

801.1(A)

Ovuka, Nancy M.

From: [REDACTED]
Sent: Wednesday, March 23, 2005 9:26 AM
To: Ovuka, Nancy M.
Cc: [REDACTED]
Subject: Fwd: Question regarding definition of "voting securities" in context of preferred stock issue

Nancy,
 I thought I'd follow up to see if you have any thoughts on the matter below. If you would like any further information, please let me know.

Thank you for your kind attention to this matter.

Best regards,

[REDACTED]

[REDACTED]

Date: Tue, 22 Mar 2005 10:37:13 -0500
 To: novuka@ftc.gov
 From: [REDACTED]
 Subject: Question regarding definition of "voting securities" in context of preferred stock issue
 Cc: [REDACTED]

Nancy,

Thank you for taking the time to review this matter.

As we discussed, our client is preparing to issue preferred stock styled as "Series A Preferred Stock." I would like to confirm with you that this Series A Preferred Stock would not be considered "voting securities" notwithstanding the fact that certain "trigger events," if occurring, will allow for the Series A holders to appoint a majority of the Board of the company.

The trigger events that would give confer voting rights upon the Series A Preferred Stock are as follows:

Trigger Event shall mean:

(A) the first to occur of: (i) the date that the Corporation has rejected the redemption rights of the Series A Preferred Stock, (ii) the date the Corporation notifies the Preferred Stockholders that the Corporation is otherwise unable or unwilling to fulfill its obligations to redeem the Series A Preferred Stock, including because of an actual or purported shortfall in funds legally available therefore, or (iii) if the Corporation fails to repurchase the outstanding Series A Preferred Stock that are required to be redeemed upon a Mandatory Redemption Date [which is 6 months after the first of (1) a date certain in 2014 or (2) the payment in full of certain debentures] for any reason;

(B) the failure by the Corporation or [a certain stockholder] to perform or observe any other covenant in the

Purchase Agreement or any ancillary documents that is continued for more than thirty (30) days and that is reasonably expected to have a material adverse effect on the Corporation, or otherwise have a material adverse effect on the Preferred Stockholders;

(C) any false or misleading representation or warranty by the Corporation in the Purchase Agreement that is reasonably expected to have a material adverse effect on the Corporation, or otherwise have a material adverse effect on the Preferred Stockholders;

(D) the failure by the Corporation or any subsidiary to make payments when due (which failure is continued beyond the cure period contained in the documents governing such payments or which has not been waived by the lender): (i) on any indebtedness or other security having a principal amount in excess of \$1,000,000; or (ii) which failure results in the acceleration of indebtedness which aggregates in excess of \$1,000,000;

(E) the voluntary or involuntary commencement of any proceeding against the Corporation or any Subsidiary, or filing any petition seeking relief, under Title 11 of the United States Code or any other Federal, state, or foreign bankruptcy, insolvency or similar law against the Corporation or any Subsidiary;

(F) an unsatisfied judgment against the Corporation or any of its Subsidiaries in excess of \$1,000,000;

(G) the failure of [a certain stockholder] to serve as Chief Executive Officer as a result of his death or Disability if a replacement, acceptable to the Required Preferred Stockholders in their sole and absolute discretion, is not found within six months after such death or Disability;

(H) the failure of [a certain stockholder] to serve as Chief Executive Officer as a result of a voluntary termination of employment;

(I) March 31, 2007, if any shares of the Series A Preferred Stock are still outstanding on such date;

(J) an IPO; or

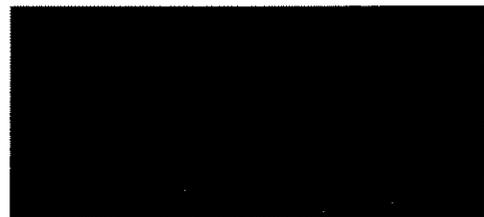
(K) any Liquidation for which certain debentures prohibit payment in full in cash of the Liquidation Value for the Preferred Stock.

Kindly confirm that our analysis is correct that none of these "trigger events" are certain, or virtually certain, to occur such that they would be considered "conversions" triggering a reporting obligation, and that this Series A Preferred Stock would not be deemed "voting securities."

I appreciate your assistance with this matter.

Best regards,





3/24
Agree w/ conclusion.
M. Verne
M. Verne concurs