

MEMO TO THE PARTNER

CONVERTIBLE PREFERRED STOCK DESIGNATION, CONVERSION, AND MAXIMUM CONVERSION PROVISIONS

Matthew Siph

TO: Law Office Partner
FROM: Associate
RE: Go Vols, Inc. Convertible Preferred Stock Designation,
Conversion, and Maximum Conversion Provisions

I. INTRODUCTION

Attached is a draft of the designation, conversion, and maximum conversion¹ provisions for the Certificate of Designations (the “Certificate of Designations”) creating a series of convertible preferred stock for Go Vols, Inc., (the “Series A Convertible Preferred Stock”) convertible into common stock (the “Common Stock”). The Series A Convertible Preferred Stock is being offered to the public in a registered public offering. Other associates are drafting the remaining provisions of the Certificate of Designations. Upon your approval of this work, these provisions are ready for inclusion in the Certificate of Designations.

This memorandum describes and provides the general authority for the transaction. Additional information regarding Go Vols, Inc. is also provided. I then describe some of the issues that I encountered in drafting these provisions. I addressed these issues applying the law to our client’s facts and reviewing precedent transaction documents for guidance. I have provided you with an analysis of the specific drafting choices that I made in crafting the provisions of the instrument, as well as several key alternatives I encountered when drafting the provisions.

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¹ See, e.g., Silver Horn Mining Ltd., Certificate of Designations (Form 8-K) (Nov. 14, 2012); Bullfrog Gold Corp., Certificate of Designations (Form 8-K) (Nov. 20, 2012); Be Active Holdings, Inc., Certificate of Designations (Form 8-K) (May 1, 2013); ITUS Corp., Certificate of Designations (Form 8-K) (Sept. 10, 2014).

II. TRANSACTIONAL CONTEXT AND AUTHORITY

Our client, Go Vols, Inc., (“Go Vols”) is a publicly held Delaware corporation listed and traded on the New York Stock Exchange. Go Vols currently does business in the collegiate sports industry. Primarily, the company handles the management of the facilities and venues for the football, men’s basketball, and women’s basketball programs at universities in the Southeastern Conference. The company has a very strong presence in the collegiate sports market and is looking to expand its operations and generate substantial revenue by entering new markets.

Go Vols desires to generate revenues from the lucrative professional sports market that are substantially more than those revenues in the collegiate market. Accordingly, Go Vols’s immediate plan is to purchase a professional sports team and bring it to Knoxville, Tennessee. The company plans to initially establish a professional football team in the city and then to franchise professional men’s and women’s basketball programs in Knoxville. Go Vols believes that these ventures will be very lucrative and plans to introduce professional teams in other cities with universities in the Southeastern Conference. Go Vols needs capital to help cover the initial start-up costs of the ventures, including purchasing the professional football team, building facilities, paying the players, and other costs associated with professional football. Go Vols plans to finance this venture with a public offering of the Series A Convertible Preferred Stock.

The General Corporation Law of the State of Delaware (the “DGCL”) provides authority for the establishment and issuance of the convertible preferred stock that Go Vols proposes to issue in the public offering.² Section 151(a) of the DGCL empowers a corporation to issue any series of stock that is authorized by its certificate of incorporation.³ This section also authorizes the corporation to create preferences and rights for each series of stock that it issues.⁴ Accordingly, the DGCL provides the authority for the company to issue preferred stock.

Go Vols’s Certificate of Incorporation (the “Charter”) authorizes the issuance of 100,000,000 shares of Common Stock, and 25,000,000 of these shares are outstanding. The Charter also authorizes 30,000,000 shares of preferred stock, and none of these shares are currently outstanding. Finally, the Charter provides for a supermajority vote of the stockholders to amend the Charter and to increase the number of

² See generally DEL. CODE ANN. tit. 8, §§ 101-398 (2015).

³ DEL. CODE ANN. tit. 8, § 151(a) (1998).

⁴ *Id.*

authorized shares in a series of stock. The Company wishes to designate the Series A Convertible Preferred Stock out of its authorized preferred shares.

DGCL § 151(e) provides the authority for stock to be made convertible for shares of any other class at the option of the holder or the corporation.⁵ This statutory rule provides for the corporation to establish the rate of exchange in the corporation's certificate of incorporation or a resolution providing for the issuance of the stock.⁶ Accordingly, the preferred stock can be made convertible into common stock at the option of the holder at a conversion rate established by the company. Go Vols has adopted the appropriate resolutions establishing the conversion rate at three shares of Common Stock for each share of Series A Convertible Preferred Stock.

Section 151(a) of the DGCL allows the corporation to issue stock by “[a] resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation.”⁷ This enables a Delaware corporation's certificate of incorporation to provide for what is commonly referred to as “blank check” authority to the board of directors to establish series of stock. Go Vols's Charter provides this blank check authority to its board of directors to designate classes and series of stock. The Charter states that “the Board of Directors of the Corporation shall have full power and authority to establish, by resolution, a class or series of preferred stock having voting powers, full or limited, or no voting powers, and designations, preferences, and relative, participating, optional, or other special rights, and qualifications, limitations, or restrictions thereof.” This blank check provision is important because “[a]bsent blank check authority, a corporation must amend its certificate of incorporation in order to establish new classes or series of preferred stock, . . . [requiring] both board and stockholder votes under Delaware law.”⁸ The board of directors has adopted the appropriate resolutions authorizing the Series A Convertible Preferred Stock under the authority of DGCL § 151(a) and pursuant to the blank check authority in Go Vols's Charter.

⁵ *Id.* § 151(e).

⁶ *Id.*

⁷ *Id.* § 151(a).

⁸ Joan MacLeod Heminway, *Federal Interventions in Private Enterprise in the United States: Their Genesis in and Effects on Corporate Finance Instruments and Transactions*, 40 SETON HALL L. REV. 1487, 1491 (2010).

DGCL § 151(g) provides for a certificate of designations to establish a series of stock.⁹ When the corporation issues any series of stock not set forth in its certificate of incorporation, “a certificate of designations setting forth a copy of . . . resolutions [authorizing the series] shall be executed, acknowledged, filed and shall become effective, in accordance with § 103.”¹⁰ After adopting the proper board resolutions, the certificate of designations is the state law filing that formally establishes the new series and adds the new series to the Charter. Because the board of directors has adopted the resolutions and acted under the appropriate authority of the DGCL, Go Vols has taken the proper steps to establish the Series A Convertible Preferred Stock with a certificate of designations. Accordingly, Go Vols is ready to file the Certificate of Designations to establish the Series A Convertible Preferred Stock.

Go Vols has determined that this series of stock is the best way to meet its current funding needs. Go Vols has outstanding debt obligations of \$10,000,000, and it does not wish to incur any additional debt to fund its new professional sports venture. Go Vols does not want to incur the fixed costs that are associated with debt, but instead, wants the relatively greater flexibility of equity securities in declaring dividends.¹¹ Because Go Vols does not wish to use debt to finance its professional sports operation, it expressed its desire to use equity as a means of financing its future activities. Rather than being bound to fixed payments on additional debt obligations, Go Vols’s board of directors will have the discretion to declare dividends. By using preferred stock instead of debt, Go Vols can “wait out the lean years by suspending its dividend, resuming it . . . upon regaining profitability.”¹² This will provide the flexibility that Go Vols is seeking while avoiding the fixed costs associated with debt.

In addition, if Go Vols defaults on debt obligations, creditors may have the right to force the company into bankruptcy. By using equity, Go Vols can avoid this possibility and reduce potential bankruptcy costs.¹³ Go Vols expressed that the benefits of using equity outweigh the tax deduction that it would receive for the interest payments on new debt obligations.

⁹ See DEL. CODE ANN. tit. 8, § 151(g) (1998).

¹⁰ *Id.*

¹¹ See DEL. CODE ANN. tit. 8, § 170 (2010).

¹² Ben Walther, *The Peril and Promise of Preferred Stock*, 39 DEL. J. CORP. L. 161, 173 (2014).

¹³ *Id.*

After deciding that equity was the appropriate means to finance its new venture, I discussed convertible securities as a way to attract investors. By offering preferred stock that is convertible into Common Stock, Go Vols can attract investors anticipating that the price of the company's Common Stock will increase. If the price of the Common Stock increases, the conversion option will give the holders the ability to convert the preferred stock into a number of common shares with a greater value than the amount that it originally paid for the preferred shares. With the conversion feature, investors can "share in the upside of the company when it grows (by converting into common stock) or maintain seniority to common stock in the event that the company does not grow as hoped (by not converting into common stock)."¹⁴

In addition to the potential value in the conversion feature of the Series A Convertible Preferred Stock, preferred stock also offers inherent benefits to attract investors. First, the preferred stockholders will enjoy a liquidation preference. If the company liquidates, the preferred stockholders will receive full satisfaction of their liquidation preference before the holders of common stock have a claim to any of the company's assets.¹⁵ Thus, Go Vols can attract investors who will be secure in knowing that they will have priority over the Common Stock holders in a liquidation event. Further, the holders of the Series A Convertible Preferred Stock will have a dividend preference. The investors in the new series will have the benefit of being paid the dividends that they have been promised before the holders of Common Stock can receive dividends.¹⁶ Thus, "the core preferences that define convertible preferred stock [are] a preference over common stock in dividend payments and liquidation."¹⁷

Go Vols had one significant concern regarding the existing controlling group of stockholders. It expressed a desire to have that group maintain control of the company because the group has been influential in establishing the company's current business relationships and business plan. Go Vols worried that issuing shares of convertible preferred stock could significantly dilute its current controlling

¹⁴ Louisa Galbo & Jaime d'Almeida, *Best Practices for Valuing Preferred Stock*, LAW 360 (Nov. 21, 2013), <http://www.law360.com/articles/489730/best-practices-for-valuing-preferred-stock>.

¹⁵ Ben Walther, *The Peril and Promise of Preferred Stock*, 39 DEL. J. CORP. L. 161, 167 (2014).

¹⁶ *Id.*

¹⁷ Ronald J. Gilson & David M Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 HARV. L. REV. 874, 882 (2003).

stockholders' interests in the company. The controlling group is a group of twenty investors who invested in the company at its initial public offering. The group is influential in the sports industry, and Go Vols does not want to lose their investments and expertise, as the company consults with the group on any major decisions. The controlling group has goals and ideas about the company's future that are very appealing to Go Vols. The group has increased their stake in the company, and together, these stockholders own sixty-eight percent of the outstanding shares of Go Vols, or 17,000,000 of 25,000,000 outstanding shares of the Common Stock.

The company is worried that new investors would have the ability to buy a significant number of shares of the Series A Convertible Preferred Stock and convert those shares into a number of shares of Common Stock that would give the investors significant voting power or control of the company. If new investors buy 3,000,001 shares of the Series A Convertible Preferred Stock and convert those shares to Common Stock, the controlling group would only own 17,000,000 of the 34,000,003 then outstanding shares. Because Go Vols will be offering 10,000,000 shares of the Series A Convertible Preferred Stock that would be convertible into 30,000,000 shares of Common Stock, there is the potential that a single investor or group of investors could acquire a substantial controlling interest in the company and alter the company's current business relationships and long-term business plan.

Go Vols is also concerned that the controlling group will abandon the company and invest elsewhere because the current controlling group has expressed a concern about its shares being diluted. Accordingly, Go Vols wants to protect the controlling group's interests so these stockholders do not sell their shares due to lack of control. The company believes that this would greatly affect its future ability to raise capital and its future business plans. Go Vols wants to ensure that the controlling group maintains control and does not want a significant influence from new investors gaining control of the company through the exercise of their conversion rights.

To address Go Vols's concern about losing the support of the controlling group, I suggested that we include a provision limiting the ownership percentage that any holder may obtain in Go Vols's Common Stock through conversion of the Series A Convertible Preferred Stock. With a maximum conversion provision, Go Vols can cap the percentage ownership that any stockholder may acquire of the outstanding shares of Common Stock in the corporation through its conversion rights. By limiting the ownership interest in the corporation that any stockholder may acquire, we address Go Vols's concern regarding the current controlling group losing control of the company and abandoning the venture. Delaware has generally upheld the use of anti-takeover devices

by corporations.¹⁸

More precisely, Delaware courts have not overturned the use of caps on ownership that entities have implemented. In the limited partnership context, the Court of Chancery of Delaware upheld the application of a 4.9% Ownership Cap.¹⁹ According to the court, the partnership agreement “erect[ed] a procedural barrier to persons attempting to purchase units in violation of the ownership cap.”²⁰ The court upheld the provision finding that “[t]he plaintiffs [were] not entitled to vote any unit in excess of the 4.9% ownership cap.”²¹ In the corporate context, stockholders have not challenged maximum conversion provisions, but Delaware courts have also not struck down maximum conversion provisions or found them to be inequitable. Given that Delaware courts have a trend of upholding antitakeover devices, the use of the maximum conversion provision should not be questioned or overturned. In *American International Rent a Car, Inc. v. Cross*, the plaintiffs challenged the repeal of a share ownership limitation based on the process employed by the board of directors.²² The Court of Chancery of Delaware upheld the repeal of the ownership limitation, but gave no indication that these types of provisions were contrary to public policy.²³

Because Go Vols is listed on the New York Stock Exchange, it must comply with the NYSE Listed Company Manual. This is important because the company must observe the requirements for transactions that involve a certain threshold of voting power or common stock in the company. The NYSE rules require shareholder approval to issue securities convertible into common stock if the common stock would have voting power greater than or equal to twenty percent of the voting power before the issuance or if the number of shares of common stock would be greater than or equal to twenty percent of the outstanding shares of common stock before the issuance.²⁴ Here, Go

¹⁸ See *Moran v. Household Int’l Inc.*, 500 A.2d 1346 (Del. 1985); *Account v. Hilton Hotels Corp.*, 780 A.2d 245 (Del. 2001).

¹⁹ *Sutter Opportunity Fund 2 LLC v. Cede & Co.*, 838 A.2d 1123, 1126 (Del. Ch. 2003).

²⁰ *Id.*

²¹ *Id.* at 1131.

²² *Am. Int’l. Rent a Car, Inc. v. Cross*, No. 7583, 1984 Del. Ch. LEXIS 413, at *5 (Del. Ch. May 9, 1984).

²³ *Id.* at *9.

²⁴ NYSE Inc., Listed Company Manual § 312.03(c) (2015).

Vols has 25,000,000 outstanding shares of Common Stock, so the issuance of the equivalent of 5,000,000 shares of Common Stock would trigger the shareholder approval requirement under the threshold. Go Vols will be issuing 10,000,000 shares of Series A Convertible Preferred Stock convertible into 30,000,000 shares of Common Stock. Therefore, the potential number of shares of Common Stock to be issued is greater than 20% of the current outstanding shares.

There is, however, an exception to stockholder approval that will apply in our case. Section 312.03 of the New York Stock Exchange rules provides that “shareholder approval will not be required for any such issuance involving any public offering for cash.”²⁵ Go Vols will be offering the Series A Convertible Preferred Stock to the public in exchange for cash. The company will hold a public offering for the series, so Go Vols will not be required to obtain shareholder approval to make the offering under the New York Stock Exchange rules.

Since Go Vols plans to conduct a public offering to sell the Series A Convertible Preferred Stock, it must register the offering with the Securities and Exchange Commission (“SEC”). This is mandated by the Securities Act of 1933,²⁶ and this act requires registration of an offer or sale of securities unless there is an exemption.²⁷ As you previously advised, one of my fellow associates in the firm’s securities regulation practice group is handling this part of the transaction. Go Vols will use a public offering for the securities because it does not believe that it will be able to raise sufficient capital through a private offering of the Series A Convertible Preferred Stock. Go Vols plans to act swiftly on offering the new series of stock because it does not have the time to reach out to private investors who might be interested in purchasing the stock. According to Go Vols, its current investors would not invest a sufficient amount in the Series A Convertible Preferred Stock to raise the capital needed to finance its new professional sports venture. Accordingly, Go Vols desires to conduct a public offering of the Series A Convertible Preferred Stock, and such a public offering of convertible preferred stock, while not common, is not unprecedented.²⁸ Accordingly, Go Vols will be moving forward with a public offering of the Series A Convertible Preferred Stock.

²⁵ *Id.*

²⁶ 15 U.S.C. § 77a (1933).

²⁷ 15 U.S.C. § 77e (2012).

²⁸ *See e.g.*, Crown Castle Int’l Corp., Registration Statement (Form 8-A12B) (Oct. 28, 2013); Stericycle Inc., Registration Statement (Form 8-A12B) (Sept. 15, 2015).

III. KEY DRAFTING CHOICES

There were many issues that I had to resolve in drafting the designation, conversion, and maximum conversion provisions for this transaction. The drafting addresses these issues, helping to minimize Go Vols's concerns in using the series of convertible preferred stock and taking advantage of the statutory framework. I identify some of the most crucial issues below for your review.

A. *Can Go Vols avoid a vote by the holders of Series A Convertible Preferred Stock to increase the number of authorized shares in the series?*

The Charter provides for a supermajority vote to increase the number of shares in a class or series of stock. Go Vols wants the ability to increase the number of authorized shares in the series to allow it to raise additional capital if needed. Accordingly, Go Vols wants to limit the obstacles to increasing the number of authorized shares and fears that the supermajority vote, that the Charter requires, could hinder its ability to adjust to its needs. To address this, the Certificate of Designations provides for board approval and excludes stockholder consent to an increase in the number of authorized shares of Series A Convertible Preferred Stock.

B. *What should be the maximum percentage of Common Stock that a holder of Series A Convertible Preferred Stock can own after the exercise of the conversion right?*

The issue is that Go Vols wants to raise a substantial amount of capital in its offering and is interested in attracting some large investors, but also wants to protect the current controlling group of the firm. Go Vols is interested in how low the percentage should be set to protect its interests. It is also interested in how it can take advantage of the SEC's beneficial ownership reporting requirement.²⁹ The draft provision includes an ownership limitation above the reporting threshold in a way that protects Go Vols's interests and works to its advantage.

²⁹ 15 U.S.C. § 78m(d) (2012).

C. *How should Go Vols handle conversion demands from holders of the Series A Convertible Preferred Stock that do not specify a conversion date?*

This issue appeals to the interplay of the right of the holder to convert the Series A Convertible Preferred Stock and the limitation on ownership in the Common Stock through conversion of the Series A Convertible Preferred Stock. Go Vols needs to know the number of outstanding shares of the Common Stock in order to provide holders of the Series A Convertible Preferred Stock with accurate information about the number of shares that they can convert. To address this, the draft provision provides that a conversion demand that does not comply with the mechanics of conversion provisions of the Certificate of Designations is ineffective.

IV. ANALYSIS OF SPECIFIC DRAFTING CHOICES

A. *Go Vols can avoid a supermajority vote of the stockholders to increase the number of shares in the series by providing appropriate language in the Certificate of Designations.*

One issue that I considered in drafting the designation provision for the Certificate of Designations was whether Go Vols can avoid obtaining the consent of the holders of the Series A Convertible Preferred stock to increase the number of authorized shares of this series. The Charter provides that a supermajority vote is needed to increase the number of authorized shares of a class or series of its stock, and Go Vols is worried about being bound by this requirement. Go Vols seeks to avoid this obstacle and ease its ability to authorize additional shares of the series if needed. Applying the statutory authority governing this issue, we can draft the Certificate of Designations to address Go Vols's concern.

DGCL § 103(a)(4) provides that a corporation shall state in its certificate of incorporation “the number of shares of each class.”³⁰ Here, the Charter sets the number of authorized shares of the class of preferred stock at 30,000,000 shares. Thus, Go Vols will have shares of authorized preferred stock remaining in addition to the 10,000,000 shares that the Series A Convertible Preferred Stock will comprise.

³⁰ DEL. CODE ANN. tit. 8, § 103(a)(4) (2014).

DGCL § 242(a)(3) provides specific authority for a corporation to amend its certificate of incorporation to “increase . . . its authorized capital stock.”³¹ For an amendment to increase the number of shares in a class or series, DGCL § 242(b)(2) provides that “the number of authorized shares of any . . . class . . . may be increased . . . by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote, if so provided in the original certificate of incorporation.”³² Accordingly, a majority vote is generally required if the certificate of incorporation provides for this vote.

In our case, the Charter specifically provides for a supermajority vote to increase the number of shares in a class or series of stock, so we need to focus on an amendment to the Charter. The Charter also provides blank check authority to the board of directors. Under the Charter, the board of directors has “full power and authority to establish, by resolution, a class or series of preferred stock having voting powers, full or limited, or no voting powers, and designations, preferences, and relative, participating, optional, or other special rights, and qualifications, limitations, or restrictions thereof.” Thus, while a supermajority vote is needed to increase the number of shares in a series, the board of directors may adopt resolutions to establish classes or series of stock. Accordingly, if we can alter the supermajority stockholder vote to increase the number of shares in a class or series, the blank check provision in Go Vols’s Charter will provide the authority for the board to issue additional stock.

DGCL § 151(g) provides a mechanism for the board of directors to amend the Charter and increase the number of authorized shares in the series.³³ This section provides authority to the board of directors to adopt resolutions creating a series of stock. Here, the board of directors has adopted the proper resolutions. The provision further states that “the number of shares of stock of any . . . series . . . may be increased . . . by a certificate . . . executed, acknowledged and filed setting forth a statement that a specified increase . . . has been authorized.”³⁴ Because Go Vols’s board of directors has blank check authority, it has the authority to adopt such a resolution and execute the required certificate.

³¹ *Id.* § 242(a)(3).

³² *Id.* § 242(b)(3).

³³ *Id.* § 151(g).

³⁴ *Id.*

Finally, “a certificate filed under [section 151(g)] has the effect of amending the certificate of incorporation.”³⁵ This key language allows us to address Go Vols’s concern and eliminate obstacles to increasing the number of shares of Series A Convertible Preferred Stock. The language that we provide in the Certificate of Designations will amend Go Vols’s Charter. This allows us to draft the Certificate of Designations to reserve the authority to increase the number of authorized shares of Series A Convertible Preferred Stock to the board of directors and amend the supermajority vote required in Go Vols’s Charter.

Here, my goal was to allow the board of directors the flexibility to increase the number of authorized shares in the series with as few obstacles as possible. Rather than relying on the supermajority provision in Go Vols’s existing Charter or seeking to amend the Charter, which would require a stockholder vote, we use the authority in the DGCL to amend the Charter. To accomplish Go Vols’s objective of removing stockholder consent and provide the authority to increase the shares in the series to the board of directors, we can use the Certificate of Designations to amend its Charter. If we include language in the Certificate of Designations giving the board of directors the exclusive authority to increase the number of shares in the series, it will have the effect of amending the Charter to provide for board approval rather than stockholder approval. By providing that the board of directors has the right to increase the number of authorized shares and that the stockholders do not have consent rights, we amend Go Vols’s Charter to designate this authority solely to the board of directors.

DGCL § 141(a) provides that the “business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors, except as otherwise provided in . . . its certificate of incorporation.”³⁶ Go Vols’s current Charter has made an exception to the board of directors managing the affairs of the corporation by providing that supermajority stockholder approval is required to increase the number of shares in a class or series. While Go Vols has designated management of this area to the stockholders, the statute provides broad power to the board of directors. Thus, Go Vols can shift the power to the board of directors under the authority of the provisions of the DGCL. With our drafting, Go Vols can increase the number of shares in this series by adopting resolutions and filing a certificate without relying on approval by a supermajority of the stockholders.

³⁵ *Id.*

³⁶ *Id.* § 141(a).

- B. *Go Vols should incorporate a maximum conversion provision that will prevent a holder from obtaining control and also allow it to obtain information about stockholders seeking a large stake in the company.*

An issue that arose in drafting the maximum conversion provision was the percentage to which ownership should be limited for the stockholders converting the Series A Convertible Preferred Stock to Common Stock. Go Vols wanted to limit the potential for a takeover of the company but wanted to raise substantial capital through this offering. The options I considered were whether to draft the provision to limit ownership to a percentage that is below the SEC's five percent beneficial ownership threshold under Section 13(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), or to draft the provision to allow an ownership interest that exceeds that requirement.

Section 13(d) of the Exchange Act provides that "any person who . . . directly or indirectly [acquires certain securities and is] the beneficial owner of more than five percent of such class shall, within 10 days after such acquisition, file . . . a statement containing [the information required by Schedule 13D.]"³⁷ This provision applies to companies "registered pursuant to [15 U.S.C. § 78I]," and as discussed above, this series must be registered with the SEC under this section.³⁸

Go Vols feared that allowing significant ownership by new investors could disrupt its business plan. It was concerned that if the maximum conversion allowed is set too high, a small number of stockholders could form a group that would have a percentage of the Common Stock vote in the aggregate that could make it hard for Go Vols to accomplish its goals and business plan. Accordingly, Go Vols wanted to make the percentage small enough that a few stockholders would not have the ability to exert significant influence on Go Vols's business. Go Vols expressed its stance that an ownership percentage by a stockholder of fifteen percent would make it uncomfortable. If four stockholders owned fifteen percent, together, they would wield sixty percent of the voting power of the company. This is the level of ownership at which the company expressed fear for its ongoing operations. Go Vols expressed that it would be willing to entertain the idea of limitation on the percentage of ownership as low as four percent to provide significant protection.

³⁷ 15 U.S.C. § 78m(d) (2012).

³⁸ *Id.*

Go Vols also feared that significant ownership by new investors could affect the loyalty of existing stockholders. Go Vols does not want the new series of stock to affect the current stockholders because it fears that these existing stockholders may sell their interest in the company if new investors threaten the existing business plan and structure of the company. This would harm Go Vols's future prospects and capital-raising ability because the company would have to sell a substantial number of shares to make up for the shares that the existing stockholders sold to investors who otherwise would have purchased new shares in the company. Go Vols believes that the existing stockholders would also feel uncomfortable if a new investor owned fifteen percent or more of the Common Stock.

Accordingly, Go Vols wants the maximum percentage that a holder may acquire of Common Stock in the company through conversion to be between four percent and fifteen percent. While a four percent ownership limitation would provide significant protection for Go Vols and its existing investors, it could be useful for Go Vols to have the information that the beneficial holder of five percent of the company would be required to provide in the mandatory disclosure statement. The Schedule 13D that any beneficial owner of five percent of any class of Go Vols's stock must provide includes the source of the funds used to acquire the securities and various information about the purpose of the transaction, including plans or proposals that would result in any change in "the present board of directors or management of the issuer, including . . . the number or term of directors; . . . any material change in the present capitalization or dividend policy of the issuer; . . . any other change in the issuer's business or corporate structure . . . ; [and] [c]hanges in the issuer's charter, bylaws or instruments corresponding thereto . . ." ³⁹ Having this information could be very beneficial to Go Vols in protecting its current investors and its existing corporate structure and business plan. Go Vols would be able to obtain significant information from holders it believes could pose a threat to take over the company.

Setting the maximum conversion above the reporting threshold will allow Go Vols to obtain this information about significant investors. I drafted the provision with a limitation on ownership of 9.99%. Setting the limitation at 9.99% will allow Go Vols to obtain information about investors and any plans they have for the company. This level of ownership will allow Go Vols to raise substantial capital because a significant investment would be required for a holder to acquire an interest convertible into a 9.99% interest in the Common Stock. With a

³⁹ 17 C.F.R. § 240.13d-101(2008).

9.99% limitation, it would take six holders of the maximum level of ownership to act in concert to have the ability to have a majority vote and make a decision for the company. This would provide more protection for Go Vols and the existing stockholders than a fifteen percent maximum conversion percentage, requiring six investors to act in concert rather than only four. Accordingly, the company can sustain its goal of raising capital while acquiring information about investors who could be a threat to the corporation by limiting the ownership that can be acquired through conversion of the Series A Convertible Preferred Stock to 9.99%.

C. Go Vols should provide that a conversion demand that lacks a conversion date is ineffective.

An issue that I encountered in drafting the conversion provision of the Certificate of Designations was how to treat conversion demands that do not specify a conversion date. This issue is especially important for Go Vols because of the interplay between the conversion of the shares of Series A Convertible Preferred Stock and maximum conversion provision. The number of outstanding shares of Common Stock on the conversion date determines the maximum number of shares that a holder of Series A Preferred Stock can acquire through conversion of the Series A Convertible Preferred Stock under the 9.99% ownership limitation. Accordingly, to provide accurate information to the holder of the Series A Convertible Preferred Stock and comply with the terms and provisions of the Series A Convertible Preferred Stock, Go Vols will need to know the number of shares of Common Stock that are outstanding at any point in time.

Many of the precedent transaction documents I reviewed include a provision that in the case that there is no conversion date in the conversion demand, the conversion date would be deemed to be the date that the company received the conversion demand. If Go Vols uses this procedure, it would be in direct violation of the specific requirements of the “Mechanics of Conversion” section of the Certificate of Designations. That section provides that the Conversion Demand must specify a date that “shall be a business day not less than fifteen days nor more than thirty days after the Conversion Demand is received by the Company.” If the holder sends the Conversion Demand and the conversion date is deemed to be the date that Go Vols receives the Conversion Demand, the conversion date will be a date that is not allowed in the Certificate of Designations because the date must be at least fifteen days from the date the demand is received. Accordingly, Go Vols could not honor a conversion date that is deemed to be the date that it received the demand.

According to the Supreme Court of Delaware, “Certificates of Incorporation are regarded as contracts between the stockholder and the corporation.”⁴⁰ Because the Charter is considered a contract, the parties to the contract are bound to its terms. The Certificate of Designations will serve as an amendment to the Charter and will become part of that contract.⁴¹ Here, Go Vols cannot convert shares of the Series A Convertible Preferred Stock to shares of Common Stock at a time that is not allowed by the contract governing such conversion. Go Vols is bound by its own contract and must adhere to its provisions. Because the Certificate of Designations will provide that the “Conversion Date shall be a business day not less than fifteen days nor more than thirty days after the Conversion Demand is received by the Company,” the corporation must adhere to this procedure.

To address this concern, the drafting could establish a conversion date that is fifteen days after receipt of the Conversion Demand by Go Vols for demands without a conversion date. This could be contrary to the expectation of the stockholder, however, if the stockholder did not want to convert the shares for thirty days. The drafting could also provide language that the Conversion Demand is ineffective if it does not provide the required conversion date, which is the drafting choice that I made. This articulation of the process puts the burden on the stockholder to specify the date on which the conversion should take effect. It eliminates any guesswork and allows Go Vols to give effect to the intent of the stockholder and relieve itself of potential disputes about an improper conversion. Providing such language in the provision will remove the burden from Go Vols in establishing the conversion date. This is fair to the stockholders because all stockholders will be bound by the restrictions in the Charter. All stockholders will have sufficient notice of this process because the provision in the Certificate of Designations will explicitly state that a Conversion Demand without a conversion date will be ineffective. Further, the attached Conversion Demand form will provide guidance and help reduce the number of ineffective conversion demands, preventing rejections from happening.

V. ANALYSIS OF MINOR DRAFTING CHOICES

I encountered many other drafting decisions in crafting the provisions for Go Vols’s Certificate of Designations. The following are a few of the choices I made in crafting the provisions:

⁴⁰ *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 384 (Del. 2012).

⁴¹ DEL. CODE ANN. tit. 8, § 151(g) (1998).

- I chose not to include an anti-dilution adjustment in the conversion provision. Go Vols wants to retain significant control of the corporation, so excluding an anti-dilution adjustment will allow Go Vols to deal with stockholders individually and approve or deny anti-dilution adjustments on a case-by-case basis. By not including an anti-dilution adjustment, Go Vols will not be bound by an adjustment in the Certificate of Designations from which subsequent stockholders could negotiate for a better adjustment. Go Vols will be able to negotiate individual adjustments as needed on a case-by-case basis.
- I chose to allow stockholders to rely on the company's Form 10-Q or a more recent public announcement for the number of outstanding shares in the maximum conversion provision for determining how many shares a stockholder may convert through the conversion right. Some precedent transaction documents allow the stockholders to also rely on the company's Form 10-K or Form 8-K, but I chose to limit the reliance to the company's quarterly report or a more recent report. This will reduce potential confusion from relying on a document that is not as current as others.
- I chose to include a provision allowing a holder of Series A Preferred Stock to seek a waiver of the maximum conversion limitation. This will allow Go Vols to adjust to its needs of raising capital and give Go Vols the ability to allow significant investors to become more involved if it chooses. By including a possible waiver, Go Vols will be able to adjust to the possibility that the maximum conversion provision was set too low and allow investors to invest more in the company.
- I chose to include a provision allowing Go Vols to change the percentage established in the maximum ownership limitation provision. This will allow Go Vols to increase the percentage to allow larger investors and also allow Go Vols to lower the percentage if the percentage is too high and allows threats to the company. This is compromise for allowing the holder to seek a waiver of the maximum conversion limitation and provides flexibility to the company.

RIDER A: DESIGNATION
GO VOLS, INC.

CERTIFICATE OF DESIGNATIONS
Pursuant to Section 151 of the General
Corporation Law of the State of Delaware

Series A Convertible Preferred Stock
(Par Value \$0.001 Per Share)

I. Terms of Preferred Stock

A. Designation and Amount. The class of preferred stock, hereby classified, shall be designated the “Series A Convertible Preferred Stock.” The initial number of authorized shares of the Series A Convertible Preferred Stock shall be 10,000,000. The Board of Directors may, in its sole discretion, increase the number of authorized shares of the Series A Convertible Preferred Stock in a certificate provided for in Section 151(g) of the General Corporation Law of the State of Delaware. The Holders of stock in Go Vols, Inc. (the “Company”) shall not have the right to consent to any increase in the number of authorized shares. Each share of the Series A Convertible Preferred Stock shall have a par value of \$0.001.

RIDER B: CONVERSION

I. CONVERSION

A. Conversion Right. Each share of Series A Convertible Preferred Stock, at any time beginning one month from the date of its issuance, may be converted at the sole option of the Converting Holder and without the payment of any additional consideration by the Converting Holder, into Common Stock at a conversion rate of three shares of Common Stock for one share of Series A Convertible Preferred Stock presented for conversion (the “Conversion Rate”).

B. Mechanics of Conversion. Before any Holder of shares of Series A Convertible Preferred Stock shall be entitled to convert any or all of those shares under this [set forth the number of the Conversion section], he or she shall make a written demand for conversion (a “Conversion Demand”) upon the Company at its principal executive offices or the

office of its transfer agent.⁴² The Conversion Demand shall set forth (i) the number of shares of Common Stock beneficially owned by the Holder, and (ii) the proposed date of the conversion (the “Conversion Date”), which shall be a business day not less than fifteen days nor more than thirty days after the Conversion Demand is received by the Company. If no Conversion Date is specified in the Conversion Demand or the Conversion Demand does not otherwise comply with this section, the Conversion Demand will be ineffective and returned to the Holder. Within five days of receipt of the Conversion Demand, the Company shall give written notice (the “Conversion Notice”) to the Holder setting forth both the address of the place or places at which the certificate or certificates representing shares of Series A Convertible Preferred Stock are to be surrendered and whether the certificate or certificates to be surrendered are required to be endorsed for transfer or accompanied by a duly executed stock power or other appropriate instrument of assignment, and if so, the form of the endorsement or power or other instrument of assignment. On or before the Conversion Date, each Holder of shares of Series A Convertible Preferred Stock to be converted shall surrender the certificate or certificates representing those shares, duly endorsed for transfer or accompanied by a duly executed stock power transfer form or other instrument of assignment, if the Conversion Notice so provides, to the Company at its principal executive offices or at the office of its transfer agent. The Company shall, on the date specified in the Conversion Demand or, if later, as soon as practicable after delivery of the certificates for shares of Series A Convertible Preferred Stock being converted, issue and deliver to such Holder of Series A Convertible Preferred Stock a certificate or certificates for the number of whole shares of Common Stock issuable upon such conversion in accordance with the provisions hereof.

⁴² An appropriate Conversion Demand Form is attached for your reference.

RIDER C: MAXIMUM CONVERSION

I. MAXIMUM CONVERSION

A. All provisions in this Maximum Conversion section shall be construed and implemented consistent with the intended beneficial ownership limitation of this section. Notwithstanding anything to the contrary set forth in this Certificate of Designations, at no time may all or a portion of Series A Convertible Preferred Stock be converted if the number of shares of Common Stock to be issued to the Holder, upon conversion, when aggregated with all other shares of Common Stock beneficially owned by the Holder at such time, would result in the Holder beneficially owning (as determined in accordance with Section 13(d) of the Exchange Act and the rules under Section 13(d)) more than 9.99% of all of the Common Stock outstanding at such time (the “Ownership Limitation”); provided, however, that at any time, a Holder of Series A Convertible Preferred Stock may request in writing that the Ownership Limitation be waived (the “Ownership Limitation Waiver Notice”).

B. By written notice to all Holders of Series A Convertible Preferred Stock, the Company may from time to time change the 9.99% Beneficial Ownership Limitation to any other percentage specified in such notice. The Holders of the Series A Convertible Preferred Stock shall not be entitled to consent to such increase or decrease in the Ownership Limitation.

C. For purposes hereof, in determining the number of outstanding shares of Common Stock, the Holder may rely on the number of outstanding shares of Common Stock as reflected in (i) the Corporation’s most recent Form 10-Q or (ii) a more recent public announcement by the Company setting forth the number of shares of Common Stock outstanding. Within five business days of receipt of a written request from a Holder of Series A Convertible Preferred Stock, the Company shall confirm in writing to the Holder the number of shares of Common Stock then outstanding. In any case, the number of outstanding shares of Common Stock shall be determined after giving effect to the conversion or exercise of securities of the Company, including the Series A Convertible Preferred Stock, by any Holder and its affiliates since the date as of which such number of outstanding shares of Common Stock was reported. The number of shares outstanding shall include any outstanding shares convertible into shares of the Company’s Common Stock within 60 days of such calculation that are not subject to the ownership limitation contained in this section.

GLOSSARY OF DEFINED TERMS⁴³

“Beneficial Owner” means person or entity having a voting or investment interest in a security as determined under Section 13(d) of the Securities Exchange Act of 1934, as amended.

“Common Stock” means the common stock of Go Vols, Inc. having a par value of \$0.001.

“Conversion Demand” means demand made by the Holder of Series A Convertible Preferred Stock to convert shares of Series A Convertible Preferred Stock to shares of Common Stock at a rate of three shares of Common Stock for each share of Series A Convertible Preferred Stock.

“Converting Holder” means the holder of the shares of Series A Preferred Stock to be or being converted.

“Exchange Act” means the Securities Exchange Act of 1934, as amended.

“Holder” means person, entity, or affiliate owning Series A Convertible Preferred Stock of the company and having the voting right attached to the shares, including any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares voting power of the security or the power to dispose of the security. This term includes all successors and assigns.

“Series A Convertible Preferred Stock” means the series A convertible preferred stock of Go Vols, Inc. having a par value of \$0.001.

⁴³ For the purpose of the Conversion and Maximum Conversion provisions above, the following terms are not defined in the provisions themselves but, rather, are defined elsewhere in the Certificate of Designations and provided for ease of reference here. The terms shall have the stated meanings.

CONVERSION DEMAND FORM:

Go Vols, Inc.
Series A Convertible Preferred Stock

The undersigned, a record owner of shares of Series A Convertible Preferred Stock, par value \$0.001 per share, of Go Vols, Inc., a Delaware corporation (the “Series A Convertible Preferred Stock”), hereby requests conversion of the number of shares of Series A Convertible Preferred Stock indicated below into shares of Go Vols, Inc. Common Stock, par value \$0.001 per share (the “Common Stock”), as of the date specified below.

Date of Conversion [REQUIRED*]:

Number of shares of Series A Convertible Preferred Stock to be converted:

Number of shares of Common Stock Holder beneficially owns:

Number of shares of Common Stock the person to whom shares are being issued beneficially owns, if different from the Holder:

Stock certificate numbers for Series A Convertible Preferred Stock to be Converted:

U.S. federal tax ID number (if applicable):

Please issue the Common Stock into which the Series A Convertible Preferred Stock are being converted in the following name/names and to the following address:

Issue to:

Address:

Telephone Number:

By:

Title:

Signature:

Name:

Title:

*** The Conversion Demand is ineffective and will be returned to the record owner if the Date of Conversion is omitted.**