

**China Privatization Fund (Del), L.P. v Galaxy  
Entertainment Group Ltd.**

2019 NY Slip Op 30804(U)

January 24, 2019

Supreme Court, New York County

Docket Number: 650587/2011

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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CHINA PRIVATIZATION FUND (DEL), L.P.,

Index No. 650587/2011

Plaintiff,

TRIAL DECISION

- against -

GALAXY ENTERTAINMENT GROUP LIMITED,

Defendant.

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**MASLEY, J.:**

To fund its development of a casino in Macau, China, defendant Galaxy Entertainment Group Limited (Galaxy) issued zero-coupon convertible bonds (the Bonds) to a consortium of institutional investors (the Consortium) in exchange for \$240 million.<sup>1</sup> (AUF ¶17).<sup>2</sup> The Bonds were convertible into shares of Galaxy's common stock traded on the Hong Kong Stock Exchange (HKSE) with a maturity date of December 4, 2011 using a formula in the December 14, 2006 Indenture (the Indenture). (JX 008).<sup>3</sup>

In December 2006, plaintiff China Privatization Fund (Del), L.P. (CPF), a member of the Consortium, purchased Bonds in the amount of \$50 million, which it converted into shares on February 18, 2011. (AUF ¶20 and 26). CPF received 52

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<sup>1</sup>United States dollars are designated by "\$" and "HK\$" denotes Hong Kong dollars.

<sup>2</sup>AUF refers to the parties' statement of agreed upon facts, dated October 3, 2017. The court disregards the parties' disputed facts submitted in violation of Part 48 Trial Rules ¶7.

<sup>3</sup>JX refers to joint party exhibits which were entered into evidence on consent and are submitted without any objection. Though each of the joint exhibits and additional party exhibits are time stamped, each entry in email chains is not. Some of the exhibits are duplicates.

million shares of Galaxy's common stock using a conversion rate of HK\$7.44 to convert Bonds to shares. (AUF ¶27).<sup>4</sup> CPF objects to Galaxy's conversion rate and asserts the correct rate is HK\$4.21, which would yield CPF 92.5 million shares instead of 52 million.<sup>5</sup> CPF demands the additional 40 million shares of Galaxy stock.<sup>6</sup>

The issue before the court is whether the parties agreed to a fixed floor, yielding a conversion price of HK\$7.44, as Galaxy contends, or a moving floor, yielding a conversion price of HK\$4.21, as CPF asserts.<sup>7</sup>

The court finds in favor of Galaxy, based on the following: the overwhelming credible evidence that establishes the negotiating parties' intent for the conversion price to move within a 20% band, creating a ceiling and floor; the absence of documentary evidence supporting CPF's theory of a 20-hour standoff culminating in the removal of the floor; the unacceptable violation of the HKSE's rules that would arise under CPF's theory; the credible testimony of William Barron, Esq., the Consortium's attorney responsible for drafting the Indenture; the consistent testimony of Galaxy's Deputy Chairman, Francis Lui, and a Consortium negotiator, Doug Ostrover, concerning a phone call occurring on December 5, sometime between 7:14 p.m. and 8 p.m. EST,

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<sup>4</sup>Converting CPF's \$50 million investment at the exchange rate of HK\$7.80, as agreed in the Indenture (JX 8 at p. 5), yields HK\$390 million which is divided by the conversion rate of HK\$7.44 resulting in 52 million shares.

<sup>5</sup>Under CPF's theory, the HK\$390 million, as calculated above, should be divided by the conversion rate of HK\$4.21 yielding 92.5 million shares.

<sup>6</sup>The difference between 92.5 million shares - 52 million shares. On February 18, 2011, the market price of Galaxy stock was HK\$ 10.58 per share. (JX 505).

<sup>7</sup>The competing calculations are illustrated in charts attached to this decision as exhibits A (Galaxy) and B (CPF). (NYSCEF Doc. Nos. 613 and 614).

concluding the deal,<sup>8</sup> and the subsequent course of performance of all parties consistent with the existence of a floor.

CPF's evidence is insufficient to establish a HK\$4.21 conversion price. The court rejects the testimony of Jamil Swati, a CPF witness and briefly a member of the Consortium. Swati's testimony was contradicted by his own contemporaneous emails and post-closing course of performance. Most significantly, he did not participate in the penultimate call with Galaxy. CPF's Mart Bakal also did not participate in the call and the court finds his testimony unreliable for a variety of reasons. Rather, Bakal's new reading of the conversion price was influenced by Tom Bratkovich, a financial consultant to California Public Employees' Retirement System (CalPERS), CPF's majority investor, who used CalPERS's awesome power to pressure Bakal into accepting HK\$4.21 instead of HK\$7.44 as the conversion price, CPF's current position. However, a different reading of the Indenture, five years later by persons not at the negotiating table, is not relevant to the intent of the drafters in 2006. The more than 500 documents in evidence do not support CPF's theory and CPF's attempt to stitch together emails, while creative, is not sufficient to prove its theory. Rather, when the emails and testimony are evaluated together, and in sequence, the evidence soundly establishes a HK\$7.44 conversion price.

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<sup>8</sup>Times are stated as Eastern Standard Time (EST) and where relevant or clarifying Hong Kong Time (HKT). HKT is 13 hours ahead of EST, and 12 hours ahead of Eastern Daylight Time (EDT), which is not relevant here because the negotiations occurred during EST. (AUF ¶6). Initially, the court relies on the time stamped on each document in evidence and calculates accordingly for email chains.

### Procedural History

In its March 4, 2011 complaint, CPF seeks judgment ordering Galaxy to specifically perform its alleged obligation to turn over to CPF the additional 40 million Galaxy shares. After unsuccessfully moving to dismiss the action, Galaxy appealed. The issue presented to the Appellate Division, First Department, involved the parties' competing interpretations of a key term in the Indenture, the "Initial Reference Price," a factor in the conversion formula. The Court affirmed the denial of Galaxy's motion to dismiss finding the term ambiguous. It explained:

"The dispute between the parties centers around whether the 'Initial Reference Price' remained a constant figure at HK\$7.80 per share during the eight Relevant Periods or was a changing figure based on successive applications of the formula in Section 13.08 (a). Under CPF's interpretation, the 'Initial Reference Price' was not constant, but rather, changed with each quarterly computation, and reflected the cumulative changes of all the past quarterly periods. Under Galaxy's interpretation, the 'Initial Reference Price' remained constant, unless adjusted pursuant to the provisions of sections 13.09 and 9.01, which are not applicable here. According to Galaxy, the definition of 'Initial Reference Price' mandates that any revisions made to the 'Initial Reference Price' pursuant to section 13.08 (a) do not adjust the 'Initial Reference Price' for purposes of determining the Revised Reference Price for subsequent Relevant Periods."

*(China Privatization Fund (Del) L.P. v Galaxy Entertainment Group Ltd., 95 AD 3d 769, 771 [1st Dept 2012]).*

The Court found that, since the Indenture's "language can be reasonably interpreted to support both Galaxy's and CPF's position" and the "contractual provisions at issue are drafted in a manner that fails to eliminate significant ambiguities," a triable issue of fact exists. (*Id.* at 772). The Court rejected CPF's literal reading of the Indenture, finding that neither interpretation was correct as a matter of law. (*Id.*) The Court's restatement of CPF's position does not signify acceptance, as CPF asserts

here. Rather, the Court directed a trial to resolve the ambiguity.

A trial was held in the fall of 2017 to determine which conversion price applies. In addition to 23 witnesses, some testifying in court (witness name Tr. page: lines) and their depositions, some only by direct trial testimony affidavit (DTT) (witness name DTT ¶) where the adversary had no cross examination,<sup>9</sup> and others by videotaped depositions (witness name Depo. page: lines), the court considered over 500 joint exhibits and even more party exhibits (PX or DX). Post-trial briefs were also filed. All the trial evidence is now before this court. Evidence not addressed in this decision is deemed irrelevant to the issue presented here and such evidence is not afforded any weight.

### Contentions

CPF contends that when Galaxy's anticipated equity deal with a strategic partner for \$200 to \$500 million failed, the Consortium successfully leveraged Galaxy's desperation for funds to close the convertible bond deal, the only deal available, with more favorable terms. According to CPF, the deal hung in the balance during a 20-hour period at the conclusion of which Galaxy agreed to a moving floor. Without a fixed floor, the revised conversion price would be HK\$4.21.

Galaxy denies that it was ever desperate for funds, and thus, the Consortium had no such leverage as CPF contends. Rather, Galaxy contends that the parties agreed to a band within which the conversion price would go up to a cap and down to a floor during a specific period linked to Galaxy's construction phase. Galaxy maintains that using the formula as intended by those who negotiated it in 2006, the revised conversion price is HK\$7.44, not HK\$4.21. Accordingly, Galaxy insists that CPF is not

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<sup>9</sup>Testifying witnesses began by swearing to DTTs.

entitled to more shares and the case should be dismissed.

### Background

Galaxy is a publicly traded company listed on the HKSE since 1991. (AUF ¶3). The Lui family is the majority owner of Galaxy, controlling more than 50% of outstanding shares. (Bakal DTT ¶10; JX 7, 134, 368). Galaxy grew from the K. Wah Group, founded in the 1950s as a construction materials company. (Bakal DTT ¶11). It became a property investor, builder of “dozens of successful apartment and office buildings, and owner of hotel properties.” (JX 385 p. 1; Bakal DTT ¶¶ 10, 11). In 2005, the corporate name was changed to Galaxy Entertainment Group Ltd. (JX 385).

In 1979, Francis Lui began working at the family’s construction business, following his U.S. education and training as a civil engineer, eventually becoming Galaxy’s Deputy Chairman. (Lui DTT ¶¶1, 2, 3).

In 2002, the Chinese government awarded Galaxy one of three Macau gaming licenses. (Lui DTT ¶4). Galaxy’s joint venture with the American Sands Hotel and Casino (Sands) to develop casinos in Macau fell through. (Bakal DTT ¶11). Nonetheless, Galaxy proceeded to open three casinos in Macau from July 2004 to April 2006. (Lui DTT ¶5). In late 2005, Galaxy issued \$600 million in bonds to finance this development. (*Id.* ¶10). In September 2006, it opened its first casino on Macau’s newly reclaimed Cotai strip. (*Id.* ¶5). In October 2006, Galaxy opened its “flagship entertainment complex StarWorld Hotel” in downtown Macau. (*Id.*). By the end of 2006, Galaxy was operating five Macau facilities with 500 gaming tables. (*Id.* See also JX 11, 78, 104, 148).

Following a career in real estate investments, Bakal founded Crimson Capital, a financial consulting firm, focusing on emerging markets in 1991. (Bakal DTT ¶¶2, 4).

Bakal has worked in China since 1994 and established Crimson Capital China, Inc. (CCC) “for the purpose of investing in Chinese companies.” (Bakal DTT ¶¶6, 7). CCC is the general partner of CPF; Bakal manages both, for which he is compensated based on profits.<sup>10</sup> (Bakal DTT ¶¶5, 20). Bakal and CalPERS formed CPF at the time of this deal. (Bakal DTT ¶17). CPF has eighteen limited partners, the largest of which is CalPERS, “which committed to invest \$100,000,000 in CPF.” (Bakal DTT ¶6; AUF ¶2). Bakal became interested in investing in Macau during a family vacation, following the 2004 opening of a casino by Sands, the “first Las Vegas-style resort casino to open in Macau.” (Bakal DTT ¶¶9, 10). Soon thereafter, he orchestrated a meeting with Lui and would visit Galaxy regularly to pitch deals. (Bakal DTT ¶10; Carter DTT ¶5)

Galaxy endeavored to build a luxury casino, hotel resort, and entertainment complex called the “Galaxy Cotai Mega Resort” with a projected opening in early 2008. (AUF ¶10). On January 26, 2006, Bakal, on behalf of unnamed investors, contacted Lui proposing a potential investment in Galaxy. (See JX 367). Roland To, Galaxy’s Director of Strategic Planning, responded that Galaxy agreed (1) to a three-month exclusive negotiation period beginning March 6, 2006, (2) that Galaxy would deal with the investors through Bakal, and (3) that Bakal was to clear all potential business partners through Galaxy to prevent conflict of interest since Galaxy was already in contact with Harrah’s.<sup>11</sup> (*Id.*). Roland To wrote “[a]s for your request to allow your group to investment [sic] in [Galaxy] shortly before, or concurrently with, us entering into any agreement with the business partners, we shall try to accommodate your request

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<sup>10</sup>Galaxy paid Bakal \$1 million to assemble this deal and he split a 1% underwriting fee with an investment bank. (Bakal Tr. 217:18-20; JX 388).

<sup>11</sup>Harrah’s was the largest U.S. casino operator at the time. (Bakal DTT ¶13).



but please be aware that we are required to comply with the rules, in particular those of the [HKSE].” (*Id.*). This agreement was extended several times. (See e.g. JX 386).

Bakal initiated meetings between Lui and Harrah’s between 2004 and 2006 which terminated by November 2006 unsuccessfully because Harrah’s wanted eventual control of Galaxy’s casinos, a proposition totally unacceptable to the Lui family. (Bakal DTT ¶13; Lui DTT ¶10; AUF ¶12). From 2006 to 2011, Bakal worked exclusively for CPF and Galaxy was 99% of CPF’s portfolio. (Bakal Tr. 277:4-6; 332:9-11). Bakal was well aware of the Lui Family’s abhorrence for loss of control of Galaxy and its aversion to dilution. (Bakal DTT ¶14). Late in 2006, Bakal suggested a deal with GSO and Fortress, U.S. investment funds. (Lui DTT ¶11). Galaxy agreed since a deal with six highly successful hedge funds would demonstrate Galaxy’s strength. (JX 346; see also Ostrover Depo., 35:24-36:6; Carter DTT ¶5).

### **The Indenture and Purchase Agreement**

The parties negotiated the \$240 million deal in 15 days, round the clock, and around the world. Ultimately, the Consortium was comprised of the following institutional investors:<sup>12</sup> CPF (\$50 million); Merrill Lynch Far East Limited (Merrill) (\$25 million) (for Fortress Investment Group (Fortress)); JP Morgan Securities (\$55 million); Plainfield Asset Management (Plainfield) (\$25 million); GSO (\$55 million) and Canyon Capital Advisors LLC (Canyon) (\$30 million), though all members of the Consortium were not initially involved in negotiations. (AUF ¶20).

The deal’s terms are set forth in two documents. The first is an Indenture. Its relevant provisions include:

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<sup>12</sup>For example, in 2005, Ostrover, and others, founded GSO, an asset management firm specializing in junk bonds, companies with credit ratings below BBB. (Ostrover Depo., 9:10-12, 135:2-12).

“Cap Price’ means the then applicable Initial Reference Price.” (JX 8, p. 3)

“Conversion,” “Conversion Date,” “Conversion Shares”, “Conversion Period,” “Conversion Price,” have the meaning is set forth in Section 13. (JX 8, p. 4).

“Floor Price’ means the then applicable Initial Reference Price multiplied by 0.79487 rounded to the nearest two decimal places.” (JX 8, p. 5).

“Initial Conversion Price’ means the then applicable Initial Reference Price multiplied by 1.20.” (JX 8, p. 6).

“Initial Reference Price’ means HK\$7.80 per share initially, subject to adjustment pursuant to Section 13.09 and Section 9.01 (but without giving effect to any adjustment pursuant to Section 13.08).” (JX 8, p. 6).

Article 9 addresses the effects of a Galaxy merger.

Section 13.04 establishes the number of shares an investor receives upon converting its Bond depending on the Conversion Price as defined in the Indenture. It distinguishes Initial Conversion Price (13.04(a)) and Revised Conversion Price (13.04(b)). (JX 8, p. 79). Specifically, it provides:

“*Conversion Price*. The price at which shares will be issued upon conversion (the **Conversion Price**) will be:

(a) to the extent a Holder exercises its Conversion Right with respect to a principal amount of Notes that have been called for redemption by the Issuer pursuant to Section 12.01, the then applicable Initial Conversion Price translated into U.S. dollars at the Fixed Exchange Rate with respect to such principal amount of Notes; and

(b) in all other cases, the then applicable Revised Conversion Price translated into U.S. dollar at the Fixed Exchange Rate.

The Conversion Price shall at all times be subject to adjustments in Section 13.09.”

Section 13.08 provides for the Reset Mechanism. It describes the manner in

which market changes impact the Conversion Price. (JX 8, p. 81). Specifically, Section 13.08 provides:

“(a) If the average Market Price for the Shares for any of the eight 13-consecutive week periods (each, a ‘**Relevant Period**’) beginning on the Issue Date and ending prior to the second anniversary of the Issue Date is lower than the then applicable Initial Reference Price, then the then applicable Initial Reference Price shall be revised at the beginning of the next Relevant Period and be for such next Relevant Period the greater of (x) such average Market Price for the preceding Relevant Period and (y) the Floor Price, and such then applicable Initial Reference Price as so revised shall constitute the Revised Reference Price for such next Relevant Period, subject to adjustment pursuant to Section 13.09(h) and Section 9.01.”

(b) If the average Market Price for the Shares for any Relevant period is equal to or greater than the then applicable Initial Reference Price, then the then applicable Initial Reference Price shall be revised at the beginning of the next Relevant period and be for such next Relevant Period the lesser of (x) such average Market Price for the preceding Relevant Period and (y) the Cap Price, and such then applicable Initial Reference Price as so revised shall constitute the Revised Reference Price for such next Relevant Period, such to adjustment pursuant to Section 13.09(h) and Section 9.01.

(c) The Revised Reference Price in effect on the date immediately prior to the second anniversary of the Issue Date shall constitute the Revised Reference Price for all purposes thereafter, subject to adjustment pursuant to Section 13.09(h).

Section 13.09 entitled “Adjustments of Initial Reference Price” details adjustments for distributions of shares, consolidations, reclassifications, conversion, capital distributions, issues of shares, or exchanges.

A change of control provision was added to the Indenture on December 5 at 3:17 p.m EST pursuant to which the Consortium could force Galaxy to re-purchase the Bonds if the Lui family sells all or part of Galaxy, though it was agreed to prior to 6:11 a.m. EST. (JX 8, p. 75, 184, 236, 238).

The other document relevant to the Bond deal is a Purchase Agreement which

sets forth how much each Consortium member would invest. (JX 3). Paragraph 1 provides: "the notes are convertible into ordinary shares, par value HK dollars \$.10 per share (the Shares), of the company (the Underlying Shares) at the initial conversion price or the revised conversion price, as the case may be set forth in the notes." (*Id.*). Significantly, paragraph 5(g) provides: "the stock exchange of Hong Kong shall have agreed to list the underlying shares." (*Id.*).

### **Negotiating and Drafting History**

The evidence establishes a time line of the following events, culminating in the alleged denouement -- a phone call between Lui and Ostrover.<sup>13</sup>

Negotiations began on Sunday, November 12, when Bakal emailed Jamil Swati of Fortress and Ostrover of GSO proposing an equity investment of \$250 million to finance Galaxy's new Cotai resort. (JX 81). Bakal explained that Galaxy was already working with two investment banks on a private placement of \$500 million to close within the month of November. (*Id.*). Bakal also mentioned Lui's requests to (1) close in two weeks and (2) increase the investment from \$250 to \$500 million. (*Id.*).

On Sunday, November 19, Bakal, Anthony Carter, CEO of Galaxy, and Roland To met with the Consortium in New York for a full day to discuss a potential investment in Galaxy. (Lui DTT ¶¶11, 12; Carter DTT ¶1). They discussed structural features, but no final agreements were made. (Swati Tr. 78:20). Swati and Ostrover led the negotiations on behalf of the initial investors of the Consortium which were: CPF, GSO, Fortress, Plainfield, and Canyon.<sup>14</sup> (Swati Tr. 88:5-8; 88:21-23; AUF ¶13). The

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<sup>13</sup>Events described herein occurred in 2006 unless stated otherwise.

<sup>14</sup>The Consortium negotiators were located in New York, except Canyon which is headquartered in California. (Soon Pho Affidavit, Jan. 11, 2006, ¶2).

Consortium proposed a five-year zero coupon convertible bond. (Bakal DTT ¶¶19; Swati Tr. 79:2-4). Swati had experience with convertible bonds, but not all members of the Consortium did. (Bakal DTT ¶¶21).

A convertible bond is a hybrid instrument that confers advantages to both the issuer and buyer; the issuer can sell equity at a premium and the buyer is protected in the form of seniority as a credit instrument. (Swati Tr. 92:7-15). One of the justifications for the convertible bond structure instead of an equity investment was the accounting requirement to "mark to market." (JX 152; Bakal DTT ¶¶ 20). With equity, an investor's balance sheet must be regularly updated to reflect changes in stock price. (Bakal DTT ¶¶20). Debt "allows the investor to avoid writing down the investment if the stock price declines." (Bakal DTT ¶¶19). A related benefit of the convertible bond is that debt gets paid off before equity in bankruptcy. (Bakal DTT ¶¶19).

During this initial meeting in New York, Galaxy recommended that the Consortium engage Barron of Davis Polk & Wardwell LLP (DPW), as deal counsel, and they immediately did so. (Bakal, Tr. 229:2-8; JX 210). Barron was one of the leading transactional lawyers in Hong Kong. (Norman DTT ¶¶20). Barron became the principal drafter of the term sheets and the Indenture. (Bakal Tr. 230:25-231:2). He was assisted by associate Jason Pan, Esq. (JX 382). White and Case represented Galaxy. (JX 230).

The next day, Bakal confirmed that Galaxy agreed to issue \$200 to \$300 million in convertible bonds and would also pursue a parallel \$200 million equity deal. (JX 456). Bakal assembled the parties to the deal and communicated with Lui day and night. (JX 103, 152, 210, 366). He worked from GSO's conference room in New York. (Bakal DTT ¶¶3). He did not lead the negotiations and was admittedly unfamiliar with

convertible bonds. (Bakal DTT ¶¶25, 21). Indeed, Swati declared in an email to Ostrover “we’ve actively taken over the process.” (JX 455).

As of November 2006, Galaxy had a market capitalization of over \$3.5 billion and cash on hand of \$520 million. (Lui DTT ¶6). Galaxy owned undeveloped land on Macau’s Cotai Strip, valued at over \$1 billion. (JX 128, p. 00108973; JX 148). “[G]ross revenue and EBITA in 2006 were more than US\$600 million . . . and \$56 million . . . respectively.” (Lui DTT ¶6). However, Standard & Poor’s credit rating for Galaxy was reported as B+, five levels below investment grade, or speculative. (JX 17). Over 3 billion shares of Galaxy stock were outstanding with a share price around HK\$8.39. (JX 148, 233, 389). The Lui family controlled 51.8% of the shares. (JX 78).

Galaxy engaged David Norman, Esq., a Hong Kong attorney who specializes in regulatory matters involving HKSE listing rules. (Norman DTT ¶¶ 1, 2, 5). The HKSE’s rules require “listing approval” before a listed company could issue shares and regulated the number of shares that a listed company could issue with or without a shareholder vote. (Norman DTT ¶9). Under no circumstances could a listed company issue more than 20% of the issued capital in existence at the time the shareholders approved a new issue called a “mandate.” (*Id.*) “Any shares issued in derogation of this approval would have been unlisted and thus illiquid.” (*Id.* ¶16). To adequately inform the shareholding public of the implication of a convertible bond, an HKSE announcement must disclose the maximum number of shares that stood to be issued. (*Id.* at ¶¶ 10, 17).

On November 30, Galaxy confirmed that the maximum number of shares that could be issued when the Bond converts would be less than Galaxy’s general mandate. (Norman DTT ¶15; JX 387). The shares for the 2011 conversion would come from

Galaxy's June 2006 new issue of stock when Galaxy's shareholders approved issuance of 658 million shares, equal to 20% of the existing 3 billion shares, consistent with HKSE rules. (JX 152, 398).

The Consortium had been monitoring Galaxy well before this deal. (See e.g. Ostrover Depo., 138:15). While they had studied Galaxy for some time and viewed Galaxy as undervalued, the Consortium was concerned about "a company with limited casino management experience could actually finish the casino on time and operate it effectively." (Bakal DTT ¶19; JX 11). They knew Galaxy lacked management experience in gaming and the stock was thinly traded in an emerging market making it a speculative investment; the Consortium's area of expertise. (Swati Tr. 64:2-6; JX 103). However, the Consortium also knew that Galaxy was land rich. (Swati Tr. 148:14). GSO evaluated Galaxy as underperforming "relative to its peers [] driven in part by the lack of experienced gaming management team. We believe if the company is able to enter a strategic alliance with a gaming operator, the company should track more in-line with the comps." (JX 148). Critical to the Consortium's strategy was to help Galaxy find a strategic partner. (Ostrover Depo., 52:10-22, 53:9-12). Eventually, liquidity would improve and the Consortium would sell the shares at a profit. (Ostrover Depo., 38:2-39:18).

While Galaxy was weak on the gaming management side, it was by all accounts a tough and talented negotiator. (See e.g. Ostrover Depo., 70:24; 74:3-5; 147:22-148:12). To address the investors' concerns about a decline in Galaxy's stock, and the accounting requirement to regularly mark to market, the parties discussed a reset provision. (Bakal DTT ¶21). "If Galaxy's price declined, an investor would get more shares when the investor converted its bonds into Galaxy stock." (Id.). "The reset was

intended to make the conversion price move along with Galaxy's stock price during" Galaxy's projected two-year construction phase of the resort. (Bakal DTT ¶22). The reset feature was GSO's "big goal;" "in the first 2 years there will be a quarterly reset of the conversion price down 20% which will hopefully allow for the paper to be continue to marked at par as long as stock does not go below 6.40." (JX 182). Galaxy's only concern with the reset was "what moves down also has the right to move back up to the starting point." (JX 97).

From the beginning of negotiations, the Consortium was hyper-focused on the reset mechanism for conversion of the Bonds into shares. Initially, Swati proposed the following terms for the deal: (1) 20-25% floor equals 6 to 6.5 HKD; (2) resets at certain times or on dilution events; (3) the effect of a forced conversion on stock price; (4) a three-year call premium; and (5) no lock up provisions applied to Consortium Investors on common issuance as the reset provision provides a hedge. (Monday, November 20, JX 162). Notably, Swati reminded the investors "reset means new conversion price, not new reference price to which a conversion premium is added (so this is a serious/painful issue on which we'll get a fair amount of push back im sure)." (JX 163). On December 1, in preparation for a conference call with Galaxy, Canyon circulated a list of 17 topics for the Consortium to discuss of which seven concerned the reset mechanism and two had to do with dilution. (JX 344). Later the same day, Bakal reported that while the Consortium expected the common share price to rise, it fought hard for the reset mechanism and protection against dilution. (JX 103).

While the Consortium focused on reset, Galaxy focused on protecting its control. However, the reset's floor, which put a limit on the number of shares the Consortium could convert, also protected Galaxy. (Nusbaum Depo., 48:17-21). All parties were



concerned about dilution. (Barron Depo., 322:15-20).

The first proposed term sheet circulated on Tuesday, November 21. (AUF ¶14). It included a fixed floor, providing an "Initial Reference Price" of HK\$8.00, and a reset mechanism for a minimum "Revised Reference Price" of HK\$6.50. (JX 91). It provided for dilution-related adjustments and required conformance with HKSE rules. (Id.). The Consortium designated Barron as the person who could explain language and intent. (JX 92).

Fortress, and thus, Swati, the Consortium's expert on convertible bonds, withdrew from negotiations on Wednesday, November 22 because Fortress had "offshore" investors that barred Fortress from making loans and the Bond could be characterized as an impermissible loan. (JX 147).<sup>15</sup>

GSO's John Nusbaum was a member of the Consortium's deal team, reported to Ostrover, and coordinated the investors, particularly after Swati stepped back. Nusbaum was GSO's "point guy," who was involved in negotiations day-to-day. (Ostrover, Depo., 24:18-25:5). Nusbaum communicated with Barron on behalf of the Consortium. (Nusbaum Depo., 36:20-37:8. See also JX 129, 107).

Barron circulated a draft of the Indenture based on the November 29 term sheet.<sup>16</sup> (JX 100). Barron cautioned "[p]lease also note that there are still some technical problems to work out. The key problem is that we really have two conversion prices, one based on the reset and one that is not. As a result, it is complicated to

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<sup>15</sup>Swati closely monitored the negotiations. A review of all JX emails after Fortress's withdrawal, shows that Swati was copied on more than 50% of the emails circulated during the critical negotiating period prior to the notification of the unsuccessful equity deal.

<sup>16</sup>Initially, a note was drafted, but an indenture was substituted on December 3. (JX 231).

make the adjustment events work properly. We will sort it out.” (*Id.*). By Thursday, December 1, the attorneys addressed ambiguities in the definitions of “revised conversion price” and “revised reference price.” (JX 382).

As the Consortium and Galaxy came to agreements, the attorneys would modify the documents accordingly. For example, on a conference call on December 4 at 12:15 a.m. HKT, Roland To and Nusbaum agreed to a floor price floating between \$6.18 and \$6.32 and the attorneys followed up with an email summarizing the agreements to be reflected in the deal documents. (JX 233, Dec 4 at 3:22 a.m. HKT, Dec. 3 at 2:22 p.m. EST). Nusbaum apparently took the lead on collecting investor input and making sure it was reflected in the term sheet. (JX 91).

Meanwhile, Barron and Pan tinkered with the definitions of “cap,” “floor,” and “initial reference price,” throughout the process. For example, on December 2 at 11:04 a.m. EST, the Indenture defined “Floor Price” as “HK\$ 6.20 per Share initially, subject to adjustment pursuant to section 9(i) and section 13(a).” (JX 105). The next day, December 3 at 12:22 p.m. EST, the definition of floor price became “the Initial Reference Price multiplied by .78.” (JX 106). By 6:12 p.m. HKT (5:12 a.m. EST) “Initially” was added to “Initial Reference Price.” (JX 118). According to the draft Indenture circulated on December 5 at 11:39 a.m. EST, Barron added “then applicable” to the definitions of “cap” and “floor.” (JX 3). Barron’s intention was always to simplify. He explained “let’s just come up with one formulation and try to use it throughout the document. And we decided ‘then applicable,’ . . . was the formulation that they would use. And it’s really as simple as that.” (Barron Depo., 352:20 to 24).

The Consortium monitored the drafts during the negotiation and demanded explanations for changes particularly to the reset mechanism. For example, the

Consortium challenged a provision deleted by DPW entitled "Adjustment to the Cap and Floor." (JX 107, Dec. 3 at 1:19 p.m. EST). Responding to Canyon's concerns about the process in which investor changes were incorporated into the Indenture, Nusbaum explained that "[DPW] revised [the] definition of cap & floor to include meaning in the deleted clause" to make the document more efficient. (JX 107). The Consortium directed DPW to protect the cap and floor. (JX 234). Barron responded that it modified the definitions making them a percentage of the adjusted reference price. (*Id.*). Barron assured the investors that there was "no need for adjustments now because of the slight change to the definitions i.e. they are a percentage of the ref price, which is adjusted." (*Id.*). However, the negotiations outpaced the attorneys' documentation.

By all accounts, the process was chaotic. For example, on December 4 at 10:42 a.m. HKT, Pan was circulating a draft with changes made since the 1:22 a.m. HKT draft. (See JX 108). On December 3 at 2:26 p.m. EST, Canyon objected to the process of making changes to the documents without investors signing off on changes. (JX 107). On December 3 at 10:07 p.m. EST, Canyon observed that Galaxy is supposed to be making an announcement this morning with issues remaining. (JX 117, Dec. 4 at 11:07 a.m. HKT). "This has been one of the worst run processes." (*Id.*). Pan complained that "things are constantly changing on the note which is a little frustrating since you'd think this would be buttoned down by now." (JX 235). Galaxy's Carter would later describe it as "3 weeks of tortuous negotiations." (JX 346).

Meanwhile, Norman circulated drafts of the HKSE announcement to be issued when the deal closed. (Norman DTT ¶12). To ensure the accuracy of the announcement, Norman copied all parties on emails circulating drafts. (Norman DTT ¶19). He warned all parties:

"the provisions of the Securities and Futures Ordinance which amongst other things ... imposes sanctions for misleading announcements or other communications on all concerned in them. It is important that information provided is true accurate and not misleading and breach of the Ordinance may be a criminal offence." (JX 119).

All participants were responsible for a clear announcement as evidenced by the 2006

"Shanghai Land" scandal resulting in the arrests of professional advisors for misstatements and omissions in a HKSE announcement. (Norman DTT ¶¶16, 17).

Since the HKSE could also suspend trading of Galaxy stock for misstatements or omissions, all the parties, not just Galaxy, had an interest in ensuring the accuracy of the announcement. (*Id.*). Otherwise, the market for Galaxy stock would be illiquid.

(*Id.*). DPW was significantly involved in drafting of the announcement to the exchange too. (JX 89, 120, 122, 222). Norman was copied on drafts of the Indenture and timely advised of changes as they occurred. (Norman DTT ¶21; JX 3, 118, 120, 122). DPW's comments to the draft announcement demonstrate careful, close attention. (JX 120, 122). Other participants commented on the draft announcements as well. (See JX 120, email from Herbert Smith LLP representing JP Morgan).<sup>17</sup>

It appeared that both deals were coming to an end. On Sunday, December 3 at 11:41 a.m. EST, DPW reported that the Purchase Agreement was done. (JX 232). According to Nusbaum, "all biz points have been agreed." (Dec. 3 at 2:26 p.m. EST, JX 107). Meanwhile, it was widely rumored in the market that Galaxy would find a strategic partner. (JX 183).

A conference call for all parties to discuss next steps was scheduled for December 4 at 2:15 a.m. HKT. (JX 133, Dec. 3 at 1:15 p.m. EST).

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<sup>17</sup>JP Morgan was the underwriter for the failed equity deal. (JX 113, 119, 473). When the equity deal collapsed, JP Morgan joined the Consortium. (Roland To Depo., 293:22-294:6).

However, late Sunday evening, December 3 (beginning 8:53 p.m. EST), Canyon discussed internally, extracting a change of control provision from Galaxy. (JX 464 and 117). The change of control provision grants investors the right to sell back their shares at par to Galaxy in the event the Lui family sells their majority stake in the company. (Lui Tr., 660:16-20). Canyon acknowledged that it was extremely late in the process, but this was a standard provision. (JX 183). Around midnight, EST, Nusbaum notified Barron of a deficiency in the note because there was no change of control provision. (JX 129). Roland To recalled that Lui was upset on a conference call with Fortress, GSO, and Bakal because they requested a change of control provision. (Roland To Depo., 295:37- 297:2). Lui admitted to being annoyed during a conference call when investors asked for a change of control provision at the last minute. (Lui DTT ¶17). He also admitted feeling insulted in light of the Lui family's commitment to Galaxy and their efforts to retain control of Galaxy. (Lui Tr. 661:4-9).

At Galaxy's request, in anticipation of an important corporate finance announcement, Galaxy's trading on the HKSE was suspended on the morning of Monday, December 4 HKT. (Sunday, Dec. 3 EST; JX 185, 390).

**Monday, December 4, 2006 EST**

Galaxy agreed to the change of control provision, and, at 6:11 a.m. EST, Canyon thanked Galaxy for its understanding. (JX 184). Pan circulated a revised draft of the Note incorporating the change of control provision. (JX 236, Dec. 4 at 6:37 a.m. EST, Dec. 4 at 7:37 p.m. HKT). At this stage, Pan sought to finalize the "commercial terms" and move on to ensure "the mechanics work." (JX 463, Dec. 4 at 6:58 a.m. EST).

Significantly, Galaxy's parallel equity deal failed. (JX 185). At 1 a.m. HKT

Merrill, which had been advising Galaxy on the equity deal, met<sup>18</sup> with Galaxy to discuss the options available following the collapse of the equity deal, both of which involved going back to the Consortium to increase the amount of the Bond. (JX 474,<sup>19</sup> Tuesday, Dec. 5 at 1:19 a.m. HKT and Dec. 4 at 12:19 p.m. EST). Galaxy agreed to decide how to proceed by "7am/8am HKT Tues (6pm/7pm NYT Mon)....[Galaxy's] goal is to finalize everything on the option they decide on and complete all docs during the day Tuesday HKT [December 5]." (JX 474 at GAL00000602\_0003). By Tuesday, 7:30 a.m. HKT, Galaxy had delivered the news to the Consortium and Galaxy decided to proceed with the Bonds only. (JX 465 at 002, Dec. 4 at 6:29 p.m. EST)

MELCO, a Galaxy competitor, was blamed for marketing a much larger IPO and possibly bad mouthing Galaxy in its presentations. (JX 114, 474). Lui insists that the failed equity deal did not cause any additional pressure on Galaxy as it had a strong balance sheet and \$520 million in cash. (Lui DTT ¶16). Swati opined that the convertible bond deal was more attractive without the equity deal because it made the surviving security scarce, but it also created pressure on Galaxy to announce something when trading resumed. (JX 468). Regardless of the cause or effect, the Consortium wanted concessions from Galaxy.

By the afternoon, there were separate conversations among the Consortium

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<sup>18</sup>The court takes judicial notice that video conferencing was in its infancy in 2006 and concludes the meeting was in person.

<sup>19</sup>This email chain begins with a reference to Merrill's 1 a.m. HKT meeting with Galaxy on Tuesday, December 5. However, this part of the email chain is not time stamped. From the content and the similarity of the headers for the first three emails in the chain, it is clear that the date stamps refer to HKT. The parties designate GMT for the last email in the chain. However, the initial 1 a.m. cannot refer to GMT since conversion from 1 a.m. GMT results in December 4 at 8 p.m. EST and December 5 at 9 p.m. HKT which is inconsistent with the content of the email message.

members. Swati discussed the news that the equity deal was “dead” and recommended “extracting concessions (lower reset floor, possibly removal of HKD8.00 reset giveback) if we want to be larger...” (JX 468, 12:50 p.m. EST<sup>20</sup>; see also JX 185, Dec. 4 at 1:41 p.m. EST). Canyon summarized the “common threads” of the various conversations: “(1) lower initial reference price (HK dollar 7.5 or below) and lower conversion premium (maybe 10%/SH); (2) take restricted payments language to eliminate dividends; (3) PIK coupon of 3% to 5%; (4) possibly adjust floor and reset mechanism (maybe even 11 eliminate upward reset mechanism) and (5) adjust mandatory conversion window to 1/3, 1/3, and 1/3 in years two, three, and 3+.” (JX 465, Dec. 4, 3:06 p.m. EST). Canyon suggested a conference call among the Consortium to harmonize deal points. (*Id.*). Bakal and GSO would be going back to Galaxy to renegotiate. (JX 113). Galaxy, Bakal, and GSO held a conference call at 6:30 p.m. EST on December 4. (JX 467).<sup>21</sup>

The next contemporaneous email from Canyon reports on the call and analyzes the current situation:

“Mart and GSO have talked to the company and the company will not budge an inch. They did not even talk about potential changes to the deal. They are at an impasse. In the company’s mind, they will come back to the market within several months and do an equity deal (which has different dynamics and risks than if they did a concurrent deal today). Mart and GSO said they would want any future equity deal to result in a dilution adjustment to our convert and the company said “no” B/C they still view it as “concurrent” – which doesn’t make sense to me. Mart and GSO

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<sup>20</sup>The parties agree that the last email in this chain was sent on Dec. 4 at 11:31 p.m. EST and Dec. 5 at 12:31 p.m. HKT.

<sup>21</sup>The contemporaneous emails from Canyon and Merrill, are consistent as to events and times and corroborate the time line set forth in this decision. For example, Merrill references Galaxy’s call, “late last night,” to inform the Consortium of the failed deal and references an anticipated call between Galaxy and the Consortium Tuesday morning (HKT). (JX 474 at 002, Dec. 5 at 7:29 a.m. HKT, Dec. 4 at 6:29 p.m. EST).

may go back and compromise to get a partial dilution adjustment (on some portion of the future equity deal) but they appear to be ready to proceed based on the current (unchanged) deal terms. They have \$155 million of commitments within the group and JPM said they can place \$55 million to get a total of \$210 million. Mart and GSO want to know where we stand. I still think it's OK although obviously not as attractive as if we had changed some of the terms. Right now, there's a game of chicken going on b/c if the company doesn't do anything after having their stock suspended, I think their stock will fall to the low HK\$7 ish area. At the same time, we do still have the reset mechanism (Albeit it can be reset back up) but it does provide some degree of downside protection, which is what it was designed to do in the first place. I still think it's an attractive long-term option (still good up/down more b/c I think the downside is very limited, although I do personally believe in Macau long-term) but maybe we should reduce our order, maybe to \$30 million"

(JX 114, Dec. 4 at 7:49 p.m. GMT, Dec. 4 at 10:49 p.m. EST, Dec. 5 at 11:49 a.m. HKT).<sup>22</sup>

On Monday evening, a dial-in-number was circulated for a conference call to begin in 15 minutes. (JX 190 and 467, Dec. 5 at 7:12 a.m. HKT, Dec. 4 at 6:12 p.m. EST).

### **Tuesday, December 5, 2006 EST**

Merrill reported that the parties are negotiating about the size of the deal; e.g. \$155, \$240 million, or something else. (JX 474, Dec. 5 at 12:10 a.m. EST, Dec. 5 at 1:10 p.m. HKT)

At 12:27 a.m. EST, Canyon agreed to invest \$30 million after Galaxy agreed to a "marginal" concession, a dilution adjustment on a portion of a future equity deal, a term sought by GSO and Bakal. (JX 189). Swati reported to the Fortress team that the "only change in terms: company allowed to raise up to \$300m in single equity offering within six months, \$150m of that without dilution adjustments." (JX 155, Dec. 5 at 12:30

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<sup>22</sup>The initial email in this chain is time-stamped "Mon, Dec 4 19:49:38 2006." The parties agree that the last email in this email chain, of this joint exhibit, was sent by Canyon on Dec. 5 at 4:21 a.m. GMT; Dec. 4 at 11:21 p.m. EST; and Dec. 5 at 12:21 p.m. HKT.



a.m. EST).

At 12:12 a.m. EST, Pan circulated a draft Indenture subject to investor review and comments, which includes the change of control provision. (JX 116, p. 4099). At 3:17 a.m. EST, Pan circulated a revised Indenture noting that "commercial terms are still being negotiated," but that this draft should be updated to include the change of control provision that was agreed upon the day before. (JX 238).

At 5:12 a.m. EST, Pan circulated a revised Indenture in which the term "Floor Price" was defined as "the Initial Reference Price multiplied by .79487 rounded to the nearest two decimal places." "Initial Reference Price" was modified since 1:22 a.m. HKT to read "HK\$7.80 per Share initially, subject to adjustment pursuant to Section 9 and Section 13(a) (but without giving effect to any adjustment pursuant to Section 7)." (JX 118). Except for changing the note to an indenture, the definition remained the same in the final draft. (JX 3, 8).

At 11:39 a.m. EST, Pan circulated the Indenture attached to the execution version of the Purchase Agreement containing the final commercial terms and asked when to exchange signature pages. (JX 3). The definitions of "Cap Price" and "Floor Price" are modified by adding "then applicable." (*Id.*).

At 11:56 a.m. EST, Lui's signature pages were emailed. (DX 504). At 11:59 a.m. EST, Pan acknowledged receipt of signature pages. (JX 503). "We now have an executed PA." (*Id.*).

At 3:10 a.m. HKT on December 6 ( Dec. 5 at 2:10 p.m. EST), Merrill reported a call from Nusbaum who declared that the parties had reached a deal "with \$7.8 reference price and a floor of slightly below 80% but keeping the current reset and most of the anti-dilution adjustment mechanism up to US\$100mm. Total deal size of

US\$210mm.” (JX 474). It also reported that the Consortium and Galaxy were discussing “loose ends,” but expected to sign the agreement in the evening of Tuesday, December 5 (GMT/EST). (*Id.*).

At 5:52 p.m. EST, Bakal emailed Nusbaum, “[a]s we agreed earlier, I called Doug at 5:30 and tried Francis on his mobile. There was no answer so I sent an MSS to his phone. I will try again at 6 PM and every 30 minutes. If this point is important to Francis he will call back.” (PX 52). At 6:06 p.m. EST, Nusbaum emailed Ostrover: “[a]ny read on timing for a call with Francis?” “Mart calling Francis now.” (PX 52). At 7:14 p.m. EST, responding to Nusbaum’s request to “stay in touch on deal progress,” Bakal advised that Francis would be calling later. (JX 475).

At 8:08 p.m. EST, Canyon questioned the mechanics of the dilution adjustment. (JX 506). At 8:21 p.m. EST, Canyon opined that given the exchange of signature pages, Galaxy will not agree to any more changes. (*Id.*).

At 8:31 p.m. EST, Ostrover declared “We are done!” (JX 476). Nusbaum responded “Mart said the call went great. I knew you would have no problem sealing it...” (*Id.*).

Finally, on Tuesday, December 5 at 12:32 p.m. EST, White and Case acknowledged receipt of all signature pages to the Purchase Agreement and Subscription Agreements and declared “[d]eal signed.” (DX 502, 503, 504, Dec. 6 at 1:32 a.m. HKT). It bound Galaxy to issue the Bonds based on those final commercial terms. (JX 3 at 7089, §4). There is no mention of a last minute change.

#### Hong Kong Stock Exchange

On December 6, the HKSE requested disclosure of the “full conversion at the Floor Price.” (JX 131). Galaxy responded that the floor price would yield 251,612,903

shares [\$240 million x HK\$ 7.8 (exchange rate)/\$7.44 (conversion price)]. (JX 132).

Since the shareholders approved a general mandate in June 2006 for 658,929,872 shares, Galaxy had sufficient shares to cover the conversion. (JX 398). Galaxy added that it used the worst case scenario, the "lowest conversion price should be HK\$6.20 x 1.2 or in other words, HK\$7.44." (JX 133). On December 13, Galaxy confirmed this number as Galaxy's exposure, not the over one billion shares that CPF now asserts. (JX 226).

On December 6, Pan circulated a "final draft" of the HKSE announcement for all participants to "sign off on." (JX 121). Norman reminded Galaxy, investors, and deal counsel of their potential liability for accuracy and omissions. (JX 227). On December 6 at 10:54 p.m., Galaxy issued a press release with the HKSE announcement which noted a conversion price "floor" of HK\$7.44. (JX 135). It explained the "[r]evised Conversion Price (based on the Floor Price) is the minimum conversion price," and that at such price of HK\$7.44 a maximum of 251,612,903 shares would be issued. (JX 134 at 563). The term "initially" was not included in the definition of Initial Reference Price in the announcement. (Norman DTT ¶¶25). Norman opined that its omission was consistent with the HKSE rule requiring plain language and that it was not misleading since the announcement correctly reported that the Initial Reference Price could be adjusted for dilution, but not affected by the reset mechanism. (Norman DTT ¶¶26). The same is true with regard to the terms "Cap Price," "Floor Price" and "then applicable." (Norman DTT ¶¶27, 28).

On Thursday, December 7 at 10:21 a.m. HKT, trading resumed. (JX 134).

On Thursday, December 14, the Indenture was signed after the HKSE granted listing approval. (JX 8, JX 226 at 353-355).

### Post Closing Activities

Neither in the initial communications after the deal closed, nor those for months or years after, was there a mention of the dramatic change asserted by CPF. Rather, the parties consistently stated and valued the Conversion Price following Galaxy's chart (exhibit A to this decision) and the values therein.

For example, the next day, Nusbaum emailed Roland To because "we pressed hard. We pressed very hard at one point and we had a call and worked overnight with them and we got a concession, and on that basis, they went and sealed the deal." (Nusbaum Depo., 101:25-102:6, JX 199). Nusbaum explained that the concession was a dilution carve out, not a reset with no floor. (Nusbaum Depo., 252:18-253:13).

Other members of the Consortium recall a hard floor. (Burley Depo., 20:13-21). The investors uniformly applied a fixed floor to analyze the conversion price. For example, after the closing, Plainfield issued an investment memorandum with a "[F]loor of HK\$6.20."<sup>23</sup> (JX 78). Canyon converted the Bonds to shares on March 28, 2011 at HK\$7.44. (AUF ¶29). Monthly, to mark to market, GSO evaluated its investment based on a Conversion Price of \$7.44. (Ostrover Depo., 108:17-109:14). In a due diligence memoranda to a prospective investor, GSO noted that the reset mechanism would reset "down to a floor of 6.20." (JX 128).

Likewise, Bakal consistently reported that there was a floor price to his son, his partners, and his investment committee. (JX 10, 11, 17).

Galaxy consistently updated the Conversion Price consistent with exhibit A. (JX 18, 337, 338, 339, 341, 404, 435, 439, 442, 498; Roland To Tr. 791:19-797:6).

"In 2008, the global financial crisis led to a decline in the economy and by

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<sup>23</sup>HK\$6.20 X 1.2 is HK\$7.44.

October 2008 the Galaxy share price hit a low of around HK\$0.56 (US\$0.072).” (Richard Harris, DTT ¶20). In March 2009, GSO sold its Bonds back to Galaxy without converting to shares. (AUF ¶25). In April 2009, Fortress returned its Bonds to Galaxy without converting to shares. (AUF ¶24; JX 361). Of the \$240 million Bonds, Galaxy converted \$165 million into shares, uniformly employing a Conversion Price of HK \$7.44. (JX 79; 442, 446).

### Bakal and CalPERS

On October 6, 2010, Stuart Friedman, CPF’s accountant, proposed a different interpretation of the Indenture for calculating the conversion price. (Bakal Tr. 339:2-9). Bakal responded that his notes and understanding confirm that “HKD \$6.24” is the Floor Price based on an Initial Reference Price of HK \$7.80. (JX 38). Bakal stated that “I am delighted if the Initial Reference Price is lower.” (JX 7).

Around September 2010, Bakal’s relationship with CalPERS began to deteriorate beginning when CPF refused to provide additional funding to invest in companies identified by Bakal. (Bakal Tr. 432:7-21). Bakal responded by issuing a default notice and threatening CalPERS with litigation. (*Id.*) CalPERS demanded that Bakal suspend all CPF investment activity. (Bakal Tr. 433:13-21; JX 141). By January 7, 2011, CalPERS’s lawyers were “ready for war” with Bakal. (JX 40).

Bakal advised Friedman that Tom Bratkovich, a consultant for CalPERS, threatened that “hell would break loose” if CPF did not cancel the default notice it issued to CalPERS. (JX 40). CalPERS threatened to “audit the Fund for closing and distribute shares of Galaxy as soon as possible.” (*Id.*) Bakal asked Friedman for a written explanation showing how he calculated the conversion price. (JX 41). This conversion theory would become CPF’s position. On February 3, 2011, Bratkovich, writing to

others at CalPERS, explained that Bakal was “strongly incentivized” to raise the conversion price issue with Galaxy “for the sake of [Bakal’s] own pocket-book.” (JX 49). Bratkovich further advised that Bakal “may need support if there is dispute” and that despite Bakal’s relationship with Galaxy, the relationship “should be tested” to ensure that CalPERS’s interests are well-represented. (*Id.*).

Bakal agreed to present CalPERS’s conversion price theory to Galaxy. In February 2011, Bakal wrote to Galaxy stating that “[t]he lawyers and accountants in the US have a very different [conversion] price.” (JX 54). The “lawyers and accountants” to which Bakal referred were Stuart Friedman and Tom Bratkovich, the architects of CalPERS’s alternative conversion price theory. (Bakal Tr. 297:11-18). On February 21, 2011, Bakal advised Galaxy that he was “not prepared to accept \$7.44 as the conversion price.” (JX 441).

#### **Findings of Fact and Conclusions of Law**

CPF has failed to satisfy its burden to prove that Lui and Ostrover agreed to a moving floor. CPF’s evidence is circumstantial, at best, which is not enough to resolve the ambiguity in its favor. Rather, based in the following findings of fact and conclusions of law, the court finds that the parties clearly agreed to a framework set forth in the Indenture yielding a Conversion Price of HK\$7.44 and consistent with the Purchase Agreement.

Where ambiguity has been found as a matter of law, an examination of available extrinsic evidence is necessary, not optional. (*Union Carbide Corp. v Affiliated FM Ins.*, 16 NY3d 419, 425 [2011]). The parties’ intentions control. (*SR Int’l Bus Ins. v World Trade Ctr. Props LLC*, 467 F3d 107, 125 [2d Cir 2006]). Courts may consider extrinsic evidence as to “the surrounding circumstances existing when the contract was entered

into, the situation of the parties and the subject matter of the instrument and parol evidence may be admissible to clear up any ambiguity in the language employed.” (*Korff v Corbett*, 18 AD 3d 248, 251 [1st Dept 2005] [citations omitted]). However, extrinsic evidence may not be used to alter, change, or excise terms in the agreement. (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 435-36 [2013]). The interpretation of the ambiguity cannot be “absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.” (See *Lipper Holdings, LLC v Trident Holdings LLC*, 1 AD3d 170, 171 [1st Dept 2003]). Here, ambiguity exists as to the terms “then applicable” and “initially” in the definitions of “Initial Reference Price,” “Cap Price,” and “Floor Price.”

The “best evidence of intent is the contract itself.” (*Gary Friedrich Enterprises LLC v Marvel Characters, Inc.*, 716 F3d 313, 314 [2d Cir 2013]). However, the court rejects CPF’s assertion that, because the evidence is equivocal, the court must interpret the contract in CPF’s favor as a matter of law. Evidence at trial is equivocal. If a decision could have been made as a matter of law, then surely Justice Oing or the First Department would have done so. Rather, the purpose of a trial is to sift through the evidence, here 23 fact witnesses and over 500 exhibits, assess credibility, evaluate the contradictory evidence, and resolve the dispute.

The court rejects CPF’s trial testimony. While counsel’s presentation was professional and trial skills superb, the evidence is simply insufficient. Bakal relies on a comment made by each of Galaxy’s Carter and Ostrover. While Nusbaum’s email at 8:49 p.m. EST (JX 476) corroborates Bakal’s testimony that he had a conversation during which Ostrover reported that Lui agreed to something, it does not report the content of that communication. Ostrover testified that Lui agreed to the deal, not a new

reset. There is no corresponding call or email to Barron or any other lawyer to modify the documents to reflect the alleged dramatic change and Barron credibly denies receiving such a call. Finally, Bakal admitted that Ostrover never stated that Lui agreed to (1) change the Reset Mechanism to a moving floor; or (2) to eliminate the Upper Reset. (Bakal Tr. 247:16-24). Carter advised Bakal that "we'd get the deal done." (Carter DTT ¶31). Bakal incorrectly infers meaning that is simply not in the words of either Ostrover or Carter. Bakal's recollection of what others said and what the speakers intended is complete conjecture.

The court finds Bakal's testimony unreliable. The court observed that his testimony was, at times, inconsistent and uncertain. For example, he testified that perhaps it was Ostrover who demanded a moving floor or perhaps not. (Bakal Tr. 241:15-242:12; 346:10-15). Bakal's trial testimony demonstrated a weak understanding of the two alternate proposals at issue in this case. He consistently made mistakes, i.e. the lowest conversion price is \$6.40 plus 20%. (See JX 5). He was confused as to whether Carter or Lui was Galaxy's CEO. (Bakal DTT 9, 29). Bakal did not come to his current reading of the reset mechanism until long after the relevant negotiation period making it suspect since it was incentivized by CalPERS's threats. Bakal actively noted and applied a Conversion Price of HK\$7.44 for years until CalPERS threatened Bakal's own financial interests. Bakal caved after CalPERS's relentless pressure. (Bakal Tr. 354:22-26, 355:9-20; 355:26-356:2-11, 435:21-437:436:2, JX 49). (See e.g. JX 7, Dec. 30, 2010 Bakal email to accountant regarding "management rep letter-compilation" in which he stated "I might have this wrong ...). Accordingly, the court is compelled to discount Bakal's testimony.

The court rejects Swati's testimony, as well. First, Swati's fresh adoption of



CPF's position is informed by his current reading of the Indenture. (Swati Tr. 132:7). Swati effectively adopts one of the two conflicting interpretations that are the basis of the First Department's finding of ambiguity. However, a witness's statement of a party position does not make it so and is not relevant evidence. (*Sally v Sally by Magee*, 225 AD2d 816, 818 [3d Dept 1996] [parties' respective interpretations of a stipulation is not relevant extrinsic evidence]). Swati's concurrence with one of the options does not give that option more weight.

Second, there is no corroboration of Swati's belief, wish, or understanding; it was never advanced and cannot be given any weight. "One party's subjective interpretation of contract, which was not communicated to other party until litigation commenced, cannot be used to establish that parties had such intent and understanding when they entered the contract." (*LaSalle Bank Nat'l Ass'n v Nomura Asset Capital Corp.*, 424 F3d 195, 207, n. 10 [2d Cir 2005] [applying New York law, citation omitted]; see also *Murray Walter Inc v Sarkisian Brox*, 183 AD2d 140, 146 [3d Dept 1992] [a unilateral expression of one party's post-contractual subjective understanding of the terms of the agreement is not probative to interpret the contract]). Swati allegedly dropped out of the negotiations immediately after the first term sheet circulated on November 22. Swati is copied on many of the circulated drafts demonstrating that he closely monitored negotiations. However, even before the equity deal failed, Swati was participating in negotiations. For example, he participated in a call with Galaxy on December 4 after midnight EST during which Lui was upset about the change of control provision. (Roland To Depo., 293:25-297:2; see also JX 184, 467, 468, 185). Indeed, Swati testified extensively about Lui's upset during this call. Therefore, Swati's view is either not relevant to the court's determination of the negotiators' intent because he was not a

participant or he violated the rules of his firm, at least, undermining his credibility.

The reliability of Swati's recollection is also questionable. The court finds that Swati was confused as to which phone call he participated when Lui became upset. All other participants testified that the call was much earlier and had to do with change-of-control. While faulty recollection is not surprising after twelve years, the court is compelled to conclude that Swati's testimony is not reliable.

Finally, Swati's testimony was ambivalent, and at times, inconsistent. Asked directly whether there was a last minute change to a moving floor, Swati responded "There may have been." (Swati Tr. 130:20-23). While Swati had no recollection of anyone demanding a moving floor, agreeing to a moving floor, creating a document noting that Galaxy agreed to a moving floor, or any deal participant stating that the floor price could move below HK\$6.20, Swati admitted that such a dramatic change from a fixed floor to a moving floor would be "huge." (Swati Tr. 186:24-188:11; 131:2-3). Nevertheless, there is no contemporaneous documentation to support his view. For example, after the December 4 call with Galaxy, Swati did not update the Investment Committee at Fortress of any changes to the fixed floor. Instead, Swati's update consisted of only a few changes, none of which involved a moving floor. (Swati Tr. 168:11-20).

The two participants of the call dispute CPF's contention that the floor was removed at the last minute. Lui denies it. Lui rejected that there was ever any discussion anything other than a hard floor. (Lui Tr. 672:5-9). Lui was upset by the lateness of the request for a change of control provision and insulted because implicit in the request is a failure to appreciate the Lui family's reputation as "long-term owners of businesses." (Lui Tr. 661:4-9). Indeed, at the time of Canyon's request for the

provision and Galaxy's agreement, the equity deal had yet to fail. That news came soon thereafter.

Ostrover testified credibly that the final deal did not contain a moving floor. He explained that he was not aware of anyone demanding a floor that could drop below HK\$6.20. (Ostrover Depo., 69:4-14; 69:20-70:3). Indeed, Ostrover never heard of a floor price that was not fixed. (Ostrover Depo., 20:2-13, 69:4-14). Ostrover explained that such a dramatic concession would have required an update to GSO's Investment Committee memorandum and other due diligence materials. (Ostrover Depo., 75:19-25). No updates were made. Ostrover, has no recollection of the dramatic denouement call with Lui or anyone else. (JX 184, 185, 467, 468).

Ostrover denied that he led the negotiations, but he was admittedly active behind the scenes as he cared about but a few seal terms, such as downside protection which was provided by the reset mechanism. (Ostrover Depo., 20:2-13). In light of his laser focus on this one issue, the court finds that Ostrover would have remembered removal of the reset mechanism's floor. Ostrover explained that "it wouldn't make a lot of sense" because "in this case, the stock going from 8 to 60, you would have to cover a \$250 million convert and you might have to give up 80 percent of the company" because of dilution. (Ostrover Depo., 197:6-15). Since GSO had divested the bond and shares well before February 2011, he had no pecuniary interest in testifying one way or the other. The court notes that it found Ostrover to be a most credible and reliable witness.

Barron's credible testimony is also critical to this decision. He was in regular contact with the investors. There was always a fixed floor which was well understood and not controversial. (Barron Depo., 325:11-14). The floor price and initial reference price could only adjust for dilution. (Barron Depo., 279:9-11). The evidence

overwhelmingly demonstrates the client would communicate the deal terms directly to him. He vividly remembered adding “subject to” because did not want to keep referring to §9. (Barron Depo., 315:8-317:16). He was not aware of CPF’s alternate reading until February 2011. (Barron Depo., 268:14-17).

CPF’s interpretation of the Indenture is contradicted by Barron, the Consortium’s own attorney who was responsible for negotiating legal terms and drafting the Indenture consistent with the business decisions made by the investors and CPF. Barron testified that the intended structure was a fixed Initial Reference Price subject only to dilution adjustments. (Barron Depo., 274:6-275:10, 271:8-17). The fixed Cap Price and fixed Floor Price derive from the fixed Initial Reference Price, and, thus, bound the conversion price by a set 20% range. (Barron Depo., 273:12-24; 266:25-267:5). Accordingly, the reset mechanism does not change the Initial Reference Price – rather, the “revision” in Section 13.08 creates a new price, the Revised Reference Price, which can move both up and down between the fixed cap and floor. (Barron Depo., 281:9-23, 283:11-21).

The court also rejects CPF’s contention that the words “then applicable” in the definition of Floor Price created a moving floor. Barron explained that his decision to include “then applicable” in the definition of Floor Price was motivated by two reasons: (1) to harmonize drafting inconsistencies in the Indenture as it relates to dilution events and (2) to address concerns about dilution. Barron testified that earlier drafts of the Indenture had inconsistent language. For example, in one paragraph, it would say “the applicable initial conversion price” or “the initial conversion price” or “the then applicable initial conversion price” – all in the same paragraph. (Barron Depo., 352:8-24). To harmonize the inconsistent language, Barron settled on one formulation to use

throughout the document. Barron decided 'then applicable' would be the operative formulation. (*Id.*). Barron explained that the words "then applicable" in the definition of Floor Price shows that the Floor Price can be adjusted for dilution purposes. (Barron Depo., 352:8-24). Investors are "absolutely paranoid" about dilution adjustments. (Barron Depo., 322:15-20). Barron chose the words "then applicable" to emphasize the potential for defined prices to change as a result of dilution." (Barron Depo., 278:4-11; 351:23-352:24).

Barron's explanation of his drafting practice and intent also undermines CPF's challenged language as part of Galaxy's grand scheme to covertly create a floor after agreeing to remove the floor in the final call with Ostrover and Lui. The court credits Barron's testimony on this point and finds that "then applicable" was added, as a measure of technical clarity, to distinguish adjustments based on dilution only.

Likewise Barron testified that with the term "initially" in the definition of Initial Reference Price. Barron explained that the term was intended to address the point that HK\$7.80 was subject to adjustment for, again, dilution events only. (Barron Depo., 276:2-8). Barron explained that the Reset Mechanism merely creates a new Revised Reference Price within a predetermined range limited on the downside by the floor price. (Barron Depo., 281:9-23; 283:11-21). The court declines to interpret the addition of "initially" as anything other than showing that it was subject to dilution. "It's that simple." (Barron Depo., 351:23-352:24).

Since Barron was not on the final call between Lui and Ostrover, the absence of any communication to Barron, or his associate Pan, following the alleged transformative call informs this decision. Barron was never directed to incorporate a floor price that could move. (Barron Depo., 270:21-271:6). As the drafter of the document, the court

gives great weight to Barron's testimony.

CPF's position is also at odds with the statements, course of performance and understandings of nonparties. Merrill reported in a contemporaneous email that parties were addressing "loose ends." (JX 474). Removal of the floor at the last minute would hardly constitute a loose end. Another inconsistency is that minutes before Ostrover declared "We're done," Canyon was studying the dilution adjustment, not the reset. (JX 506). Finally, when asked about a moving floor, the court noted Búrley's confused look which spoke volumes.

Based on the disclosure requirements of the HKSE, the court rejects CPF's interpretation. Under CPF's model of a conversion price of HK\$4.21, Galaxy would need to issue 1.248 billion shares of Galaxy stock. However, Galaxy had authority to issue up to 658 million shares or 20% of 3.294 billion outstanding shares. (JX 398). Likewise, CPF's theory would also violate the Purchase Agreement which required Galaxy to get necessary shareholder approval before closing. A result that violates the Purchase Agreement and the HKSE rules is commercially unreasonable. (*See Lipper Holdings LLC, supra*).

The court rejects CPF's interpretation that Galaxy knowingly entered into a contract that violated HKSE rules, risking potential criminal liability. (See Norman DTT ¶¶ 18-19). The court cannot construe the Indenture to yield an interpretation that would contravene the HKSE rules. (*See Turner Constr Co*, 85 AD2d 325, 332 [1<sup>st</sup> Dept 1982] (construe ambiguous contract to avoid illegality)). While the HKSE rules do not bind the investors, as CPF insists, the Purchase Agreement required HKSE approval. The court finds that in light of HKSE rules, Galaxy would never have agreed to a moving floor.

The court discounts Galaxy's few mistakes as compared to the many correct

declarations of the Conversion Prices. (JX 480). Implicit in CPF's argument is that Galaxy's "mistakes" were not mistakes at all, but that Galaxy orchestrated a grand conspiracy to will the floor back from its disappearance into being by consistently issuing statements contrary to its last minute change. CPF accuses the Consortium of blindly following Galaxy's pronouncements of the Conversion Prices. To establish such a conspiracy theory, CPF must show more than a few mistakes. Moreover, the evidence compels the court to reject the idea that the Consortium - extremely sophisticated investors - blindly relied on others.

Accordingly, the court is compelled to focus on the intent and course of performance of the negotiating investors, attorney drafters, and Galaxy. Testimony from witnesses possessing no competence as to the intent of the negotiating parties need not be considered. (*DeRoche v Methodist Hosp. of Brooklyn*, 249 AD2d 438, 439 [2d Dept 1998]). However possible CalPERS's calculation, now CPF's position, may be, CalPERS was not involved in the 2006 negotiations or drafting of the Indenture. Likewise, the court rejects CalPERS "post hoc interpretation as legally irrelevant." (*Alfin, Inc. Pac Ins Co*, 735 F Supp 115, 120 [SDNY 1990]).

Contract construction rules compel the same result. The court must give meaning to all words and avoid an interpretation that causes meaninglessness. (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC* 149 AD3d 127, 133 [1<sup>st</sup> Dept 2017]). Likewise, the court must harmonize if possible so as not to leave any provision without force and effect. (*Id.*). Interpretations that render any language "mere surplusage" are to be avoided. (*FCI Grp, Inc.* 54 AD3d 171, 176 [1<sup>st</sup> Dept 2008]).

CPF's interpretation impermissibly renders the cap meaningless. Galaxy's Roland To explained that the reset mechanism must have a hard lower bound and must

also allow the conversion price to move back up if Galaxy's share price increased. (Roland Tr. 42:21-43:13). John Nusbaum concurred. (Nusbaum Depo., 94:4-7). Bakal admitted that the parties intended that the conversion price could move both up and down (Bakal Tr. 318:4-15), but CPF's position renders the upward reset inoperable. (Bakal Tr. 318:19-319:6). Indeed, at trial, Bakal could not credibly reconcile his interpretation with the upward reset, which undermined his reliability. CPF's expert witness, Greg Nachtwey, likewise testified that under CPF's theory, the Conversion Price could not move upward. (Nachtwey Tr. 490:3-492:3; 493:4-18). However, Galaxy's interpretation gives distinct meaning to distinct terms. (Barron Tr. 273:25-275:10; 279:12-21; 288:23-289:20). The upward reset works.

The conduct of the deal participants exemplifies the global understanding of the parties' intent that the floor was fixed. "The best evidence of the intent of parties to a contract is their conduct after the contract is formed." (*Waverly Corp. v City of New York*, 48 AD3d 261, 265 [1<sup>st</sup> Dept 2008]). All the parties at the table, including Bakal, understood the Conversion Price to be HK\$7.44.

The court has concerns about an ambiguous convertible bond unleashed in the market. For markets to perform efficiently, markets must be open, fair, and transparent and investors must have certainty that a security means what it says. The issuer of an indenture has an awesome responsibility to ensure the language of a financial instrument projected into the market is crystal clear. However, the court must reject CPF's theory because a moving floor would create its own unique uncertainty. For example, without a floor, Galaxy could not have calculated the worse case scenario to respond to the HKSE's inquiry regarding the maximum exposure arising from conversion.



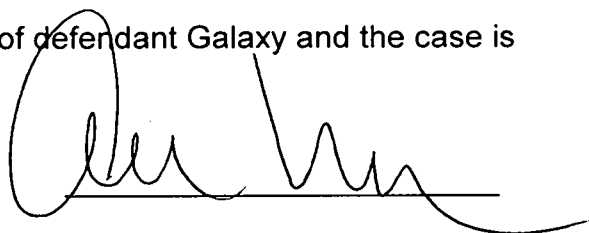
Galaxy's Indenture was ambiguous. CPF urges that such an ambiguity should be read against the issuer - Galaxy - relying on *Sass v New Yorker Tower, Ltd*, 23 AD2d 105,108 (1st Dept 1965). However, this was not a negotiation where borrowers and lenders have no connection. Galaxy did not control the Indenture's language. (See *Lefrak Org, Inc v Chubb Custom Ins Co*, 942 F Supp 949, 952 [SDNY 1996]). Rather, it was highly negotiated by sophisticated investors, and, thus the behavior of the negotiators after the execution is critical. (See *Citibank, NA v 666 Fifth Ave Ltd P'ship*, 2 AD3d 331 [1<sup>st</sup> Dept 2003]). Accordingly, the court rejects CPF's reliance on the *Contra Proferentem* doctrine and analogous cases. (*Sass v New Yorker Towers, Ltd*, supra).

The court also rejects CPF's reliance on the times at which Lui executed signature pages. First, the evidence is equivocal. There were a number of documents for which signatures were required and it was not always clear which pages were referenced in testimony and emails. Second, the pages were held in escrow. When Lui signed the pages is irrelevant.

Transactions evolve and, on occasion, once-rejected terms are later adopted. The final Indenture here, however, reflects the reset mechanism as proposed from the beginning, with a cap and a floor; the framework remained the same throughout. There was no last minute change to the reset mechanism.

Accordingly, the court finds in favor of defendant Galaxy and the case is dismissed.

Dated: Jan 24, 2019



J.S.C.  
**HON. ANDREA MASLEY**  
J.S.C.

**Number of Shares at Conversion based on Galaxy's Understanding**

*Figures in HKD Unless Otherwise Stated*

Period	End Date	Initial Reference Price / Cap Price	Floor Price	Average Market Price	Revised Reference Price	Revised Conversion Price	Total Shares if Converted	CPF Shares if Converted
		(A)	(B) = (A) * 0.79487 (rounded)	(C)	(D) = (C) but bounded by (A) and (B)	(E) = (D) * 1.2 conversion premium	(F) = 240m ÷ ((E) ÷ 7.8)	(G) = 50m ÷ ((E) ÷ 7.8)
<b>Issue Date</b>	<b>12/14/2006</b>	<b>\$7.80</b>	<b>\$6.20</b>		<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>
Relevant Period 1	3/14/2007	\$7.80	\$6.20	\$7.98	\$7.80	\$9.36	200,000,000	41,666,666
Relevant Period 2	6/13/2007	\$7.80	\$6.20	\$7.74	\$7.74	\$9.29	201,506,997	41,980,624
Relevant Period 3	9/12/2007	\$7.80	\$6.20	\$7.62	\$7.62	\$9.14	204,814,004	42,669,584
Relevant Period 4	12/12/2007	\$7.80	\$6.20	\$7.97	\$7.80	\$9.36	200,000,000	41,666,666
Relevant Period 5	3/12/2008	\$7.80	\$6.20	\$6.39	\$6.39	\$7.67	244,067,797	50,847,457
Relevant Period 6	6/11/2008	\$7.80	\$6.20	\$5.56	\$6.20	\$7.44	251,612,903	52,419,354
Relevant Period 7	9/10/2008	\$7.80	\$6.20	\$3.71	\$6.20	\$7.44	251,612,903	52,419,354
Relevant Period 8	12/10/2008	\$7.80	\$6.20	\$1.06	\$6.20	\$7.44	251,612,903	52,419,354
<b>Final Conversion Price</b>	<b>12/10/08 forward</b>	<b>\$7.80</b>			<b>\$6.20</b>	<b>\$7.44</b>	<b>251,612,903</b>	<b>52,419,354</b>

Sources and Notes:

- [A] "'Initial Reference Price' means HK\$7.80 per Share initially, subject to adjustment pursuant to Section 13.09 and Section 9.01 (but without giving effect to any adjustment pursuant to Section 13.08)."; "'Cap Price' means the then applicable Initial Reference Price." JX 8 (Indenture) Section 1.01.  
**There were no dilution adjustments pursuant to Section 13.09 and Section 9.01 during any Relevant Period.**
- [B] "'Floor Price' means the then applicable Initial Reference Price multiplied by 0.79487 rounded to the nearest two decimal places." JX 8 (Indenture) Section 1.01.
- [C] Statement of Agreed Facts ¶ 22
- [D] "'Revised Reference Price' shall be determined pursuant to, and have the meaning specified in, Section 13.08."; JX 8 (Indenture) Section 1.01, Section 13.08(a) and (b) ("Reset Mechanism").
- [E] "'Revised Conversion Price' means the Revised Reference Price multiplied by 1.20." JX 8 (Indenture) Section 1.01.
- [F] The number of shares that would be issued if the full US\$240,000,000 of Notes were voluntarily converted into Galaxy common stock (at a fixed US\$1.00/HK\$7.80 exchange rate per JX 8 (Indenture) Section 1.01).  
**See also JX 134 (Hong Kong Stock Exchange Notice, 12/6/2006) at GEG\_000017562 (Conversion Right) and GEG\_000017565 (Effects of Conversion on Issued Share Capital of the Company); JX 341 (Galaxy notices to Trustee, last one dated 8/26/2010).**
- [G] The number of shares that would be issued if CPF's US\$50,000,000 were voluntarily converted into Galaxy common stock.

*Exhibit A to 1/24/19 decision*

**Number of Shares at Conversion based on Plaintiff's Interpretation**

*Figures in HKD Unless Otherwise Stated*

Period	End Date	Average Market Price	Then Applicable Initial Reference Price	Floor Price	Revised Reference Price	Conversion Price (HKD)	Converted Shares
	[A]	[B]	[C]=[D]-1	[D]=[C]*0.79487	[E]=min([C], max([B], (D)))	[F]=[C]*1.2	[G]=ROUNDDOWN(50,000,000*7.8/[F],0)
<b>Issue Date</b>	<b>12/14/2006</b>	<b>\$ 7.80</b>	<b>\$ 7.80</b>			<b>\$ 9.36</b>	<b>41,666,666</b>
Relevant Period 1	3/14/2007	\$ 7.98	\$ 7.80	\$ 6.20	\$ 7.80	\$ 9.36	41,666,666
Relevant Period 2	6/13/2007	7.74	7.80	6.20	7.74	9.36	41,666,666
Relevant Period 3	9/12/2007	7.62	7.74	6.15	7.62	9.29	41,979,720
Relevant Period 4	12/12/2007	7.97	7.62	6.06	7.62	9.14	42,646,476
Relevant Period 5	3/12/2008	6.39	7.62	6.06	6.39	9.14	42,646,476
Relevant Period 6	6/11/2008	5.56	6.39	5.08	5.56	7.66	50,893,905
Relevant Period 7	9/10/2008	3.71	5.56	4.42	4.42	6.67	58,460,365
Relevant Period 8	12/10/2008	1.06	4.42	3.51	3.51	5.30	73,529,411
<b>Final Revision Date</b>	<b>12/12/2008</b>	<b>\$ 0.76</b>	<b>\$ 3.51</b>			<b>\$ 4.21</b>	<b>92,592,592</b>

Sources and Notes:

- [A] Galaxy Entertainment Group Limited and The Bank of New York Indenture, Execution Version, Dec. 14, 2006, §13.08(a), p. 81.
- [B] Bloomberg Data
- [C] Galaxy Entertainment Group Limited and The Bank of New York Indenture, Execution Version, Dec. 14, 2006, §13.08(a), p. 81.
- [D] Galaxy Entertainment Group Limited and The Bank of New York Indenture, Execution Version, Dec. 14, 2006, §13.08(a), p. 5.
- [E] Galaxy Entertainment Group Limited and The Bank of New York Indenture, Execution Version, Dec. 14, 2006, §13.08(b), p. 82.
- [F] Galaxy Entertainment Group Limited and The Bank of New York Indenture, Execution Version, Dec. 14, 2006, p. 12.
- [G] The number of shares that would be received if the Note were converted into Galaxy's common stock.  
 The Fixed Exchange Rate is defined as \$1 USD to \$7.80 HKD. See Galaxy Entertainment Group Limited and The Bank of New York Indenture, Execution Version, Dec. 14, 2006, p. 5.  
 Fractions of conversion shares will not be issued. See Galaxy Entertainment Group Limited and The Bank of New York Indenture, Execution Version, Dec. 14, 2006, §13.03, p. 79-79.

Exhibit B to 1/24/19 decision

FILED: NEW YORK COUNTY CLERK 01/28/2019 02:55 PM

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