of Original Common Stock and Common Stock. Except as otherwise provided in this Article IV, all shares of Original Common Stock and Common Stock shall be identical and shall entitle the holder thereof to the same preferences, voting powers, relative, participating, optional or other special rights and privileges, and qualifications, limitations or restrictions.
3. Voting Rights. Except as otherwise required by law or this Restated Certificate of Incorporation, the holder or holders of Common Stock Securities shall vote together as one class, and each holder of Common Stock Securities shall have one vote in respect of each share of such stock held by such holder of record on the books of the corporation, for the election of directors and on all matters submitted to a vote of stockholders of the corporation.
4. Dividends. Subject to the preferential rights of the Preferred Stock, if any, the holders of shares of Common Stock Securities shall be entitled to receive, when and if declared by the Board of Directors, out of the assets of the corporation which are by law available therefor, dividends payable either in cash, in property or in shares of capital stock.
5. Liquidation, Dissolution or Winding Up. In the event of any dissolution, liquidation or winding up of the affairs of the corporation, after distribution in full of the preferential amounts, if any, to be distributed to the holders of shares of the Preferred Stock, holders of Common Stock Securities shall be entitled, unless otherwise provided by law or this Restated Certificate of Incorporation, to receive all of the remaining assets of the corporation of whatever kind available for distribution to stockholders ratably in proportion to the number of shares of Common Stock Securities held by them respectively.
6. Subdivisions and Combinations of Shares. The corporation shall not in any manner subdivide (by stock split, stock dividend or otherwise) or combine (by stock split, stock dividend or otherwise) the outstanding Common Stock or Original Common Stock unless all outstanding Common Stock Securities are proportionately subdivided or combined.
7. Automatic Conversion. Each share of NOL Restricted Common Stock shall automatically be converted into the equivalent number of shares of Original Common Stock at the close of business of the Corporation on the Restriction Release Date.

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Upon the occurrence of such automatic conversion, all shares of NOL Restricted Common Stock shall be converted without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent, and shall no longer be deemed to be outstanding and all rights with respect to such shares shall immediately cease and terminate, except only the right to receive shares of Original Common Stock in exchange therefor. Upon the occurrence of such automatic conversion, the holders of NOL Restricted Common Stock shall, upon notice from the Corporation, surrender the certificates representing such shares at the office of the Corporation or of its transfer agent for the Common Stock. Thereupon, there shall be issued and delivered to such holder a certificate or certificates for the number of shares of Original Common Stock into which the shares of NOL Restricted Common Stock so surrendered were automatically converted. The Corporation shall not be obligated to issue such certificates unless certificates evidencing the shares of NOL Restricted Common Stock so converted are either delivered to the Corporation or any such transfer agent, or the holder notifies the Corporation that such certificates have been lost, stolen, or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith. Following such automatic conversion, all shares of NOL Restricted Common Stock so converted shall be retired and cancelled, and the Corporation shall not reissue any shares of NOL Restricted Common Stock. The Corporation shall, at all times prior to automatic conversion of the NOL Restricted Common Stock, cause to be authorized and reserved for issuance a number of shares of Original Common Stock sufficient to permit conversion of the NOL Restricted Common Stock.

D. Reclassification.

Immediately upon the effectiveness of the filing of this Certificate of Amendment to the Corporation's Restated Certificate of Incorporation with the Secretary of State of the State of Delaware (the Effective Time), each share of Original Common Stock issued and outstanding immediately prior to the Effective Time shall be reclassified as and converted into and shall become one share of NOL Restricted Common Stock (Common Stock, pursuant to the Reclassification).

The Reclassification of the shares of Original Common Stock into shares of Common Stock shall be deemed to occur at the Effective Time, regardless of when any certificate previously representing such shares of Original Common Stock (if such shares are held in certificated form) are physically surrendered to the Corporation in exchange for certificates representing shares of such Common Stock. Each certificate outstanding immediately prior to the Effective Time representing shares of Original Common Stock shall, until surrendered to the Corporation in exchange for a certificate representing such new number of shares of Common Stock, automatically represent from and after the Effective Time the reclassified number of shares of Common Stock. All options and rights issuable or issued with respect to Original Common Stock pursuant to any stock option plan, employee stock purchase plan or other stock plan of the Corporation prior to the Effective Time shall represent options and rights for the equivalent number of shares of Common Stock from and after the Effective Time.

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E. Transfer Restrictions.

1. **Certain Definitions.** As used in this Section E:

Acquire or Acquisition and similar terms means the acquisition of record, legal, beneficial or any other ownership of Corporation Securities by any means, including, without limitation, (a) the exercise of any rights under any option, warrant, convertible security, pledge or other security interest or similar right to acquire shares, or (b) the entering into of any swap, hedge or other arrangement that results in the acquisition of any of the economic consequences of ownership of Corporation Securities, but shall not include the acquisition of any such rights unless, as a result, the acquirer would be considered an owner of Corporation Securities under the rules of Section 382 of the Code.

Business Day means any day, other than a Saturday, Sunday or day on which banks located in Denver, Colorado, are authorized or required by law to close.

Code means the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

Corporation Securities means (a) shares of Common Stock Securities, (b) shares of Preferred Stock of any class or series of Preferred Stock (other than Preferred Stock that is not stock pursuant to Treasury Regulation Sections 1.382-2(a)(3) and 1.382-2T(f)(18)(ii) or any successor provision), (c) warrants, rights or options (within the meaning of Treasury Regulation Section 1.382-4(d), or any successor provision) to purchase Stock and (d) any other interests that would be treated as stock of the Corporation pursuant to Treasury Regulation Section 1.382-2T(f)(18), or any successor provision.

Dispose or Disposition means any direct or indirect sale, transfer, assignment, conveyance, pledge or other disposition or other action in any manner whatsoever, whether voluntary or involuntary, by operation of law or otherwise, by any Person or group that reduces the Percentage Stock Ownership of any Person or group.

Entity means an entity within the meaning of Treasury Regulation Section 1.382-3(a)(1).

Five Percent Shareholder means (i) a Person or group of Persons that is identified as a 5-percent shareholder of the Corporation pursuant to Treasury Regulation Section 1.382-2T(g)(1) (or any successor provision) or (ii) a Person that is a first tier entity or higher tier entity of the Corporation if that person has a public group or individual, or a higher tier entity of that Person has a public group or individual, that is treated as a 5-percent shareholder of the Corporation pursuant to Treasury Regulation Section 1.382-2T(g) or any successor provision (where the terms first tier entity, higher tier entity, and public group are defined in Treasury Regulation Section 1.382-2T(f) or any successor provision), but excluding any public group with respect to the Corporation, as that term is defined in Treasury Regulation Section 1.382-2T(f)(13) (or any successor provision). For the purposes of determining the existence and identity of, and the amount of Corporation Securities owned by, any Five Percent Shareholder, the Corporation is entitled to rely conclusively on (a) the existence and absence of filings of Schedules 13D or 13G under the Securities Exchange Act of 1934, as amended (or any similar schedules) as of any date, and (b) its actual knowledge of the ownership of the Corporation Securities.

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Percentage Stock Ownership and similar terms means percentage Stock Ownership of any Person or group for purposes of Section 382 of the Code, as determined in accordance with Treasury Regulation Section 1.382-2T(g), (h), (j) and (k) (or any successor provision).

Person means an individual, corporation, estate, trust, association, limited liability company, partnership, joint venture or similar organization, and also includes a syndicate or group as those terms are used for the purposes of Section 13(d)(3) of the Securities Exchange Act of 1934, as amended.

Prohibited Transfer means any purported Transfer of Corporation Securities to the extent that such a Transfer is prohibited and/or void under this Article IV.

Restriction Release Date means such date, after the Effective Time, that is the earlier of (i) the date that Section 382 of the Code or any successor statute is repealed if the Board of Directors determines in good faith that this Article IV is no longer necessary or advisable for preservation of the Tax Benefits, (ii) the date that the Board of Directors determines in good faith that it is in the best interests of the Corporation and its stockholders for the transfer restrictions set forth in this Article IV to terminate, or (iii) January 1, 2026. Any such determinations by the Board of Directors shall be set forth in a written resolution that is publicly announced or otherwise made available to stockholders.

Restricted Holder means a Person or group of Persons that (a) is a Five Percent Shareholder and Acquires or proposes to Acquire Corporation Securities, or (b) is proposing to Acquire Corporation Securities, and following such proposed Acquisition of Corporation Securities, would be a Five Percent Shareholder.

Stock means any interest that would be treated as stock of the Corporation pursuant to Treasury Regulation Sections 1.382-2(a)(3) and 1.382-2T(f)(18) (or any successor provisions).

Stock Ownership means any direct or indirect ownership of Stock, including any ownership by virtue of application of constructive ownership rules, with such direct, indirect and constructive ownership determined under the provisions of Section 382 of the Code.

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Tax Benefits means the net operating loss carryovers, capital loss carryovers, general business credit carryovers, alternative minimum tax credit carryovers and foreign tax credit carryovers, as well as any loss or deduction attributable to a net unrealized built-in loss within the meaning of Section 382 of the Code, of the Corporation or any direct or indirect subsidiary thereof.

Transfer means any direct or indirect Acquisition or Disposition of Corporation Securities or other action in any manner whatsoever, whether voluntary or involuntary, by operation of law or otherwise, that alters the Percentage Stock Ownership of any Person or group, or any attempt to do any of the foregoing. A Transfer shall also include the creation or grant of an option (including within the meaning of Treasury Regulation Section 1.382-4(d)). A Transfer shall not include an issuance or grant of Corporation Securities by the Corporation.

Treasury Regulation means a Treasury Regulation promulgated under the Code.

2. Transfer Restrictions.

(a) From and after the Effective Time and prior to the Restriction Release Date, no Transfer shall be permitted, and any such purported Transfer shall be void *ab initio*, to the extent that after giving effect to such purported Transfer (or any series of Transfers of which such Transfer is a part), either (i) any Person or group of Persons shall become a Five Percent Shareholder, or (ii) the Percentage Stock Ownership interest in the Corporation of any Five Percent Shareholder shall be increased. The prior sentence is not intended to prevent the Corporation Securities from being DTC-eligible and shall not preclude the settlement of any transactions in the Corporation Securities entered into through the facilities of a national securities exchange or any national securities quotation system, provided, that if the settlement of the transaction would result in a Prohibited Transfer, such Transfer shall nonetheless be a Prohibited Transfer.

(b) The restrictions contained in this Article IV are for the purposes of reducing the risk that any ownership change of the Corporation Securities (as defined in the Code) may limit the Corporation's ability to utilize its Tax Benefits. In connection therewith, and to provide for effective policing of these provisions, a Restricted Holder who proposes to Acquire Corporation Securities shall, prior to the date of the proposed Acquisition, request in writing (a Request) that the Board of Directors of the Corporation (or a committee thereof that has been appointed by the Board of Directors) review the proposed Acquisition and authorize or not authorize the proposed Acquisition in accordance with this Section E.2(b) of Article IV. A Request shall be mailed or delivered to the Secretary of the Corporation at the Corporation's principal place of business, or telecopied to the Corporation's telecopier number at its principal place of business. Such Request shall be deemed to have been received by the Corporation when actually received by the Secretary of the Corporation. A Request shall include (i) the name, address and telephone number of the Restricted Holder, (ii) a description of the Restricted Holder's direct and indirect ownership of Corporation Securities, (iii) a description of the Corporation Securities that the Restricted Holder proposes to Acquire, (iv) the date on which the proposed Acquisition is expected to take place (or, if the Acquisition is proposed to be made by a Five Percent Shareholder in a transaction on a national securities exchange or any national securities quotation system, a statement to that effect), (v) the name of the proposed transferor of the Corporation Securities that the Restricted Holder proposes to Acquire (or, if the Acquisition is proposed to be made by a Five Percent Shareholder in a transaction on a national securities exchange or any national securities quotation system, a statement to that effect), and (vi) a request that the Board of Directors (or a committee thereof that has been appointed by the Board of Directors) authorize, if appropriate, the Acquisition pursuant to this Section E.2(b) of Article IV.

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(c) The Board of Directors may authorize an Acquisition by a Restricted Holder, or otherwise determine to waive the application of any restrictions contained in this Article IV, if it determines, in its sole discretion, that, after taking into account the preservation of the Tax Benefits, such Acquisition or waiver would be in the best interests of the Corporation and its stockholders and in such cases, the restrictions set forth in Section E.2(a) of this Article IV shall not apply, notwithstanding the effect of any such authorization or waiver on the Tax Benefits. Any proposed Acquisition by a Restricted Holder that is not so authorized by the Board of Directors or subject to such a waiver shall be deemed a Prohibited Transfer. The Board of Directors may, in its sole discretion, impose any conditions that it deems reasonable and appropriate in connection with authorizing any such Acquisition by a Restricted Holder or granting such a waiver. In addition, the Board of Directors may, in its sole discretion, require such representations from the Restricted Holder or such opinions of counsel to be rendered by counsel selected by the Board of Directors, in each case as to such matters as the Board of Directors may determine. Any Restricted Holder who makes a Request to the Board of Directors shall reimburse the Corporation, on demand, for all costs and expenses incurred by the Corporation with respect to any proposed Acquisition of Corporation Securities subject to such Request, whether or not such Request is granted, including, without limitation, the Corporation's costs and expenses incurred in determining whether to authorize the proposed Acquisition, which costs may include, but are not limited to, any expenses of counsel and/or tax advisors engaged by the Board of Directors to advise the Board of Directors or deliver an opinion thereto.

3. Treatment of Excess Securities.

(a) No employee or agent of the Corporation shall record any Prohibited Transfer, and the purported transferee of a Prohibited Transfer (the Purported Transferee) shall not be recognized as a stockholder of the Corporation for any purpose whatsoever in respect of the Corporation Securities which are the subject of the Prohibited Transfer (the Excess Securities). The Purported Transferee shall not be entitled with respect to such Excess Securities to any rights of stockholders of the Corporation, including, without limitation, the right to vote such Excess Securities and to receive dividends or distributions, whether liquidating or otherwise, in respect thereof. Once the Excess Securities have been acquired in a Transfer that is not a Prohibited Transfer, such Corporation Securities shall cease to be Excess Securities.

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(b) If the Board of Directors determines that a Prohibited Transfer has been recorded by an agent or employee of the Corporation notwithstanding the prohibition in Section E.3(a) of this Article IV, such recording and the Prohibited Transfer shall be void *ab initio* and have no legal effect and, upon written demand by the Corporation, the Purported Transferee shall transfer or cause to be transferred any certificate or other evidence of ownership of the Excess Securities within the Purported Transferee's possession or control, together with any dividends or other distributions that were received by the Purported Transferee from the Corporation with respect to the Excess Securities (the Prohibited Distributions), to an agent designated by the Board of Directors (the Agent). In the event of an attempted Prohibited Transfer involving the purchase or Acquisition of Corporation Securities in violation of this Article 4 by a Restricted Holder, the Agent shall thereupon sell to a buyer or buyers, which may include the Corporation or the purported transferor, the Excess Securities transferred to it in one or more arm's-length transactions (including over a national securities exchange or national securities quotation system on which the Corporation Securities may be traded); provided, however, that the Agent, in its sole discretion, shall effect such sale or sales in an orderly fashion and shall not be required to effect any such sale within any specific time frame if, in the Agent's discretion, such sale or sales would disrupt the market for the Corporation Securities, would adversely affect the value of the Corporation Securities or would be in violation of applicable securities laws. If the Purported Transferee has resold the Excess Securities before receiving the Corporation's demand to surrender the Excess Securities to the Agent, the Purported Transferee shall be deemed to have sold the Excess Securities for the Agent, shall be deemed to hold in trust for the Agent, and shall be required to transfer to the Agent, any Prohibited Distributions and proceeds of such sale, except to the extent that the Corporation grants written permission to the Purported Transferee to retain a portion of such sales proceeds not exceeding the amount that the Purported Transferee would have received from the Agent pursuant to Section E.3(c) of this Article IV if the Agent, rather than the Purported Transferee, had resold the Excess Securities.

(c) The Agent shall apply any proceeds of a sale by it of Excess Securities and, if the Purported Transferee had previously resold the Excess Securities, any amounts received by it from a Purported Transferee, together with any Prohibited Distributions received by it, as follows: (i) first, to reimburse itself to the extent necessary to cover its costs and expenses incurred in accordance with its duties hereunder; (ii) second, to reimburse the Purported Transferee for the amounts paid by the Purported Transferee for the Excess Securities (or in the case of any Prohibited Transfer by gift, devise or inheritance or any other Prohibited Transfer without consideration, the fair market value, calculated on the basis of the closing market price for the Corporation Securities on the day before the Prohibited Transfer), and (iii) third, the remainder, if any, to the original transferor, or, if the original transferor cannot be readily identified, to the Company to the extent of any amounts owing to the Company pursuant to Section E.3(f) below, with the remainder, if any, to be donated to an entity designated by the Corporation's Board of Directors that is described in Section 501(c) of the Code, contributions to which must be eligible for deduction under each of Sections 170(b)(1)(A), 2055 and 2522 of the Code. The recourse of any Purported Transferee with respect of any Prohibited Transfer shall be limited to the amount payable to the Purported Transferee pursuant to clause (ii) of this Section E.3(c) of this Article IV. Except as may be required by law, in no event shall the proceeds of any sale of Excess Securities pursuant to this Article IV inure to the benefit of the Corporation or the Agent, except to the extent used to cover costs and expenses incurred by the Agent in performing its duties hereunder.

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(d) In the event of any Transfer which does not involve a transfer of securities of the Corporation within the meaning of Delaware law (Securities, and individually, a Security) but which would cause a Five Percent Shareholder to violate a restriction on Transfers provided for in this Article IV, the application of Section E.3(b) and Section E.3(c) shall be modified as described in this Section E.3(d). In such case, no such Five Percent Shareholder shall be required to dispose of any interest that is not a Security, but such Five Percent Shareholder and/or any Person whose ownership of Securities is attributed to such Five Percent Shareholder shall be deemed to have disposed of and shall be required to dispose of sufficient Securities (which Securities shall be disposed of in the inverse order in which they were acquired) to cause such Five Percent Shareholder, following such disposition, not to be in violation of this Article IV. Such disposition shall be deemed to occur simultaneously with the Transfer giving rise to the application of this provision, and such number of Securities that are deemed to be disposed of shall be considered Excess Securities and shall be disposed of through the Agent as provided in Section E.3(b) and Section E.3(c), except that the maximum aggregate amount payable either to such Five Percent Shareholder, or to such other Person that was the record owner of such Excess Securities, in connection with such sale shall be the fair market value of such Excess Securities at the time of the purported Transfer. All expenses incurred by the Agent in disposing of such Excess Stock shall be paid out of any amounts due such Five Percent Shareholder or such other Person. The purpose of this Section E.3(d) is to extend the restrictions in Section E.2(a) and Section E.3(a) to situations in which there is a Five Percent Shareholder without a direct Transfer of Securities, and this Section E.3(d), along with the other provisions of this Article IV, shall be interpreted to produce the same results, with differences as the context requires, as a direct Transfer of Corporation Securities.

(e) If the Purported Transferee fails to surrender to the Agent the Excess Securities or the proceeds of a sale thereof, or any Prohibited Distributions received by it, or to otherwise comply with Section E.3 of this Article IV, within thirty (30) days from the date on which the Corporation makes a demand pursuant to Section E.(3)(b) of this Article IV, or any written demand with respect to a deemed disposition pursuant to Section E.3(d) of this Article IV, then the Corporation may take such actions as it deems necessary or advisable to enforce the provisions hereof, and/or enjoin or rescind any violation hereof, including the institution of legal or equitable proceedings to compel such surrender.

(f) If any Person shall knowingly violate, or knowingly cause any other Person under control of such Person (a Controlled Person) to violate this Article IV, then that Person and any such Controlled Person shall be jointly and severally liable for, and shall pay to the Corporation, such amount as will, after taking account of all taxes imposed with respect to the receipt or accrual of such amount and all costs incurred by the Corporation as a result of such violation, put the Corporation in the same financial position as it would have been in had such violation not occurred.

4. Amendment of Transfer Restrictions. Notwithstanding the provisions of Article XII of the Corporation's Restated Certificate of Incorporation, the Corporation may only amend or repeal any of the provisions set forth in this Section E. by the affirmative vote of the holders of two-thirds of the shares entitled to vote thereon.

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5. Legends: Compliance

(a) All certificates reflecting Corporation Securities on or after the Effective Time shall, until the Restriction Release Date, bear a conspicuous legend in substantially the following form:

THE RESTATED CERTIFICATE OF INCORPORATION, AS AMENDED (THE CERTIFICATE OF INCORPORATION), OF THE CORPORATION CONTAINS RESTRICTIONS PROHIBITING THE TRANSFER (AS DEFINED IN THE CERTIFICATE OF INCORPORATION) OF STOCK OF THE CORPORATION (INCLUDING THE CREATION OR GRANT OF CERTAIN OPTIONS, RIGHTS AND WARRANTS) WITHOUT THE PRIOR AUTHORIZATION OF THE BOARD OF DIRECTORS OF THE CORPORATION (THE BOARD OF DIRECTORS) IF SUCH TRANSFER AFFECTS THE PERCENTAGE OF STOCK OF THE CORPORATION (WITHIN THE MEANING OF SECTION 382 OF THE INTERNAL REVENUE CODE OF 1986, AS AMENDED (THE CODE) AND THE TREASURY REGULATIONS PROMULGATED THEREUNDER) THAT IS TREATED AS OWNED BY A FIVE PERCENT SHAREHOLDER UNDER THE CODE AND SUCH REGULATIONS. IF THE TRANSFER RESTRICTIONS ARE VIOLATED, THEN THE TRANSFER WILL BE VOID *AB INITIO* AND THE PURPORTED TRANSFEREE OF THE STOCK WILL BE REQUIRED TO TRANSFER EXCESS SECURITIES (AS DEFINED IN THE CERTIFICATE OF INCORPORATION) TO THE CORPORATION S AGENT. IN THE EVENT OF A TRANSFER WHICH DOES NOT INVOLVE SECURITIES OF THE CORPORATION WITHIN THE MEANING OF THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE (SECURITIES) BUT WHICH WOULD VIOLATE THE TRANSFER RESTRICTIONS, THE PURPORTED TRANSFEREE (OR THE RECORD OWNER) OF THE SECURITIES WILL BE REQUIRED TO TRANSFER SUFFICIENT SECURITIES PURSUANT TO THE TERMS PROVIDED FOR IN THE CORPORATION S CERTIFICATE OF INCORPORATION TO CAUSE THE FIVE PERCENT STOCKHOLDER TO NO LONGER BE IN VIOLATION OF THE TRANSFER RESTRICTIONS. THE CORPORATION WILL FURNISH WITHOUT CHARGE TO ANY PROPERLY INTERESTED PERSON A COPY OF THE CERTIFICATE OF INCORPORATION, CONTAINING THE ABOVE-REFERENCED TRANSFER RESTRICTIONS, UPON WRITTEN REQUEST TO THE CORPORATION AT ITS PRINCIPAL PLACE OF BUSINESS.

The Board of Directors may also require that any certificates issued by the Corporation evidencing ownership of shares of Stock that are subject to conditions imposed by the Board of Directors under Section E.2(b) of this Article IV also bear a conspicuous legend referencing the applicable restrictions.

(b) The Corporation shall have the power to make appropriate notations upon its stock transfer records and to instruct any transfer agent, registrar, securities intermediary or depository with respect to the requirements of this Article IV for any uncertificated Corporation Securities or Corporation Securities held in an indirect holding system. At the request of the Corporation, or as a condition to the registration of the Transfer of any Stock, any Person who is a beneficial, legal or record holder of Stock, and any proposed transferee of such Stock and any Person controlling, controlled by or under common control with the proposed transferee of such Stock, shall provide such information as the Corporation may request from time to time in order to determine compliance with this Article IV or the status of the Tax Benefits of the Corporation.

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(c) Nothing contained in this Article IV shall limit the authority of the Board of Directors of the Corporation to take such other action to the extent permitted by law as it deems necessary or advisable to preserve the Corporation's Tax Benefits. The Board of Directors of the Corporation shall have the power to determine all matters necessary for determining compliance with this Article IV, including, without limitation, determining (i) the identification of Five Percent Shareholders and Restricted Holders, (ii) whether a Transfer or proposed Transfer is a Prohibited Transfer, (iii) the Percentage Stock Ownership in the Corporation of any Five Percent Shareholders and Restricted Holders, (iv) whether an instrument or right constitutes a Corporation Security, (v) the amount (or fair market value) due to a Purported Transferee, (vi) the interpretation of the provisions of this Article IV, and (vii) any other matters which the Board of Directors deems relevant. In addition, the Board of Directors may, to the extent permitted by law, from time to time establish, modify, amend or rescind Bylaws, regulations and procedures of the Corporation not inconsistent with the express provisions of this Article IV for purposes of determining whether any Transfer of Stock would jeopardize the Corporation's ability to preserve or use the Tax Benefits, or for the orderly application, administration and implementation of the provisions of this Article IV. In the case of an ambiguity in the application of any of the provisions of this Article IV, including any definition used herein, the Board of Directors shall have the power to determine the application of such provisions with respect to any situation based on its reasonable belief, understanding or knowledge of the circumstances. In the event that this Article IV requires an action by the Board of Directors but fails to provide specific guidance with respect to such action, the Board of Directors shall have the power to determine the action to be taken so long as such action is not contrary to the provisions of this Article IV. All actions, calculations, interpretations and determinations that are done or made by the Board of Directors in good faith pursuant to this Article IV shall be final, conclusive and binding on the Corporation, the Agent, and all other parties to a Transfer; provided, however, that the Board of Directors may delegate all or any portion of its duties and powers under this Article IV to a committee of the Board of Directors as it deems advisable or necessary. All references in this Article IV to the Code and the regulations promulgated thereunder shall be deemed to include any successor provision.

(d) To the fullest extent permitted by law, the Corporation and the members of the Board of Directors shall be fully protected in relying in good faith upon the information, opinions, reports or statements of the chief executive officer, the chief financial officer or the chief accounting officer of the Corporation or of the Corporation's legal counsel, independent auditors, transfer agent, investment bankers or other employees and agents in making the determinations and findings contemplated by this Article IV, and the members of the Board of Directors shall not be responsible for any good faith errors made in connection therewith.

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(e) Nothing contained in this Article IV shall be construed to give any Person other than the Corporation or the Agent any legal or equitable right, remedy or claim under this Article IV. This Article IV shall be for the sole and exclusive benefit of the Corporation and the Agent.

(f) With regard to any power, restriction, remedy or right provided herein or otherwise available to the Corporation or the Agent provided under this Article IV, (i) no waiver will be effective unless expressly contained in a writing signed by the waiving party; and (ii) no waiver alteration, modification or impairment will be implied by reason of any previous waiver, extension of time, delay or omission in exercise, or other indulgence.

(g) If any provision of this Article IV or the application of any such provision to any Person or under any circumstance shall be held invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision of this Article IV.

[SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, this Certificate of Amendment to the Corporation's Restated Certificate of Incorporation has been executed by a duly authorized officer of the corporation on this the [_____]th day of [_____] 2010.

Heska Corporation

By:

Name:

Title:

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Appendix B

**Heska Corporation
1997 Employee Stock Purchase Plan
AS AMENDED AND RESTATED, EFFECTIVE May 4, 2010**

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Heska Corporation
1997 Employee Stock Purchase Plan
As Amended and Restated, Effective May 4, 2010

SECTION 1. PURPOSE OF THE PLAN.

The Plan was adopted by the Board on April 23, 1997. The purpose of the Plan is to provide Eligible Employees with an opportunity to increase their proprietary interest in the success of the Company by purchasing Stock from the Company on favorable terms and to pay for such purchases through payroll deductions. The Plan is intended to qualify under section 423 of the Code.

The Plan was amended and restated on May 16, 2002, February 6, 2004, February 24, 2005 and June 17, 2008. The Plan is now amended and restated, effective May 4, 2010.

SECTION 2. ADMINISTRATION OF THE PLAN.

(a) **Committee Composition.** The Plan shall be administered by the Committee. The Committee shall consist exclusively of one or more directors of the Company, who shall be appointed by the Board.

(b) **Committee Responsibilities.** The Committee shall interpret the Plan and make all other policy decisions relating to the operation of the Plan. The Committee may adopt such rules, guidelines and forms as it deems appropriate to implement the Plan. The Committee's determinations under the Plan shall be final and binding on all persons.

SECTION 3. ENROLLMENT AND PARTICIPATION.

(a) **Offering Periods.** While the Plan is in effect, two overlapping Offering Periods shall commence in each calendar year. Beginning on July 1, 2008, the Offering Periods shall consist of the five-year periods commencing on each January 1 and July 1.

(b) **Accumulation Periods.** While the Plan is in effect, two Accumulation Periods shall commence in each calendar year. Beginning on July 1, 2008, the Accumulation Periods shall consist of the six-month periods commencing on each January 1 and July 1.

(c) **Enrollment.** Any individual who, on the day preceding the first day of an Offering Period, qualifies as an Eligible Employee may elect to become a Participant in the Plan for such Offering Period by executing the prescribed form, which shall be filed with the Company at the prescribed location prior to the commencement of such Offering Period.

(d) **Duration of Participation.** Once enrolled in the Plan, a Participant shall continue to participate in the Plan until he or she ceases to be an Eligible Employee, withdraws from the Plan under Section 5(a) or is withdrawn from the Plan under Section 5(b). A Participant who withdrew from the Plan under Section 5(a) or was withdrawn from the Plan under Section 5(b) may again become a Participant, if he or she then is an Eligible Employee, by following the procedure described in Subsection (c) above.

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(e) **Applicable Offering Period.** One Offering Period may apply to a Participant at one time. The applicable Offering Period for a given Participant shall be determined as follows:

(i) Once a Participant is enrolled in the Plan for an Offering Period, such Offering Period shall continue to apply to him or her until the earliest of (A) the end of such Offering Period, (B) the end of his or her participation under Subsection (d) above, (C) enrollment by the Participant in a subsequent Offering Period following a written request on the prescribed form to enroll in an immediately subsequent Offering Period filed with the Company at the prescribed location prior to the commencement of such subsequent Offering Period, which shall only be effective if such Participant has designated on the enrollment form filed with the Company at the prescribed location prior to the commencement of such subsequent Offering Period that he or she elects to have withheld at least 1% of Compensation in the first month of such subsequent Offering Period or (D) automatic enrollment in a subsequent Offering Period under Paragraph (ii) below.

(ii) In the event that the Fair Market Value of Stock on the last trading day before the commencement of the Offering Period in which the Participant is enrolled is higher than on the last trading day before the commencement of any subsequent Offering Period, the Participant shall automatically be enrolled for such subsequent Offering Period if the Participant has designated on the enrollment form filed with the Company at the prescribed location prior to the commencement of such subsequent Offering Period that he or she elects to have withheld at least 1% of Compensation in the first month of such subsequent Offering Period, *unless* the Participant has filed a written request on the prescribed form *not to be enrolled* in such subsequent Offering Period with the Company at the prescribed location prior to the commencement of such subsequent Offering Period.

(iii) When a Participant reaches the end of an Offering Period but his or her participation is to continue as the Participant has not discontinued payroll deductions under Section 4(d) at the end of such Offering Period, then such Participant shall be enrolled automatically for the Offering Period that commences immediately thereafter unless such Participant does not comply with the five percent limit outlined in Section 8(a) and in which case such Participant shall be enrolled automatically in the next available Offering Period in which such Participant complies with the five percent limit outlined in Section 8(a) unless such Participant has ceased to participate in the Plan under Section 3(d).

SECTION 4. EMPLOYEE CONTRIBUTIONS.

(a) **Frequency of Payroll Deductions.** A Participant may purchase shares of Stock under the Plan solely by means of payroll deductions. Payroll deductions, as designated by the Participant pursuant to Subsection (b) below, shall occur on each payday during participation in the Plan.

(b) **Amount of Payroll Deductions.** An Eligible Employee shall designate on the prescribed form the portion of his or her Compensation that he or she elects to have withheld for the purchase of Stock. Such portion shall be a whole percentage of the Eligible Employee's Compensation, but not less than 1% nor more than 10%. Any other provision of the Plan notwithstanding, no Participant shall have more than \$25,000 withheld in the aggregate during all Accumulation Periods ending in the same calendar year. If a Participant is precluded by this Subsection (b) from making additional payroll deductions, then his or her payroll deductions shall be discontinued automatically and shall resume at the beginning of the earliest Accumulation Period ending in the next calendar year (if he or she then is an Eligible Employee).

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(c) **Changing Withholding Rate.** If a Participant wishes to change the rate of payroll withholding, he or she may do so by filing the prescribed form with the Company at the prescribed location at any time. The new withholding rate shall be effective as soon as reasonably practicable after such form has been received by the Company. The new withholding rate shall be a whole percentage of the Eligible Employee's Compensation, but not less than 1% nor more than 10%.

(d) **Discontinuing Payroll Deductions.** If a Participant wishes to discontinue employee contributions entirely, he or she may do so by filing the prescribed form with the Company at the prescribed location at any time. Payroll withholding shall cease as soon as reasonably practicable after such form has been received by the Company. (In addition, employee contributions may be discontinued automatically pursuant to Section 4(b) or 8(b).) A Participant who has discontinued employee contributions may resume such contributions by filing the prescribed form with the Company at the prescribed location. Payroll withholding shall resume as soon as reasonably practicable after such form has been received by the Company.

(e) **Limit on Number of Elections.** No Participant shall make more than two elections under Subsection (c) or (d) above, combined, during any Accumulation Period.

SECTION 5. WITHDRAWAL FROM THE PLAN.

(a) **Withdrawal.** A Participant may elect to withdraw from the Plan by filing the prescribed form with the Company at the prescribed location at any time before the last day of an Accumulation Period. As soon as reasonably practicable thereafter, payroll deductions shall cease and the entire amount credited to the Participant's Plan Account shall be refunded to him or her in cash, without interest. No partial withdrawals shall be permitted.

(b) **Failure to Participate.** A participant who did not purchase Stock under the Plan during an Accumulation Period due to a decision to discontinue employee contributions under Section 4(d) shall be deemed as failing to participate in the Plan and shall be withdrawn from the Plan automatically. As soon as reasonably practicable thereafter, the entire amount credited to the Participant's Plan Account shall be refunded to him or her in cash, without interest.

(c) **Re-Enrollment After Withdrawal.** A former Participant who has withdrawn or was withdrawn from the Plan shall not be a Participant until he or she re-enrolls in the Plan under Section 3(c). Re-enrollment may be effective only at the commencement of an Offering Period.

SECTION 6. CHANGE IN EMPLOYMENT STATUS.

(a) **Termination of Employment.** Termination of employment as an Eligible Employee for any reason, including death, shall be treated as an automatic withdrawal from the Plan under Section 5(a). (A transfer from one Participating Company to another shall not be treated as a termination of employment.)

(b) **Leave of Absence.** For purposes of the Plan, employment shall not be deemed to terminate when the Participant goes on a military leave, a sick leave or another *bona fide* leave of absence, if the leave was approved by the Company in writing and if continued crediting of service for such purpose is expressly required by the terms of such leave or by applicable law (as determined by the Company). Employment, however, shall be deemed to terminate 90 days after the Participant goes on a leave, unless a contract or statute protects his or her right to return to work. Employment shall be deemed to terminate in any event when the approved leave ends, unless the Participant immediately returns to work.

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(c) **Death.** In the event of the Participant's death, unless otherwise prohibited by law, the amount credited to his or her Plan Account shall be paid to a beneficiary designated by him or her for this purpose on the prescribed form or, if none, to the Participant's estate. Such form shall be valid only if it was filed with the Company at the prescribed location before the Participant's death and is not otherwise prohibited by law.

SECTION 7. PLAN ACCOUNTS AND PURCHASE OF SHARES.

(a) **Plan Accounts.** The Company shall maintain a Plan Account on its books in the name of each Participant. Whenever an amount is deducted from the Participant's Compensation under the Plan, such amount shall be credited to the Participant's Plan Account. Amounts credited to Plan Accounts shall not be trust funds and may be commingled with the Company's general assets and applied to general corporate purposes. No interest shall be credited to Plan Accounts.

(b) **Purchase Price.** The Purchase Price for each share of Stock purchased at the close of an Accumulation Period shall be 85% of the Fair Market Value of such share on the last trading day in such Accumulation Period.

(c) **Number of Shares Purchased.** As of the last day of each Accumulation Period, each Participant shall be deemed to have elected to purchase the number of shares of Stock calculated in accordance with this Subsection (c), unless the Participant has previously elected to withdraw from the Plan in accordance with Section 5(a). The amount then in the Participant's Plan Account shall be divided by the Purchase Price, and the number of shares that results shall be purchased from the Company with the funds in the Participant's Plan Account. The foregoing notwithstanding, no Participant shall purchase more than 2,500 shares of Stock with respect to any Accumulation Period nor more than the amounts of Stock set forth in Sections 8(b) and 12(a). Any fractional share, as calculated under this Subsection (c), shall be rounded down to the next lower whole share.

(d) **Available Shares Insufficient.** In the event that the aggregate number of shares that all Participants elect to purchase during an Accumulation Period exceeds the maximum number of shares remaining available for issuance under Section 12(a), then the number of shares to which each Participant is entitled shall be determined by multiplying the number of shares available for issuance by a fraction, the numerator of which is the number of shares that such Participant has elected to purchase and the denominator of which is the number of shares that all Participants have elected to purchase.

(e) **Issuance of Stock.** Certificates representing the shares of Stock purchased by a Participant under the Plan shall be issued to him or her as soon as reasonably practicable after the close of the applicable Accumulation Period, except that the Committee may determine that such shares shall be held for each Participant's benefit by a broker designated by the Committee (unless the Participant has elected that certificates be issued to him or her). Shares may be registered in the name of the Participant or jointly in the name of the Participant and his or her spouse as joint tenants with right of survivorship or as community property.

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(f) **Unused Cash Balances.** An amount remaining in the Participant's Plan Account that represents the Purchase Price for any fractional share shall be carried over in the Participant's Plan Account to the next Accumulation Period. Any amount remaining in the Participant's Plan Account that represents the Purchase Price for whole shares that could not be purchased by reason of Subsection (c) above, Section 8(b) or Section 12(a) shall be refunded to the Participant in cash, without interest.

SECTION 8. LIMITATIONS ON STOCK OWNERSHIP.

(a) **Five Percent Limit.** Any other provision of the Plan notwithstanding, no Participant shall be granted a right to purchase Stock under the Plan if such Participant, immediately after his or her election to purchase such Stock, would own stock possessing 5% or more of the total combined voting power or value of all classes of stock of the Company or any parent or Subsidiary of the Company. For purposes of this Subsection (a), the following rules shall apply:

(i) Ownership of stock shall be determined after applying the attribution rules of section 424(d) of the Code;

(ii) Each Participant shall be deemed to own any stock that he or she has a right or option to purchase under this or any other plan; and

(iii) Each Participant shall be deemed to have the right to purchase 25,000 shares of Stock under this Plan with respect to each Offering Period.

(b) **\$25,000 Limit.** Any other provision of the Plan notwithstanding, no Participant shall purchase Stock with a Fair Market Value (determined at the time such purchase right option is granted) in excess of \$25,000 during any calendar year under this Plan and all other employee stock purchase plans of the Company or any parent or Subsidiary of the Company. For purposes of this Subsection (b), employee stock purchase plans not described in section 423 of the Code shall be disregarded. If a Participant is precluded by this Subsection (b) from purchasing additional Stock under the Plan, then his or her employee contributions shall automatically be discontinued and shall resume at the beginning of the earliest Accumulation Period ending in the next calendar year (if he or she has remained a continuous Participant).

SECTION 9. RIGHTS NOT TRANSFERABLE.

The rights of any Participant under the Plan, or any Participant's interest in any Stock or moneys to which he or she may be entitled under the Plan, shall not be transferable by voluntary or involuntary assignment or by operation of law, or in any other manner other than by beneficiary designation or the laws of descent and distribution. If a Participant in any manner attempts to transfer, assign or otherwise encumber his or her rights or interest under the Plan, other than by beneficiary designation or the laws of descent and distribution, then such act shall be treated as an election by the Participant to withdraw from the Plan under Section 5(a).

SECTION 10. NO RIGHTS AS AN EMPLOYEE.

Nothing in the Plan or in any right granted under the Plan shall confer upon the Participant any right to continue in the employ of a Participating Company for any period of specific duration or interfere with or otherwise restrict in any way the rights of the Participating Companies or of the Participant, which rights are hereby expressly reserved by each, to terminate his or her employment at any time and for any reason, with or without cause.

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SECTION 11. NO RIGHTS AS A STOCKHOLDER.

A Participant shall have no rights as a stockholder with respect to any shares of Stock that he or she may have a right to purchase under the Plan until such shares have been purchased on the last day of the applicable Accumulation Period.

SECTION 12. STOCK OFFERED UNDER THE PLAN.

(a) **Authorized Shares.** The aggregate number of shares of Stock available for purchase under the Plan shall be 2,750,000, subject to adjustment pursuant to this Section 12.

(b) **Anti-Dilution Adjustments.** The aggregate number of shares of Stock offered under the Plan, the 2,500-share limitation described in Section 7(c) and the price of shares that any Participant has elected to purchase shall be adjusted proportionately as directed by the Committee for any increase or decrease in the number of outstanding shares of Stock resulting from a subdivision or consolidation of shares or the payment of a stock dividend, any other increase or decrease in such shares effected without receipt or payment of consideration by the Company, the distribution of the shares of a Subsidiary to the Company's stockholders or a similar event.

(c) **Reorganizations.** Any other provision of the Plan notwithstanding, immediately prior to the effective time of a Change in Control, the Offering Period and Accumulation Period then in progress shall terminate, shares shall be purchased pursuant to Section 7 and any remaining unused balance in a given Participant's Plan Account shall be returned to such Participant. In the event of a merger or consolidation to which the Company is a constituent corporation and which does not constitute a Change in Control, the Plan shall continue unless the plan of merger or consolidation provides otherwise. The Plan shall in no event be construed to restrict in any way the Company's right to undertake a dissolution, liquidation, merger, consolidation or other reorganization.

SECTION 13. AMENDMENT OR DISCONTINUANCE.

The Board shall have the right to amend, suspend or terminate the Plan at any time and without notice. Except as provided in Section 12, any increase in the aggregate number of shares of Stock to be issued under the Plan shall be subject to approval by a vote of the stockholders of the Company. In addition, any other amendment of the Plan shall be subject to approval by a vote of the stockholders of the Company to the extent required by an applicable law or regulation.

SECTION 14. DEFINITIONS.

(a) **Accumulation Period** means a six-month period during which contributions may be made toward the purchase of Stock under the Plan, as determined pursuant to Section 3(b).

(b) **Board** means the Board of Directors of the Company, as constituted from time to time.

(c) **Change in Control** means:

(i) The consummation of a merger or consolidation of the Company with or into another entity or any other corporate reorganization, if more than 50% of the combined voting power of the continuing or surviving entity's securities outstanding immediately after such merger, consolidation or other reorganization is owned by persons who were not stockholders of the Company immediately prior to such merger, consolidation or other reorganization; or

(ii) The sale, transfer or other disposition of all or substantially all of the Company's assets or the complete liquidation or dissolution of the Company.

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A transaction shall not constitute a Change in Control if its sole purpose is to change the state of the Company's incorporation or to create a holding company that will be owned in substantially the same proportions by the persons who held the Company's securities immediately before such transaction.

(d) **Code** means the Internal Revenue Code of 1986, as amended.

(e) **Committee** means a committee of the Board, as described in Section 2.

(f) **Company** means Heska Corporation, a Delaware corporation.

(g) **Compensation** means (i) the total compensation paid in cash to a Participant by a Participating Company, including salaries, wages, bonuses, incentive compensation, commissions and overtime pay, plus (ii) any pre-tax contributions made by the Participant under Section 401(k) or 125 of the Code. Compensation shall exclude moving or relocation allowances, car allowances, imputed income attributable to cars or life insurance, fringe benefits, contributions to employee benefit plans and similar items. The Committee shall determine whether a particular item is included in Compensation.

(h) **Eligible Employee** means any employee of a Participating Company whose customary employment is for more than five months per calendar year and for more than 20 hours per week. The foregoing notwithstanding, an individual shall not be considered an Eligible Employee if his or her participation in the Plan is prohibited by the law of any country which has jurisdiction over him or her or if he or she is subject to a collective bargaining agreement that does not provide for participation in the Plan.

(i) **Exchange Act** means the Securities Exchange Act of 1934, as amended.

(j) **Fair Market Value** means the market price of Stock, determined by the Committee as follows:

(i) If Stock is normally listed on the Nasdaq Stock Market, then the Fair Market Value shall be equal to the last transaction price reported by the Nasdaq Stock Market;

(ii) If provision (i) above is not applicable and Stock is normally listed on a stock exchange, then the Fair Market Value shall be equal to the last transaction price reported by such stock exchange;

(iii) If provisions (i) and (ii) above are not applicable and Stock was traded over-the-counter on the date in question, then the Fair Market Value shall be equal to the last transaction price reported by the principal automated inter-dealer quotation system on which Stock is quoted or, if the Stock is not quoted on any such system, by the Pink Sheets published by the National Quotation Bureau, Inc.; and

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(iv) If none of the foregoing provisions is applicable or may be implemented, then the Fair Market Value shall be determined by the Committee in good faith on such basis as it deems appropriate.

Whenever possible, the determination of Fair Market Value by the Committee shall be based on the prices as reported directly to the Company by the Nasdaq Stock Market or a comparable exchange or as reported in *The Wall Street Journal*. Such determination shall be conclusive and binding on all persons.

(k) **Offering Period** means the five-year period with respect to which the right to purchase Stock may be granted under the Plan and during which contributions may be made toward the purchase of Stock under the Plan, as determined pursuant to Section 3(a).

(l) **Participant** means an Eligible Employee who elects to participate in the Plan, as provided in Section 3(c).

(m) **Participating Company** means (i) the Company and (ii) each present or future Subsidiary designated by the Committee as a Participating Company.

(n) **Plan** means this Heska Corporation 1997 Employee Stock Purchase Plan, as it may be amended from time to time.

(o) **Plan Account** means the account established for each Participant pursuant to Section 7(a).

(p) **Purchase Price** means the price at which Participants may purchase Stock under the Plan, as determined pursuant to Section 7(b).

(q) **Stock** means the Common Stock of the Company.

(r) **Subsidiary** means any corporation (other than the Company) in an unbroken chain of corporations beginning with the Company, if each of the corporations other than the last corporation in the unbroken chain owns stock possessing 50% or more of the total combined voting power of all classes of stock in one of the other corporations in such chain.

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SECTION 15. EXECUTION.

To record the most recent amendment of the Plan by the Board or its Committee on May 4, 2010, the Company has caused its authorized officer to execute the same.

Heska Corporation

By:

Title: Chairman and Chief Executive
Officer

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Heska Corporation

Holder Account Number

C 1234567890 J N T

o Mark this box with an X if you have made changes to your name or address details above.

2010 Annual Meeting Proxy Card

A. Election of Directors

The Board of Directors recommends a vote *FOR* the listed nominees.

1. Election of two Directors to serve for a three-year term that expires at the 2013 Annual Meeting or until their respective successors have been elected and qualified.

For Withhold

01 Peter Eio

02 G. Irwin Gordon

B Issues

The Board of Directors recommends a vote *FOR* each of the following:

- | | | For | Against | Abstain |
|----|---|------------|----------------|----------------|
| 2. | To adopt a certificate of amendment to our restated Certificate of Incorporation to reclassify our common stock and add net transfer restrictions to preserve value of our tax net operating losses | | | |
| 3. | To amend and restate the 1997 Employee Stock Purchase Plan to, including an increase in the number of shares available under the plan by 500,000 shares. | | | |
| 4. | To ratify the appointment of Ehrhardt Keefe Steiner & Hottman PC as Heska Corporation's independent registered public accountant. | | | |
| 5. | To consider such other business as may properly come before the 2010 Annual Meeting. | | | |

C Authorized Signatures Sign Here This section must be completed for your instructions to be executed.

Please date and sign exactly as your name or names appear herein. Corporate or partnership proxies should be signed in full corporate or partnership name by an authorized person. Persons signing in a fiduciary capacity should indicate their full title in such capacity.

Signature 1 Please keep signature within the box Signature 2 Please keep signature within the box Date (mm/dd/yyyy)

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Proxy Heska Corporation

THIS PROXY IS SOLICITED ON BEHALF OF THE BOARD OF DIRECTORS

The undersigned hereby appoints Robert B. Grieve, Ph.D., Jason A. Napolitano and Michael A. Bent, and each of them, as proxies, with full power of substitution, and hereby authorizes them to represent and vote, as designated below, all shares of the Common Stock of Heska Corporation, a Delaware corporation (the ***Company***), held of record by the undersigned on March 24, 2010, at the 2010 Annual Meeting of Stockholders (the ***Annual Meeting***) to be held at the corporate offices of the Company located at 3760 Rocky Mountain Avenue, Loveland, Colorado 80538 at 9:00 a.m., local time, on Tuesday, May 4, 2010, or at any adjournment or postponement thereof, with all the powers that the undersigned would have if personally present at the meeting.

The undersigned hereby acknowledges receipt of the Notice of Annual Meeting and Proxy Statement, dated April 5, 2010, and a copy of Heska Corporation's 2009 Annual Report on Form 10-K/A as filed with the Securities and Exchange Commission. The undersigned hereby expressly revokes any and all proxies heretofore given or executed by the undersigned with respect to the shares of stock represented by this proxy and, by filing this proxy with the Secretary of Heska Corporation, gives notice of such revocation. This proxy when properly executed will be voted in accordance with the specifications made by the undersigned stockholder.

IF NO DIRECTION IS MADE, THIS PROXY WILL BE VOTED FOR THE ELECTION OF THE NOMINEES FOR DIRECTOR, FOR ADOPTION OF THE CERTIFICATE AMENDMENT, FOR THE AMENDMENT AND RESTATEMENT OF THE 1997 EMPLOYEE STOCK PURCHASE PLAN, FOR THE RATIFICATION OF EHRHARDT KEEFE STEINER & HOTTMAN PC AS THE COMPANY'S INDEPENDENT REGISTERED PUBLIC ACCOUNTANT AND AT THE DISCRETION OF THE PROXIES ON ANY OTHER BUSINESS THAT MAY PROPERLY COME BEFORE THE ANNUAL MEETING. THIS PROXY MAY BE REVOKED AT ANY TIME PRIOR TO THE TIME IT IS VOTED.

PLEASE COMPLETE, DATE AND SIGN THIS PROXY AND RETURN PROMPTLY IN THE ENCLOSED ENVELOPE.

IMPORTANT NOTICE REGARDING THE AVAILABILITY OF PROXY MATERIALS FOR THE STOCKHOLDER MEETING TO BE HELD ON MAY 4, 2010

The Proxy Statement, this Proxy Card and our 2009 Annual Report on Form 10-K/A are available at <https://materials.proxyvote.com/42805E>.