FIGHT THE RONA, INC. — PREFERRED STOCK SUPERMAJORITY CLASS VOTING PROVISIONS

Kaleb Byars*

MEMORANDUM

TO: Senior Partner
FROM: Kaleb Byars
RE: Fight the Rona, Inc. – Preferred Stock Supermajority Class Voting Provisions

I. INTRODUCTION

You requested for me to draft supermajority class voting provisions that you will insert in our client Fight the Rona, Inc.'s (the "Corporation") Certificate of Designations. The Certificate of Designations will establish a new series of preferred stock (the "Series A Preferred Stock"), which will be issued to certain investors. Attached at the end of this memorandum are draft provisions ("Rider A"), a glossary defining certain terms in Rider A, and an appendix.

This memorandum provides the information you asked me to provide in three parts. First, this memorandum provides the transactional context, including relevant facts pertaining to the parties, each party's requests, and the transaction. Second, this memorandum identifies the three most important legal issues I encountered while drafting Rider A, and it explains my proposed solutions and analysis. Finally, this memorandum discusses minor drafting decisions reflected in Rider A as well as other factors our firm should consider regarding this transaction.

* Judicial Law Clerk, the United States District Court for the Eastern District of Tennessee | Juris Doctor, the University of Tennessee College of Law | Bachelor of Science in Business Administration: Economics and Finance, the University of Tennessee at Martin. The author expresses sincere thanks to Professor Joan Heminway for her unwavering assistance in developing this memorandum. The author also expresses thanks to the editors and staff of *Transactions: The Tennessee Journal of Business Law* for their editing efforts. The author specifically thanks Hannah-Claire Boggess, Patrick Clarke, Jonathan Davis, Matt Napolitano, Sam Rule, and Alex Sosnowski for their outstanding editing.

II. TRANSACTIONAL CONTEXT

We represent the Corporation, which retained our law firm to represent it in negotiations related to the authorization and issuance of shares of the Series A Preferred Stock to Alexander Hamilton, Aaron Burr, Maria Reynolds, Thomas Jefferson, and James Madison (the "Investors"). The Investors are business-sophisticated individuals who live in Delaware and who have participated in joint ventures together in the past. The Corporation is a privately held Delaware corporation. The Corporation was founded in early 2021 with the purpose to invent, produce, and disseminate a COVID-19 vaccine. While the Corporation only recently started Phase One testing, many of its competitors have commenced Phase Three testing or received limited approval.

The Corporation's Certificate of Incorporation authorizes 10,000,000 shares of a single class of common stock, par value $0.01 per share. One million of these shares are outstanding and held by twenty-five individual stockholders who are unrelated to the Corporation's directors and officers. The Corporation's Certificate of Incorporation also authorizes 10,000,000 shares of a single class of preferred stock, par value $0.01 per share. None of these shares are outstanding. However, the Corporation's Certificate of Incorporation contains a blank check provision that permits the Corporation's board of directors to unilaterally designate and issue new series of preferred stock to the fullest extent that § 151 of the General Corporation Law of the State of Delaware allows.[1] An excerpt of the Corporation's blank check provision is in Appendix A. The Corporation has no outstanding debt other than current liabilities associated with its short-term operations.

The Corporation needs additional funding for research and development, and its directors are considering establishing a new series of preferred stock. The Corporation considered, but decided against, issuing debt because it prefers to avoid the fixed costs that accompany debt instruments. The Corporation equally considered but decided against issuing additional shares of common stock because the Corporation's common stockholders have expressed their desire to retain their current voting power with respect to electing the Corporation's directors. Thus, the Corporation intends to designate and issue 500,000 shares of a new

[1] *See* DEL. CODE ANN. tit. 8, § 151 (West 2017).

series of preferred stock, par value $0.01 per share (i.e., the Series A Preferred Stock), and issue most if not all of these shares to the Investors.

The Investors are negotiating with the Corporation to purchase the Series A Preferred Stock in consideration for cash through a private placement under Section 4(a)(2) of the Securities Act of 1933, as amended.[2] However, the Investors have reservations. The Investors are concerned about the Corporation's inherently risky operations and that the Corporation is lagging behind its competitors. To hedge their risk, the Investors demand limited control over the Corporation's future decisions that would affect their investments. Specifically, they demand unanimous (or as a second preference, high-percentage supermajority) voting rights for any decision that would dissolve or result in a merger involving the Corporation or that would adversely affect their shares. Moreover, the Investors demand transfer restrictions on their shares to protect these voting rights. The Corporation is in dire need of funding, so it is willing to grant the Investors these rights.[3] We are currently drafting the first draft of the Corporation's Certificate of Designations, which will establish the Series A Preferred Stock. I am drafting the supermajority class voting provisions.[4]

Delaware law[5] authorizes this transaction. A corporation may authorize new series of preferred stock[6] in its certificate of incorporation, a certificate of designations, or by board resolution pursuant to authority expressly granted to the board in the certificate of incorporation.[7] Full, limited, or no voting rights may accompany the new series of preferred stock.[8] Pertinently, these rights may require that shareholders of the new series approve certain transactions before the corporation engages in those

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[2] *See* 15 U.S.C. § 77d(a)(2) (2015). The Series A Preferred Stock will not be registered. Another associate in our firm is handing the Section 4(a)(2) exemption issue.

[3] Importantly, providing the Investors these rights will not dilute the common stockholders' power to elect directors.

[4] Other members of our firm are drafting the other portions of the Certificate of Designations.

[5] The Corporation and the Investors agree Delaware law governs this transaction because the Corporation is incorporated in Delaware. *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112 (Del. 2005) ("[O]nly one state [has] authority to regulate a corporation's internal affairs – the state of incorporation.").

[6] DEL. CODE ANN. tit. 8, § 151(a); *see also id.* § 102(a)(4).

[7] *See* 1 BRADLEY W. VOSS, VOSS ON DELAWARE CONTRACT LAW § 6.19 (2021).

[8] *Id.*

transactions.[9] Furthermore, these voting provisions may require a supermajority percentage of votes.[10] Because there is no public market for the Corporation's securities, stock exchange rules do not apply to the issuance of the Series A Preferred Stock.[11]

Set forth in the next Part are key issues I encountered in drafting the supermajority voting provisions. I note in advance I used Goldman Sachs, Group, Inc.'s ("Goldman") Certificate of Designations[12] as my model precedent transaction document because: (1) I located no negative litigation history related to the document; (2) the language used in Goldman's Certificate of Designations is similar to the language used in voting provisions in numerous other precedent documents;[13] and (3) Goldman's Certificate of Designations covers transactions similar to the transactions that Rider A covers.[14] Also, for purposes of Part III.2 below, you should be aware that the Corporation's Certificate of Incorporation contains an exculpation provision.[15]

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[9] *Id.*; *see also* Seibert v. Gulton Indus., No. 5631, 1979 WL 2710, at *3–4 (Del. Ch. June 21, 1979), *aff'd mem.*, 414 A.2d 822 (Del. 1980); 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 5.6 (4th ed. 2021).

[10] *See* BALOTTI & FINKELSTEIN, *supra* note 9, § 7.24 (citing *Seibert*, 1979 WL 2710, at *3–4). *But see infra* Part III.1.

[11] Though, as discussed in Part IV, the Corporation should consider relevant stock exchange rules.

[12] Goldman Sachs Grp., Inc., Certificate of Designations (Form 8–K Exhibit 3.1 and 4.1) (Nov. 1, 2017).

[13] To determine this similarity, I used Bloomberg Law's "Run Draft Analyzer" feature. Nearly 1,000 precedent documents use language similar to Goldman's Certificate of Designations, and the language in those documents is 85–98% similar to the language in Goldman's Certificate of Designations. As I drafted Rider A, I edited it to reflect the most common language among all precedent documents. For example, Goldman's title for its provision that is the equivalent of Section 7(b) in Rider A is "Other Voting Rights." Nevertheless, I entitled Section 7(b) "Class Voting Rights as to Particular Matters" because the majority of precedent documents use that phrasing.

[14] Because the Investors desire the right to approve by supermajority vote any sale by the Corporation of substantially all of its assets, Section 7(b)(iv) in Rider A provides the Investors this right. However, Goldman's supermajority voting provisions do not apply to asset sales, so I obtained the model language for Section 7(b)(iv) from another Delaware corporation's certificate of designations. *See* MDU Res. Grp., Inc., Certificate of Incorporation (Form 10–K Exhibit 3.A) (Nov. 3, 1994).

[15] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2020). Similarly, we should be aware and inform the board of the terms of the indemnification provision in the Corporation's Certificate of Designation and availability of insurance.

III. KEY SUBSTANTIVE ISSUES AND CORRESPONDING ANALYSIS

This Part identifies the three most important issues I encountered when drafting the supermajority class voting provisions. It also provides my proposed solutions and analysis for these issues.

1. Maximum Legally Permissible Supermajority Percentage

The Investors' demand for unanimous or high supermajority voting rights presents the question of whether those voting rights are valid. Rider A addresses this issue by requiring a vote of the holders of at least 80% of the shares of the Series A Preferred Stock to approve the covered transactions because 80% is the highest percentage Delaware courts have explicitly held is valid.[16]

Although supermajority class votes are generally authorized by Delaware law,[17] there is a dispute whether unanimous (or nearly unanimous) supermajority percentages are valid.[18] This is so because high supermajority voting provisions: (1) are "practically irreplaceable" in that they require a nearly unanimous vote to be amended;[19] and (2) may violate public policy because they grant a small group of shareholders a veto power over certain corporate actions, and this veto power contravenes the notion that corporations should have representative governments.[20]

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[16] *See generally* Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923 (Del. 1990).

[17] *See* BALOTTI & FINKELSTEIN, *supra* note 9, § 7.24 (citing Seibert v. Gulton Indus., No. 5631, 1979 WL 2710, at *3–4 (Del. Ch. June 21, 1979), *aff'd mem.*, 414 A.2d 822 (Del. 1980)).

[18] *See* Acquicor Tech. Inc., SEC Staff Comment Letter, 2006 WL 8217485 (Oct. 19, 2006); Caterpillar, Inc., SEC Staff No-Action Letter, 2017 WL 446952 (Mar. 28, 2017); BALOTTI & FINKELSTEIN, *supra* note 9, § 5.6; BALOTTI & FINKELSTEIN, *supra* note 9, § 7.24 (citing *Seibert*, 1979 WL 2710, at *3–4); Sellers v. Joseph Bancroft & Sons Co., 2 A.2d 108, 114 (Del. Ch. 1938); F. Hodge O'Neal, *Restrictions on Transfer Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773, 786 (1952) (citing *Sellers*); *Statutory Assistance for Closely Held Corporations*, 71 HARV. L. REV. 1498, 1498 n.3 (1958) (citing *Sellers*). *But see* Roland Park Shopping Ctr., Inc. v. Hendler, 109 A.2d 753, 758 (Md. 1954) (holding the statute expressly permits unanimous voting provisions because they are merely supermajority provisions).

[19] *Sellers*, 2 A.2d at 114.

[20] Jay M. Zitter, *Annotation, Validity, Construction, and Effect of Provision in Charter or Bylaw Requiring Supermajority Vote*, 80 A.L.R. 4th 667 n.6 (1990).

Consequently, we must consider how to grant the Investors' demand of high supermajority or unanimous voting rights without violating the law. True, it is unclear whether unanimous voting requirements are per se invalid, but we should avoid unnecessary risks. Therefore, Rider A provides for an 80% voting requirement.[21] I considered using a 67% or 75% requirement, both which drafters commonly use.[22] However, I decided to implement an 80% requirement because the Investors desire the highest supermajority percentage possible, and the Delaware Supreme Court has upheld 80% supermajority voting requirements.[23] Also, numerous precedent documents comfortably require 80% votes.[24] Additionally, here, a voting requirement over 80% would practically require unanimity (and therefore possibly be void on policy grounds) because there will initially be only five investors.[25] Finally, I could locate no precedent documents that require a percentage higher than 80%; perhaps other drafters utilize percentages lower than 80% for similar reasons.[26]

2. Compliance with Fiduciary Duties

Board action implementing supermajority voting rights may constitute a breach of the directors' fiduciary duties.[27] This issue arises when directors do not exercise due care[28] or when their "primary purpose" for implementing the provisions is to interfere with shareholders'

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[21] *See* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 4.30 (Rev. 3d ed. 2021) ("If there is any doubt about the acceptance of unanimity requirements . . . the drafter may be well advised to use a [] high percentage requirement rather than a [unanimous requirement].").

[22] *See, e.g.*, Bank of Am. Corp., Certificate of Incorporation (Form 10–Q Exhibit 3–A) (Oct. 28, 2019) ("67%").

[23] Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 927–28 (Del. 1990).

[24] *See, e.g.*, CTI Indus. Corp., Certificate of Designations (Form 8–K Exhibit 3.1) (Jan. 3, 2020); Foamex Int'l Inc., Certificate of Designations (Form 10–Q Exhibit 4) (May 9, 2008).

[25] Zitter, *supra* note 20.

[26] *See, e.g.*, Gen. Motors Co., Certificate of Designations (Form 8–K Exhibit 4.1) (Aug. 7, 2009) ("66 2/3%").

[27] *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659–60 (Del. Ch. 1988); BALOTTI & FINKELSTEIN, *supra* note 9, §§ 6.41, 7.24.

[28] 1 BRENT A. OLSEN, PUBLICLY TRADED CORPORATIONS HANDBOOK § 3.16 (May 2021 ed. 2021).

franchise.[29] To address this issue, we should properly inform the directors how to comply with their duties.

Supermajority class voting provisions invoke duty of loyalty concerns because directors breach their duty of loyalty when they enact the provisions in bad faith or when doing so is not in their corporation's best interests.[30] What is more, if challenged, courts review directors' decisions to enact the provisions under the exacting *Blasius* standard. Applying *Blasius*, courts first determine whether the directors acted with the "primary purpose" of marginalizing shareholders' voting rights.[31] If so, courts will hold the directors did not violate their duty of loyalty only if the directors can demonstrate they had a "compelling justification" for implementing the provisions.[32] To ensure the Corporation's directors comply with their duty of loyalty, we should ensure the directors consider: (1) the Corporation's dire need for financing; and (2) whether the Corporation's need for financing outweighs the risk that the supermajority provisions will cause deadlock if the Investors dissent from an action all other stockholders wish to take.[33] These considerations will also ensure the directors likely receive business judgment rule deference rather than *Blasius* review because they show the directors' primary purpose for enacting the provisions was the good faith management of the company.[34] And even if a court were to apply *Blasius* review, a court reviewing the record would likely hold the Corporation's need for financing was a "compelling justification."[35]

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[29] Glazer v. Zapata Corp., 658 A.2d 176, 186 (Del. Ch. 1993).

[30] OLSEN, *supra* note 28, § 3.1.

[31] *See Blasius*, 564 A.2d at 659–60.

[32] OLSEN, *supra* note 28, § 3.29. The policy for *Blasius* review is that, by their nature, supermajority class voting provisions disenfranchise other stockholders in that even if all other stockholders' consent to a specific transaction, the transaction may not occur without a high-percentage vote by the class. *See* Chesapeake Corp. v. Shore, 771 A.2d 293, 320 (Del. Ch. 2000).

[33] *See Chesapeake*, 771 A.2d at 320 ("Absent confessions of an improper purpose, the most important evidence of what a board intended to do is often what effects its actions have."). This is especially important given that the voting percentage requirement in Rider A is as high as 80%.

[34] *See id.* at 322 (explaining when a board acts with a legitimate purpose, *Blasius* does not apply).

[35] The board in *Blasius* acted with the primary purpose of "thwarting the exercise of a shareholder vote." *See id.* at 320. In contrast, the board in this proposed example is acting in good faith based on the need for financing.

The directors' duty of care requires that the directors consider all material information reasonably available regarding the effects enacting the supermajority voting provisions will have on the Corporation.[36] The directors will breach their duty of care—and under the business judgment rule, courts will only question the directors' decision—if they are grossly negligent in failing to consider this information.[37] To ensure the Corporation's directors satisfy their duty of care, the directors should consider: (1) our and other expert opinion suggesting the supermajority voting provisions are necessary; and (2) securing common shareholder approval of the provisions. Note, though, the Corporation's Certificate of Incorporation includes an exculpation provision, so it is unlikely the directors will be liable for breaching their duty of care. Thus, we should focus on ensuring the directors satisfy their duty of loyalty. Of course, along the way, for purposes of both their duties of loyalty and care, the directors should ensure the Corporation's board meeting minutes and other records reflect their deep consideration of their alternatives, choices, and reasoning.[38]

3. Including "whether by merger, consolidation or otherwise" in the Adverse Amendment Provision

Voting provisions often require holders of a specific series of stock to approve any amendment to the corporate charter that would adversely affect the holders of that series (an "Adverse Amendment Provision"). The Delaware Supreme Court narrowly construes the transactions these provisions cover absent a specific phrase. Rider A resolves this issue by including the phrase: "whether by merger, consolidation or otherwise."

The Delaware Supreme Court in *Avatex* held an Adverse Amendment Provision will not require a class vote if the amendment adversely affecting the holders is caused by a merger or consolidation unless the provision includes the phrase "whether by merger,

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[36] OLSEN, *supra* note 28, § 3.16.

[37] Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

[38] *See generally Chesapeake*, 771 A.2d 293 (criticizing directors who did not consider the consequences of enacting supermajority voting provisions); Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663 (2007). The time of board deliberations, too, can have bearing on whether courts hold that directors have breached their fiduciary duties. *See* Arthur Fleischer, Jr. et al., *Takeover Defense: Mergers and Acquisitions* § 3.04 (8th ed. 2018).

consolidation or otherwise."[39] Importantly, the *Avatex* court and other courts that addressed the issue after *Avatex* explained that drafters who desire to have merger and consolidation transactions covered by their Adverse Amendment Provisions should include this phrase's language verbatim.[40]

Here, because the Investors demand supermajority voting rights for all transactions that would adversely affect their shares, Rider A (in Section 7(b)(ii)) contains an Adverse Amendment Provision to require 80% of the holders of the Series A Preferred Stock to approve any transaction that adversely affects them. Meanwhile, Rider A (in Section 7(b)(iii)) contains a provision that requires the holders to approve most mergers and consolidations. However, it is notable that Section 7(b)(iii) explicitly exempts certain mergers and consolidations from the supermajority vote requirement. Thus, if we exclude the above phrase from Section 7(b)(ii), a court could interpret that section to not require a class vote in the case of a merger that adversely affects the holders of the Series A Preferred Stock but that is exempted by Section 7(b)(iii).

The drafting alternatives are clear: We can include or omit the pertinent phrase in Section 7(b)(ii) in Rider A. I include the phrase, relying on the Delaware Supreme Court's and other scholars' advice.[41] Doing so is consistent with all parties' interests because the Investors demand broad authority to vote in merger transactions, and the Corporation is willing to grant this authority.

IV. MINOR DRAFTING DECISIONS AND OTHER CONSIDERATIONS

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[39] Elliott Assocs., L.P. v. Avatex Corp., 715 A.2d 843, 847–55 (Del. 1998).

[40] *Id.* at 855 ("The path for future drafters . . . is clear. When a certificate [omits the phrase], the preferred have no class vote [in the event of merger or consolidation transactions.]"). *See generally* Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962, 967–71 (Del. Ch. 1989) (holding a class vote was not required when the voting provisions omitted the phrase "whether by merger, consolidation or otherwise"); Benchmark Cap. Partners IV, L.P. v. Vague, No. Civ.A. 19719, 2002 WL 1732423, at *7–9 (Del. Ch. July 15, 2002), *aff'd*, 822 A.2d 396 (Del. 2003). Indeed, these cases do not differ even in their omission of an oxford comma from the phrase, and for this reason, Rider A omits oxford commas despite our firm's policy to generally include them. *See, e.g.*, *Benchmark*, 2002 WL 1732423, at *8–9.

[41] *See, e.g.*, D. Gordon Smith, *Independent Legal Significance, Good Faith, and the Interpretation of Venture Capital Contracts*, 40 WILLAMETTE L. REV. 825, 843–44 (2004).

In addition to these considerations and those we discussed during our meetings, this Part contains a list of less noteworthy drafting decisions and topics our firm should consider. Here is the list:

- While most relevant precedent transactions documents use the word "such" throughout their provisions, I have replaced the word "such" with "the" in Rider A to follow firm preference.
- We should consider the requirement that voting provisions be "clear and unambiguous."[42]
- We should consider the requirement that preferred stock have liquidation or dividend preferences for preferred stock supermajority voting provisions to be valid.[43]
- We should consider the effect Rider A's voting provisions will have on the Corporation's ability to list the Series A Preferred Stock on a stock exchange in the future.[44]
- We should consider whether to use the word form of 80% (i.e., "eighty percent") rather than its numerical alternative (i.e., "80%") in defining the supermajority percentage.[45]
- I omitted a materiality requirement from Section 7(b)(ii) because the Investors demand broad authority to approve all transactions that adversely affect them.[46]

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[42] *See* Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 926–27 (Del. 1990) (holding provisions similar to those in Rider A were clear and unambiguous).

[43] *See* Nat'l Educ. Corp. v. Bell & Howell Co., C. A. No. 7278, 1983 WL 18035, at *4 (Del. Ch. Aug. 25, 1983).

[44] For example, New York Stock Exchange ("NYSE") Listing Rules explain that the NYSE has a preference against preferred stock supermajority voting provisions that require supermajority approval of mergers or acquisitions. *See* NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 703.05(A). *But see id.* § 703.05(E) (providing exceptions). *See generally id.* § 313.00(C) (discussing minimum voting rights required for listed preferred stock).

[45] *Compare* Citizens Fin. Grp., Certificate of Incorporation (Form 8–K Exhibit 3.1) (Apr. 23, 2020) ("two-thirds"), *with* Bank of Am. Corp., Certificate of Incorporation (Form 10–Q Exhibit 3–A) (Oct. 28, 2019) ("67%").

[46] The previous language from Goldman's Certificate of Designations required a supermajority vote only when amendments, alterations, or repeals would be "material and adverse" rather than merely "adverse."

RIDER A

Section 7. Voting Rights

(a) General. The holders of the Series A Preferred Stock shall not have any voting rights except as set forth below or as otherwise from time to time required by law.

(b) Class Voting Rights as to Particular Matters. So long as any shares of the Series A Preferred Stock are outstanding, in addition to any other vote or consent of stockholders required by law or otherwise by the Certificate of Incorporation, the vote or consent of the holders of at least 80% of the shares of the Series A Preferred Stock at the time outstanding and entitled to vote, voting together as a separate class, given in person or by proxy, either in writing without a meeting or by vote at any meeting called for the purpose, shall be necessary for authorizing, approving or ratifying:

(i) any amendment or alteration of the Certificate of Incorporation to:
- **(A)** increase the number of authorized shares of Senior Stock;
- **(B)** authorize, designate or otherwise create shares of Senior Stock; or
- **(C)** authorize, designate or otherwise create any shares or securities convertible into or exchangeable or exercisable for shares of Senior Stock;

(ii) any amendment, alteration or repeal, whether by merger, consolidation or otherwise, of any provision of the Certificate of Incorporation so as to adversely affect the special rights, preferences, privileges or voting powers of the Series A Preferred Stock, taken as a whole;

(iii) any reclassification involving the Series A Preferred Stock or merger or consolidation of the Corporation with another corporation or other entity, unless in each case (x) the shares of the Series A Preferred Stock remain outstanding or, in the case of any merger or consolidation in which the Corporation is not the surviving or resulting entity, are converted into or exchanged for preference

securities of the surviving or resulting entity or its ultimate parent, and (y) the shares remaining outstanding or the preference securities, as the case may be, have rights, preferences, privileges and voting powers, and limitations and restrictions that, taken as a whole, are not materially less favorable to the holders of the Series A Preferred Stock than the rights, preferences, privileges and voting powers, and limitations and restrictions of the Series A Preferred Stock immediately prior to the reclassification, merger or consolidation, taken as a whole; or

(iv) the voluntary dissolution, liquidation or winding up of the affairs of the Corporation, or the sale, lease or conveyance by the Corporation of all or substantially all its property or assets;

provided, *however*, that for all purposes of this Section 7(b), the creation and issuance, or an increase in the number of authorized or issued shares, of any other series of Preferred Stock ranking equally with or junior to the Series A Preferred Stock with respect to the payment of dividends (whether the dividends are cumulative or non-cumulative) or the distribution of assets upon liquidation, dissolution or winding up of the Corporation will not be deemed to adversely affect the rights, preferences, privileges or voting powers of the Series A Preferred Stock.

GLOSSARY[47]

"Certificate of Incorporation" means the certificate of incorporation of the Corporation, as it may be amended from time to time, and shall include this Certificate of Designations.

"Corporation" means Fight the Rona, Inc, a corporation validly organized and existing under the General Corporation Law of the State of Delaware.

"Preferred Stock" means any and all series of the preferred stock of the Corporation, including the Series A Preferred Stock.

"Senior Stock" means any class or series of capital stock of the Corporation ranking senior to the Series A Preferred Stock with respect to either or both the payment of dividends or the distribution of assets upon any liquidation, dissolution or winding up of the Corporation.

"Series A Preferred Stock" means the series of preferred stock, par value $0.01 per share, that this Certificate of Designations establishes.

[47] These defined terms appear in Rider A, so I define them here for your convenience. I expect the Corporation's Certificate of Designations will define each of these terms similarly.

APPENDIX A

CERTIFICATE OF INCORPORATION

OF

FIGHT THE RONA, INC.

* * * * *

ARTICLE 4
CAPITAL STOCK

Section 4.01. *Authorized Shares*.

(a) *Classes of Stock*. [Omitted]

(b) *Preferred Stock*. The Board of Directors is hereby empowered, without any action or vote by the Corporation's stockholders (except as may otherwise be provided by the terms of any class or series of Preferred Stock then outstanding), to authorize by resolution or resolutions from time to time the issuance of one or more classes or series of Preferred Stock and to fix the corresponding rights, preferences, privileges and restrictions, including dividend rights, dividend rates, conversion rights, voting rights, terms of redemptions, redemption prices and liquidation preferences with respect to each such class or series of Preferred Stock and the number of shares constituting each such class or series, and to increase or decrease the number of shares of any such class or series to the extent permitted by Delaware law.

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