

MEMO TO THE PARTNER

FUNDAMENTAL CHANGE CONVERSION RIGHTS FOR MANDATORY CONVERTIBLE PREFERRED STOCK

Ben Dickenson*

TO: Law Office Partner
FROM: Associate
RE: Fundamental Change Conversion Rights for Mandatory
Convertible Preferred Stock

INTRODUCTION

You requested that I draft the conversion rights and notice portions of a “Fundamental Change” conversion provision for the Certificate of Designations for a series of preferred stock that ABC, Inc., a Delaware corporation (“ABC”) will issue to our client, Venture, Ltd., a Delaware corporation (“Venture”). I have attached Rider A, containing the draft provisions, and a glossary for your review. In this memo, I will provide the transactional context for this issuance, identify the substantive legal issues involved, and analyze my drafting decisions. Unless noted otherwise, capitalized terms used and not defined in this memorandum have the same meaning given to them in Rider A and/or in the attached glossary. Any other such terms maintain their meaning as indicated in prior drafts of the Certificate of Designation.

I. TRANSACTIONAL CONTEXT

ABC, a Delaware public corporation headquartered in Tennessee, is raising capital by issuing 1,000,000 shares of 9.00% Series A Mandatory Convertible Preferred Stock (the “Series A Preferred Stock”) to our client, Venture, Ltd. (“Venture”), a Delaware corporation. Venture is a venture

* B.A., Lee University; J.D., The University of Tennessee College of Law. The Author will join Husch Blackwell, LLP as a first-year Associate in the fall of 2018. I would like to thank Professor Joan Heminway who provided significant commentary and feedback on this project.

capital holding company headquartered in Tennessee. ABC is a rapidly growing tech company that has had significant success with several new smartphone “apps,” including apps that provide users with low-cost rides and low-cost options to rent temporary accommodations out of other persons’ homes and apartments. ABC’s stock value has been consistently increasing due to its consistent record of providing stellar apps involving the gig economy. ABC is seeking capital for the development of a new app that allows users to post chores and tasks to an online task board. The app will connect users with independent contractors who will bid on and complete the desired tasks.

With ABC’s upward trajectory, Venture believes that this is a low-risk, high-reward opportunity. Initially, Venture wants preferred stock with priority dividends, rather than voting control. ABC and Venture have already agreed to and drafted provisions for the following: (1) a Mandatory Conversion provision that will convert all 1,000,000 preferred shares at a favorable conversion rate five calendar years from the date of issuance; (2) a floating Mandatory Conversion Rate provision based on Conversion Chart detailing the applicable rate based on the underlying value of ABC’s common stock on the Mandatory Conversion Date; (3) an Optional Conversion provision providing Venture, but not ABC, the right to convert the Series A Preferred Stock at any time, but at a lower conversion rate in the Conversion Chart; and (4) a Fundamental Change make-whole provision that will provide recompense for lost dividends if Venture converts its preferred shares upon the occurrence of such a transaction. The Series A Preferred Stock will pay dividends at an annual rate of 9.00% of the Liquidation Preference, and the Liquidation Preference shall be set at \$75.00 per share of Series A Preferred Stock.

However, Venture is concerned that ABC, as a rising star in the market, will be acquired, merged with, or reorganized before five years pass. Venture wants a provision that provides Venture an optional conversion upon the occurrence of such a Fundamental Change that provides a better conversion rate. If ABC changes hands, Venture wants a larger share of the common stock and, thus, the ability to have more voting power post-transaction. Alternatively, Venture wants the opportunity to convert to ensure it is treated equally to holders of the common stock in a cash-out or similar merger. Venture also wants the option to convert either all or a portion of the preferred shares. ABC

prefers a mandatory conversion of all preferred shares upon a Fundamental Change so as to give ABC more control over the disposition of the preferred shares. Venture also wants to ensure ABC provides adequate notice of the date of such an event and a sufficient time window to convert after the transaction so that it may act appropriately in response to a Fundamental Change. We are providing an initial first draft of the Fundamental Change provision to ABC in a week, and you directed me to lean on the side of more investor-friendly protections in the conversion rights and notice sections that we may negotiate down at a later date.

Pursuant to General Corporation Law of the State of Delaware (“DGCL”) section 151, ABC’s Certificate of Incorporation provides ABC’s board of directors with authority to issue two classes of stock, common and preferred. ABC’s Certificate of Incorporation authorizes its board to issue 200,000,000 shares of common stock and 50,000,000 shares of preferred stock. ABC’s Certificate of Incorporation grants ABC’s board of directors “blank check” authority to issue shares of preferred stock in one or more series at the board’s sole discretion in accordance with DGCL section 151(a) & (g). This “blank check” provision allows ABC’s board to fix, by resolution, the designation, powers, preferences, and rights of any series of preferred stock. Additionally, pursuant to DGCL section 151(e), the Certificate grants the board the power to decide “whether or not the shares of such series shall be subject to conversion into common stock and the times, prices, and other terms and conditions of such conversion.”¹

As of today, ABC has 100,000,000 shares of common stock and no shares of preferred stock outstanding. ABC’s common stock is publicly traded on the New York Stock Exchange, with an average trading price over the last twelve months of \$75.00 per share. Venture has agreed in principle to invest \$15,000,000 in financing for ABC’s newest app development. In consideration, pursuant to DGCL section 161, ABC will issue 1,000,000 shares of 9.00% Series A Mandatory Convertible Preferred Stock, par value of \$.001 per share and an Initial Value of \$15.00 per share to Venture.

¹ DEL. CODE ANN. tit. 8, § 151(e) (West 2018).

ABC plans to apply for an exemption to registration for this offering with the Securities and Exchange Commission (“SEC”) to comply with the Securities Act of 1933 and the Exchange Act of 1934.² ABC will apply for an exemption under SEC Rule 506(b) of Regulation D because Venture is an accredited, and the only, investor.³ Also, ABC will consult with its securities attorneys to comply with the Delaware Securities Act and applicable Delaware securities law.⁴

II. ISSUES PRESENTED

1. *Should the Fundamental Change conversion be mandatory or optional?*⁵

Both parties have differing goals in drafting the Fundamental Change conversion provision as either mandatory or optional for Venture. ABC desires that Venture’s preferred shares must convert upon the occurrence of a Fundamental Change, albeit at a more favorable conversion rate. This conversion would provide ABC the *de facto* right to eliminate the preferred shares’ priority dividends before the five-year Mandatory Conversion Date upon ABC’s decision to go through a Fundamental Change; however, any conversion would be subject to a dividend make-whole premium.⁶ Venture desires an optional conversion so that Venture may adequately review its options regarding the transaction, including either exercising the option to receive equal treatment with common stock or abstaining if the terms of the Fundamental Change do not negatively impact its preferred shares’ rights.⁷

² 15 U.S.C. § 77e(a) (2012). *See also* 15 U.S.C. § 77b(a)(1) (2012) (broad definition of “security” includes preferred stock); 15 U.S.C. § 77b(a)(3) (2012) (“sell” includes any “disposition of a security.”).

³ *See* 17 C.F.R. § 230.506(b) (2018).

⁴ DEL. CODE ANN. tit. 6, § 73-208(b) (West 2018).

⁵ “Fundamental Change” is defined in the glossary.

⁶ *See* Andrew M. Johnston & Ryan J. Greecher, *Preferred Stock*, 99 CORPORATE PRACTICE PORTFOLIO SERIES (BNA), available at Bloomberg Law (discussing how mandatory conversion provisions can “allow other groups to control outcomes for the preferred stockholders who are subject to the automatic conversion.”).

⁷ *See, e.g.*, *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381 (Del. 2012) (holding that an automatic conversion provision of preferred stock was effectively a restriction on that stock that, when triggered, could prevent other rights of the preferred stock (such as a deemed liquidation provision) from being effective); *AGR Halifax Fund, Inc. v. Fiscina*, 743 A.2d 1188, 1195 (Del. Ch. 1999) (upholding an optional conversion that enabled preferred shareholders to obtain a majority of common stock and replace the company’s

2. Does the Fundamental Change Conversion Right's partial conversion option and timing protect Venture's investment without overly burdening ABC's interests?

Both parties are haggling over the flexibility of the conversion right.⁸ Specifically, Venture wants the right to convert either all or less than all of the preferred shares upon the occurrence of a Fundamental Change. ABC prefers conversion of all shares in one transaction, but ABC is not contesting this point much because Venture will be the sole owner of all of the Series A Preferred Stock.⁹ The parties are also negotiating whether Venture may convert on or after the Effective Date of a Fundamental Change and the length of the time-period after the transaction when Venture may elect to convert.¹⁰

3. Does the Fundamental Change Notice requirement provide adequate and timely notice to Venture without unreasonably burdening ABC's board of directors?

Both parties agree that it is important that ABC provide sufficient notice to Venture of any Fundamental Change.¹¹ Under Delaware law and in limited circumstances, directors may effectuate a Fundamental Change through controlling shareholders' consent and without prior notice to

board of directors, despite technical failure of shareholders to surrender certificates within a reasonable time after notice of conversion).

⁸ Ben Walther, *The Peril and Promise of Preferred Stock*, 39 DEL. J. CORP. L. 161, 162 (2014) (discussing how preferred stock has “virtually disappeared in most mature industries, largely because preferred shareholders have found it terribly difficult to protect the value of their investment.”).

⁹ See Preferred Stock in Private Equity Transactions, WESTLAW PRACTICE NOTE, available at Westlaw Practical Law: US Capital Markets & Corporate Governance, Resource ID 1-547-3885 (discussing how companies typically “allow any investor to convert the preferred stock to common stock at any time after the issuance date” if there is only one holder).

¹⁰ Three precedent documents permit conversion on the date of the transaction; two permit it the day after. The conversion period usually ranges from ten to thirty days after the transaction.

¹¹ See DEL. CODE ANN. tit. 8, § 228(a) (West 2018) (providing a board the ability to enact a Fundamental Change without prior notice to other shareholders if the change is consented to by the majority of shareholders in lieu of a meeting). DEL. CODE ANN. tit. 8, § 228(e) (West 2018) (requiring the corporation to provide “prompt notice” to non-consenting shareholders following the action taken in lieu of the meeting).

shareholders.¹² ABC wants a shorter period of time between notice and the occurrence of a Fundamental Change so that Venture has less time to persuade voting shareholders to vote against the change. Venture desires a longer period of time so as not to be caught off guard without adequate time to prepare how to respond to such change.¹³ However, the parties generally agree on the substantive terms to be included in the notice.¹⁴

III. ANALYSIS OF DRAFTING CHOICES

A. Major Drafting Decisions

1. Type of Fundamental Change Conversion

An optional right of conversion is preferable to a mandatory conversion upon the occurrence of a Fundamental Change. ABC prefers the mandatory conversion because it gives ABC the *de facto* ability to rid itself of the preferred shares and its priority dividends through a Fundamental Change at the directors' and common stock holders' behest.¹⁵ Venture staunchly objects to such a provision. Owing to the significant risk inherent in preferred stock, a potential investor in preferred equity will always negotiate for as much control as possible.¹⁶

¹² DEL. CODE ANN. tit. 8, § 228(a) (West 2018); DEL. CODE ANN. tit. 8, § 228(e) (West 2018); *see also* Klotz v. Warner Commc'ns, Inc., 674 A.2d 878 (Del. 1995) (affirming approval by Warner Communications, Inc.'s shareholders of a merger with Time, Inc. without a meeting or prior notice to other shareholders pursuant to General Corporation Law of the State of Delaware section 228(a) after Time had purchased a majority of Warner stock).

¹³ The concept of notice is prevalent in corporate governance. *See* DEL. CODE ANN. tit. 8, § 251(c) (West 2018) (requiring 20 days' prior notice to all stockholders of a stockholder meeting to approve a merger, consolidation or conversion of the corporation).

¹⁴ The precedent transaction documents I found had almost identical provisions regarding what substantive notice must be provided to preferred shareholders in advance of a Fundamental Change.

¹⁵ Walther, *supra* note 8, at 190–92 (citing *Equity-Linked Inv'rs, L.P. v. Adams*, 705 A.2d 1040 (Del. Ch. 1997)) (discussing how *Equity-Linked* reflected an embrace of a “model of fiduciary duties that casts the board as a bully, picking fights with the preferred on behalf of the common.”).

¹⁶ Walther, *supra* note 8, at 164, 190–196 (discussing how recent Delaware decisions have “eroded” directors' fiduciary duties to preferred shareholders so they largely exist “in name only.”). *See also* LC Capital Master Fund, Ltd., v. James, 990 A.2d 435, 438–39 (Del. Ch. 2010).

An optional conversion right provides Venture with a greater degree of control in the face of a hostile Fundamental Change sought by ABC's board and common equity holders.¹⁷ It will provide Venture with the ability to assess the consequences of a Fundamental Change and act accordingly, e.g., by converting the preferred shares to receive equal treatment with common equity in a merger.¹⁸ Additionally, the more favorable Fundamental Change Conversion Rate (as negotiated in another provision) will ensure Venture has a stronger position if faced with aggressive action by ABC's board. ABC will likely concede this point as such provisions predominantly provide the holder an optional, rather than a mandatory, conversion right.¹⁹ ABC's sophisticated counsel will likely understand Venture's concerns about the vulnerability of preferred stock.²⁰

An additional phrase in the first sentence clarifies that a Fundamental Change conversion must occur "in connection with" such a transaction. I added an additional sentence clarifying what conversion "in connection with" a Fundamental Change means and describing the period of time during which this must take place (see below for more details on this conversion period).²¹ This clarification provides Venture additional protection if litigation arises concerning whether a conversion was appropriately elected due to a Fundamental Change transaction.

¹⁷ *E.g.*, AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1188, 1195 (Del. Ch. 1999) (optional conversion that enabled preferred shareholders to obtain a majority of common stock and replace the company's directors).

¹⁸ Johnston & Greecher, *supra* note 6.

¹⁹ *See, e.g.*, Onconova Therapeutics, Inc., Certificate of Designation (Form S-1/A) (Feb. 12, 2018) ("Onconova"); Harte Hanks, Inc., Certificate of Designation (Form 8-K) (Jan. 29, 2018) ("Harte"); Cowen Grp., Inc., Certificate of Designation (Form 8-K) (May 20, 2015) ("Cowen Group"); Resolute Energy, Inc., Certificate of Designation (Form 8-K) (Oct. 7, 2016) ("Resolute Energy"); Jones Energy, Inc., Certificate of Designation (Form 8-K) (Aug. 26, 2016) ("Jones Energy") (collectively, the "precedent documents"). All five precedent documents had a special conversion option upon the occurrence of a Fundamental Change.

²⁰ Walther, *supra* note 8, at 196 (arguing that convertible preferred investors must "expressly negotiate for contractual provisions that protect it from the abuses" of directors and common equity holders).

²¹ Similar clarifications existed in three out of five of the precedent documents. *E.g.*, Cowen Group; Resolute Energy; Jones Energy.

2. Flexibility of Fundamental Change Conversion

The conversion provision provides Venture discretion to convert either all or some of the preferred shares, in whole parts, into common equity at the applicable rate. This flexibility will allow Venture to benefit from partial conversion while retaining some preferred shares to be converted at a later date, depending on the underlying price of ABC's common stock and the terms of the transaction. While ABC may prefer the entire disposition of the preferred stock in one transaction, such flexibility is commonplace in similar provisions and ABC will not likely protest it.²²

Also, the provision allows Venture to convert its shares simultaneously on the Effective Date of a Fundamental Change and anytime thereafter during the Fundamental Change Conversion Period. The Fundamental Change Conversion Period begins on the Effective Date of any Fundamental Change and extends to a minimum of twenty and a maximum of thirty calendar after such Effective Date, at the option of ABC.²³ The calendar days will ensure the period is not effectively longer than stated, such as if business or trading days was used instead. This timeframe will give Venture ample opportunity to decide whether to effect conversion upon occurrence of a Fundamental Change, with the added incentive of the additional Fundamental Change Dividend Make-Whole Premium (a separately drafted provision to be placed in subsection (c) of the Fundamental Change provision).²⁴ Under another already drafted section, Venture will retain its ordinary optional conversion right under, at any other time, including prior to a Fundamental Change.²⁵ This

²² *E.g.*, Cowen Group; Resolute Energy; Jones Energy; Harte; Onconova. All five precedent documents provide for conversion of either all or a lesser number of the preferred shares. *See also* Westlaw Practice Note, *supra* note 9.

²³ This is a happy medium based on the norms reflected in the precedent documents. *E.g.*, Cowen Group; Resolute Energy; Jones Energy; Harte; Onconova.

²⁴ The already drafted make-whole premium, essentially providing for lost dividends if Venture converts early upon a Fundamental Change, is crucial to ensure Venture's initial expected dividends. *See* Walther, *supra* note 8, at 196–99 (arguing for more protections because conversion rights “merely give the preferred the ability to participate in the upside potential created by the common's excessive risk taking.”).

²⁵ The already drafted non-Fundamental Change optional conversion right will provide Venture a crucial power to convert its shares earlier, albeit at a lower rate, to attempt to stop or mitigate an impending unfavorable transaction. *See* AGR Halifax Fund, Inc. v.

Fundamental Change Conversion Period range, rather than a fixed time period, will also ensure ABC has flexibility in limiting Venture's option to convert so as not to overly burden ABC's actions post-transaction. I also added limiting language from another document that does not allow this time period to go beyond the Mandatory Conversion Date to prevent conflicts if ABC goes through a Fundamental Change in close proximity to the Mandatory Conversion Date.

3. Amount of Notice in Advance of a Fundamental Change

ABC must provide Venture with written notice within at least fifteen calendar days of any anticipated Fundamental Change. Notice to shareholders, both common and preferred, is a crucial aspect of corporate governance.²⁶ In some jurisdictions, including Delaware, directors and majority stockholders can circumvent regular notice requirements, making it paramount that Venture receive explicit and sufficient notice.²⁷ This number of days is a compromise between the longer notice period desired by Venture and the shorter period demanded by ABC.²⁸ This notice will provide Venture sufficient time to prepare for a Fundamental Change while not requiring ABC to show its hand too early. This provision uses calendar days rather than trading days or business days to assuage any of ABC's concerns that the notice period could extend much longer than twenty days.

Additionally, I included a parenthetical requirement that the board must use good faith in determining the anticipated Effective Date. I did not include language that some precedent documents used, such as "if such prior notice is not practicable, no later than x days after the Fundamental Change." Such an open-ended hedging of the notice

Fiscina, 743 A.2d 1188, 1195 (Del. Ch. 1999) (detailing an example of an optional conversion used by preferred holders to remove and replace a corporation's directors).

²⁶ See, e.g., DEL. CODE ANN. tit. 8, § 251(c) (West 2018) (requiring 20 days prior notice to all stock holders of a shareholder meeting to approve a merger, consolidation or conversion of the corporation).

²⁷ See DEL. CODE ANN. tit. 8, § 228 (West 2018) (providing a board the ability to act without prior notice to other shareholders if the change is consented to by the majority of shareholders in lieu of a meeting); *Klotz v. Warner Commc'ns, Inc.*, 674 A.2d 878 (Del. 1995).

²⁸ Precedent documents ranged from as few as ten to as many as thirty days' notice. E.g., *Cowen Group*; *Resolute Energy*; *Jones Energy*; *Harte*; *Onconova*.

requirement could act to the detriment of Venture at the behest of the ABC's board.²⁹ I also used a more detailed, substantive explanation of what is required in the Fundamental Change Notice to better provide Venture with adequate awareness of all circumstances.³⁰ However, I did not include an additional requirement that ABC provide further notice via a press release, as some precedent documents required, as I did not believe it would provide drastically more notice and it appeared more burdensome to ABC.

B. *Minor Drafting Choices*

I decided to use sub-headers because the terms are all drafted in longform. The precedent documents used several different headers for the overall Fundamental Change section, but I settled on "Special Rights upon a Fundamental Change" as it encompasses the broad variety of rights under this provision, including those already drafted or expected to be added beyond this Rider. I spread out the notice requirements into separate paragraphs as they are somewhat lengthy and difficult to read in one paragraph. Empty brackets in Rider A are left blank to reflect the section number for the Fundamental Change provision.

The Defined Terms listed in the Glossary following Rider A are only those terms relevant to the Fundamental Change provision and which were likely not defined elsewhere before in the certificate,³¹ especially the definition of what constitutes a "Fundamental Change." I used the broadest definition of "Fundamental Change" within the precedent documents I found. These terms would be placed at the beginning of the Certificate of Designation, alphabetically ordered, and numbered accordingly after being combined with the complete list of Defined Terms.

²⁹ *See, e.g.*, *Equity-Linked Inv'rs L.P. v. Adams*, 705 A.2d 1040, 1057 (Del. Ch. 1997) (board permitted to exclude preferred holders from bidding in a *Revlon*-like transaction); *Greenmont Capital Partners I, LP v. Mary's Gone Crackers, Inc.*, No. 7265-VCP, 2012 WL 4479999, at *1 (Del. Ch. 2012) (where a board and one series of preferred holders acted to strip a second series of preferred holders of its liquidation preference via a conversion provision).

³⁰ The precedent documents ranged significantly in the substance of what all is required for sufficient notice. I utilized the option that provided the most information in the most succinct form. *E.g.*, *Cowen Group*; *Resolute Energy*; *Jones Energy*; *Harte*; *Onconova*.

³¹ For example, terms such as Holder, Company, Common Shares, and Board of Directors are used in other earlier provisions of the Certificate. As such, they have been defined beforehand and are omitted from the glossary.

RIDER A**CERTIFICATE OF DESIGNATION OF 9.00% SERIES A MANDATORY CONVERTIBLE PREFERRED STOCK OF ABC, INC.**

Section [] Special Rights upon a Fundamental Change.

(a) *Optional Fundamental Change Conversion Right.* In the event of a Fundamental Change, the Holders shall have the right to convert their Series A Mandatory Convertible Preferred Shares in connection with the Fundamental Change, in whole or in part, into Common Shares at the Fundamental Change Conversion Rate at any time during the Fundamental Change Conversion Period. A conversion of the Series A Mandatory Convertible Preferred Shares shall be deemed for purposes of this Section [] to be “in connection with” a Fundamental Change if the conversion occurs on a date during the Fundamental Change Conversion Period, which shall be a date no less than twenty calendar days after and no more than thirty calendar days from, and including, the Effective Date of such Fundamental Change, provided that the Fundamental Change Conversion Period will not be extended beyond the Mandatory Conversion Date. Upon conversion under this Section [](a), converting Holders shall receive from the Company, for each Series A Mandatory Convertible Preferred Share:

- (i) a number of Common Shares equal to the Fundamental Change Conversion Rate as set forth in Section [](d); and
- (ii) the sum of any Accumulated Dividends and the Fundamental Change Dividend Make-Whole Premium as described in Section [](c) below, to the extent the Company is legally permitted to make such payments.

- (b) *Fundamental Change Notice.* To the extent the Company or the Board of Directors is aware of a Fundamental Change, on or before the fifteenth calendar day prior to the anticipated Effective Date of the Fundamental Change (determined in good faith by the Board), a written notice (the “Fundamental Change Notice”) shall be sent by or on behalf of the Company, by first-class mail, postage prepaid, to the Holders of record as they appear on the share register of the Company. Such notice shall state:
- (i) the anticipated Effective Date of the Fundamental Change;
 - (ii) that Holders shall have the right to effect a Fundamental Change Conversion in connection with such Fundamental Change during the Fundamental Change Conversion Period;
 - (iii) the Fundamental Change Conversion Period;
 - (iv) if the Company shall elect to pay any amount payable pursuant to Section 9(c) below in full in Common Shares or in a combination of cash and Common Shares (and if so, will specify the combination, which may be in percentage terms); and
 - (v) the instructions a Holder must follow to effect a Fundamental Change Conversion in connection with such Fundamental Change.

GLOSSARY

- () “Effective Date” shall mean the date on which any Fundamental Change occurs and is effective.
- () A “ Fundamental Change ” shall be deemed to have occurred at any time after the Series A Mandatory Convertible Preferred Stock is originally issued if any of the following occurs:
 - (i) the consummation of any transaction (other than any transaction described in clause (ii) below, whether or not the proviso therein applies) the result of which is that a “person” or “group” within the meaning of Section 13(d) of the Exchange Act of 1934, other than the Corporation, ABC, Inc., one of the Corporation’s majority-owned Subsidiaries and our or their employee benefit plans or, provided that the Qualifying Owners taken together do not in the aggregate own more than 51% of the outstanding voting power of the Corporation’s common equity, a Qualifying Owner, has become the direct or indirect “beneficial owner,” as defined in Rule 13d-3 under the Exchange Act, of more than 50% of the voting power of the Corporation’s common equity;
 - (ii) the consummation of (A) any recapitalization, reclassification or change of the Corporation’s common stock (other than a change in par value, or from par value to no par value, or from no par value to par value, or changes resulting from a subdivision or combination), as a result of which the Corporation’s common stock would be converted into, or exchanged for, stock, other securities or other property or assets; or (B) any sale, lease or other transfer in one transaction or a series of transactions of all or substantially all of the consolidated assets of the Corporation and its Subsidiaries, taken as a whole, to any Person other than one of the Corporation’s Subsidiaries; provided, however, that none of the transactions described in clauses (A) or (B) shall constitute a “Fundamental Change” if (x) the holders of all classes of

the Corporation's common equity immediately prior to such transaction continue to own at least, directly or indirectly, more than 50% of the surviving corporation or transferee, or the parent thereof, immediately after such event or (y) such transaction is effected solely to change the Corporation's jurisdiction of formation or to form a holding company for the Corporation and that results in a share exchange or reclassification or similar exchange of the outstanding Class A Common Stock solely into common stock of the surviving entity;

(iii) the Corporation's common stock (or other common stock into which the Series A Preferred Stock is convertible) ceases to be listed or quoted on any of the New York Stock Exchange, the NASDAQ Global Select Market or the NASDAQ Global Market (or any of their respective successors);

(iv) the stockholders of the Corporation approve any plan or proposal for the liquidation or dissolution of the Corporation (other than in a transaction described in clause (ii) above);

provided, however, that a transaction or transactions described in clause (i) or (ii) above shall not constitute a "Fundamental Change" if at least 90% of the consideration received or to be received by holders of Class A Common Stock (excluding cash payments made pursuant to dissenters' appraisal rights) in connection with such transaction or transactions that would otherwise constitute a "Fundamental Change" consists of shares of common stock or common equity interests that are listed or quoted on any of the New York Stock Exchange, the NASDAQ Global Select Market or the NASDAQ Global Market (or any of their respective successors), or that will be so listed or quoted when issued or exchanged in connection with such transaction or transactions and as a result of such transaction or transactions the Series A Preferred Stock becomes convertible into such

consideration (excluding cash payments for fractional shares and cash payments made pursuant to dissenters' appraisal rights).

- () “Fundamental Change Conversion Period” shall mean, in respect of a Fundamental Change, the period beginning on, and including, the Effective Date for the Fundamental Change and ending on 5:00 p.m., New York City time, on the date that is no earlier than 20 calendar days after such Effective Date and no later than 30 calendar days from such Effective Date (or, if earlier, the Mandatory Conversion Date).
- () “Fundamental Change Conversion Rate” shall mean, in respect of a Fundamental Change, the conversion rate set forth in the conversion table in Section [](d).
- () “Fundamental Change Dividend Make-Whole Premium” shall have the meaning specified in Section [](c).
- () “Mandatory Conversion Date” shall mean the date five calendar years from the issuance of the Series A Mandatory Convertible Preferred Stock.
- () “Optional Fundamental Change Conversion Right” shall mean the right of the Holders to convert their preferred shares pursuant to Section [](a).