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Rafael L. Encarnacion
Carina C. Laforteza
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Vicente D. Gerochi IV
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Vida M. Panganiban-Alindogan
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SENIOR ASSOCIATES

September 12, 2016

Hon. Roberto Eugenio T. Cadiz
COMMISSIONER
COMMISSION ON HUMAN RIGHTS
SAAC Building, Commonwealth Avenue
UP Complex, Diliman
Quezon City
Philippines

In Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People, CHR-NI-2016-0001:
***Ad Cautelam* Comment on Petition filed by Greenpeace Southeast Asia et. al.**

Dear Commissioner Cadiz:

By way only of special and limited appearance, and without submitting our client ConocoPhillips (“**ConocoPhillips**”) to the Honorable Commission’s jurisdiction, we write in response to the Honorable Commission on Human Rights’ *Order* dated 21 July 2016. Attached to the Honorable Commission’s *Order* was a Petition dated 9 May 2016 filed by Greenpeace Southeast Asia (Philippines) (“**Greenpeace**”), the Philippine Rural Reconstruction Movement, and the other individuals named therein (together, the “**Petitioners**”) (the “**Petition**”). We understand that the Petitioners previously filed a petition dated 22 September 2015 on the same matter.

ConocoPhillips emphasizes at the outset that this Comment is being filed strictly on an *ad cautelam* basis, in order to inform the Honorable Commission that the Petition cannot be maintained as to ConocoPhillips for lack of personal jurisdiction and improper extra-territorial service of the Petition. ConocoPhillips also reserves its right to comment on the subject matter jurisdiction of the Commission as well as the substantive issues raised in the Petition should it be necessary to do so.

I. BACKGROUND

The Petitioners have filed the Petition before this Commission calling for an inquiry into the responsibility of certain carbon-producing companies in allegedly fueling climate change-induced extreme weather events that have impacted the lives of Filipino nationals. The Petitioners have named around 50 companies as respondents in this case – the so-called “Carbon Majors,” including ConocoPhillips – alleging that they shoulder primary responsibility for climate change.

On 21 July 2016, the Honorable Commission issued its *Order* directing the Petitioners to serve the Petition upon the Respondents and enjoining the Respondents to submit their Comment or Answer within 45 days from receipt of the Petition (the “**Order**”). A copy of the Petition was transmitted by the Commission via courier (DHL) to ConocoPhillips at 600 North Dairy Ashford (77079-1175), P.O. Box 2197 Houston, TX 77252-2197 USA. DHL delivered the Petition to that address on 29 July 2016.

This letter constitutes ConocoPhillips’ *Ad Cautelam* Comment pursuant to the Order.

II. THE HONORABLE COMMISSION HAS NOT ACQUIRED AND CANNOT EXERCISE PERSONAL JURISDICTION OVER CONOCOPHILLIPS

Any compulsory process ordered by the Honorable Commission requires that the party so being compelled fall within both its jurisdiction *ratione materiae* (subject matter jurisdiction) and jurisdiction *ratione personae* (personal jurisdiction). Reserving comment on the issue of the Commission’s subject matter jurisdiction, in this case the Commission clearly lacks personal jurisdiction over ConocoPhillips, as it does not transact business in the Philippines within the meaning of Philippine law. A foreign corporation is one which owes its existence to the laws of another state, and generally, it has no legal existence within the state in which it is foreign; and if a foreign corporation does not conduct any business in the Philippines, there would be no reason for it to be subject to Philippine regulation.¹

The Commission’s authority to compel persons to comply with its orders emanates from its power to cite for contempt “in accordance with the Rules of

¹ *Avon Insurance v. Court of Appeals*, G.R. No. 97642, 29 August 1997.

Court.”² In turn, for foreign private juridical entities, the Rules of Court³ allow summons to be served only on those that transact business in the Philippines.⁴ The Corporation Code predicates a foreign corporation’s right to sue in the Philippines on the corporation “transacting business in the Philippines.”⁵ “Transacting business” or “doing business” requires acts “that imply a continuity of commercial dealing or arrangement,” such as:

soliciting orders, service contracts, opening offices whether called “liaison” offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or the control of any domestic business, firm, entity or corporations in the Philippines; and any other act that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.⁶

² 1987 PHILIPPINE CONSTITUTION, art. XIII, Section 18: “The Commission on Human Rights shall have the following powers and functions: ... (2) Adopt its operational guidelines and rules of procedure, and cite for contempt for violations thereof in accordance with the Rules of Court.”

³ The Commission’s *Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance* approved on April 12, 2012 (“**CHR Rules of Procedure**”) provide in relevant part: “[Rule 7,] Section 22. Applicability of the Rules of Court. - In all matters of procedure not covered by the foregoing rules, the provisions of the Revised Rules of Court shall apply in a suppletory character. ”

⁴ Rules of Court, Rule 14, Section 12 provides in part: “*Service upon foreign private juridical entities.* — When the defendant is a foreign private juridical entity which has **transacted business in the Philippines**, service may be made on its resident agent designated in accordance with law for that purpose, or, if there be no such agent, on the government official designated by law to that effect, or on any of its officers or agents within the Philippines.” (emphasis added).

⁵ Corporation Code of the Philippines, art. 133.

⁶ Philippine Foreign Investments Act, Republic Act No. 7042, 13 June 1991, Section 3(d).

ConocoPhillips does not transact or do business in the Philippines as contemplated by Philippine law. ConocoPhillips is a company incorporated in the State of Delaware, U.S.A., as demonstrated in the certificate of incorporation appended to this letter as its Annex 1. It does not have any offices or branches in the Philippines and does not have a business license to operate or a resident agent in the Philippines. ConocoPhillips has not, to the best of its knowledge, appointed any representatives or distributors either domiciled or resident in the Philippines over 180 days in any calendar year. The Securities and Exchange Commission (the “SEC”) confirms this fact, as the SEC has no record of ConocoPhillips in their corporate register. The Petitioners themselves acknowledge, in their list of respondents found in Annex C, that ConocoPhillips has “NO RECORDS WITH S.E.C.”⁷ This absence of records is precisely because ConocoPhillips is not “transacting business” or “doing business” in the Philippines.

Importantly, the Petitioners themselves acknowledged that some of the entities they named as respondents would likely not be subject to the Commission’s jurisdiction, noting that some entities they asked the Commission to investigate have no address in the Philippines. Indeed, in their original Petition dated 22 September 2015, the Petitioners had noted that they “will find it amenable that the investigation and related processes for this Petition will involve only those Respondent Carbon Majors with branches, regional offices, and/or subsidiaries in or substantial connection (through their agents) to, the Philippines.”⁸ ConocoPhillips has no branch, regional office, subsidiary, or substantial connection in or with the Philippines, whether by itself or through agents. Thus, the Honorable Commission has not acquired jurisdiction over the person of ConocoPhillips because the latter is a foreign entity not transacting business in the Philippines, and summons has not been properly served on it, as explained further below.

⁷ See Petition, Annex C, Respondent investor-owned Carbon Majors with principal business addresses with information of known Philippine presence based on the Securities and Exchange Commission records, at second page no. 5.

⁸ Original Petition dated 22 September 2015, at pages 11-12. This language has been removed in the Petition dated 9 May 2016.

III. THE EXTRATERRITORIAL SERVICE OF SUMMONS OVER CONOCOPHILLIPS WAS IMPROPER

Summons has not been properly served on ConocoPhillips.⁹ Rule 7, Section 10 of the CHR Rules of Procedure predicates the Commission's jurisdiction over a respondent on a valid service of summons.¹⁰

The Supreme Court has clarified that proper service of process is intended to protect a respondent's right to due process.¹¹ The proper service of summons fulfills two fundamental objectives, namely: (a) to vest in the court jurisdiction over the person of the defendant; and (b) to afford to the defendant the opportunity to be heard on the claim brought against him.¹² The respondent must be properly apprised of a pending inquiry against him and assured of the opportunity to present his defenses to the suit. Proper service of process on the respondent is also critical to establish jurisdiction over the respondent and to compel it to appear in the proceedings. If service has not been properly made, the court or tribunal does not have jurisdiction over the respondent's person and the petition must be dismissed. As held by the Supreme Court:

fundamental is the rule that jurisdiction over a defendant in a civil case is acquired either through service of summons or through voluntary appearance in court and submission to its authority. In the absence or when the service of summons upon the person of the defendant is defective, the court acquires no jurisdiction over his person, and a judgment rendered against him is null and void.¹³

⁹ The Philippines is not a signatory to any treaty with the United States regarding service of process. Service of process must comply with Philippine law in order to be effective.

¹⁰ CHR Rules of Procedure, Rule 7, Section 10 (emphasis added) ("Any person implicated in the complaint for or report of human rights violations shall: (a) be accorded due process; (b) be given due notice of the [Commission] processes in his/her case [...].")

¹¹ *Ma. Imelda M. Manotoc v. Carpio Morales*, G.R. No. 130974, 16 August 2006.

¹² *Macasaet v. Co, Jr.*, G.R. No. 156759, 5 June 2013, citing *Umandap v. Sabio, Jr.*, G.R. No. 140244, 29 August 2000.

¹³ *Spouses Belen v. Judge Chavez, et al.*, 573 Phil. 58, 67 (2008).

Significantly, it has been held by the Supreme Court that a defendant who does not reside and is not found in the Philippines in an action *in personam* cannot be tried in Philippine courts because of the impossibility of acquiring jurisdiction over the person, unless such person voluntarily appears in court.¹⁴ An action *in personam* is a proceeding to enforce personal rights or obligations such as those alleged and prayed in the present Petition; such action is brought against the person the purpose of which is to impose, through the judgment of a court, some responsibility or liability directly upon the person of the defendant.¹⁵

Rule 14, Section 12 of the Rules of Court establishes the proper procedure for extraterritorial service of summons as follows:

Service upon foreign private juridical entity. – When the defendant is a foreign private juridical entity which has transacted business in the Philippines, service may be made on its resident agent designated in accordance with law for that purpose, or, if there be no such agent, on the government official designated by law to that effect, or on any of its officers or agents within the Philippines.

If the foreign private juridical entity is not registered in the Philippines or has no resident agent, service may, with leave of court, be effected out of the Philippines through any of the following means:

a) By personal service coursed through the appropriate court in the foreign country with the assistance of the Department of Foreign Affairs;

b) By publication once in a newspaper of general circulation in the country where the defendant may be found and by serving a copy of

¹⁴ *Perkin Elmer Singapore Pte Ltd. v. Dakila Trading Corporation*, G.R. No. 172242, 14 August 2007.

¹⁵ *Domagas v. Jensen*, G.R. No. 158407, 17 January 2005.

the summons and the court order by registered mail at the last known address of the defendant;

c) By facsimile or any recognized electronic means that could generate proof of service; or

d) By such other means as the court may in its discretion direct.¹⁶

Even assuming *arguendo* that the Petitioners could in principle serve process upon ConocoPhillips extra-territorially, Philippine law limits extra-territorial service of summons upon foreign private entities to only four modes with leave of court: (1) by personal service out of the country coursed through the appropriate court in the foreign country with the assistance of the Department of Foreign Affairs; (2) by publication **and** sending a copy of the summons and order of the court by registered mail to the defendant's last known address; (3) by facsimile or any recognized electronic means that could generate proof of service; or (4) by any other means the court may consider sufficient. The Petitioners have failed to comply with the legal requirements for extra-territorial service of process.

The Petitioners made no attempt to effectuate personal service of process upon ConocoPhillips. The Petitioners have also failed to take leave of court to serve process by publication and registered mail, or any other manner permitted under Rule 14, Section 12 as required under Rule 14, Section 17.¹⁷ Instead, the Petitioners requested the Commission to send "notices, summons, and pleadings to the business address of the Respondents or through the national human rights institutions or institutional counterparts in the countries where they are based."¹⁸ The Commission transmitted a copy of the Petition and the July 21 Order by DHL to ConocoPhillips. This is improper service of process under Philippine law and there is no indication that the Petitioners filed a written motion for leave of court with the necessary supporting affidavit setting out the grounds for the application.

¹⁶ Emphasis added.

¹⁷ Rules of Court, Rule 14, Section 17: "Leave of court. – Any application to the court under this Rule for leave to effect service in any manner for which leave of court is necessary **shall be made by motion in writing, supported by affidavit of the plaintiff or some person on his behalf, setting forth the grounds for the application.**" (emphasis added).

¹⁸ Petition at page 26.

As there has been no proper service of summons here, this Commission lacks jurisdiction over the person of ConocoPhillips and must dismiss the Petition.

* * *

For these reasons, Respondent ConocoPhillips respectfully requests, on an *ad cautelam* basis, that the Honorable Commission:

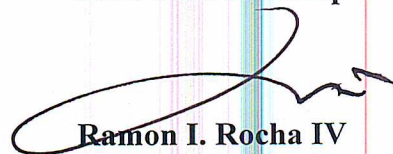
- (1) rule that the Commission does not have jurisdiction over the person of ConocoPhillips; and
- (2) remove ConocoPhillips as a respondent in these proceedings.

Very truly yours,


Carlos Roberto Z. Lopez


Ramon G. Songco


John Paul R. Rotap


Ramon I. Rocha IV

(By way of special and limited appearance)

Encl.: Annex 1, ConocoPhillips Certificate of Incorporation, duly authenticated


Copies Furnished:

Atty. Zeldania DT Soriano
Legal Representative of the Petitioners
Greenpeace Southeast Asia (Philippines)
Rooms 301-302, JGS Building
No. 30 Sct. Tuason,
Brgy. Laging Handa, Quezon City
Philippines

Atty. Grizelda Mayo-Anda
Counsel for the Petitioners Environmental Legal Assistance Center
Carlos Sayang Compound, Mitra Road
Brgy. Sta. Monica, Puerto Princesa City
Philippines

Explanation for Filing and Service by Registered Mail

Due to time constraints and the distances involved, copies of this letter are being filed and served by registered mail.


John Paul R. Rotap


Ramon I. Rocha IV


REPUBLIC OF THE PHILIPPINES)
MAKATI CITY) S.S.

SUBSCRIBED AND SWORN to before me, a Notary Public in and for Makati City, Philippines, by Ramon G. Songco with Philippine Passport No. EB3764639, issued on June 26, 2012 at DFA Manila.

IN WITNESS WHEREOF, I have hereto set my hand and affixed by notarial seal this 13th day of September 2016 at Makati City, Philippines.

Doc. No. 34 ;
Page No. 8 ;
Book No. 1 ;
Series of 2016.




LEAH ZILPAH A. CALDERON
Notary Public for Makati City
Appointment No. M-393 until Dec. 31, 2017
Roll of Attorney No. 64179
PTR No. 5321995MD • 01/06/16 • Makati City
IBP No. 1020630 • 01/06/16 • Makati Chapter
SyCipLaw Center, 105 Paseo de Roxas
Makati City, 1226 Metro Manila
Philippines

29409749



CONSULATE GENERAL OF THE REPUBLIC OF THE PHILIPPINES
NEW YORK

Foreign Service of the Philippines)
Consulate General of the Philippines)
New York, New York) S.S.
United States of America)

CERTIFICATE OF AUTHENTICATION

I, **ARMAN R. TALBO**, Vice Consul of the Republic of the Philippines, in and
the Consular District of New York, duly commissioned and qualified in the States
New York, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New
Jersey, Pennsylvania, Rhode Island, and Vermont, do hereby certify that

*** JEFFREY W. BULLOCK ***

at the time he/she signed and affixed his/her official seal to the annexed certificate,

**SECRETARY OF STATE
STATE OF DELAWARE**

and that full faith and credit ought to be given to his/her official act.

This Consulate General assumes no responsibility for the contents of the
attached document.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of
the Consulate General of the Philippines to be affixed 06th day of September 2016.

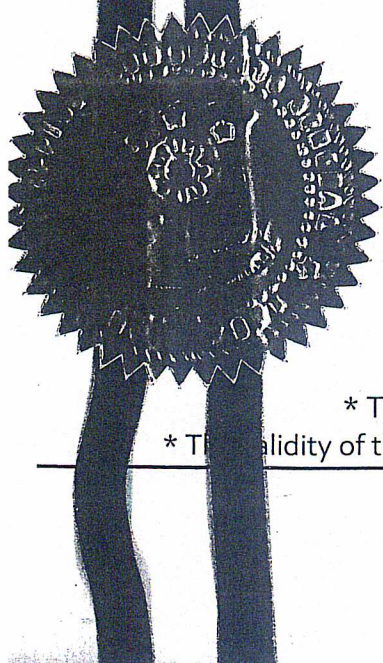

ARMAN R. TALBO
Consul

Doc. No. **11040**
Service No. **033**
Series of 2016
Fee. \$25.00

Annexed document is a/an
**AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION OF
CONOCOPHILLIPS, A DELAWARE
CORPORATION**

* This document is not valid if it is altered in any way whatsoever *

* The validity of this certification is for five (5) years, unless specified by the attached document. *

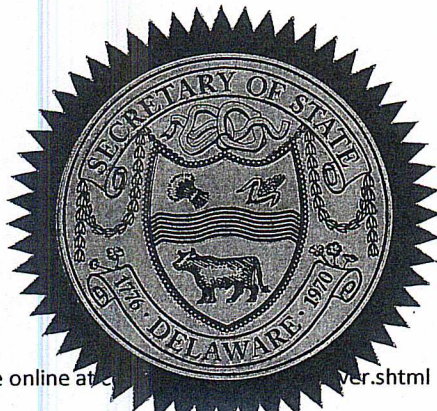



Delaware

The First State

Page 1

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "CONOCOPHILLIPS", FILED IN THIS OFFICE ON THE THIRTIETH DAY OF MAY, A.D. 2008, AT 12:44 O`CLOCK P.M.




Jeffrey W. Bullock, Secretary of State

3456839 8100
SR# 20165642348

You may verify this certificate online at [http://www.ver.shtml](#)

Authentication: 202932612
Date: 09-02-16

**AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
CONOCOPHILLIPS,
A DELAWARE CORPORATION**

ConocoPhillips, a corporation organized and existing under the General Corporation Law of the State of Delaware (the "Corporation"), does hereby certify that:

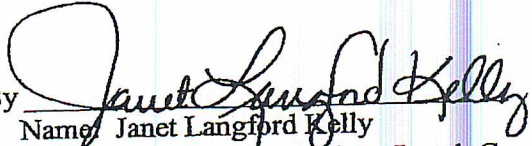
FIRST: The name of the Corporation is ConocoPhillips. The original Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of Delaware on November 16, 2001 under the name of CORVETTEPORSCHER CORP.

SECOND: This Amended and Restated Certificate of Incorporation of the Corporation, which amends and restates the provisions of the Restated Certificate of Incorporation of the Corporation, has been duly adopted in accordance with the provisions of Section 242 and 245 of the General Corporation Law of the State of Delaware.

THIRD: The Restated Certificate of Incorporation of the Corporation is hereby amended and restated to read in its entirety as set forth on Exhibit A attached hereto and, as so amended and restated, shall be the Amended and Restated Certificate of Incorporation of the Corporation until such time as it may be further amended in accordance with applicable law and the provisions thereof.

IN WITNESS WHEREOF, the Corporation has caused this Amended and Restated Certificate of Incorporation to be executed by its duly authorized officer as of this 30th day of May 2008.

CONOCOPHILLIPS

By 
Name: Janet Langford Kelly
Title: Senior Vice President, Legal, General
Counsel and Corporate Secretary

*State of Delaware
Secretary of State
Division of Corporations
Delivered 12:39 PM 05/30/2008
FILED 12:44 PM 05/30/2008
SRV 080637320 - 3456839 FILE*

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
of
CONOCOPHILLIPS

FIRST: The name of the Corporation is ConocoPhillips (hereinafter the "Corporation").

SECOND: The address of the registered office of the Corporation in the State of Delaware is 2711 Centerville Road, Suite 400, in the City of Wilmington, County of New Castle. The name of its registered agent at that address is Corporation Service Company.

THIRD: The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of the State of Delaware as set forth in Title 8 of the Delaware Code (the "DGCL").

FOURTH: A. AUTHORIZED SHARES. The total number of shares of stock that the Corporation shall have authority to issue is 3,000,000,000 (three billion) of which (i) 2,500,000,000 (two billion, five hundred million) shares shall be shares of Common Stock, par value \$.01 per share (the "Common Stock"), and (ii) 500,000,000 (five hundred million) shares shall be shares of Preferred Stock, par value \$.01 per share (the "Preferred Stock"). The number of authorized shares of any of the Preferred Stock or the Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority in voting power of the stock of the Corporation entitled to vote thereon irrespective of the provisions of Section 242(b)(2) of the DGCL (or any successor provision thereto), and no vote of the holders of any of the Preferred Stock or the Common Stock voting separately as a class shall be required therefor.

B. PREFERRED STOCK. The Board of Directors is hereby expressly authorized, by resolution or resolutions, to provide, out of the unissued shares of Preferred Stock, for series of Preferred Stock and, with respect to each such series, to fix the number of shares constituting such series and the designation of such series, and the voting powers, preferences and relative, participating, optional or other special rights, if any, and any qualifications, limitations or restrictions thereof, of the shares of such series. The voting powers, preferences and relative, participating, optional and other special rights, if any, of each series of Preferred Stock, and any qualifications, limitations or restrictions thereof, if any, may differ from those of any and all other series at any time outstanding.

C. COMMON STOCK.

(1) Subject to the rights of the holders of Preferred Stock, and subject to any other provisions of this Restated Certificate of Incorporation ("Certificate of Incorporation"), holders of Common Stock shall be entitled to receive such dividends and other distributions in cash, stock of any corporation or property of the Corporation as may be declared thereon by the Board of Directors from time to time out of assets or funds of the Corporation legally available therefor and shall share equally on a per share basis in all such dividends and other distributions.

(2) (a) At every meeting of the stockholders of the Corporation every holder of Common Stock shall be entitled to one vote in person or by proxy for each share of Common Stock standing in his or her name on the transfer books of the Corporation in connection with the election of directors and all other matters submitted to a vote of stockholders; provided, however, that, except as otherwise required by law, holders of Common Stock, as such, shall not be entitled to vote on any amendment to this Certificate of Incorporation (including any Certificate of Designation relating to any series of Preferred Stock) that relates solely to the terms of one or more outstanding series of Preferred Stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to this Certificate of Incorporation (including any Certificate of Designation relating to any series of Preferred Stock) or pursuant to the DGCL.

(b) The affirmative vote of shares representing not less than 80% of the votes entitled to be cast by the Voting Stock shall be required to alter, amend or adopt any provision inconsistent with or repeal Article FIFTH, Article SEVENTH or Article NINTH or any provision of this paragraph (C)(2)(b), and the affirmative vote of shares representing not less than 80% of the votes entitled to be cast by the Voting Stock, acting on the unanimous recommendation of the entire Board of Directors, shall be required to alter, amend or adopt any provision inconsistent with or repeal Article FIRST. "Voting Stock" shall mean the then outstanding shares of capital stock entitled to vote generally on the election of directors and shall exclude any class or series of capital stock only entitled to vote in the event of dividend arrearages thereon, whether or not at the time of determination there are any such dividend arrearages.

(c) Every reference in this Certificate of Incorporation to a majority or other proportion of shares, or a majority or other proportion of the votes of shares, of Voting Stock shall refer to such majority or other proportion of the votes to which such shares of Voting Stock are entitled.

(d) At any meeting of stockholders, the presence in person or by proxy of the holders of shares of capital stock entitled to cast a majority of all the votes which could be cast at such meeting by the holders of all of the outstanding shares of capital stock of the Corporation entitled to vote at such meeting shall constitute a quorum.

(3) In the event of any dissolution, liquidation or winding up of the affairs of the Corporation, whether voluntary or involuntary, after payment in full of the amounts required to be paid to the holders of Preferred Stock, the remaining assets and funds of the Corporation shall be distributed pro rata to the holders of Common Stock. For purposes of this paragraph (C)(3), the voluntary sale, conveyance, lease, exchange or transfer (for cash, shares of stock, securities or other consideration) of all or substantially all of the assets of the Corporation or a consolidation or merger of the Corporation with one or more other corporations or other entities (whether or not the Corporation is the corporation surviving such consolidation or merger) shall not be deemed to be a liquidation, dissolution or winding up, voluntary or involuntary.

(4) (a) All rights to vote and all voting power (including, without limitation thereto, the right to elect directors) shall be vested exclusively in the holders of Common Stock, except as otherwise expressly provided in this Certificate of Incorporation, in a Certificate of Designation with respect to any Preferred Stock or as otherwise expressly required by applicable law.

(b) No stockholder shall be entitled to exercise any right of cumulative voting.

FIFTH: A. The business and affairs of the Corporation shall be managed by or under the direction of a Board of Directors. The total number of directors constituting the entire Board shall be not less than six nor more than twenty as determined from time to time by resolution adopted by affirmative vote of a majority of the entire Board of Directors. Effective at the annual meeting of stockholders scheduled to be held in 2009 and at each annual meeting of stockholders thereafter, all director nominees shall stand for election to terms expiring at the next succeeding annual meeting, with each director to hold office until his or her successor shall have been duly elected and qualified, subject, however, to prior death, resignation, removal or departure from the Board of Directors for other cause. The term of each director serving as of and immediately following the date of the 2008 annual meeting of stockholders shall expire at the next annual meeting of stockholders after such date, notwithstanding that such director may have been elected for a term that extended beyond the date of such annual meeting of stockholders. Unless otherwise required by law, any vacancy on the Board of Directors or newly created directorship may be filled only by a majority of the directors then in office, though less than a quorum, or by a sole remaining director, and the directors so chosen shall hold office until the next election and until their successors are duly elected and qualified, or until their earlier death, resignation, removal or departure from the Board of Directors for other cause.

Notwithstanding the foregoing, whenever the holders of outstanding shares of one or more series of Preferred Stock are entitled to elect a director or directors of the Corporation separately as a series or together with one or more other series pursuant to a resolution of the Board of Directors providing for the establishment of such series, such director or directors shall not be subject to the foregoing provisions of this Article FIFTH, and the election, term of office, removal and filling of vacancies in respect of such director or directors shall be governed by the resolution of the Board of Directors so providing for the establishment of such series and by applicable law.

B. Subject to applicable law, any director or the entire Board of Directors may be removed with or without cause, such removal to be by the affirmative vote of the shares representing at least a majority of the votes entitled to be cast by the Voting Stock.

Notwithstanding the foregoing, whenever holders of outstanding shares of one or more series of Preferred Stock are entitled to elect directors of the Corporation pursuant to the provisions applicable in the case of arrearages in the payment of dividends or other defaults contained in the resolution or resolutions of the Board of Directors providing for the establishment of any such series, any such director of the Corporation so elected may be removed in accordance with the provisions of such resolution or resolutions.

C. There shall be no limitation on the qualification of any person to be a director or on the ability of any director to vote on any matter brought before the Board or any Board committee, except (i) as required by applicable law, (ii) as set forth in this Certificate of Incorporation or (iii) any By-Law adopted by the Board of Directors with respect to the eligibility for election as a director or the qualification for continuing service as a director upon reaching a specified age or, in the case of employee directors, with respect to the qualification for continuing service of directors upon ceasing employment from the Corporation.

D. Except as (i) required by applicable law or (ii) set forth in this Certificate of Incorporation, at all meetings of the Board of Directors, a majority of the entire Board of Directors shall constitute a quorum for the transaction of business and the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the Board of Directors.

E. The following provisions are inserted for further definition, limitation and regulation of the powers of the Corporation and of its directors and stockholders:

(1) The By-Laws of the Corporation may be adopted, altered, amended or repealed (i) by the affirmative vote of the shares representing a majority of the votes entitled to be cast by the Voting Stock; PROVIDED, HOWEVER, that any proposed alteration, amendment or repeal of, or the adoption of any By-Law inconsistent with, Section 3, 7, 10 or 11 of Article II of the By-Laws or Section 1, 2 or 11 of Article III of the By-Laws or Section 4, 5 or 12 of Article IV of the By-Laws (in each case, as in effect on the date hereof), or the alteration, amendment or the repeal of, or the adoption of any provision inconsistent with this sentence, by the stockholders shall require the affirmative vote of shares representing not less than 80% of the votes entitled to be cast by the Voting Stock; and PROVIDED, FURTHER, HOWEVER, that in the case of any such stockholder action at a special meeting of stockholders, notice of the proposed alteration, amendment, repeal or adoption of the new By-Law or By-Laws must be contained in the notice of such special meeting, or (ii) by action of the Board of Directors of the Corporation except as otherwise specified in Section 12 of Article IV of the By-Laws.

(2) In addition to the powers and authority hereinbefore or by statute expressly conferred upon them, the directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the Corporation, subject, nevertheless, to the provisions of the DGCL, this Certificate of Incorporation, and any By-Laws adopted by the stockholders; PROVIDED, HOWEVER, that no By-Laws hereafter adopted by the stockholders shall invalidate any prior act of the directors which would have been valid if such By-Laws had not been adopted.

SIXTH: Meetings of stockholders may be held within or without the State of Delaware, as the By-Laws may provide. The books of the Corporation may be kept (subject to any provision contained in the DGCL) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the By-Laws of the Corporation.

SEVENTH: Any action required or permitted to be taken by the stockholders of the Corporation may be effected only at a duly called annual or special meeting of such holders and may not be effected by a consent in writing by such holders in lieu of such a meeting. Except as otherwise required by law, special meetings of stockholders of the Corporation for any purpose or purposes may be called only by the Board of Directors pursuant to a resolution stating the purpose or purposes thereof or by the Chairman of the Board of Directors of the Corporation and any power of stockholders to call a special meeting is specifically denied. No business other than that stated in the notice of such meeting shall be transacted at any special meeting.

EIGHTH: A. Subject to Section 253 of the DGCL, in addition to any affirmative vote that may be required by law, this Certificate of Incorporation or the By-Laws of the Corporation, and except as otherwise expressly provided in paragraph (B) of this Article EIGHTH:

(i) any merger or consolidation of the Corporation or any subsidiary of the Corporation with or into (A) any Related Person or (B) any Person that is an Affiliate of a Related Person; or

(ii) any sale, lease, exchange, transfer or other disposition by the Corporation to any Related Person or any Affiliate of any Related Person of all or substantially all of the assets of the Corporation; or

(iii) any reclassification of securities (including any reverse stock split) or recapitalization of the Corporation for which the approval of shareholders of the Corporation is otherwise required, or any merger, consolidation or share exchange of the Corporation with any of its subsidiaries for which the approval of shareholders of the Corporation is otherwise required, which has the effect, either directly or indirectly, of increasing by more than 1% the proportionate share of the Common Stock or Voting Stock Beneficially Owned by any Related Person or any Affiliate of any Related Person; or

(iv) any dissolution of the Corporation voluntarily caused or proposed by or on behalf of a Related Person or any Affiliate of any Related Person, shall require the affirmative vote of shares representing (x) not less than 80% of the votes entitled to be cast by the Voting Stock and (y) not less than 66-2/3% of the votes entitled to be cast by the Voting Stock not Beneficially Owned, directly or indirectly, by any Related Person, with respect to such Business Combination. Such affirmative vote shall be required, notwithstanding the fact that no vote may be required, or that a lesser percentage may be specified, by law, elsewhere in this Certificate of Incorporation, in the By-Laws of the Corporation or in any agreement with any national securities exchange or otherwise.

B. The provisions of paragraph (A) shall not be applicable to any particular Business Combination, and such Business Combination shall require only such affirmative vote as is required by law, the By-Laws of the Corporation and any other provision of the Certificate of Incorporation, if all of the conditions specified in either of the following paragraphs (B)(i) and (B)(ii) are met:

(i) the cash, property, securities or other consideration to be received per share by each holder of any outstanding class or series of Voting Stock in the Business Combination is, with respect to each such class or series, either (A) the same in form and amount per share as the highest consideration paid by the Related Person in a tender or exchange offer in which such Related Person acquired at least 50% of the outstanding stock of such class or series of Voting Stock and which was consummated not more than one year prior to the date of such Business Combination, or if earlier, the entering into of a definitive agreement providing therefor or (B) not less in amount (as to cash) or Fair Market Value (as to consideration other than cash) as of the date of the determination of the Highest Per Share Price (as to property, securities or other consideration) than the Highest Per Share Price applicable to such class or series of shares of Voting Stock; PROVIDED THAT, in the event of any Business Combination in which the Corporation survives, any shares retained by the holders thereof shall constitute consideration other than cash for purposes of this paragraph (B)(i); or

(ii) a majority of the Continuing Directors shall have expressly approved such Business Combination either in advance of or subsequent to such Related Person's having become a Related Person.

In the case of any Business Combination with a Related Person to which paragraph (B)(ii) above does not apply, a majority of the Continuing Directors, promptly following the request of a Related Person, shall determine the Highest Per Share Price for each class or series of stock of the Corporation. Such determination shall be announced not less than five days prior to the meeting at which holders of shares vote on the Business Combination. Such determination shall be final,

unless the Related Person becomes the Beneficial Owner of additional shares of Common Stock after the date of the earlier determination, in which case the Continuing Directors shall make a new determination as to the Highest Per Share Price for each class or series of shares prior to the consummation of the Business Combination.

A Related Person shall be deemed to have acquired a share at the time that such Related Person became the Beneficial Owner thereof. With respect to shares owned by Affiliates, Associates and other Persons whose ownership is attributable to a Related Person, if the price paid by such Related Person for such shares is not determinable by a majority of the Continuing Directors, the price so paid shall be deemed to be the higher of (i) the price paid upon the acquisition thereof by the Affiliate, Associate or other Person or (ii) the Share Price of the shares in question at the time when the Related Person became the Beneficial Owner thereof.

C. For purposes of this Article EIGHTH and notwithstanding anything to the contrary set forth in this Certificate of Incorporation:

(i) The term "Affiliate," used to indicate a relationship to a specified Person, shall mean a Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person.

(ii) The term "Associate," used to indicate a relationship with a specified Person, shall mean (A) any corporation, partnership, limited liability company, association, joint venture or other organization (other than the Corporation or any wholly owned subsidiary of the Corporation) of which such specified Person is an officer or partner or is, directly or indirectly, the Beneficial Owner of 10% or more of any class of equity securities; (B) any trust or other estate in which such specified Person has a beneficial interest of 10% or more or as to which such specified Person serves as trustee or in a similar fiduciary capacity; (C) any Person who is a director or officer of such specified Person or any of its parents or subsidiaries (other than the Corporation or any wholly owned subsidiary of the Corporation); and (D) any relative or spouse of such specified Person or of any of its Associates, or any relative of any such spouse, who has the same home as such specified Person or such Associate.

(iii) A Person shall be a "Beneficial Owner" of any stock (A) which such Person or any of its Affiliates or Associates beneficially owns, directly or indirectly; or (B) which such Person or any of its Affiliates or Associates has, directly or indirectly, (1) the right to acquire (whether such right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise, or (2) the right to vote pursuant to any agreement, arrangement or understanding; or (C) which is beneficially owned, directly or indirectly, by any other Person, with which such Person or any of its Affiliates or Associates has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting or disposing of such stock; or (D) of which such Person would be the Beneficial Owner pursuant to the terms of Rule 13d-3 of the Exchange Act, as in effect on September 30, 1998. Stock shall be deemed "Beneficially Owned" by the Beneficial Owner or Owners thereof.

(iv) The term "Business Combination" shall mean any transaction which is referred to in any one or more of clauses (i) through (iv) of paragraph (A) of this Article EIGHTH.

(v) The term "Continuing Director" shall mean, with respect to a Business Combination with a Related Person, any director of the Corporation who is unaffiliated with the Related Person and was a director prior to the time that the Related Person became a Related

Person, and any successor of a Continuing Director who is unaffiliated with the Related Person and is recommended or nominated to succeed a Continuing Director by a majority of the Continuing Directors. Without limiting the generality of the foregoing, a director shall be deemed to be affiliated with a Related Person if such director (A) is an officer, director, employee or general partner of such Related Person; (B) is an Affiliate or Associate of such Related Person; (C) is a relative or spouse of such Related Person or of any such officer, director, general partner, Affiliate or Associate; (D) performs services, or is a member, employee, greater than 5% stockholder or other equity owner of any organization (other than the Corporation and its subsidiaries) which performs services for such Related Person or any Affiliate of such Related Person, or is a relative or spouse of any such Person; or (E) was nominated for election as a director by such Related Person.

(vi) The term "Fair Market Value" shall mean, in the case of securities, the average of the closing sales prices during the 30-day period immediately preceding the date in question of such security on the principal United States securities exchange registered under the Exchange Act on which such security is listed (or the composite tape therefor) or, if such securities are not listed on any such exchange, the average of the last reported sales price (if so reported) or the closing bid quotations with respect to such security during the 30-day period preceding the date in question on the New York Stock Exchange or, if no such quotations are available, the fair market value on the date in question of such security as determined in good faith by a majority of the Continuing Directors; and in the case of property other than cash or securities, the fair market value of such property on the date in question as determined in good faith by a majority of the Continuing Directors.

(vii) The term "Highest Per Share Price" shall mean, with respect to a Related Person, the highest price that can be determined to have been paid or agreed to be paid for any share or shares of any class or series of Voting Stock by such Related Person in a transaction that either (1) resulted in such Related Person's Beneficially Owning 15% or more of such class or series of Voting Stock outstanding or (2) was effected at a time when such Related Person Beneficially Owned 15% or more of such class or series of Voting Stock outstanding, in either case occurring not more than one year prior to the date of the Business Combination. In determining the Highest Per Share Price, appropriate adjustment will be made to take into account (w) distributions paid or payable in stock, (x) subdivisions of outstanding stock, (y) combinations of shares of stock into a smaller number of shares and (z) similar events.

(viii) The term "Person" shall mean any individual, corporation, limited liability company, association, partnership, joint venture, trust, estate or other entity or organization.

(ix) The term "Related Person" shall mean any Person (other than the Corporation or any subsidiary of the Corporation and other than any profit sharing, employee ownership or other employee benefit plan of the Corporation or any subsidiary of the corporation or any trustee or fiduciary with respect to any such plan when acting in such capacity) who or which (A) is the Beneficial Owner of 15% or more of any class or series of Voting Stock outstanding; or (B) is an Affiliate of the Corporation and at any time within the two-year period immediately prior to the date in question was the Beneficial Owner of 15% or more of any class or series of Voting Stock outstanding. For the purposes of determining whether a Person is a Related Person, the number of shares of any class or series deemed to be outstanding shall include shares of such class or series of which the Person is deemed the Beneficial Owner, but shall not include any other shares which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, otherwise.

D. Nothing contained in this Article EIGHTH shall be construed to relieve any Related Person from any fiduciary obligation imposed by law.

E. Notwithstanding any other provision of this Certificate of Incorporation (and notwithstanding that a lesser percentage may be specified by law), the affirmative vote of shares representing (x) not less than 80% of the votes entitled to be cast by the Voting Stock voting together as a single class and (y) not less than 66-2/3% of the votes entitled to be cast by the Voting Stock not Beneficially Owned, directly or indirectly, by any Related Person shall be required to amend or repeal, or adopt any provisions inconsistent with, this Article EIGHTH.

NINTH: To the fullest extent that the DGCL or any other law of the State of Delaware as it exists or as it may hereafter be amended permits the limitation or elimination of the liability of directors, no director of the Corporation shall be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. No amendment to or repeal of this Article NINTH shall apply to or have any effect on the liability or alleged liability of any director of the Corporation for or with respect to any acts or omissions of such director occurring prior to such amendment or repeal.