

FD# 22216

AFFIDAVIT OF STEPHEN J. CARLOTTI

I, Stephen J. Carlotti, first duly sworn depose and say that:

1. I am the attorney for Ross-Simons of Warwick, Inc., a Rhode Island corporation.
2. On July 19, 2000, the shareholders of said Corporation unanimously adopted Articles of Amendment thereto and on July 19, 2000 and I caused said Articles of Amendment to be filed with the Secretary of State of Rhode Island on July 19, 2000.
3. Exhibit A to said Articles of Amendment was erroneous and inconsistent with the Articles of Amendment as actually approved by the stockholders.
4. Attached hereto as Exhibit 1 is a true and correct copy of Exhibit A as adopted by the shareholders of said Corporation on July 19, 2000, which Exhibit A should have been filed with the Articles of Amendment.

  
Stephen J. Carlotti

STATE OF RHODE ISLAND  
COUNTY OF PROVIDENCE

Subscribed and sworn to before me this 21<sup>st</sup> day of September 2001.

  
Diane M. Leduc

Notary Public

My Commission Expires: 6/25/05

**FILED**

**SEP 27 2001**

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EXHIBIT A

TO ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION

Article FOURTH, as amended, is hereby deleted in its entirety and the following substituted therefor:

"FOURTH" "The aggregate number of shares which the Corporation has the authority to issue is 18,510,000 shares, consisting of (i) 18,500,000 shares of Class A Voting Common Stock with \$0.01 par value per share, (ii) 5,000 shares of Class B Non-voting Common Stock with no par value per share, and (ii) 5,000 shares of Series A Preferred Stock with a par value of \$0.01 per share.

1. Designation. The distinctive designation of such series is "Series A Preferred Stock" (hereinafter in this Resolution called "Series A Preferred Stock").

2. Rank. The Series A Preferred Stock shall, with respect to dividend rights and rights of liquidation, winding up and dissolution, rank prior to all classes of common stock of the Company. After the date hereof, the Company shall not issue any preferred stock ranking senior to or pari passu with the Series A Preferred Stock, and no subsidiary of the Company shall issue any preferred stock, in each case unless otherwise consented to by the holders of a majority of the outstanding shares of Series A Preferred Stock (all equity securities of the Company to which the Series A Preferred Stock ranks prior are collectively referred to herein as the "Junior Securities").

3. Dividends.

(a) The holders of the shares of Series A Preferred Stock shall be entitled to receive quarterly dividends, payable on September 1, December 1, March 1 and June 1 of each year (each a "Dividend Date"), when, as and if declared by the Board of Directors, out of funds legally available for the payment thereof, in an amount per share equal to 5% of the Liquidation Preference (as hereinafter defined) per share, in preference to dividends on, and other distributions in respect of, Junior Securities. Each quarterly dividend shall be fully cumulative and shall accrue (whether or not declared) on a daily basis from the last Dividend Date and, if not paid in cash, shall be added to the Liquidation Preference (as hereinafter defined) on the next Dividend Date. Dividends on the shares of Series A Preferred Stock shall be paid to the holders of record at the close of business on the date specified by the Board of Directors at the time such dividend is declared; provided, however, that such date shall not be more than 60 days nor less than 10 days prior to the relevant Dividend Date.

(b) All dividends paid with respect to the shares of Series A Preferred Stock pursuant to Section 3(a) shall be paid *pro rata* to the holders entitled thereto.

(c) The holders of the shares of Series A Preferred Stock shall be entitled to receive the dividends provided for in Section 3(a) (including any



such dividends that have been added to the Liquidation Preference) in preference to and with priority over any dividends on, and other distributions in respect of, any of the Junior Securities other than dividends and distributions payable solely in Junior Securities.

4. Liquidation Preference. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Company, holders of the shares of Series A Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Company available for distribution to its stockholders an amount in cash per share equal to (i) \$1,000 plus (ii) the amount of all dividends that have been added to the Liquidation Preference (collectively, the "**Liquidation Preference**") plus an amount in cash equal to all accrued but unpaid dividends thereon not theretofore added to the Liquidation Preference to the date fixed for liquidation, dissolution or winding up, before any payment shall be made or any assets distributed to the holders of any of the Junior Securities. If the assets of the Company are not sufficient to pay in full the liquidation payments payable to holders of the outstanding shares of Series A Preferred Stock, then the holders of all such shares shall share ratably and proportionately in such distribution of assets in accordance with the amount that would be payable on such distribution if the amounts to which holders of the outstanding shares of Series A Preferred Stock are entitled were paid in full.

5. Change of Control Redemption

- (a) Change of Control. If at any time after the first issuance of shares of Series A Preferred Stock, there shall occur a Change of Control (as hereinafter defined), then, subject to Section 5(a)(3) hereof, the holders of the shares of Series A Preferred Stock shall have the redemption rights hereinafter set forth. As used herein, "**Change of Control**" shall mean (1) prior to an IPO, the failure by Freeman Spogli & Co. LLC, a Delaware limited liability company ("**FS&C**") and its Affiliates to collectively own, directly or indirectly, beneficially and of record, shares representing at least 45% of the aggregate ordinary voting power represented by the issued and outstanding capital stock of the Company; (2) after an IPO, the failure by FS&C and its Affiliates to collectively own, directly or indirectly, beneficially and of record, shares representing at least 15% of the aggregate ordinary voting power represented by the issued and outstanding capital stock of the Company; (3) after an IPO, any Person or group (within the meaning of Rule 13d-5 under the United States Securities and Exchange Act of 1934 as in effect on the date hereof), other than FS&C and its Affiliates, shall beneficially own, directly or indirectly, shares of capital stock of the Company representing a percentage of the aggregate ordinary voting power represented by the issued and outstanding capital stock of the Company that is greater than the percentage thereof represented by shares owned by FS&C and its Affiliates or (4) occupation of a majority of the seats (other than vacant seats) on the board of directors of the Company by persons who are not Continuing Directors. For purposes of the foregoing, any shares of capital stock of the Company that are held by any Person shall, to the extent that FS&C or any of its Affiliates has the power to direct the voting of such shares, be deemed to be owned, beneficially and of record, by FS&C. For purposes hereof, "**Affiliate**" shall mean, with respect to a specified person or entity, another person or entity that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common



Control with the person or entity specified; **"Continuing Directors"** shall mean the directors of the Company on the date of, and after giving effect to, the consummation of the transactions contemplated by the Recapitalization Agreement dated as of June 22, 2000 by and among the Company, RSW Holding Company, LLC, a Delaware limited liability company, an affiliate of FS&C and the sellers identified therein, and each other director if, in each case, such other director's nomination for election to the board of directors of the Company is recommended by a majority of the then Continuing Directors or such other director receives the vote of FS&C or its applicable Affiliate in his or her election by the stockholders of the Company; **"Control"** shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ability to exercise voting power, by contract or otherwise and **"Controlling"** and **"Controlled"** have meanings correlative thereto; and **"IPO"** shall mean the issuance by the Company of shares of its common stock to the public pursuant to a bona fide underwritten public offering, resulting in the receipt by the Company of at least \$70,000,000 of gross cash proceeds;

- (1) If the Company will not be the surviving corporation following a proposed Change of Control, the Company shall notify the holders of the Series A Preferred Stock in writing of the possibility of such Change of Control at least 15 days prior to the occurrence thereof, shall offer to purchase for cash any and all outstanding shares of Series A Preferred Stock at a price equal to 101% of the Liquidation Preference per share, plus accrued and unpaid dividends from the last dividend payment date to the date of redemption, simultaneously with (and as a condition to) the occurrence of the Change of Control, and shall purchase at such time all shares of Series A Preferred Stock with respect to which the holders have accepted such offer.
- (2) If the Company is or will be the surviving corporation following such Change of Control, the Company shall notify the holders of the Series A Preferred Stock in writing of the possibility or occurrence of such Change of Control, as the case may be, no later than five days following the later of (x) the date of such Change of Control and (y) the date the Company becomes aware of the fact that such Change of Control has occurred, shall offer to purchase for cash any and all outstanding shares of Series A Preferred Stock at a price equal to 101% of the Liquidation Preference per share, plus accrued and unpaid dividends from the last dividend payment date to the date of redemption, at a date not less than 15 nor more than 60 days following the date of such notice and shall purchase at such date all shares of Series A Preferred Stock with respect to which the holders have accepted such offer.
- (3) Notwithstanding anything contained in this Certificate or the Certificate of Incorporation, if the provisions of any agreement or instrument governing any indebtedness of the Company for borrowed money would prohibit the Company from redeeming or





offering to redeem the Series A Preferred Stock, or if the consummation of such a redemption or offer to redeem would cause a default or event of default under any such agreement or instrument, then (a) the Company shall not be entitled to purchase or redeem, or offer to purchase or redeem, the Series A Preferred Stock and (b) the holders of shares of the Series A Preferred Stock shall not be entitled to require the Company to purchase or redeem, or offer to purchase or redeem, the Series A Preferred Stock, in each case until the earlier of (i) the mandatory redemption date for the Series A Preferred Stock set out in Section 6 below and (ii) the date on which all such Indebtedness has been repaid in full in cash (and all commitments to lend thereunder have been terminated) or the holders of such Indebtedness consent to the redemption. The only remedy the holders of shares of Series A Preferred Stock shall have as a result of the Company's failure to redeem or offer to redeem Series A Preferred Stock or the Company's failure to comply with any other provision of this Certificate or the Certificate of Incorporation shall be an increase in the annual dividend rate applicable to the Series A Preferred Stock to 22%.

(b) Notice of Change of Control Redemption. The notice of redemption from the Company to the holders of shares of Series A Preferred Stock shall state:

- (1) that a Change of Control may occur or has occurred, as the case may be, and that each holder of shares of Series A Preferred Stock has the right to require the Company to redeem any or all of such shares at the redemption price;
- (2) the anticipated date for redemption, which shall be no later than the date specified in whichever of Section 5(a)(1) or Section 5(a)(2) is applicable;
- (3) a description of the Change in Control; and
- (4) that the holder is to surrender to the Company, in the manner and at the place designated, the certificate or certificates representing shares of Series A Preferred Stock with respect to which the holder has accepted the Company's redemption offer.

6. Mandatory Redemption.

(a) Redemption. The shares of Series A Preferred Stock shall be redeemed in whole on the eighth anniversary of the first issuance of the shares of Series A Preferred Stock, at a redemption price equal to the Liquidation Preference per share plus accrued and unpaid dividends from the last dividend payment date to the date of redemption.

(b) Notice of Mandatory Redemption. The notice of redemption from the Company to the holders of shares of Series A Preferred Stock shall state:



(1) the date fixed for redemption, which shall be the eighth anniversary of the first issuance of the shares of Series A Preferred Stock; and

(2) that the holder is to surrender to the Company, in the manner and at the place designated, its certificate or certificates representing its shares of Series A Preferred Stock.

(c) Payment Upon Mandatory Redemption. The Redemption Price shall be payable in cash on the eighth anniversary of the first issuance of the shares of Series A Preferred Stock, upon surrender of the certificates representing the shares of Series A Preferred Stock.

7. Optional Redemption.

(a) Redemption. The Company may, subject to Section 5(a)(3) hereof, redeem the Series A Preferred Stock, in whole or in part, at any time, at a redemption price per share equal to the percentages of the Liquidation Preference set forth below, plus accrued and unpaid dividends from the last dividend payment date to the date of redemption, if redeemed during the 12-month period beginning July 31 of the years indicated below.

<u>Year</u>	<u>Redemption Prices</u>
2000	120%
2001	117 $\frac{1}{2}$ %
2002	115%
2003	112 $\frac{1}{2}$ %
2004	110%
2005	107 $\frac{1}{2}$ %
2006	105%
2007	102 $\frac{1}{2}$ %

(b) Notice of Optional Redemption. Notice of redemption pursuant to Section 7(a) hereof shall be mailed at least 15 days before the redemption date by first class mail to each holder whose Series A Preferred Stock is to be redeemed at such holder's registered address. The notice of redemption from the Company to the holders of shares of Series A Preferred Stock shall state:

(1) the date fixed for redemption which shall be not less than 15 nor more than 60 days following the date of such notice;

(2) the number of shares of Series A Preferred Stock to be redeemed and, if fewer than all the shares held by such holder are to be redeemed, the number of shares to be redeemed from such holder; and

(3) that the holder is to surrender to the Company, in the manner and at the place designated, its certificate or certificates representing its shares of Series A Preferred Stock.



- (c) Pro Rata Basis. If less than all of the outstanding shares of Series A Preferred Stock are to be redeemed pursuant to Section 7(a), the Company shall select those shares to be redeemed pro rata (with any fractional shares being rounded to the nearest whole share).

8. Status of Recquired Shares. Shares of Series A Preferred Stock that have been issued and reacquired or redeemed in any manner shall (upon compliance with any applicable provisions of the laws of the State of Rhode Island) have the status of authorized and unissued shares of preferred stock undesignated as to series and may be redesignated and reissued.

9. Voting Rights.

- (a) The holders of record of the shares of Series A Preferred Stock shall not be entitled to any voting rights, except as herein provided and as provided by the Rhode Island Business Corporation Act.

- (b) A class vote of two-thirds of the shares of Series A Preferred Stock then outstanding shall be required to (x) amend, alter or repeal any provision of the Certificate of Incorporation (by merger or otherwise) so as to adversely affect the preferences, rights or powers of the Series A Preferred Stock (including, without limitation, any change to the dividend payable on the Series A Preferred Stock or the Liquidation Preference), (y) issue any series of equity securities senior or pari passu, with respect to dividend rights and rights on liquidation, winding up and dissolution, to the Preferred Stock or (z) authorize or permit any subsidiary to issue any shares of preferred stock.

10. Board Right. Upon certification from the holder of a majority of outstanding shares of Series A Preferred Stock (the "**Majority Holder**") that there is no other agreement or arrangement pursuant to which the Majority Holder is permitted to designate one or more members of the Board of Directors, the Company shall increase the size of the Board of Directors by one member and the Majority Holder shall be permitted to appoint such director.

11. Reports. So long as any shares of the Preferred Stock are outstanding, the Company will furnish the holders thereof with any quarterly and annual financial reports that the Company is required to file with the Securities and Exchange Commission pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 or, in the event the Company is not required to file such reports, the same reports as are provided to the holders of the Company's common stock or the Company's senior lenders.

12. Notices Generally. Whenever it is provided herein that any notice, request, consent, approval or other communication shall or may be given to or served upon the Company or any holder of shares of Series A Preferred Stock, each such notice, request, consent, approval or other communication shall be in writing and shall (i) if the Series A Preferred Stock is held by fewer than 15 persons, either be delivered in person or by telecopy or by air courier guaranteeing second business day delivery, and (ii) if the Series A Preferred Stock is held by 15 or more persons, also be delivered by first class mail, in either case directed to the party to receive the same at its address stated below:



(a) If to any holder of shares of Series A Preferred Stock, at its last known address appearing on the books of the Company maintained for such purposes.

(b) If to the Company, at:

Ross-Simons of Warwick, Inc.  
9 Ross Simons Drive  
Cranston, Rhode Island 02920

or at such other address as may be substituted by notice given as herein provided. The giving of any notice required hereunder may be waived in writing by the party entitled to receive such notice. Every notice, request, consent, approval or other communication hereunder shall be deemed to have been duly given or served on the date on which personally delivered, or on the date actually received, if sent by telecopy or overnight courier service, with receipt acknowledged."





## EXHIBIT B

### TO ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION

SIXTH: Provisions (if any) for the regulation of the internal affairs of the corporation:

- I. (A) A Director of the corporation shall not be personally liable to the corporation or its shareholders for monetary damages for breach of the Director's duty as a Director, except for (i) liability for any breach of the Director's duty of loyalty to the corporation or its shareholders, (ii) liability for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) liability imposed pursuant to the provisions of Section 43 of the Rhode Island Business Corporation Act, as amended (the "Act"), or (iv) liability for any transaction (other than transactions approved in accordance with Section 37.1 of the Act) from which the Director derived an improper personal benefit. If the Act is amended to authorize corporate action further eliminating or limiting the personal liability of Directors, then the liability of a Director of the corporation shall be eliminated or limited to the fullest extent so permitted. Any repeal or modification of this provision by the corporation shall not adversely affect any right or protection of a Director of the corporation existing prior to such repeal or modification.

(B) The Directors of the corporation may include provisions in the corporation's by-laws, or may authorize agreements to be entered into with each Director, officer, employee or other agent of the corporation (an "Indemnified Person"), for the purpose of indemnifying an Indemnified Person in the manner and to the extent permitted by the Act.

In addition to the authority conferred upon the Directors of the corporation by the foregoing paragraph, the Directors of the corporation may include provisions in its by-laws, or may authorize agreements to be entered into with each Indemnified Person, for the purpose of indemnifying such person in the manner and to the extent provided herein:

(i) The by-law provisions or agreements authorized hereby may provide that the corporation shall, subject to the provisions of this Article, pay, on behalf of an Indemnified Person any Loss or Expenses arising from any claim or claims which are made against the Indemnified Person (whether individually or jointly with other Indemnified Persons) by reason of any Covered Act of the Indemnified Person.

(ii) For the purposes of this Article, when used herein

(1) "Directors" means any or all of the directors of the corporation or those one or more shareholders or other persons who are exercising any powers normally vested in the board of directors;

(2) "Loss" means any amount which an Indemnified Person is legally obligated to pay for any claim for Covered Acts and shall include, without being limited to, damages, settlements, fines, penalties or, with respect to employee benefit plans, excise taxes;

(3) "Expenses" means any expenses incurred in connection with the defense against any claim for Covered Acts, including, without being limited to, legal, accounting or



investigative fees and expenses or bonds necessary to pursue an appeal of an adverse judgment; and

(4) "Covered Act" means any act or omission of an Indemnified Person in the Indemnified Person's official capacity with the Corporation and while serving as such or while serving at the request of the Corporation as a member of the governing body, officer, employee or agent of another corporation, including, but not limited to corporations which are subsidiaries or affiliates of the Corporation, partnership, joint venture, trust, other enterprise or employee benefit plan.

(iii) The by-law provisions or agreements authorized hereby may cover Loss or Expenses arising from any claims made against a retired Indemnified Person, the estate, heirs or legal representative of a deceased Indemnified Person or the legal representative of an incompetent, insolvent or bankrupt Indemnified Person, where the Indemnified Person was an Indemnified Person at the time the Covered Act upon which such claims are based occurred.

(iv) Any by-law provisions or agreements authorized hereby may provide for the advancement of Expenses to an Indemnified Person prior to the final disposition of any action, suit or proceeding, or any appeal therefrom, involving such Indemnified Person and based on the alleged commission by such Indemnified Person of a Covered Act, subject to an undertaking by or on behalf of such Indemnified Person to repay the same to the corporation if the Covered Act involves a claim for which indemnification is not permitted under clause (v), below, and the final disposition of such action, suit, proceeding or appeal results in an adjudication adverse to such Indemnified Person.

(v) The by-law provisions or agreements authorized hereby may not indemnify an Indemnified Person from and against any Loss, and the corporation shall not reimburse for any Expenses, in connection with any claim or claims made against an Indemnified Person which the corporation has determined to have resulted from: (1) any breach of the Indemnified Person's duty of loyalty to the corporation or its shareholders; (2) acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law; (3) action contravening Section 43 of the Act; or (4) a transaction (other than a transaction approved in accordance with Section 37.1 of the Act) from which the person seeking indemnification derived an improper personal benefit.

(C) Any action may be taken by shareholders without a meeting in accordance with the provisions of Section 7-1.1-30.3 of the Rhode Island Business Corporation Act.

(D) The Directors of the corporation may, in their sole discretion from time to time, make distributions from the capital surplus of the corporation.

