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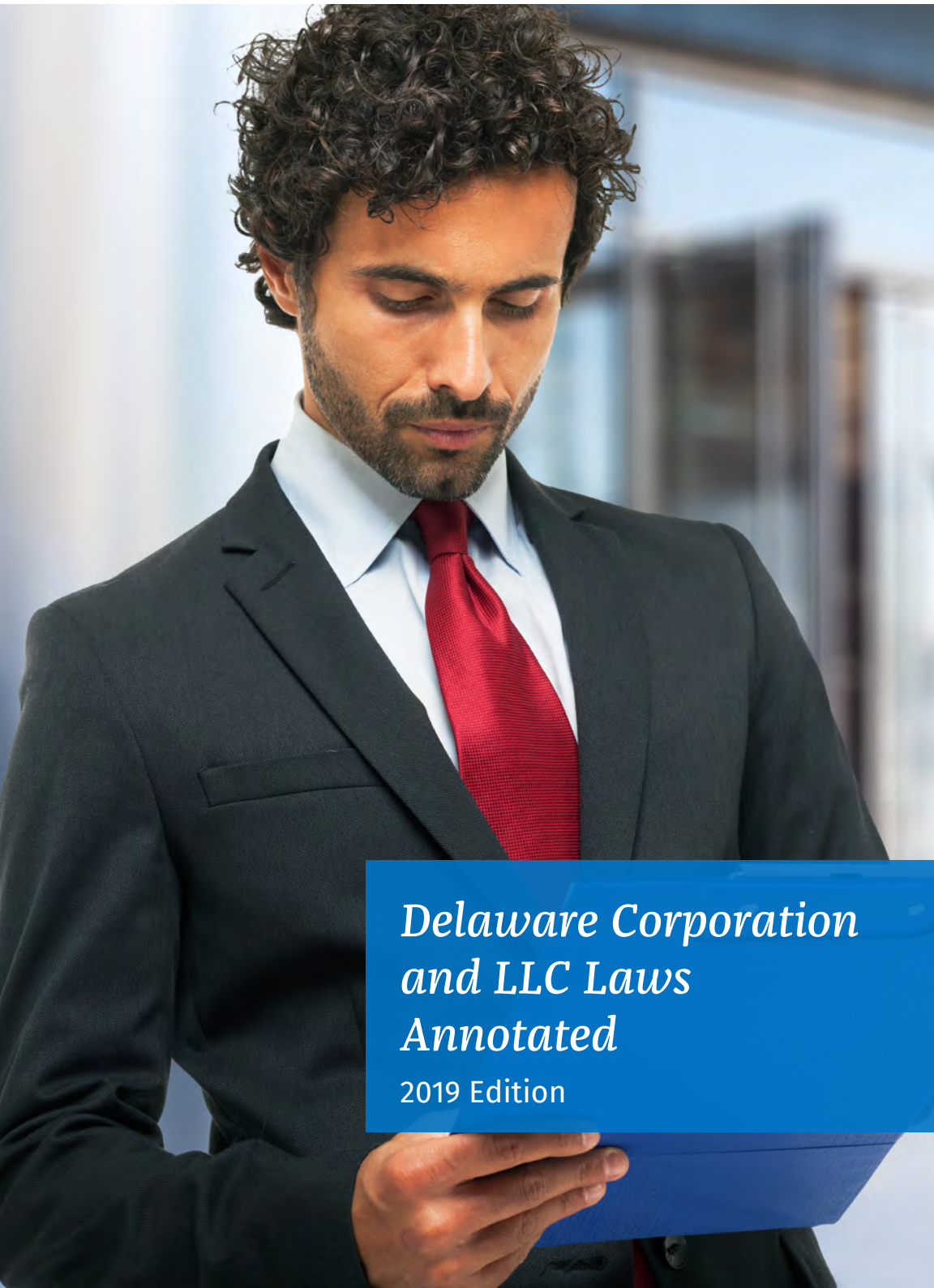

Delaware Corporation and LLC Laws Annotated

2019 Edition

Delaware

Corporation and LLC Laws

Annotated

CONTAINING

The provisions of the Delaware Constitution relative to corporations, the Delaware General Corporation Law, the Delaware Franchise Tax Law, and the Delaware Limited Liability Company Act — annotated with pertinent decisions of the Delaware courts. All statutes include amendments enacted through August 2019.

THIRTY FIFTH EDITION

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Delaware Constitution
Article IX

§1 CORPORATIONS MUST BE ORGANIZED UNDER GENERAL LAWS

No corporation shall hereafter be created, amended, renewed or revised by special act, but only by or under general law, nor shall any existing corporate charter be amended, renewed or revived by special act, but only by or under general law; but the foregoing provisions shall not apply to municipal corporations, banks or corporations for charitable, penal, reformatory, or educational purposes, sustained in whole or in part by the State. The General Assembly shall, by general law, provide for the revocation or forfeiture of the charters of all corporations for the abuse, misuse, or non-user of their corporate powers, privileges or franchises. Any proceeding for such revocation or forfeiture, shall be taken by the Attorney General, as may be provided by law. No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly

§2 PRE-EXISTING CORPORATIONS MUST ACCEPT PROVISIONS OF CONSTITUTION BEFORE AMENDMENT OR RENEWAL OF CHARTER

No corporation in existence at the adoption of this Constitution shall have its charter amended or renewed without first filing, under the corporate seal of said corporation, and duly attested, in the office of the Secretary of State, an acceptance of the provisions of this Constitution.

§3 STOCK MUST BE ISSUED FOR CASH, LABOR, OR PROPERTY

Repealed 74 Del Laws Ch. 281, eff. 6-30-04.

§4 RESERVATION PROTECTIVE OF EXISTING CORPORATE RIGHTS

The rights, privileges, immunities and estates of religious societies and corporate bodies, except as herein otherwise provided, shall remain as if the Constitution of this State had not been altered.

§5 FOREIGN CORPORATIONS, BEFORE DOING BUSINESS IN STATE, MUST APPOINT AGENT FOR SERVICE OF PROCESS

No foreign corporation shall do any business in this State through or by branch offices, agents or representatives located in this State, without having an authorized agent or agents in the State upon whom legal process may be served.

§6 SHARES OF NON-RESIDENTS SHALL NOT BE TAXED

Shares of the capital stock of corporations created under the laws of this State, when owned by persons or corporations without this State, shall not be subject to taxation by any law now existing or hereafter to be made.

Delaware General Corporation Law

Title 8. Corporations
Chapter 1. General Corporation Law

Subchapter I
FORMATION

§101 INCORPORATORS; HOW CORPORATION FORMED; PURPOSES

(a) Any person, partnership, association or corporation, singly or jointly with others, and without regard to such person's or entity's residence, domicile or state of incorporation, may incorporate or organize a corporation under this chapter by filing with the Division of Corporations in the Department of State a certificate of incorporation which shall be executed, acknowledged and filed in accordance with Sec. 103 of this title.

(b) A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.

(c) Corporations for constructing, maintaining and operating public utilities, whether in or outside of this State, may be organized under this chapter, but corporations for constructing, maintaining and operating public utilities within this State shall be subject to, in addition to the provisions of this chapter, the special provisions and requirements of Title 26 applicable to such corporations. (Last amended by Ch. 339, L.'98, eff. 7-1-98.)

Decisions

.1 Promoters' contracts. — Corporation can adopt contract made by promoters for its benefit, although such contract antedates corporation's existence. *Commissioners of Lewes v. Breakwater Fisheries Co, 117 A 823 (Ch. Ct. 1922)*.

Corporation is not bound by promoter's contract which it has not adopted. *Stringer v. Electronics Supply Corp, 2 A.2d 78 (Ch. Ct. 1938)*.

The doctrine of preincorporation agreement, which allows a promoter who is establishing a corporation to enter into an agreement that binds the corporation, applies to nonprofit corporations. *Lorillard Tobacco Co. v. American Legacy Foundation, 903 A.2d 728 (Del. Supr. 2006).*

.2 Promoters' liabilities. — Promoters must account to corporation for secret profit obtained at its expense and surrender for cancellation shares representing secret profit. *Birbeck v. Am Toll Bridge Co of Cal, 2 A.2d 158 (Ch. Ct. 1938)*.

Corporation can maintain action against its promoters, who were also its financiers and managers, for accounting or to recover corporate property appropriated by them to their own use in breach of their fiduciary obligations as promoters. *Bovay v. H M Byllesby & Co, 12 A.2d 178 (Ch. Ct. 1940).*

Court will approve derivative suit settlement that denies recovery from promoter for breach of fiduciary duty in underwriting transactions, when promoter bargained at arm's length with corporation and did not make any secret profits. *Gladstone v. Bennett, 153 A.2d 577 (Ch. Ct. 1959)*.

.3 Internal affairs doctrine. — Delaware Supreme Court reaffirmed internal affairs doctrine, which holds that law of state of incorporation determines issues relating to corporation's internal affairs. Panama law governs issue of whether a Panamanian corporation's Delaware subsidiary may vote shares it holds in parent company under circumstances prohibited by Delaware law, but not Panamanian law. *McDermott Inc v. Lewis, 531 A.2d 206 (Del. Supr. 1987)*.

§102 CONTENTS OF CERTIFICATE OF INCORPORATION

(a) The certificate of incorporation shall set forth:

(1) The name of the corporation, which (i) shall contain 1 of the words "association," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited," (or abbreviations thereof, with or without punctuation), or words (or abbreviations thereof, with or without punctuation) of like import of foreign countries or jurisdictions (provided they are written in roman characters or letters); provided, however, that the Division of Corporations in the Department of State may waive such requirement (unless it determines that such name is, or might otherwise appear to be, that of a natural person) if such corporation executes, acknowledges and files with the Secretary of State in accordance with §103 of this title

a certificate stating that its total assets, as defined in §503(i) of this title, are not less than $10,000,000, or, in the sole discretion of the Division of Corporations in the Department of State, if the corporation is both a nonprofit nonstock corporation and an association of professionals, (ii) shall be such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names that are reserved on such records and from the names on such records of each other corporation, partnership, limited partnership, limited liability company, registered series of a limited liability company or statutory trust organized or registered as a domestic or foreign corporation, partnership, limited partnership, limited liability company, registered series of a limited liability company or statutory trust under the laws of this State, except with the written consent of the person who has reserved such name or such other foreign corporation or domestic or foreign partnership, limited partnership, limited liability company, registered series of a limited liability company or statutory trust, executed, acknowledged and filed with the Secretary of State in accordance with §103 of this title, or except that, without prejudicing any rights of the person who has reserved such name or such other foreign corporation or domestic or foreign partnership, limited partnership, limited liability company, registered series of a limited liability company or statutory trust, the Division of Corporations in the Department of State may waive such requirement if the corporation demonstrates to the satisfaction of the Secretary of State that the corporation or a predecessor entity previously has made substantial use of such name or a substantially similar name, that the corporation has made reasonable efforts to secure such written consent, and that such waiver is in the interest of the State, (iii) except as permitted by §395 of this title, shall not contain the word "trust," and (iv) shall not contain the word "bank," or any variation thereof, except for the name of a bank reporting to and under the supervision of the State Bank Commissioner of this State or a subsidiary of a bank or savings association (as those terms are defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. §1813), or a corporation regulated under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841 et seq., or the Home Owners' Loan Act, as amended, 12 U.S.C. §1461 et seq.; provided, however, that this section shall not be construed to prevent the use of the word "bank," or any variation thereof, in a context clearly not purporting to refer to a banking business or otherwise likely to mislead the public about the nature of the business of the corporation or to lead to a pattern and practice of

abuse that might cause harm to the interests of the public or the State as determined by the Division of Corporations in the Department of State;

(2) The address (which shall be stated in accordance with §131(c) of this title) of the corporation's registered office in this State, and the name of its registered agent at such address;

(3) The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any;

(4) If the corporation is to be authorized to issue only 1 class of stock, the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. If the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class and shall specify each class the shares of which are to be without par value and each class the shares of which are to have par value and the par value of the shares of each such class. The certificate of incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by §151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation. The foregoing provisions of this paragraph shall not apply to nonstock corporations. In the case of nonstock corporations, the fact that they are not authorized to issue capital stock shall be stated in the certificate of incorporation. The conditions of membership, or other criteria for identifying members, of nonstock corporations shall likewise be stated in the certificate of incorporation or the bylaws. Nonstock corporations shall have members, but failure to have members shall not affect otherwise valid corporate acts or work a forfeiture or dissolution of the corporation. Nonstock corpora-

tions may provide for classes or groups of members having relative rights, powers and duties, and may make provision for the future creation of additional classes or groups of members having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of members. Except as otherwise provided in this chapter, nonstock corporations may also provide that any member or class or group of members shall have full, limited, or no voting rights or powers, including that any member or class or group of members shall have the right to vote on a specified transaction even if that member or class or group of members does not have the right to vote for the election of the members of the governing body of the corporation. Voting by members of a nonstock corporation may be on a per capita, number, financial interest, class, group, or any other basis set forth. The provisions referred to in the 3 preceding sentences may be set forth in the certificate of incorporation or the bylaws. If neither the certificate of incorporation nor the bylaws of a nonstock corporation state the conditions of membership, or other criteria for identifying members, the members of the corporation shall be deemed to be those entitled to vote for the election of the members of the governing body pursuant to the certificate of incorporation or bylaws of such corporation or otherwise until thereafter otherwise provided by the certificate of incorporation or the bylaws;

(5) The name and mailing address of the incorporator or incorporators;

(6) If the powers of the incorporator or incorporators are to terminate upon the filing of the certificate of incorporation, the names and mailing addresses of the persons who are to serve as directors until the first annual meeting of stockholders or until their successors are elected and qualify.

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of

this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation;

(2) The following provisions, in haec verba, viz:

(i), for a corporation other than a nonstock corporation,

"Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this corporation under §291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under §279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation";

(ii), for a nonstock corporation, viz:

"Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its members or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or member thereof or on the application of any receiver or receivers appointed for this corporation under §291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under §279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the members or class of members of this corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three fourths in value of the creditors or class of creditors,

and/or of the members or class of members of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the members or class of members, of this corporation, as the case may be, and also on this corporation";

(3) Such provisions as may be desired granting to the holders of the stock of the corporation, or the holders of any class or series of a class thereof, the preemptive right to subscribe to any or all additional issues of stock of the corporation of any or all classes or series thereof, or to any securities of the corporation convertible into such stock. No stockholder shall have any preemptive right to subscribe to an additional issue of stock or to any security convertible into such stock unless, and except to the extent that, such right is expressly granted to such stockholder in the certificate of incorporation. All such rights in existence on July 3, 1967, shall remain in existence unaffected by this paragraph unless and until changed or terminated by appropriate action which expressly provides for the change or termination;

(4) Provisions requiring for any corporate action, the vote of a larger portion of the stock or of any class or series thereof, or of any other securities having voting power, or a larger number of the directors, than is required by this chapter;

(5) A provision limiting the duration of the corporation's existence to a specified date; otherwise, the corporation shall have perpetual existence;

(6) A provision imposing personal liability for the debts of the corporation on its stockholders to a specified extent and upon specified conditions; otherwise, the stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts;

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under §174 of this title; or (iv) for any transaction from which the director derived an improper personal

benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with §141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

(c) It shall not be necessary to set forth in the certificate of incorporation any of the powers conferred on corporations by this chapter.

(d) Except for provisions included pursuant to paragraphs (a)(1), (a)(2), (a)(5), (a)(6), (b)(2), (b)(5), (b)(7) of this section, and provisions included pursuant to paragraph (a)(4) of this section specifying the classes, number of shares, and par value of shares a corporation other than a nonstock corporation is authorized to issue, any provision of the certificate of incorporation may be made dependent upon facts ascertainable outside such instrument, provided that the manner in which such facts shall operate upon the provision is clearly and explicitly set forth therein. The term "facts," as used in this subsection, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(e) The exclusive right to the use of a name that is available for use by a domestic or foreign corporation may be reserved by or on behalf of:

(1) Any person intending to incorporate or organize a corporation with that name under this chapter or contemplating such incorporation or organization;

(2) Any domestic corporation or any foreign corporation qualified to do business in the State of Delaware, in either case, intending to change its name or contemplating such a change;

(3) Any foreign corporation intending to qualify to do business in the State of Delaware and adopt that name or contemplating such qualification and adoption; and

(4) Any person intending to organize a foreign corporation and have it qualify to do business in the State of Delaware and adopt that name or contemplating such organization, qualification and adoption.

The reservation of a specified name may be made by filing with the Secretary of State an application, executed by the applicant, certifying that the reservation is made by or on behalf of a domestic corporation, foreign corporation or other person described in paragraphs (e)(1)-(4) of this section above, and specifying the name to be reserved and the

name and address of the applicant. If the Secretary of State finds that the name is available for use by a domestic or foreign corporation, the Secretary shall reserve the name for the use of the applicant for a period of 120 days. The same applicant may renew for successive 120-day periods a reservation of a specified name by filing with the Secretary of State, prior to the expiration of such reservation (or renewal thereof), an application for renewal of such reservation, executed by the applicant, certifying that the reservation is renewed by or on behalf of a domestic corporation, foreign corporation or other person described in paragraphs (e)(1)-(4) of this section above and specifying the name reservation to be renewed and the name and address of the applicant. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the Secretary of State a notice of the transfer, executed by the applicant for whom the name was reserved, specifying the name reservation to be transferred and the name and address of the transferee. The reservation of a specified name may be cancelled by filing with the Secretary of State a notice of cancellation, executed by the applicant or transferee, specifying the name reservation to be cancelled and the name and address of the applicant or transferee. Unless the Secretary of State finds that any application, application for renewal, notice of transfer, or notice of cancellation filed with the Secretary of State as required by this subsection does not conform to law, upon receipt of all filing fees required by law the Secretary of State shall prepare and return to the person who filed such instrument a copy of the filed instrument with a notation thereon of the action taken by the Secretary of State. A fee as set forth in Sec. 391 of this title shall be paid at the time of the reservation of any name, at the time of the renewal of any such reservation and at the time of the filing of a notice of the transfer or cancellation of any such reservation.

(f) The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in §115 of this title. (Last amended by Ch. 354, L. '18, eff. 8-1-19.)

Decisions

.1 Classification of corporations. — Corporations which are not organized for profit are not synonymous with corporations for religious, literary, charitable, social or eleemosynary purposes; such classification does not necessarily exclude business,

trading or commercial concerns. *Read v. Tidewater Coal Exchange, 116 A 898 (Ch. Ct. 1922)*.

.2 Certificate of incorporation as contract. — Certificate of incorporation is contract between state and corporation, between corporation and its stockholders, and between stockholders inter sese. *Morris v. American Public Utilities Co, 122 A. 696 (Ch. Ct. 1923)*.

.3 State's power to alter. — Buyers of stock in Delaware corporation become stockholders with actual or imputed knowledge that state's corporation law may be changed and corporate charter amended to conform to change, subject to limitation that stockholders' rights must be protected. *Weinberg v. Baltimore Brick Co, 108 A.2d 81 (Ch. Ct. 1954)*, *aff'd, 114 A.2d 812 (1955)*.

.4 Court's power to alter. — Court can order certificate of incorporation reformed to reflect stockholders' agreement regarding voting rights, when provision was omitted inadvertently, and its inclusion will not affect rights of third parties. *In re Farm Industries, Inc, 196 A.2d 582 (Ch. Ct. 1963)*.

.5 Court's power to cancel. — Court can cancel certificate of incorporation filed by Secretary of State in reliance on false representations therein that three persons had associated to form corporation. *State ex rel Southerland, Atty Gen v. United States Realty Improvement Co, 132 A 138 (Ch. Ct. 1926)*.

.6 Protection of name. — Court will enjoin use by corporation of name which causes confusion with name of another corporation. *Fox Fur Co v. Fox Fur Co, 59 F. Supp. 701 (D. Del. 1945)*.

Stockholder can sue derivatively to enjoin use of his corporation's name by competing corporation. *Taussig v. Wellington Fund, Inc, 187 F. Supp. 179 (D. Del. 1960), aff'd, 313 F.2d 472 (3d Cir 1963)*.

"American Plan Corporation" can enjoin use of same name by subsidiaries of another company engaged in closely related business, since (1) name is distinctive and so proof of secondary meaning is unnecessary, and (2) use of same name by other company will cause confusion among corporation's potential customers. *American Plan Corp v. State Loan & Finance Corp, 365 F.2d 635 (3d Cir 1966)*.

Court will enjoin use of name "DuPont" for razor blades when original DuPont company was well-known as manufacturer of many kinds of consumer goods, including toiletries, even though it did not make razor blades. *El DuPont de Nemours & Co v. DuPont Safety Razor Corp, 82 A.2d 384 (Ch. Ct. 1951)*.

.7 Use of family name. — Use of family name in corporate name by second user is permitted if second user makes clear to public it has no connection with first user. *Carl Springer, Inc v. Carl Springer Supply Co, 104 A.2d 637 (Ch. Ct. 1954)*.

Individual has right to use his name in his business, even though his surname may have acquired secondary meaning, and this right includes right to transfer his business to corporation bearing his name. *Andrew Jergens Co v. Woodbury, Inc, 273 F 952 (D. Del. 1921)*.

.8 Duty of Secretary of State. — Secretary of State fulfilled statutory duty in determining that name he was registering, Transamerica Airlines, Inc. was distinguishable from name already registered, Trans-Americas Airlines, Inc. on records of Division of Corporation. Secretary has no duty to determine whether similar corporate names already registered carry with them property rights on which other par-

ties may not infringe. *Trans-Americas Airlines, Inc v. Kenton, 491 A.2d 1139 (Del. Supr. 1985).*

.9 Preferred stock. —Although certificate of incorporation contained boiler plate provision stating that no stockholder had preemptive rights, that provision merely confirmed common law presumption and did not prevent board of directors from issuing preferred stock with preemptive rights where certificate of incorporation also granted directors blank check power to designate rights and privileges of preferred stock. *Benihana of Tokyo, Inc. v. Benihana, Inc. 906 A.2d 114 (Del. Supr. 2006).*

Stock preferences so obscure as to be irreconcilably repugnant cannot be accorded recognition. *Holland v. Nat Automotive Fibres, Inc, 194 A 124 (Ch. Ct. 1937)*, *2 A.2d 124 (Ch. Ct. 1938)*.

Neither general language in a certificate of incorporation concerning the powers of directors nor extrinsic evidence regarding the shareholders' intentions on that matter was sufficient under a state statute to give a corporation's board the power to create preferred stock voting rights. *Laster v. Waggoner, 581 A.2d 1127 (Ch. Ct. 1989)*.

.10 Class voting. — Charter provision giving holders of common stock Series B right to elect minority directors means that majority in number of issued and outstanding Series B common stock must vote before Class B common directors can be elected, but successful nominees for Class B directors need receive only majority of shares voted. *Investment Associates, Inc v. Standard Power & Light Corp, 48 A.2d 501 (Ch. Ct. 1946)*.

When certificate of incorporation provides that Class B stockholders elect majority of board of directors and Class A stockholders the remaining, Class B is entitled to elect only bare majority. *Young v. Janas, 103 A.2d 299 (Ch. Ct. 1954)*.

.11 Shareholders' preemptive rights. — Amendment to certificate of incorporation can eliminate preemptive rights. *Gottlieb v. Heyden Chemical Corp, 83 A.2d 595 (Ch. Ct. 1951).*

Stockholder can bring action against alleged fraudulent plan to increase number of shares to be issued for inadequate consideration, even though he has preemptive rights to subscribe to these shares, since if consideration is in fact inadequate, he must purchase additional shares to prevent dilution of his stock interest. *Bennett v. Breuil Petroleum Corp, 99 A.2d 236 (Ch. Ct. 1953)*.

All that is required by rule on preemptive rights is that stockholder be accorded opportunity to subscribe for shares of new issue of stock; whether he takes such opportunity or not is immaterial. *Greenbaum v. Keil, 62 A.2d 441 (Ch. Ct. 1948)*.

Court will enjoin sale of authorized but unissued stock when it is shown that primary reason for sale was to deprive majority stockholders of voting control. *Canada Southern Oils, Ltd v. Manabi Exploration Co, 96 A.2d 810 (Ch. Ct. 1953)*.

When original corporation's stock was issued at intervals over considerable period of time, and block of shares went to promoter for services in selling this stock, no preemptive rights attached to that block of stock. *Yasik v. Wachtel, 17 A.2d 309 (Ch. Ct. 1944)*. See, also, *Diamond State Brewery, Inc v. De La Rigaudiere, 17 A.2d 313 (Ch. Ct. 1941)*.

Directors may, if they act in good faith and for best interests of corporation, offer no par value stock to one class of stockholders at lower price than to other classes

of stockholder, since directors have large discretion in marketing no par value stock. *Bodell v. General G & E Corp, 140 A 264 (Ch. Ct. 1927)*.

.12 Provisions limiting director's liability. — After determining that a board of directors had breached their duty of disclosure by making only a "partial disclosure" in a Schedule 14D-9 that was disseminated by a corporation in connection with a tender offer, the Delaware Supreme Court found that the directors were nonetheless protected from liability under GCL Sec. 102(b)(7) and the amendment to their certificate of incorporation implementing the statutory provision. *Zirn v. VLI Corp, 681 A.2d 1050 (Del. Supr. 1996)*.

Stockholders failed to state a claim against board for accepting lower of two offers where stockholders did not establish breach of duty of loyalty and even if they could establish breach of duty of due care, that claim was barred by exculpatory charter provision under Sec. 102(b)(7). *Malpiede v. Townson, 780 A.2d 1075 (Del. Supr. 2001).*

When the standard of review is entire fairness, the court must make a finding of unfairness and the basis of liability for monetary damages before the exculpatory nature of a Sec. 102(b)(7) provision is examined. *Emerald Partners v. Berlin, 787 A.2d 85 (Del. Supr. 2001)*.

Sec. 102(b)(7) provision did not protect directors of acquired corporation who were also officers, directors and shareholders of acquiring corporation as they stood on both sides of the transaction, thereby implicating their duty of loyalty. However, the Sec. 102(b)(7) provision did protect members of special committee who determined price was fair, as there was no evidence they violated the duty of loyalty and any lack of effectiveness could be ascribed only to a breach of the duty of care. *Clements v. Rogers, 790 A.2d 1222 (Ch. Ct. 2001).*

Even though a corporation's directors were protected from liability for their breaches of the fiduciary duty of care under Sec 102(b)(7), that statutory provision provided no protection to a financial advisor who aided and abetted the breach.*In Re Rural Metro Corporation Stockholder Litigation*, *88 A.3d 54 (Del. Ch. 2014).*

.13 Forum selection clause — A forum selection clause purporting to require any claim under the Securities Act of 1933 to be brought in federal court was invalid and ineffective as it sought to bind the plaintiff to a particular forum where the claim does not involve rights or relationships that were established by or under Delaware's corporation law. *Sciabacucchi v. Salzberg*, 2018 Del. Ch. LEXIS 578.

§103 EXECUTION, ACKNOWLEDGMENT, FILING, RECORDING AND EFFECTIVE DATE OF ORIGINAL CERTIFICATE OF INCORPORATION AND OTHER INSTRUMENTS; EXCEPTIONS

(a) Whenever any instrument is to be filed with the Secretary of State or in accordance with this section or chapter, such instrument shall be executed as follows:

(1) The certificate of incorporation, and any other instrument to be filed before the election of the initial board of directors if the initial di-

rectors were not named in the certificate of incorporation, shall be signed by the incorporator or incorporators (or, in the case of any such other instrument, such incorporator's or incorporators' successors and assigns). If any incorporator is not available then any such other instrument may be signed, with the same effect as if such incorporator had signed it, by any person for whom or on whose behalf such incorporator, in executing the certificate of incorporation, was acting directly or indirectly as employee or agent, provided that such other instrument shall state that such incorporator is not available and the reason therefor, that such incorporator in executing the certificate of incorporation was acting directly or indirectly as employee or agent for or on behalf of such person, and that such person's signature on such instrument is otherwise authorized and not wrongful.

(2) All other instruments shall be signed:

a. By any authorized officer of the corporation; or

b. If it shall appear from the instrument that there are no such officers, then by a majority of the directors or by such directors as may be designated by the board; or

c. If it shall appear from the instrument that there are no such officers or directors, then by the holders of record, or such of them as may be designated by the holders of record, of a majority of all outstanding shares of stock; or

d. By the holders of record of all outstanding shares of stock.

(b) Whenever this chapter requires any instrument to be acknowledged, such requirement is satisfied by either:

(1) The formal acknowledgment by the person or 1 of the persons signing the instrument that it is such person's act and deed or the act and deed of the corporation, and that the facts stated therein are true. Such acknowledgment shall be made before a person who is authorized by the law of the place of execution to take acknowledgments of deeds. If such person has a seal of office such person shall affix it to the instrument.

(2) The signature, without more, of the person or persons signing the instrument, in which case such signature or signatures shall constitute the affirmation or acknowledgment of the signatory, under penalties of perjury, that the instrument is such person's act and deed or the act and deed of the corporation, and that the facts stated therein are true.

(c) Whenever any instrument is to be filed with the Secretary of State or in accordance with this section or chapter, such requirement means that:

(1) The signed instrument shall be delivered to the office of the Secretary of State;

(2) All taxes and fees authorized by law to be collected by the Secretary of State in connection with the filing of the instrument shall be tendered to the Secretary of State; and

(3) Upon delivery of the instrument, the Secretary of State shall record the date and time of its delivery. Upon such delivery and tender of the required taxes and fees, the Secretary of State shall certify that the instrument has been filed in the Secretary of State's office by endorsing upon the signed instrument the word "Filed", and the date and time of its filing. This endorsement is the "filing date" of the instrument, and is conclusive of the date and time of its filing in the absence of actual fraud. The Secretary of State shall file and index the endorsed instrument. Except as provided in paragraph (4) of this subsection and in subsection (i) of this section, such filing date of an instrument shall be the date and time of delivery of the instrument.

(4) Upon request made upon or prior to delivery, the Secretary of State may, to the extent deemed practicable, establish as the filing date of an instrument a date and time after its delivery. If the Secretary of State refuses to file any instrument due to an error, omission or other imperfection, the Secretary of State may hold such instrument in suspension, and in such event, upon delivery of a replacement instrument in proper form for filing and tender of the required taxes and fees within 5 business days after notice of such suspension is given to the filer, the Secretary of State shall establish as the filing date of such instrument the date and time that would have been the filing date of the rejected instrument had it been accepted for filing. The Secretary of State shall not issue a certificate of good standing with respect to any corporation with an instrument held in suspension pursuant to this subsection. The Secretary of State may establish as the filing date of an instrument the date and time at which information from such instrument is entered pursuant to subdivision (c)(7) of this section if such instrument is delivered on the same date and within 4 hours after such information is entered.

(5) The Secretary of State, acting as agent for the recorders of each of the counties, shall collect and deposit in a separate account established exclusively for that purpose a county assessment fee with respect to each filed instrument and shall thereafter weekly remit from such account to the recorder of each of the said counties the amount or amounts of such fees as provided for in subdivision (c)(5) of this section or as elsewhere provided by law. Said fees shall be for the purposes of

defraying certain costs incurred by the counties in merging the information and images of such filed documents with the document information systems of each of the recorder's offices in the counties and in retrieving, maintaining and displaying such information and images in the offices of the recorders and at remote locations in each of such counties. In consideration for its acting as the agent for the recorders with respect to the collection and payment of the county assessment fees, the Secretary of State shall retain and pay over to the General Fund of the State an administrative charge of 1 percent of the total fees collected.

(6) The assessment fee to the counties shall be $24 for each 1-page instrument filed with the Secretary of State in accordance with this section and $9 for each additional page for instruments with more than 1 page. The recorder's office to receive the assessment fee shall be the recorder's office in the county in which the corporation's registered office in this State is, or is to be, located, except that an assessment fee shall not be charged for either a certificate of dissolution qualifying for treatment under §391(a)(5)b. of this title or a document filed in accordance with Subchapter XV of this chapter.

(7) The Secretary of State, acting as agent, shall collect and deposit in a separate account established exclusively for that purpose a courthouse municipality fee with respect to each filed instrument and shall thereafter monthly remit funds from such account to the treasuries of the municipalities designated in §301 of Title 10. Said fees shall be for the purposes of defraying certain costs incurred by such municipalities in hosting the primary locations for the Delaware Courts. The fee to such municipalities shall be $20 for each instrument filed with the Secretary of State in accordance with this section. The municipality to receive the fee shall be the municipality designated in §301 of Title 10 in the county in which the corporation's registered office in this State is, or is to be, located, except that a fee shall not be charged for a certificate of dissolution qualifying for treatment under §391(a)(5)b. of this title, a resignation of agent without appointment of a successor under §136 of this title, or a document filed in accordance with Subchapter XV of this chapter.

(8) The Secretary of State shall cause to be entered such information from each instrument as the Secretary of State deems appropriate into the Delaware Corporation Information System or any system which is a successor thereto in the office of the Secretary of State, and such information and a copy of each such instrument shall be permanently maintained as a public record on a suitable medium. The Secretary of State is

authorized to grant direct access to such system to registered agents subject to the execution of an operating agreement between the Secretary of State and such registered agent. Any registered agent granted such access shall demonstrate the existence of policies to ensure that information entered into the system accurately reflects the content of instruments in the possession of the registered agent at the time of entry.

(d) Any instrument filed in accordance with subsection (c) of this section shall be effective upon its filing date. Any instrument may provide that it is not to become effective until a specified time subsequent to the time it is filed, but such time shall not be later than a time on the 90th day after the date of its filing. If any instrument filed in accordance with subsection (c) of this section provides for a future effective date or time and if the transaction is terminated or its terms are amended to change the future effective date or time prior to the future effective date or time, the instrument shall be terminated or amended by the filing, prior to the future effective date or time set forth in such instrument, of a certificate of termination or amendment of the original instrument, executed in accordance with subsection (a) of this section, which shall identify the instrument which has been terminated or amended and shall state that the instrument has been terminated or the manner in which it has been amended.

(e) If another section of this chapter specifically prescribes a manner of executing, acknowledging or filing a specified instrument or a time when such instrument shall become effective which differs from the corresponding provisions of this section, then such other section shall govern.

(f) Whenever any instrument authorized to be filed with the Secretary of State under any provision of this title, has been so filed and is an inaccurate record of the corporate action therein referred to, or was defectively or erroneously executed, sealed or acknowledged, the instrument may be corrected by filing with the Secretary of State a certificate of correction of the instrument which shall be executed, acknowledged and filed in accordance with this section. The certificate of correction shall specify the inaccuracy or defect to be corrected and shall set forth the portion of the instrument in corrected form. In lieu of filing a certificate of correction the instrument may be corrected by filing with the Secretary of State a corrected instrument which shall be executed, acknowledged and filed in accordance with this section. The corrected instrument shall be specifically designated as such in its heading, shall specify the inaccuracy or defect to be corrected, and shall set

forth the entire instrument in corrected form. An instrument corrected in accordance with this section shall be effective as of the date the original instrument was filed, except as to those persons who are substantially and adversely affected by the correction and as to those persons the instrument as corrected shall be effective from the filing date.

(g) Notwithstanding that any instrument authorized to be filed with the Secretary of State under any provision of this title is when filed inaccurately, defectively or erroneously executed, sealed or acknowledged, or otherwise defective in any respect, the Secretary of State shall have no liability to any person for the preclearance for filing, the acceptance for filing, or the filing and indexing of such instrument by the Secretary of State.

(h) Any signature on any instrument authorized to be filed with the Secretary of State under this title may be a facsimile, a conformed signature or an electronically transmitted signature.

(i) (1) If:

a. Together with the actual delivery of an instrument and tender the required taxes and fees, there is delivered to the Secretary of State a separate affidavit (which in its heading shall be designated as an "affidavit of extraordinary condition") attesting, on the basis of personal knowledge of the affiant or a reliable source of knowledge identified in the affidavit, that an earlier effort to deliver such instrument and tender such taxes and fees was made in good faith, specifying the nature, date and time of such good faith effort and requesting that the Secretary of State establish such date and time as the filing date of such instrument; or

b. Upon the actual delivery of an instrument and tender of the required taxes and fees, the Secretary of State in the Secretary's discretion provides a written waiver of the requirement for such an affidavit stating that it appears to the Secretary of State that an earlier effort to deliver such instrument and tender such taxes and fees was made in good faith and specifying the date and time of such effort; and

c. The Secretary of State determines that an extraordinary condition existed at such date and time, that such earlier effort was unsuccessful as a result of the existence of such extraordinary condition, and that such actual delivery and tender were made within a reasonable period (not to exceed 2 business days) after the cessation of such extraordinary condition, then the Secretary of State may establish such date and time as the filing date of such instrument. No fee shall be paid to the Secretary of State for receiving an affidavit of extraordinary condition.

For purposes of this subsection, an "extraordinary condition" means: any emergency resulting from an attack on, invasion or occupation by

foreign military forces of, or disaster, catastrophe, war or other armed conflict, revolution or insurrection, or rioting or civil commotion in, the United States or a locality in which the Secretary of State conducts its business or in which the good faith effort to deliver the instrument and tender the required taxes and fees is made, or the immediate threat of any of the foregoing; or any malfunction or outage of the electrical or telephone service to the Secretary of State's office, or weather or other condition in or about a locality in which the Secretary of State conducts its business, as a result of which the Secretary of State's office is not open for the purpose of the filing of instruments under this chapter or such filing cannot be effected without extraordinary effort. The Secretary of State may require such proof as it deems necessary to make the determination required under paragraph (1)c. of this subsection, and any such determination shall be conclusive in the absence of actual fraud.

If the Secretary of State establishes the filing date of an instrument pursuant to this subsection, the date and time of delivery of the affidavit of extraordinary condition or the date and time of the Secretary of State's written waiver of such affidavit shall be endorsed on such affidavit or waiver and such affidavit or waiver, so endorsed, shall be attached to the filed instrument to which it relates. Such filed instrument shall be effective as of the date and time established as the filing date by the Secretary of State pursuant to this subsection, except as to those persons who are substantially and adversely affected by such establishment and, as to those persons, the instrument shall be effective from the date and time endorsed on the affidavit of extraordinary condition or written waiver attached thereto.

(j) Notwithstanding any other provision of this chapter, it shall not be necessary for any corporation to amend its certificate of incorporation, or any other document, that has been filed prior to August 1, 2011, to comply with §131(c) of this title, provided that any certificate or other document filed under this chapter on or after August 1, 2011, and changing the address of a registered office shall comply with §131(c) of this title. (Last amended by Ch. 327, L. '14, eff. 8-1-14.)

§104 CERTIFICATE OF INCORPORATION; DEFINITION

The term "certificate of incorporation," as used in this chapter, unless the context requires otherwise, includes not only the original certificate of incorporation filed to create a corporation but also all other certifi-

cates, agreements of merger or consolidation, plans of reorganization, or other instruments, howsoever designated, which are filed pursuant to Sec. 102, 133-136, 151, 241-243, 245, 251-258, 263-264, 267, 303, 311-313 or any other section of this title, and which have the effect of amending or supplementing in some respect a corporation's certificate of incorporation. (Last amended by Ch. 265, L. '16, eff. 8-1-16.)

§105 CERTIFICATE OF INCORPORATION AND OTHER CERTIFICATES; EVIDENCE

A copy of a certificate of incorporation, or a restated certificate of incorporation, or of any other certificate which has been filed in the office of the Secretary of State as required by any provision of this title shall, when duly certified by the Secretary of State, be received in all courts, public offices and official bodies as prima facia evidence of:

(1) Due execution, acknowledgment and filing of the instrument;

(2) Observance and performance of all acts and conditions necessary to have been observed and performed precedent to the instrument becoming effective; and

(3) Any other facts required or permitted by law to be stated in the instrument. (Last amended by Ch. 587, L. '96, eff. 11-24-97.)

§106 COMMENCEMENT OF CORPORATE EXISTENCE

Upon the filing with the Secretary of State of the certificate of incorporation, executed and acknowledged in accordance with Sec. 103 of this title, the incorporator or incorporators who signed the certificate, and such incorporator's or incorporators' successors and assigns, shall, from the date of such filing, be and constitute a body corporate, by the name set forth in the certificate, subject to subsection (d) of Sec. 103 of this title and subject to dissolution or other termination of its existence as provided in this chapter. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 De facto corporations. — De facto corporation cannot escape its obligations by raising question of its want of de jure existence; only state can question de jure

existence of de facto corporation. *Brady v. Del Mut Life Ins Co, 45 A 345 (Ch. Ct. 1899)*.

.2 Fiction of corporate entity. — When directors of corporation offered corporation's services to new company to be formed, which was to have same board of directors, and which would vote to compensate old corporation with all common stock of new corporation for its services in selling new corporation's preferred stock, court will order cancellation of common stock so issued and will ignore separate entity of corporations. *Pauley Petroleum, Inc v. Continental Oil Co, 239 A.2d 629 (Del. Supr. 1968)*.

Court will not disregard separate entities of two corporations when it is shown that foreign subsidiary's existence is for sound business reasons and there is no fraud or public wrong alleged. *Phoenix Canada Oil Co v. Texaco, Inc, 658 F. Supp. 1061 (D. Del. 1987)*.

Companies were not responsible for subsidiaries' activities where subsidiaries kept their own books and records, maintained their own bank accounts and paid their own taxes. *Irwin & Leighton, Inc v. WM Anderson Co, 532 A.2d 983 (Del. Ch. 1987)*.

Creditor that involved itself in management of its troubled debtor did not thereby assume liability for debtor's contract obligations to third party. Court refused to pierce corporate veil to hold creditor liable because creditor's involvement did not constitute such domination and control so as to render debtor mere instrumentality of the creditor. *Johnson & Johnson v. Coopervision, 720 F. Supp. 1116 (D. Del. 1989)*.

Doctrine of piercing the corporate veil is usually employed against a defendant corporation to hold its shareholders or its parent company liable; court ruled that plaintiff corporation could not invoke the doctrine in order to benefit from its own inattention to corporate formalities. *Holly Farms Corp v. Taylor, 722 F. Supp. 1152 (D. Del. 1989)*.

§107 POWERS OF INCORPORATORS

If the persons who are to serve as directors until the first annual meeting of stockholders have not been named in the certificate of incorporation, the incorporator or incorporators, until the directors are elected, shall manage the affairs of the corporation and may do whatever is necessary and proper to perfect the organization of the corporation, including the adoption of the original bylaws of the corporation and the election of directors.

§108 ORGANIZATION MEETING OF INCORPORATORS OR DIRECTORS NAMED IN CERTIFICATE OF INCORPORATION

(a) After the filing of the certificate of incorporation an organization meeting of the incorporator or incorporators, or of the board of direc-

tors if the initial directors were named in the certificate of incorporation, shall be held, either within or without this State, at the call of a majority of the incorporators or directors, as the case may be, for the purposes of adopting bylaws, electing directors (if the meeting is of the incorporators) to serve or hold office until the first annual meeting of stockholders or until their successors are elected and qualify, electing officers if the meeting is of the directors, doing any other or further acts to perfect the organization of the corporation, and transacting such other business as may come before the meeting.

(b) The persons calling the meeting shall give to each other incorporator or director, as the case may be, at least 2 days' notice thereof in writing or by electronic transmission by any usual means of communication, which notice shall state the time, place and purposes of the meeting as fixed by the persons calling it. Notice of the meeting need not be given to anyone who attends the meeting or who waives notice either before or after the meeting.

(c) Any action permitted to be taken at the organization meeting of the incorporators or directors, as the case may be, may be taken without a meeting if each incorporator or director, where there is more than 1, or the sole incorporator or director where there is only 1, consents thereto in writing or by electronic transmission. Any person (whether or not then an incorporator or director) may provide, whether through instruction to an agent or otherwise, that a consent to action will be effective at a future time (including a time determined upon the happening of an event), no later than 60 days after such instruction is given or such provision is made and such consent shall be deemed to have been given for purposes of this subsection at such effective time so long as such person is then an incorporator or director, as the case may be, and did not revoke the consent prior to such time. Any such consent shall be revocable prior to its becoming effective.

(d) If any incorporator is not available to act, then any person for whom or on whose behalf the incorporator was acting directly or indirectly as employee or agent, may take any action that such incorporator would have been authorized to take under this section or §107 of this title; provided that any instrument signed by such other person, or any record of the proceedings of a meeting in which such person participated, shall state that such incorporator is not available and the reason therefor, that such incorporator was acting directly or indirectly as employee or agent for or on behalf of such person, and that such person's signature on such instrument or participation in such meeting is other-

wise authorized and not wrongful. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

§109 BYLAWS

(a) The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors of a corporation other than a nonstock corporation or initial members of the governing body of a nonstock corporation if they were named in the certificate of incorporation, or, before a corporation other than a nonstock corporation has received any payment for any of its stock, by its board of directors. After a corporation other than a nonstock corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote. In the case of a nonstock corporation, the power to adopt, amend or repeal bylaws shall be in its members entitled to vote. Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.

(b) The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees. The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in §115 of this title. (Last amended by Ch. 40, L. '15, eff. 8-1-15.)

Decisions

.1 Validity of. — A bylaw seeking to require a corporation to reimburse the election expenses of shareholders whose candidates were elected is a proper subject for shareholder action. However, the bylaw as written was not valid where it did not reserve to the board the power to exercise its fiduciary duty to decide if reimburse-

ment is appropriate. *CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. Supr. 2008)*.

A bylaw that would reduce the board size below the number of currently sitting directors would result in ending the term of a director in a manner not contemplated by Sec. 141. That section provides that a director's term ends when a successor is elected and qualified or the director resigns or is removed. Sec. 141 does not contemplate a term ending through board shrinkage. *Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. Supr. 2010).*

Stockholders can amend bylaws to give them right to create additional directors and then elect them without first amending certificate of incorporation. *Richman v. DeVal Aerodynamics, Inc, 183 A.2d 569 (Del. Ch. 1962)*.

Bylaw granting to stockholders power to fix number of directors, and election of directors without first fixing their number, is valid. *Ellin v. Consolidated Caribou Silver Mines, Inc, 67 A.2d 416 (Del. Ch. 1949)*.

Bylaw cannot set one year term for directors if charter provides for staggered three-year terms; directors elected under such invalid bylaw serve only as de facto directors whose terms can be terminated at any time by stockholder action. *Prickett v. American Steel and Pump Corp, 253 A.2d 86 (Del. Ch. 1969)*.

Supreme Court affirmed a Court of Chancery ruling that an article of defendant's charter requiring an 80 percent supermajority to amend the bylaws of defendant was clear and unambiguous. Consequently, plaintiffs could not enlarge the size of the board of directors without an 80 percent supermajority stockholder vote. *Centaur Partners, IV v. National Intergroup, Inc, 582 A.2d 923 (Del. Supr. 1990).*

Fee shifting bylaw provision is permissible under Delaware law. Neither statutory nor common law prohibits it. As the intent to deter litigation is not invariably an improper purpose, such an intent would not render the fee shifting bylaw provision unenforceable.*ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. Supr. 2014).*

A fee-shifting bylaw that was adopted after a reverse stock split did not apply to a stockholder who had been cashed out and no longer a stockholder when the bylaw was adopted. *Strougo v. Hollander, 111 A.3d 590 (Del. Ch. 2015).*

.2 Bylaw reviewing consents. — In evaluating reasonableness of bylaw purporting to establish ministerial review of validity of consents, court must determine purpose sought, impact on exercise of power conferred under Sec. 228, make sure orderly function of corporate democracy is ensured. *Allen v. Prime Computer, Inc., 490 A.2d 417 (Del. Supr. 1988).*

.3 Bylaw amendments. — A board of directors could not amend the bylaws to provide that directors may only be removed by a two-thirds vote as such a bylaw is inconsistent with Sec. 141. *Frechter v. Zier*, *C.A. No. 12038 (Ch. Ct. 1-29-17).*

§110 EMERGENCY BYLAWS AND OTHER POWERS IN EMERGENCY

(a) The board of directors of any corporation may adopt emergency bylaws, subject to repeal or change by action of the stockholders, which shall notwithstanding any different provision elsewhere in this chapter or in Chapters 3 and 5 of Title 26, or in Chapter 7 of Title 5, or in the cer-

tificate of incorporation or bylaws, be operative during any emergency resulting from an attack on the United States or on a locality in which the corporation conducts its business or customarily holds meetings of its board of directors or its stockholders, or during any nuclear or atomic disaster, or during the existence of any catastrophe, or other similar emergency condition, as a result of which a quorum of the board of directors or a standing committee thereof cannot readily be convened for action. The emergency bylaws may make any provision that may be practical and necessary for the circumstances of the emergency, including provisions that:

(1) A meeting of the board of directors or a committee thereof may be called by any officer or director in such manner and under such conditions as shall be prescribed in the emergency bylaws;

(2) The director or directors in attendance at the meeting, or any greater number fixed by the emergency bylaws, shall constitute a quorum; and

(3) The officers or other persons designated on a list approved by the board of directors before the emergency, all in such order of priority and subject to such conditions and for such period of time (not longer than reasonably necessary after the termination of the emergency) as may be provided in the emergency bylaws or in the resolution approving the list, shall, to the extent required to provide a quorum at any meeting of the board of directors, be deemed directors for such meeting.

(b) The board of directors, either before or during any such emergency, may provide, and from time to time modify, lines of succession in the event that during such emergency any or all officers or agents of the corporation shall for any reason be rendered incapable of discharging their duties.

(c) The board of directors, either before or during any such emergency, may, effective in the emergency, change the head office or designate several alternative head offices or regional offices, or authorize the officers so to do.

(d) No officer, director or employee acting in accordance with any emergency bylaws shall be liable except for wilful misconduct.

(e) To the extent not inconsistent with any emergency bylaws so adopted, the bylaws of the corporation shall remain in effect during any emergency and upon its termination the emergency bylaws shall cease to be operative.

(f) Unless otherwise provided in emergency bylaws, notice of any meeting of the board of directors during such an emergency may be

given only to such of the directors as it may be feasible to reach at the time and by such means as may be feasible at the time, including publication or radio.

(g) To the extent required to constitute a quorum at any meeting of the board of directors during such an emergency, the officers of the corporation who are present shall, unless otherwise provided in emergency bylaws, be deemed, in order of rank and within the same rank in order of seniority, directors for such meeting.

(h) Nothing contained in this section shall be deemed exclusive of any other provisions for emergency powers consistent with other sections of this title which have been or may be adopted by corporations created under this chapter.

§111 JURISDICTION TO INTERPRET, APPLY, ENFORCE OR DETERMINE THE VALIDITY OF CORPORATE INSTRUMENTS AND PROVISIONS OF THIS TITLE

(a) Any civil action to interpret, apply, enforce or determine the validity of the provisions of:

(1) The certificate of incorporation or the bylaws of a corporation;

(2) Any instrument, document or agreement (i) by which a corporation creates or sells, or offers to create or sell, any of its stock, or any rights or options respecting its stock, or (ii) to which a corporation and 1 or more holders of its stock are parties, and pursuant to which any such holder or holders sell or offer to sell any of such stock, or (iii) by which a corporation agrees to sell, lease or exchange any of its property or assets, and which by its terms provides that 1 or more holders of its stock approve of or consent to such sale, lease or exchange;

(3) Any written restrictions on the transfer, registration of transfer or ownership of securities under §202 of this title;

(4) Any proxy under §212 or §215 of this title;

(5) Any voting trust or other voting agreement under §218 of this title;

(6) Any agreement, certificate of merger or consolidation, or certificate of ownership and merger governed by §§251-253, §§255-258, §§263-264, or §267 of this title;

(7) Any certificate of conversion under §265 or §266 of this title;

(8) Any certificate of domestication, transfer or continuance under §388, §389 or §390 of this title; or

(9) Any other instrument, document, agreement, or certificate required by any provision of this title;

May be brought in the Court of Chancery, except to the extent that a statute confers exclusive jurisdiction on a court, agency or tribunal other than the Court of Chancery.

(b) Any civil action to interpret, apply or enforce any provision of this title may be brought in the Court of Chancery. (Last amended by Ch. 265, L. '16, eff. 8-1-16.)

Decisions

.1 Stay due to earlier filed action. — Chancery Court would not stay action challenging backdating of stock options in favor of earlier filed federal action as Delaware had an overwhelming interest in resolving issue of whether backdating stock options violated Delaware fiduciary duties. *Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007).*

.2 Limits on Chancery Court jurisdiction. — Chancery Court lacks subject matter jurisdiction to adjudicate the question of whether defendant made a false statement about plaintiff and whether it did so with actual malice. *Perlman v. Vox Media Inc.,* 2019 Del. Ch. LEXIS 240.

§112 ACCESS TO PROXY SOLICITATION MATERIAL

The bylaws may provide that if the corporation solicits proxies with respect to an election of directors, it may be required, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials (including any form of proxy it distributes), in addition to individuals nominated by the board of directors, one or more individuals nominated by a stockholder. Such procedures or conditions may include any of the following:

(1) A provision requiring a minimum record or beneficial ownership, or duration of ownership, of shares of the corporation's capital stock, by the nominating stockholder, and defining beneficial ownership to take into account options or other rights in respect of or related to such stock;

(2) A provision requiring the nominating stockholder to submit specified information concerning the stockholder and the stockholder's nominees, including information concerning ownership by such persons of shares of the corporation's capital stock, or options or other rights in respect of or related to such stock;

(3) A provision conditioning eligibility to require inclusion in the corporation's proxy solicitation materials upon the number or proportion

of directors nominated by stockholders or whether the stockholder previously sought to require such inclusion;

(4) A provision precluding nominations by any person if such person, any nominee of such person, or any affiliate or associate of such person or nominee, has acquired or publicly proposed to acquire shares constituting a specified percentage of the voting power of the corporation's outstanding voting stock within a specified period before the election of directors;

(5) A provision requiring that the nominating stockholder undertake to indemnify the corporation in respect of any loss arising as a result of any false or misleading information or statement submitted by the nominating stockholder in connection with a nomination; and

(6) Any other lawful condition. (Added by Ch. 14, L. '09, eff. 8-1-09.)

§113 PROXY EXPENSE REIMBURSEMENT

(a) The bylaws may provide for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to such procedures or conditions as the bylaws may prescribe, including:

(1) Conditioning eligibility for reimbursement upon the number or proportion of persons nominated by the stockholder seeking reimbursement or whether such stockholder previously sought reimbursement for similar expenses;

(2) Limitations on the amount of reimbursement based upon the proportion of votes cast in favor of one or more of the persons nominated by the stockholder seeking reimbursement, or upon the amount spent by the corporation in soliciting proxies in connection with the election;

(3) Limitations concerning elections of directors by cumulative voting pursuant to §214 of this title; or

(4) Any other lawful condition.

(b) No bylaw so adopted shall apply to elections for which any record date precedes its adoption. (Added by Ch. 14, L. '09, eff. 8-1-09.)

§114. APPLICATION OF CHAPTER TO NONSTOCK CORPORATIONS

(a) Except as otherwise provided in subsections (b) and (c) of this section, the provisions of this chapter and of chapter 5 of this title shall apply to nonstock corporations in the manner specified in the following paragraphs (a)(1)-(4) of this section:

(1) All references to stockholders of the corporation shall be deemed to refer to members of the corporation;

(2) All references to the board of directors of the corporation shall be deemed to refer to the governing body of the corporation;

(3) All references to directors or to members of the board of directors of the corporation shall be deemed to refer to members of the governing body of the corporation; and

(4) All references to stock, capital stock, or shares thereof of a corporation authorized to issue capital stock shall be deemed to refer to memberships of a nonprofit nonstock corporation and to membership interests of any other nonstock corporation.

(b) Subsection (a) of this section shall not apply to:

(1) Sections 102(a)(4), (b)(1) and (2), 109(a), 114, 141, 154, 215, 228, 230(b), 241, 242, 253, 254, 255, 256, 257, 258, 271, 276, 311, 312, 313, 390, and 503 of this title, which apply to nonstock corporations by their terms;

(2) Sections 102(f), 109(b) (last sentence), 151, 152, 153, 155, 156, 157(d), 158, 161, 162, 163, 164, 165, 166, 167, 168, 203, 211, 212, 213, 214, 216, 219, 222, 231, 243, 244, 251, 252, 267, 274, 275, 324, 364, 366(a), 391 and 502(a)(5) of this title; and

(3) Subchapter XIV and subchapter XVI of this chapter.

(c) In the case of a nonprofit nonstock corporation, subsection (a) of this section shall not apply to:

(1) The sections and subchapters listed in subsection (b) of this section;

(2) Sections 102(b)(3), 111(a)(2)and (3), 144(a)(2), 217, 218(a) and (b), and 262 of this title; and

(3) Subchapter V, subchapter VI (other than §§204 and 205 of this title) and subchapter XV of this chapter.

(d) For purposes of this chapter:

(1) A “charitable nonstock corporation” is any nonprofit nonstock corporation that is exempt from taxation under §501(c)(3) of the United States Internal Revenue Code, or any successor provisions.

(2) A “membership interest” is, unless otherwise provided in a nonstock corporation’s certificate of incorporation, a member’s share of the profits and losses of a nonstock corporation, or a member’s right to receive distributions of the nonstock corporation’s assets, or both;

(3) A “nonprofit nonstock corporation” is a nonstock corporation that does not have membership interests; and

(4) A “nonstock corporation” is any corporation organized under this chapter that is not authorized to issue capital stock. (Last amended by Ch. 354, L. ‘18, eff. 8-1-18.)

§115 FORUM SELECTION PROVISIONS

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. “Internal corporate claims” means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery. (As Added by Ch. 40, L. ‘15, eff. 8-1-15.)

§116 DOCUMENT FORM, SIGNATURE AND DELIVERY

(a) Except as provided in subsection (b) of this section, without limiting the manner in which any act or transaction may be documented, or the manner in which a document may be signed or delivered:

(1) Any act or transaction contemplated or governed by this chapter or the certificate of incorporation or bylaws may be provided for in a document, and an electronic transmission shall be deemed the equivalent of a written document. “Document” means (i) any tangible medium on which information is inscribed, and includes handwritten, typed, printed or similar instruments, and copies of such instruments; and (ii) an electronic transmission.

(2) Whenever this chapter or the certificate of incorporation or bylaws requires or permits a signature, the signature may be a manual, facsimile, conformed or electronic signature. “Electronic signature” means an electronic symbol or process that is attached to, or logically associated with, a document and executed or adopted by a person with an intent to authenticate or adopt the document.

(3) Unless otherwise agreed between the sender and recipient, an electronic transmission shall be deemed delivered to a person for pur-

poses of this chapter and the certificate of incorporation and bylaws when it enters an information processing system that the person has designated for the purpose of receiving electronic transmissions of the type delivered, so long as the electronic transmission is in a form capable of being processed by that system and such person is able to retrieve the electronic transmission. Whether a person has so designated an information processing system is determined by the certificate of incorporation, the bylaws or from the context and surrounding circumstances, including the parties' conduct. An electronic transmission is delivered under this section even if no person is aware of its receipt. Receipt of an electronic acknowledgement from an information processing system establishes that an electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

This chapter shall not prohibit 1 or more persons from conducting a transaction in accordance with Chapter 12A of Title 6 so long as the part or parts of the transaction that are governed by this chapter are documented, signed and delivered in accordance with this subsection or otherwise in accordance with this chapter. This subsection shall apply solely for purposes of determining whether an act or transaction has been documented, and the document has been signed and delivered, in accordance with this chapter, the certificate of incorporation and the bylaws.

(b) Subsection (a) of this section shall not apply to:

(1) a document filed with or submitted to the Secretary of State, the Register in Chancery, or a court or other judicial or governmental body of this State;

(2) a document comprising part of the stock ledger;

(3) a certificate representing a security;

(4) any document expressly referenced as a notice (or waiver of notice) by this chapter, the certificate of incorporation or bylaws;

(5) a consent in lieu of a meeting given by a director, stockholder or incorporator;

(6) a ballot to vote on actions at a meeting of stockholders; and

(7) an act or transaction effected pursuant to § 280 of this title or subchapters III, XIII or XVI of this chapter.

The foregoing shall not create any presumption about the lawful means to document a matter addressed by this subsection, or the lawful means to sign or deliver a document addressed by this subsection. A provision of the certificate of incorporation or bylaws shall not limit the

application of subsection (a) of this section unless the provision expressly restricts one or more of the means of documenting an act or transaction, or of signing or delivering a document, permitted by subsection (a) of this section.

(c) In the event that any provision of this chapter is deemed to modify, limit or supersede the Electronic Signatures in Global and National Commerce Act, (15 U.S.C. § 7001 et. seq.), the provisions of this chapter shall control to the fullest extent permitted by section 7002(a)(2) of such act. (As Added by Ch. 45, L. '19, eff. 8-1-19.)

Subchapter II
POWERS

§121 GENERAL POWERS

(a) In addition to the powers enumerated in Sec. 122 of this title, every corporation, its officers, directors and stockholders shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its certificate of incorporation, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation.

(b) Every corporation shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter.

§122 SPECIFIC POWERS

Every corporation created under this chapter shall have power to:

(1) Have perpetual succession by its corporate name, unless a limited period of duration is stated in its certificate of incorporation;

(2) Sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, in its corporate name;

(3) Have a corporate seal, which may be altered at pleasure, and use the same by causing it or a facsimile thereof, to be impressed or affixed or in any other manner reproduced;

(4) Purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated, and to sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, all or any of its property and assets, or any interest therein, wherever situated;

(5) Appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation;

(6) Adopt, amend and repeal bylaws;

(7) Wind up and dissolve itself in the manner provided in this chapter;

(8) Conduct its business, carry on its operations and have offices and exercise its powers within or without this State;

(9) Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof;

(10) Be an incorporator, promoter, or manager of other corporations of any type or kind;

(11) Participate with others in any corporation, partnership, limited partnership, joint venture or other association of any kind, or in any transaction, undertaking or arrangement which the participating corporation would have power to conduct by itself, whether or not such participation involves sharing or delegation of control with or to others;

(12) Transact any lawful business which the corporation's board of directors shall find to be in aid of governmental authority;

(13) Make contracts, including contracts of guaranty and suretyship, incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage, pledge or other encumbrance of all or any of its property, franchises and income, and make contracts of guaranty and suretyship which are necessary or convenient to the conduct, promotion or attainment of the business of (a) a corporation all of the outstanding stock of which is owned, directly or indirectly, by the contracting corporation, or (b) a corporation which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, or (c) a corporation all of the outstanding stock of which is owned, directly or indirectly, by a corporation which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, which contracts of guaranty and suretyship shall be deemed to be necessary or convenient to the conduct, promotion or attainment of the business of the con-

tracting corporation, and make other contracts of guaranty and suretyship which are necessary or convenient to the conduct, promotion or attainment of the business of the contracting corporation;

(14) Lend money for its corporate purposes, invest and reinvest its funds, and take, hold and deal with real and personal property as security for the payment of funds so loaned or invested;

(15) Pay pensions and establish and carry out pension, profit sharing, stock option, stock purchase, stock bonus, retirement, benefit, incentive and compensation plans, trusts and provisions for any or all of its directors, officers, and employees, and for any or all of the directors, officers, and employees of its subsidiaries;

(16) Provide insurance for its benefit on the life of any of its directors, officers, or employees, or on the life of any stockholder for the purpose of acquiring at such stockholder's death shares of its stock owned by such stockholder.

(17) Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders. (Last amended by Ch. 343, L. '00, eff. 7-1-00.)

Decisions

.1 Powers in general. — Delaware corporation, by appropriate language in its charter, may deny to itself action permitted by Delaware law. *Weinberg v. Baltimore Brick Co, 114 A.2d 812 (Del. Supr. 1955)*.

Corporation possesses all powers conferred by its charter and statute creating it. *Davis v. Louisville Gas & Electric Co, 142 A 654 (Ch. Ct. 1928)*.

No power or authority can be conferred upon corporation by its charter which is not provided by statute under which it was created. *Greene v. E H Rollins & Sons, Inc, 2 A.2d 249 (Ch. Ct. 1938); Lawson v. Household Finance Corp, 152 A 723 (Ch. Ct. 1930)*.

.2 Suits. — In absence of some special duty owing by corporation to persons injured, liability of corporation for malicious tort committed by its servant or agent rests upon authorization, direct or indirect, proceeding from nature of servant's or agent's employment, or upon adoption or ratification of agent's act. *MacDonough v. A S Beck Shoe Corp, 10 A.2d 510 (Del. Supr. 1939)*.

In action against corporation for trespass, it is not necessary to allege names of agents and officers of corporation through whom alleged trespass was committed. *Knight v. Industrial Trust Co, 193 A 723 (Del. Supr. 1937)*.

Holder of corporate indenture notes has common law right to sue corporation to enforce payment of notes after maturity unless indenture provisions expressly or by necessary implication preclude such right. *Halle v. Van Sweringen Corp, 185 A 236 (Del. Supr. 1936)*.

Corporation may also be vicariously or secondarily liable if the officer commits tort while acting on corporation's behalf, but officer remains personally liable. *Brandywine Mushroom Co v. Hockession Mushroon Products, Inc, 682 F. Supp. 1307 (D. Del. 1988)*.

Corporation's preferred shareholders from People's Republic of China were entitled to participate on equal basis with other preferred shareholders in distribution of fund created by PRC's payment of reparations for confiscation of corporation's property. Fund was created by agreement between U.S. and PRC. Corporation's claims under Delaware law must yield when they are inconsistent with or impair U.S. foreign policy. *Judah v. Shanghai Power Co, 546 A.2d 981 (Del. Supr. 1988)*.

.3 Corporate seal. — Corporate seal implies that corporation authorizes officer acting in particular matter to make contract evidenced by instrument on which seal is placed; and, in absence of opposing proof, instrument so sealed is to be regarded as binding act and deed of corporation. *Italo-Petroleum Corp of America v. Hannigan, 14 A.2d 401 (Del. Supr. 1940)*.

Corporation can contract without use of corporate seal, and so judgment on corporation's promissory note will not be refused because note did not bear corporate seal. *Peyton-DuPont Securities Co v. Vesper Oil & Gas Co, 131 A 566 (Del. Supr. 1925)*.

.4 Property. — Corporation has power to hold property which it does as quasi trustee for its stockholders. *Southerland v. Decimo Club Inc, 142 A 786 (Ch. Ct. 1928)*.

.5 Mortgages and bonds. — After-acquired property clause in corporate mortgage is valid, but holders of bonds secured by such mortgage take after-acquired property subject to any liens or equities with which it is impressed when acquired by corporation. *In re Frederica Water, Light & Power Co, 93 A 376 (Ch. Ct. 1915)*.

Holder of corporate bonds has common law right to sue corporation to enforce payment unless indenture provisions expressly or by necessary implication precludes such right, but such restrictions are strictly construed, and are effective only insofar as they are clear and reasonably free from doubt. *Japha v. Delaware Valley Utilities Co, 15 A.2d 432 (1940); Halle v. Van Sweringen Corp, 185 A 236 (1936); Noble v. European Mortgage & Investment Corp, 165 A 157 (Ch. Ct. 1933)*.

Unissued shares of capital stock of corporation may be pledged as collateral security for loan made to corporation. *In re International Radiator Co, 92 A 255 (Ch. Ct. 1914)*.

Issuing corporation and directors do not owe fiduciary duty to holder of convertible debentures. Existing property right or equitable interest must be present to create a fiduciary duty. Holder of convertible debenture has no equitable interest until it is converted. He therefore remains a creditor of corporation whose interests are governed by indenture's contractual terms. *Simons v. Cogan, 549 A.2d 300 (Del. 1987)*.

.6 Agents. — When corporation receives and retains fruits of loan negotiated by its agent, it cannot deny agent's authority to borrow money, even though creditor made check out to agent personally, and after he deposited it in corporate account, book entries were made in corporation's records reflecting credit to agent's personal

account in amount same as loan. *Mulco Products, Inc v. Black, 127 A.2d 851 (Del. 1956).*

.7 Bylaws. — Corporation has power to make reasonable bylaws which do not conflict with constitution, statutes or charter. *Gaskill v. Gladys Belle Oil Co, 146 A 337 (Ch. Ct. 1929)*.

Bylaws must be reasonable, and bylaw providing for five days' notice of special stockholders' meeting is reasonable. *Moon v. Moon Motor Car Co, 151 A 298 (Ch. Ct. 1930)*.

President and sole stockholder of corporation signing contract on its behalf is unhampered by either absence of authorizing bylaws or by restraining force of existing by-laws. *Community Stores, Inc v. Dean, 14 A.2d 633 (1940)*.

.8 Dissolution and winding up. — Corporation in dissolution must preserve assets for benefit of creditors, and cannot prefer stockholders. *Asmussen v. Quaker City Corp, 156 A 180 (Ch. Ct. 1931)*.

.9 Profit-sharing plan. — Officers are liable to their corporation for discount they gave its profit-sharing plan in selling corporation's own bonds to it, even though corporation acquired those bonds at same discount from public, when (1) officers were beneficiaries of plan, (2) sale was not approved by board, and (3) corporation did not need money so urgently that it could not have obtained it on more favorable terms elsewhere. *Schwartz v. Miner, 146 A.2d 801 (Ch. Ct. 1958)*.

.10 Business outside state. — Corporation has power to do business in other states with their assent. *Magna Oil & Refining Co v. White Star Refining Co, 280 F 52 (3d Cir 1922)*.

.11 Attorney-client privilege. — Corporation waives attorney-client privilege relating to communications with its attorney on bylaw and charter amendments when it has already voluntarily testified to specific discussions with him about same subject matter; absent waiver, corporation has same privilege as any other client. *Lee National Corp v. Deramus, 313 F. Supp. 224 (D. Del. 1970)*.

.12 Joint ventures. — Corporation acted independently in joint ventures with companies that had nominees on its board and about 20% of its stock, since stock ownership alone, when less than majority, does not prove control. K*aplan v. Centex Corp, 284 A.2d 119 (Ch. Ct. 1971)*.

.13 Self dealing. — Parent company owning majority of stock of subsidiary commercial airline carrier parent was guilty of self-dealing when it delayed selling jet airplanes to subsidiary because latter would not agree to finance plan, thus forcing airline to lease jets from parent on day-to-day basis. *Trans World Airlines v. Summa Corp, 374 A.2d 5 (Ch. Ct. 1977)*.

.14 Suit against alien corporation. — Corporation's claims against People's Republic of China for expropriating its property in 1950 were extinguished by 1979 Executive Agreement between United States and PRC. Corporation could not assert that debt as counterclaim against PRC shareholders in their action to participate in settlement fund engendered by 1979 Executive Agreement. *Shanghai Power Co v. Delaware Trust Co, 526 A.2d 906 (Ch. Ct. 1987)*.

.15 Attorney's fees, liability for. — Corporation was not liable for attorney's fees incurred in minority shareholder's successful class action suit against corporation when (1) there was class recovery from which attorney's fees could be awarded, (2) although corporation violated its fiduciary duty to minority sharehold-

ers, there was no showing of corporation's bad faith or deliberate fraud, and (3) minority shareholders could not claim that corporation should pay attorney's fees because damage award was too low since this amounts to indirect reargument of damage award. *Weinberger v. UOP, Inc, 517 A.2d 653 (Ch. Ct. 1986)*.

.16 Nonprofit insurance company. — A nonprofit health insurance company organized under the GCL does not owe fiduciary duties to its plan participants because the interests of the plan participants and the insurance company are not sufficiently aligned. *Crosse v. BCBSD, Inc., 836 A.2d 492 (Del. 2003).*

.17 Renouncing opportunities. — A trade secret claim under the Delaware Uniform Trade Secret Act is precluded by the type of waiver permitted by Sec. 122(17). *Alarm.com Holdings, Inc. v. ABS Capital Partners, Inc.*, 2018 Del. Ch. LEXIS 193.

§123 POWERS RESPECTING SECURITIES OF OTHER CORPORATIONS OR ENTITIES

Any corporation organized under the laws of this State may guarantee, purchase, take, receive, subscribe for or otherwise acquire; own, hold, use or otherwise employ; sell, lease, exchange, transfer or otherwise dispose of; mortgage, lend, pledge or otherwise deal in and with, bonds and other obligations of, or shares or other securities or interests in, or issued by, and other domestic or foreign corporation, partnership, association, or individual, or by any government or agency or instrumentality thereof. A corporation while owner of any such securities may exercise all the rights, powers and privileges of ownership, including the right to vote.

Decisions

.1 Purchase of stock in other corporations. — Delaware corporations may acquire securities of other corporations. *Leibert v. Grinnell Corp, 194 A.2d 846 (Ch. Ct. 1963); Butler v. New Keystone Copper Co, 93 A 380 (Ch. Ct. 1915)*.

Purchase by corporation of all stock of several corporations does not create de facto merger so as to give dissenting stockholder appraisal rights. *Orzeck v. Englehart, 192 A.2d 36 (Ch. Ct.), aff'd, 195 A.2d 375 (1963)*.

Officers can bind corporation to assume third party's guarantee of his business' obligations, even without prior specific board authorization or subsequent ratification, when assumption agreement is made in connection with corporation's continuing program of buying other businesses. *Harvard Industries, Inc v. Wendel, 178 A.2d 486 (Ch. Ct. 1962)*.

.2 Voting of stock held by corporation. — If corporation has power to hold stock, it has incidental power to vote it, notwithstanding its certificate of incorporation confers no special power to that end. *Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co, 127 A 56 (Ch. Ct. 1924)*.

Holding corporation owning controlling stock in another corporation can deposit stock in voting trust. *Adams v. Clearance Corp, 116 A.2d 893 (Ch. Ct.)*, *aff'd, 121 A.2d 302 (1955)*.

.3 Parent and subsidiary. — Corporation has duty to share its allocation of quotas for importation of crude oil with subsidiary when government regulation states that parent and subsidiary are one crude oil importer; refiner who owns and controls another must deal with subsidiary on a fair and equitable basis in spite of contrary business judgment. *Getty Oil Co v. Skelly Oil Co, 255 A.2d 717 (Ch. Ct. 1969)*.

§124 EFFECT OF LACK OF CORPORATE CAPACITY OR POWER; ULTRA VIRES

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

(1) In a proceeding by a stockholder against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, such compensation as may be equitable for the loss or damage sustained by any of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

(2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through stockholders in a representative suit, against an incumbent or former officer or director of the corporation, for loss or damage due to such incumbent or former officer's or director's unauthorized act;

(3) In a proceeding by the Attorney General to dissolve the corporation, or to enjoin the corporation from the transaction of unauthorized business. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 No defense to liability. — Corporation cannot escape its tort liability by plea of ultra vires. *Northern Assurance Co v. Rachlin Clothes Shop, Inc, 125 A 184 (Del. Supr. 1924)*.

A contract is not ultra vires merely because it conflicts with a contract involving a third party. Where all three categories of Sec. 124 are inapplicable the ultra vires doctrine will not render the contract at issue void. *Lynch v. Coinmaster USA, Inc., 614 F. Supp. 2d 494 (D. Del. 2009).*

.2 Directors' ultra vires act. — When directors authorized transfer of life insurance policy on president's life, without consideration, to pay his debts, such transfer was ultra vires and void even though president used money he had borrowed to buy machinery for corporation. *Wolter v. Johnston, 34 F.2d 598 (3d Cir. 1929)*.

§125 CONFERRING ACADEMIC OR HONORARY DEGREES

No corporation organized after April 18, 1945, shall have power to confer academic or honorary degrees unless the certificate of incorporation or an amendment thereof shall so provide and unless the certificate of incorporation or an amendment thereof prior to its being filed in the office of the Secretary of State shall have endorsed thereon the approval of the Department of Education of this State. No corporation organized before April 18, 1945, any provision in its certificate of incorporation to the contrary notwithstanding, shall possess the power aforesaid without first filing in the office of the Secretary of State a certificate of amendment so providing, the filing of which certificate of amendment in the office of the Secretary of State shall be subject to prior approval of the Department of Education, evidenced as hereinabove provided. Approval shall be granted only when it appears to the reasonable satisfaction of the Department of Education that the corporation is engaged in conducting a bona fide institution of higher learning, giving instructions in arts and letters, science or the professions, or that the corporation proposes, in good faith, to engage in that field and has or will have the resources, including personnel, requisite for the conduct of an institution of higher learning. Upon dissolution, all such corporations shall comply with §8530 of Title 14. Notwithstanding any provision herein to the contrary, no corporation shall have the power to conduct a private business or trade school unless the certificate of incorporation or an amendment thereof, prior to its being filed in the office of the Secretary of State, shall have endorsed thereon the approval of the Department of Education pursuant to Chapter 85 of Title 14.

Notwithstanding the foregoing provisions, any corporation conducting a law school, which has its principal place of operation in Delaware, and which intends to meet the standards of approval of the American Bar Association, may, after it has been in actual operation for not less than 1 year, retain at its own expense a dean or dean emeritus of a law school fully approved by the American Bar Association to make an on-site inspection and report concerning the progress of the corporation toward meeting the standards for approval by the American Bar Association. Such dean or dean emeritus shall be chosen by the Attorney General from a panel of 3 deans whose names are presented to the Attorney General as being willing to serve. One such dean on this panel shall be nominated by the trustees of said law school corporation; another dean shall be nominated by a committee of the Student Bar Association of said law school; and the other dean shall be nominated by a committee of lawyers who are parents of students attending such law school. If any of the above-named groups cannot find a dean, it may substitute 2 full professors of accredited law schools for the dean it is entitled to nominate, and in such a case if the Attorney General chooses 1 of such professors, such professor shall serve the function of a dean as herein prescribed. If the dean so retained shall report in writing that, in such dean's professional judgment, the corporation is attempting, in good faith, to comply with the standards for approval of the American Bar Association and is making reasonable progress toward meeting such standards, the corporation may file a copy of the report with the Superintendent of Public Instruction and with the Attorney General. Any corporation which complies with these provisions by filing such report shall be deemed to have temporary approval from the State and shall be entitled to amend its certificate of incorporation to authorize the granting of standard academic law degrees. Thereafter, until the law school operated by the corporation is approved by the American Bar Association, the corporation shall file once during each academic year a new report, in the same manner as the first report. If, at any time, the corporation fails to file such a report, or if the dean retained to render such report states that, in such dean's opinion, the corporation is not continuing to make reasonable progress toward accreditation, the Attorney General, at the request of the Superintendent of Public Instruction, may file a complaint in the Court of Chancery to suspend said temporary approval and degree-granting power until a further report is filed by a dean or dean emeritus of an accredited law school that the school has resumed its progress towards meeting the standards for approval. Upon approval

of the law school by the American Bar Association, temporary approval shall become final, and shall no longer be subject to suspension or vacation under this section. (Last amended by Ch. 249, L. '04, eff. 6-8-04.)

§126 BANKING POWER DENIED

(a) No corporation organized under this chapter shall possess the power of issuing bills, notes, or other evidences of debt for circulation as money, or the power of carrying on the business of receiving deposits of money.

(b) Corporations organized under this chapter to buy, sell and otherwise deal in notes, open accounts and other similar evidences of debt, or to loan money and to take notes, open accounts and other similar evidences of debt as collateral security therefor, shall not be deemed to be engaging in the business of banking. (Last amended by Ch. 148, L. '69, eff. 7-15-69.)

§127 PRIVATE FOUNDATION; POWERS AND DUTIES

A corporation of this State which is a private foundation under the United States internal revenue laws and whose certificate of incorporation does not expressly provide that this section shall not apply to it is required to act or to refrain from acting so as not to subject itself to the taxes imposed by 26 USCA Sec. 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to taxes on investments which jeopardize charitable purpose), or 4945 (relating to taxable expenditures), or corresponding provisions of any subsequent United States internal revenue law. (Added by Ch. 87, L. '71, eff. 5-20-71.)

Subchapter III
REGISTERED OFFICE AND REGISTERED AGENT

§131 REGISTERED OFFICE IN STATE; PRINCIPAL OFFICE OR PLACE OF BUSINESS IN STATE

(a) Every corporation shall have and maintain in this State a registered office which may, but need not be, the same as its place of business.

(b) Whenever the term "corporation's principal office or place of business in this State" or "principal office or place of business of the corporation in this State" or other term of like import, is or has been used in a corporation's certificate of incorporation, or in any other document, or in any statute, it shall be deemed to mean and refer to, unless the context indicates otherwise, the corporation's registered office required by this section; and it shall not be necessary for any corporation to amend its certificate of incorporation or any other document to comply with this section.

(c) As contained in any certificate of incorporation or other document filed with the Secretary of State under this chapter, the address of a registered office shall include the street, number, city, county and postal code. (Last amended by Ch. 96, L. '11, eff. 8-1-11.)

§132 REGISTERED AGENT IN STATE; RESIDENT AGENT

(a) Every corporation shall have and maintain in this State a registered agent, which agent may be any of:

(1) The corporation itself;

(2) An individual resident in this State;

(3) A domestic corporation (other than the corporation itself), a domestic partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a domestic limited liability company or a domestic statutory trust; or

(4) A foreign corporation, a foreign partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a foreign limited liability company or a foreign statutory trust.

(b) Every registered agent for a domestic corporation or a foreign corporation shall:

(1) If an entity, maintain a business office in this State which is generally open, or if an individual, be generally present at a designated location in this State, at sufficiently frequent times to accept service of process and otherwise perform the functions of a registered agent;

(2) If a foreign entity, be authorized to transact business in this State;

(3) Accept service of process and other communications directed to the corporations for which it serves as registered agent and forward same to the corporation to which the service or communication is directed;

(4) Forward to the corporations for which it serves as registered agent the annual report required by §502 of this title or an electronic notification of same in a form satisfactory to the Secretary of State ("Secretary"); and

(5) Satisfy and adhere to regulations established by the Secretary regarding the verification of both the identity of the entity's contacts and individuals for which the registered agent maintains a record for the reduction of risk of unlawful business purposes.

(c) Any registered agent who at any time serves as registered agent for more than 50 entities (a "commercial registered agent"), whether domestic or foreign, shall satisfy and comply with the following qualifications.

(1) A natural person serving as a commercial registered agent shall:

a. Maintain a principal residence or a principal place of business in this State;

b. Maintain a Delaware business license;

c. Be generally present at a designated location within this State during normal business hours to accept service of process and otherwise perform the functions of a registered agent as specified in subsection (b) of this section;

d. Provide the Secretary upon request with such information identifying and enabling communication with such commercial registered agent as the Secretary shall require; and

e. Satisfy and adhere to regulations established by the Secretary regarding the verification of both the identity of the entity's contacts and individuals for which the natural person maintains a record for the reduction of risk of unlawful business purposes.

(2) A domestic or foreign corporation, a domestic or foreign partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a domestic or foreign limited liability company, or a domestic or foreign statutory trust serving as a commercial registered agent shall:

a. Have a business office within this State which is generally open during normal business hours to accept service of process and otherwise perform the functions of a registered agent as specified in subsection (b) of this section;

b. Maintain a Delaware business license;

c. Have generally present at such office during normal business hours an officer, director or managing agent who is a natural person;

d. Provide the Secretary upon request with such information identifying and enabling communication with such commercial registered agent as the Secretary shall require; and

e. Satisfy and adhere to regulations established by the Secretary regarding the verification of both the identity of the entity's contacts and individuals for which it maintains a record for the reduction of risk of unlawful business purposes.

(3) For purposes of this subsection and paragraph (f)(2)a. of this section, a commercial registered agent shall also include any registered agent which has an officer, director or managing agent in common with any other registered agent or agents if such registered agents at any time during such common service as officer, director or managing agent collectively served as registered agents for more than 50 entities, whether domestic or foreign.

(d) Every corporation formed under the laws of this State or qualified to do business in this State shall provide to its registered agent and update from time to time as necessary the name, business address and business telephone number of a natural person who is an officer, director, employee, or designated agent of the corporation, who is then authorized to receive communications from the registered agent. Such person shall be deemed the communications contact for the corporation. Every registered agent shall retain (in paper or electronic form) the above information concerning the current communications contact for each corporation for which he, she or it serves as a registered agent. If the corporation fails to provide the registered agent with a current communications contact, the registered agent may resign as the registered agent for such corporation pursuant to §136 of this title.

(e) The Secretary is fully authorized to issue such regulations, as may be necessary or appropriate to carry out the enforcement of subsections (b), (c) and (d) of this section, and to take actions reasonable and necessary to assure registered agents' compliance with subsections (b), (c) and (d) of this section. Such actions may include refusal to file documents submitted by a registered agent, including the refusal to file any documents regarding an entity's formation.

(f) Upon application of the Secretary, the Court of Chancery may enjoin any person or entity from serving as a registered agent or as an officer, director or managing agent of a registered agent.

(1) Upon the filing of a complaint by the Secretary pursuant to this section, the Court may make such orders respecting such proceeding as

it deems appropriate, and may enter such orders granting interim or final relief as it deems proper under the circumstances.

(2) Any one or more of the following grounds shall be a sufficient basis to grant an injunction pursuant to this section:

a. With respect to any registered agent who at any time within 1 year immediately prior to the filing of the Secretary's complaint is a commercial registered agent, failure after notice and warning to comply with the qualifications set forth in subsection (b) of this section and/or the requirements of subsection (c) or (d) of this section above;

b. The person serving as a registered agent, or any person who is an officer, director or managing agent of an entity registered agent, has been convicted of a felony or any crime which includes an element of dishonesty or fraud or involves moral turpitude;

c. The registered agent has engaged in conduct in connection with acting as a registered agent that is intended to or likely to deceive or defraud the public.

(3) With respect to any order the court enters pursuant to this section with respect to an entity that has acted as a registered agent, the court may also direct such order to any person who has served as an officer, director, or managing agent of such registered agent. Any person who, on or after January 1, 2007, serves as an officer, director, or managing agent of an entity acting as a registered agent in this State shall be deemed thereby to have consented to the appointment of such registered agent as agent upon whom service of process may be made in any action brought pursuant to this section, and service as an officer, director, or managing agent of an entity acting as a registered agent in this State shall be a signification of the consent of such person that any process when so served shall be of the same legal force and validity as if served upon such person within this State, and such appointment of the registered agent shall be irrevocable.

(4) Upon the entry of an order by the Court enjoining any person or entity from acting as a registered agent, the Secretary shall mail or deliver notice of such order to each affected corporation at the address of its principal place of business as specified in its most recent franchise tax report or other record of the Secretary. If such corporation is a domestic corporation and fails to obtain and designate a new registered agent within 30 days after such notice is given, the Secretary shall declare the charter of such corporation forfeited. If such corporation is a foreign corporation, and fails to obtain and designate a new registered agent within 30 days after such notice is given, the Secretary shall forfeit

its qualification to do business in this State. If the court enjoins a person or entity from acting as a registered agent as provided in this section and no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the corporation for which the registered agent had been acting shall thereafter be upon the Secretary in accordance with Sec. 321 of this title. The Court of Chancery may, upon application of the Secretary on notice to the former registered agent, enter such orders as it deems appropriate to give the Secretary access to information in the former registered agent's possession in order to facilitate communication with the corporations the former registered agent served.

(g) The Secretary is authorized to make a list of registered agents available to the public, and to establish such qualifications and issue such rules and regulations with respect to such listing as the Secretary deems necessary or appropriate.

(h) Whenever the term "resident agent" or "resident agent in charge of a corporation's principal office or place of business in this State," or other term of like import which refers to a corporation's agent required by statute to be located in this State, is or has been used in a corporation's certificate of incorporation, or in any other document, or in any statute, it shall be deemed to mean and refer to, unless the context indicates otherwise, the corporation's registered agent required by this section; and it shall not be necessary for any corporation to amend its certificate of incorporation or any other document to comply with this section. (Last amended by Ch. 334, L. '18, eff. 7-17-18.)

Decisions

.1 Corporation as registered agent. — When corporation's registered agent is itself, service of process may be made by any method authorized by statute for service either on corporations or on their registered agents. *Keith v. Melvin I Joseph Constr Co, 451 A.2d 842 (1982)*.

§133 CHANGE OF LOCATION OF REGISTERED OFFICE; CHANGE OF REGISTERED AGENT

Any corporation may, by resolution of its board of directors, change the location of its registered office in this State to any other place in this

State. By like resolution, the registered agent of a corporation may be changed to any other person or corporation including itself. In either such case, the resolution shall be as detailed in its statement as is required by Sec. 102(a)(2) of this title. Upon the adoption of such a resolution, a certificate certifying the change shall be executed, acknowledged, and filed in accordance with Sec. 103 of this title. (Last amended by Ch. 587, L. '96, eff. 11-24-97.)

§134 CHANGE OF ADDRESS OR NAME OF REGISTERED AGENT

(a) A registered agent may change the address of the registered office of the corporation or corporations for which the agent is a registered agent to another address in this State by filing with the Secretary of State a certificate, executed and acknowledged by such registered agent, setting forth the address at which such registered agent has maintained the registered office for each of the corporations, and further certifying to the new address to which each such registered office will be changed on a given day, and at which new address such registered agent will thereafter maintain the registered office for each of the corporations for which it is a registered agent. Thereafter, or until further change of address, as authorized by law, the registered office in this State of each of the corporations for which the agent is a registered agent shall be located at the new address of the registered agent thereof as given in the certificate.

(b) In the event of a change of name of any person or corporation acting as registered agent in this State, such registered agent shall file with the Secretary of State a certificate, executed and acknowledged by such registered agent, setting forth the new name of such registered agent, the name of such registered agent before it was changed, and the address at which such registered agent has maintained the registered office for each of the corporations for which it acts as a registered agent. A change of name of any person or corporation acting as a registered agent as a result of a merger or consolidation of the registered agent, with or into another person or corporation which succeeds to its assets by operation of law, shall be deemed a change of name for purposes of this section. (Last amended by Ch. 82, L. '01, eff. 7-1-01.)

§135 RESIGNATION OF REGISTERED AGENT COUPLED WITH APPOINTMENT OF SUCCESSOR

The registered agent of 1 or more corporations may resign and appoint a successor registered agent by filing a certificate with the Secretary of State, stating the name and address of the successor agent, in accordance with Sec. 102(a)(2) of this title. There shall be attached to such certificate a statement of each affected corporation ratifying and approving such change of registered agent. Each such statement shall be executed and acknowledged in accordance with Sec. 103 of this title. Upon such filing, the successor registered agent shall become the registered agent of such corporations as have ratified and approved such substitution and the successor registered agent's address, as stated in such certificate, shall become the address of each such corporation's registered office in this State. The Secretary of State shall then issue a certificate that the successor registered agent has become the registered agent of the corporations so ratifying and approving such change and setting out the names of such corporations.

§136 RESIGNATION OF REGISTERED AGENT NOT COUPLED WITH APPOINTMENT OF SUCCESSOR

(a) The registered agent of a corporation, including a corporation which has become void pursuant to Section 510 of this title, may resign without appointing a successor by filing a certificate of resignation with the Secretary of State, but such resignation shall not become effective until 30 days after the certificate is filed. The certificate shall be executed and acknowledged by the registered agent, shall contain a statement that written notice of resignation was given to the corporation at least 30 days prior to the filing of the certificate by mailing or delivering such notice to the corporation at its address last known to the registered agent and shall set forth the date of such notice. The certificate shall include such information last provided to the registered agent pursuant to Section 132(d) of this title for a communications contact for the affected corporation. Such information regarding the communications contact shall not be deemed public. A certificate filed pursuant to this section must be on the form prescribed by the Secretary of State.

(b) After receipt of the notice of the resignation of its registered agent, provided for in subsection (a) of this section, the corporation for

which such registered agent was acting shall obtain and designate a new registered agent to take the place of the registered agent so resigning in the same manner as provided in Sec. 133 of this title for change of registered agent. If such corporation, being a corporation of this State, fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the Secretary of State shall declare the charter of such corporation forfeited. If such corporation, being a foreign corporation, fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the Secretary of State shall forfeit its authority to do business in this State.

(c) After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the corporation for which the resigned registered agent had been acting shall thereafter be upon the Secretary of State in accordance with Sec. 321 of this title. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Subchapter IV
DIRECTORS AND OFFICERS

§141 BOARD OF DIRECTORS; POWERS; NUMBER, QUALIFICATIONS, TERMS AND QUORUM; COMMITTEES; CLASSES OF DIRECTORS; NONSTOCK CORPORATIONS; RELIANCE UPON BOOKS; ACTION WITHOUT MEETING; REMOVAL

(a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

(b) The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than 1/3 of the total number of directors. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.

(c)(1) All corporations incorporated prior to July 1, 1996, shall be governed by paragraph (1) of this subsection, provided that any such corporation may by a resolution adopted by a majority of the whole board elect to be governed by paragraph (2) of this subsection, in which case paragraph (1) of this subsection shall not apply to such corporation. All corporations incorporated on or after July 1, 1996, shall be governed by paragraph (2) of this subsection. The board of directors may, by resolution passed by a majority of the whole board, designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqu-

alified from voting, whether or not the member or members present constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the certificate of incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the board of directors as provided in subsection (a) of §151 of this title, fix the designations and any of the preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the corporation or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation or fix the number of shares of any series of stock or authorize the increase or decrease of the shares of any series), adopting an agreement of merger or consolidation under §251, §252, §254, §255, §256, §257, §258, §263 or §264 of this title, recommending to the stockholders the sale, lease or exchange of all or substantially all of the corporation's property and assets, recommending to the stockholders a dissolution of the corporation or a revocation of a dissolution, or amending the bylaws of the corporation; and, unless the resolution, bylaws or certificate of incorporation expressly so provides, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock or to adopt a certificate of ownership and merger pursuant to §253 of this title.

(2) The board of directors may designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member.

Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to the following matter: (i) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by this chapter to be submitted to stockholders for approval or (ii) adopting, amending or repealing any bylaw of the corporation.

(3) Unless otherwise provided in the certificate of incorporation, the bylaws or the resolution of the board of directors designating the committee, a committee may create 1 or more subcommittees, each subcommittee to consist of 1 or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee. Except for references to committees and members of committees in subsection (c) of this section, every reference in this chapter to a committee of the board of directors or a member of a committee shall be deemed to include a reference to a subcommittee or member of a subcommittee.

(4) A majority of the directors then serving on a committee of the board of directors or on a subcommittee of a committee shall constitute a quorum for the transaction of business by the committee or subcommittee, unless the certificate of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee that created the subcommittee requires a greater or lesser number, provided that in no case shall a quorum be less than 1/3 of the directors then serving on the committee or subcommittee. The vote of the majority of the members of a committee or subcommittee present at a meeting at which a quorum is present shall be the act of the committee or subcommittee, unless the certificate of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee that created the subcommittee requires a greater number.

(d) The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and

at each annual election held after such classification becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire. The certificate of incorporation or bylaw provision dividing the directors into classes may authorize the board of directors to assign members of the board already in office to such classes at the time such classification becomes effective. The certificate of incorporation may confer upon holders of any class or series of stock the right to elect 1 or more directors who shall serve for such term, and have such voting powers as shall be stated in the certificate of incorporation. The terms of office and voting powers of the directors elected separately by the holders of any class or series of stock may be greater than or less than those of any other director or class of directors. In addition, the certificate of incorporation may confer upon 1 or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors. Any such provision conferring greater or lesser voting power shall apply to voting in any committee, unless otherwise provided in the certificate of incorporation or bylaws. If the certificate of incorporation provides that 1 or more directors shall have more or less than 1 vote per director on any matter, every reference in this chapter to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors.

(e) A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.

(f) Unless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, or by electronic transmission. Any person (whether or not then a director) may provide, whether through instruction to an agent or otherwise, that a consent to action will be effective at a future time (including a time determined upon the hap-

pening of an event), no later than 60 days after such instruction is given or such provision is made and such consent shall be deemed to have been given for purposes of this subsection at such effective time so long as such person is then a director and did not revoke the consent prior to such time. Any such consent shall be revocable prior to its becoming effective. After an action is taken, the consent or consents relating thereto shall be filed with the minutes of the proceedings of the board of directors, or the committee thereof, in the same paper or electronic form as the minutes are maintained.

(g) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors of any corporation organized under this chapter may hold its meetings, and have an office or offices, outside of this State.

(h) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors.

(i) Unless otherwise restricted by the certificate of incorporation or bylaws, members of the board of directors of any corporation, or any committee designated by the board, may participate in a meeting of such board, or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting.

(j) The certificate of incorporation of any nonstock corporation may provide that less than 1/3 of the members of the governing body may constitute a quorum thereof and may otherwise provide that the business and affairs of the corporation shall be managed in a manner different from that provided in this section. Except as may be otherwise provided by the certificate of incorporation, this section shall apply to such a corporation, and when so applied, all references to the board of directors, to members thereof, and to stockholders shall be deemed to refer to the governing body of the corporation, the members thereof and the members of the corporation, respectively; and all references to stock, capital stock, or shares thereof shall be deemed to refer to memberships of a nonprofit nonstock corporation and to membership interests of any other nonstock corporation.

(k) Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors, except as follows:

(1) Unless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, stockholders may effect such removal only for cause; or

(2) In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no director may be removed without cause if the votes cast against such director's removal would be sufficient to elect such director if then cumulatively voted at an election of the entire board of directors, or, if there be classes of directors, at an election of the class of directors of which such director is a part.

Whenever the holders of any class or series are entitled to elect 1 or more directors by the certificate of incorporation, this subsection shall apply, in respect to the removal without cause of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series and not to the vote of the outstanding shares as a whole. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Directors acting as board. — Directors, when acting for corporation, must act as board; individual directors, acting as such, cannot bind board. *Bruch v. National Credit Co, 116 A 738 (Ch. Ct. 1923)*.

.2 Delegation of authority. — Directors cannot delegate their duty to manage corporate enterprise, but this does not prevent them from depositing in voting trust shares of stock owned by corporation, even though these shares represent sole substantial asset of corporation. *Adams v. Clearance Corp, 121 A.2d 302 (Del. Supr. 1956)*.

Corporation equally owned by two groups of stockholders can create new class of non-participating voting stock, and issue one share to odd numbered new director able to break deadlock; arrangement is not unlawful delegation of directors' duties, since it was approved by unanimous vote of stockholders and effected through charter amendment. *Lehrman v. Cohen, 222 A.2d 800 (Del. Supr. 1966)*.

A board of directors did not abdicate its duty to manage the corporation by entering into an agreement with a CEO whereby the CEO would be responsible for general management and could terminate the agreement, and be owed his salary for life, if the board interfered with him. *Grimes v. Donald, 673 A.2d 1207 (Del. Supr. 1996)*.

A no hand poison pill which prevented a newly elected board from redeeming a shareholders' rights plan for six months was invalid under Sec. 141 as this limitation on the board's authority was not set out in the certificate of incorporation, and as it prevented the newly elected board from completely discharging its management duties. *Quickturn Design Systems v. Shapiro, 721 A.2d 1281 (Del. Supr. 1998).*

A dead hand poison pill, which provided that only the board that adopted a shareholder rights plan can redeem it, violated Sec. 141 by creating voting power

distinctions among directors which were not expressed in the certificate of incorporation and by limiting a newly elected board's ability to achieve a business combination. *Carmody v. Toll Brothers, Inc., 723 A.2d 1180 (Ch. Ct. 1998).*

The court upheld a poison pill designed to prevent the sale of a parent corporation where the sale was the culmination of an improper course of conduct and would thwart the completion of a strategic process intended to maximize shareholder value. *Hollinger International, Inc. v. Black, 844 A.2d 1022 (Del. Ch. 2004), aff'd, Black v. Hollinger International, Inc. (Del. Supr. 2005).*

.3 Directors as fiduciaries. — Delaware corporate fiduciary law does not require directors to value or preserve piecemeal assets in a merger setting. Therefore, the Court of Chancery did not err in approving the settlement of a class action despite derivative plaintiffs objection that it improperly released claims that the board had breached its fiduciary duties by failing to value or preserve the derivative claims before agreeing to the merger. *Ark. Teacher Ret. Sys. v. Caiafa, 996 A.2d 321 (Del. Supr. 2010).*

Directors breached no fiduciary duties by causing corporation to exercise its right to redeem retired stockholders' shares at a time that was most advantageous to the corporation's working stockholders. *Nemec v. Shrader, 991 A.2d 1122 (Del. Supr. 2010).*

A corporation has a right, under *Brophy v. Cities Service Co.,* 70 A.2d 5 (Del. Ch. 1949), to recover from its fiduciaries for harm caused by insider trading. *Brophy* is neither outdated nor inconsistent with the current federal insider trading regime and a reasoned application of *Brophy* serves the critical Delaware policy of policing against violations of the duty of loyalty. *Pfeiffer v. Toll, 989 A.2d 683 (Del. Ch. 2010).*

A stockholder does not have to show that a corporation suffered actual harm before bringing a breach of fiduciary duty claim that officers and directors improperly used the corporation's material, non-public information (ie a *Brophy* claim). *Kahn v. Kolberg Kravis Roberts & Co., LP, 23 A.3d 831 (Del. Supr. 2011).*

Terms of merger which left preferred shareholders of pre-merger corporation as shareholders of post-merger corporation did not result from directors' breach of fiduciary duty. Although directors' actions in seeking merger partner based on what partner would offer common shareholders, without seeking anything specific for preferred shareholders, may have breached duty, merger partner's offer was not made in direct response to director's solicitations. *Dalton v. American Investment Co, 490 A.2d 574 (Ch. Ct. 1985)*.

Majority shareholders/directors breached their fiduciary duties of fair dealing owed to minority shareholders when they approved cash-out merger because (1) merger had intended effect of terminating pending derivative litigation seeking recovery from majority shareholders/directors and (2) no independent agency, either board committee, special counsel or investment banker, provided basis to conclude that derivative claims were without value to corporation or that cash-out price was fair. *Merritt v. Colonial Foods, Inc, 505 A.2d 757 (Ch. Ct. 1986)*.

Self-tender for preferred stock was coercive when it occurred when stock was at lowest level in five years, board had stated policy of not declaring dividends, and board advised shareholders that it intended to seek delisting of stock. *Eisenberg v. Chicago Milwaukee Corp, 537 A.2d 1051 (Ch. Ct. 1987)*.

Court refused to dismiss complaint by minority shareholders challenging merger of corporation into wholly owned subsidiary of parent owning 93% of corporation's voting power. Suit challenged merger on grounds that price was unfair, material facts had been misrepresented, and merger terms had not been adequately considered by board that was dominated by parent. When parent corporation and sub's directors stand on both sides of a merger transaction, they have burden of establishing entire fairness of merger. *Sealy Mattress Co of New Jersey, Inc v. Sealy, Inc, 532 A.2d 1324 (Ch. Ct. 1987)*.

Issuing corporation and directors do not owe fiduciary duty to holder of convertible debentures. Existing property right or equitable interest must be present to create a fiduciary duty. Holder of convertible debenture has no equitable interest until it is converted. He therefore remains a creditor of corporation whose interests are governed by indenture's contractual terms. *Simons v. Cogan, 549 A.2d 300 (1988), aff'g, 542 A.2d 785 (Ch. Ct. 1987).*

Controlling shareholder owed general fiduciary duty to corporation and minority shareholders even though certain specific transactions were immunized by governmental agency approval. Controlling shareholder breached this duty by taking actions for its own benefit that were materially detrimental to subsidiary's productivity and effectiveness. *Summa Corp v. Trans World Airlines, Inc, 540 A.2d 403 (Del. Supr. 1988).*

The Supreme Court of Delaware affirmed a Court of Chancery's decision approving a settlement of a shareholder suit which challenged a decision by board of directors acting through a special committee of outside directors, to donate over $85 million to be used in the construction and funding of a museum and cultural center for art. The court concluded that, although the settlement was meager, it was adequate, considering all of the facts and the circumstances. *Kahn v. Sullivan, 594 A.2d 48 (Del. Supr. 1991).*

The business judgment rule applied to a board's decision to set a new record date to vote on a merger where the decision was based in part on a Chancery Court order, was made by a disinterested and independent board, would not thwart the will of the stockholders, and where the directors would not retain their positions after the merger. *In re MONY Group, 853 A.2d 661 (Del. Ch. 2004).*

Complaint alleging board committed waste by failing to adopt a plan that would make its executive bonus payments tax deductible failed to state a claim of waste because it did not allege that bonus payments would be tax deductible or that board's decision to sacrifice tax savings to retain flexibility was unconscionable or irrational. *Freedman v. Adams, 58 A.3d 414 (Del. Supr. 2013).*

The business judgment standard of review applied to a controller buyout where the controlling stockholder conditioned its offer upon the board agreeing to two procedural protections — approval by a Special Committee and by a majority of the minority stockholders and where the committee was independent and met its duty of care and the minority vote was informed and not coerced. *Kahn v. M & F Worldwide Corp.*, *88 A.3d 635 (Del. Supr. 2014).*

.4 Duties when defending against takeovers. — Corporation's self tender for its shares which excluded participation of shareholder making hostile tender offer for corporation's stock, was valid because (1) selective stock repurchase plan was reasonable in relation to threat directors believed was posed by inadequate and coer-

cive two-tier tender offer by corporate raider with reputation as green-mailer and (2) directors did not act in bad faith or to entrench themselves and therefore did not lose protection of business judgment rule when they tendered their shares in exchange offer since they were receiving benefits shared generally by all shareholders except raider. *Unocal Corp v. Mesa Petroleum Co, 493 A.2d 946 (Del. Supr. 1985).*

Directors' funding of ESOP in response to shift of ownership was not valid because (1) directors had never considered funding ESOP as takeover defense that would increase number of outstanding shares to dilute majority status of consent holder, (2) directors were without power to ratify funding by less than unanimous vote after change in bylaws, and (3) corporate actions, which seek to undo takeover bids after control has passed, are not protected by business judgment rule. *Frantz Mfg Co v. EAC Industry, 501 A.2d 401 (Del. Supr. 1985).*

Target's self-tender offer for 65% of its outstanding stock was not reasonable in relation to threat posed by takeover offer. Although target's directors could create option for shareholders permitting them to continue participation in target, they could not structure offer so that no rational shareholder would risk tendering into competing offer when to do so created risk of being frozen out of front end of self tender. *AC Acquisitions Corp v. Anderson, Clayton & Co, 519 A.2d 103 (Ch. Ct. 1986).*

Court ruled that tender offeror was unlikely to succeed in proving that transaction amounted to breach of fiduciary duty by target's board or that of sweeping shareholder where (1) declaration of dividend was protected by business judgment rule when there was no self-dealing or waste and it furthered several business objectives; (2) the transactions in question were not motivated by single entrenchment purpose when sweeping shareholder was potential bidder and transactions were negotiated at arm's-length; (3) street sweep was not coercive to sellers; market forces propelled the sale; (4) defensive measures were reasonable in relation to threat posed. *Ivanhoe Partners v. Newmont Mining Corp, 533 A.2d 585 (Ch. Ct.)*, *aff'd, 535 A.2d 1334 (Del. Supr. 1987).*

Court issued preliminary injunction to prevent target from restructuring to prevent takeover by outsider. Restructuring, which was not put to shareholder vote, was said to be worth $64.15 to shareholders. Outsider proposed either $73 per share cash tender offer or restructuring allegedly worth $5.65 more to shareholders than management's proposal. As fiduciaries, directors may not "cram down" transaction to protect shareholders from noncoercive, economically superior one. *Robert M Bass Group, Inc v. Evans, 552 A.2d 1227 (Ch. Ct. 1988).*

Court ordered target corporation to redeem poison pill rights in face of cash tender offer for all its shares by outsider, where target's decision to keep poison pill in place was not reasonable in relation to threat posed. *Grand Metropolitan Public Limited Co v. The Pillsbury Co, 558 A.2d 1049 (Ch. Ct. 1988).*

Directors who authorized corporation to purchase its own stock in order to resist takeover have burden of proving that such action was primarily in corporate interest and that change in control would threaten future business success of corporation. *Crane Co v. Harsco Corp, 511 F. Supp. 294 (D. Del. 1981).*

Directors had authority to adopt Rights Plan as preventive measure to ward off future advances by corporate raiders, where (1) action was not taken for entrenchment purposes, and (2) Plan was reasonable reaction by directors to perceived

threat to corporation of coercive acquisition techniques. *Moran v. Household International, Inc, 500 A.2d 1346 (Del. Supr. 1985).*

The Court of Chancery issued preliminary injunction to require target corporation to redeem poison pill rights in face of all-cash tender offer for $74 per share. Target was proceeding with restructuring said to be worth $76 per share to shareholders. Once target has chosen value-maximizing alternative to auction of company or negotiations with tender offeror, legitimate role of poison pill will have ended. At this stage, foreclosing shareholder choice is not reasonable in relation to threat posed. *City Capital Associates Limited Partnership v. Interco Inc, 551 A.2d 787 (Ch. Ct. 1988).*

Target's ESOP was defensive device that is designed to add value to company and all of shareholder. Thus, plan adopted by shareholders, whether adequately considered or not, is fair and should not be invalidated. *Shamrock Holdings, Inc v. Polaroid Corp, 559 A.2d 257 (Ch. Ct. 1989).*

Court denied preliminary injunction to bar target corporation from making self-tender for 22% of its own shares or from selling $300 million in preferred stock to white squire. Target's directors were entitled to treat hostile offer as threat. There was evidence that $45 per share being offered was inadequate, and target's shareholders could not value their shares accurately because of uncertainty over size of target's recovery in patent infringement suit against competitor. *Shamrock Holdings, Inc v. Polaroid Corp, 559 A.2d 278 (Ch. Ct. 1989).*

Where a takeover was inevitable and the heightened scrutiny of *Unocal Corp v. Mesa Petroleum Co,* 493 A.2d 946 (Del 1985) applied, the defensive measures employed by the board were a balanced and reasonable response to the threat posed and demonstrated the directors' abiding concern for shareholders who were otherwise subject to freeze-out. The business judgment rule protected the board which: (1) rejected the tender offer; (2) diligently sought enhanced shareholder value through alternative opportunities; and (3) vigorously negotiated substantive improvements to shareholder protection. Summary judgment dismissing the stockholders' class action was affirmed where the directors attempted and were able to negotiate a superior transaction for its shareholders than was available under the earlier offer. *Gilbert v. The El Paso Co, 575 A.2d 1131 (Del. Supr. 1990).*

Board's decision to adopt a Stock Employee Compensation Trust Plan (SECT), in order to decrease insurgent shareholder's voting power, would be analyzed under *Unocal's* reasonableness and proportionality tests. Even though directors had not established a likelihood of demonstrating that their actions were reasonable in relation to the threat posed by the shareholder, the shareholder was not entitled to a preliminary injunction to prevent the voting of the SECT's shares since it was likely to win the proxy contest and there was an absence of harm. *Aquila, Inc. v. Quanta Services, Inc., 805 A.2d 196 (Del. Ch. 2002).*

Where a board meets its burden under *Unocal* to articulate a legally cognizable threat — namely an allegedly inadequate offer that a majority of the stockholders would likely tender into — and has taken defensive measures, including a poison pill, that fall within a range of reasonable responses proportionate to that threat, all claims asserted against the directors must be dismissed. *Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011).*

Board's adoption and implementation of poison pill with 4.99 percent stock ownership threshold trigger which was intended to protect NOLs were valid exercises of

business judgment where board had reasonable grounds to conclude there was a threat to the company and its response was reasonable in relation to the threat and was not preclusive or coercive. *Versata Enterprises v. Selectica, Inc., 5 A.3d 586 (Del. Supr. 2010).*

.5 Duty of care. — Directors breached their fiduciary duty to shareholders when they approved corporation's merger after (1) failing to inform themselves of all relevant and reasonably available information and (2) failing to disclose all material information that reasonable shareholders would consider important in deciding whether to approve merger. Business judgment did not protect directors when failure to inform themselves constituted gross negligence. *Smith v. Van Gorkom, 488 A.2d 858 (Del. Supr. 1985)*.

Neither the CEO, compensation committee nor board of directors breached their duty of care in hiring a president and approving an employment agreement that resulted in a very large termination payment to the president where the corporation needed a new president, the candidate was well regarded and all defendants were fully informed of all material information regarding the agreement. *In re Walt Disney Company Derivative Lit., 906 A.2d 27 (Del. Supr. 2006).*

Where minority stockholder alleged that majority stockholder initiated transaction to sell the corporation and timed the transaction to benefit itself, that board authorized majority stockholder to negotiate the agreement without any procedural safeguards, that board approved transaction after only one meeting based on information from majority stockholder, minority stockholder stated claims for breaches of duty of care and loyalty. *McMullin v. Beran, 765 A.2d 910 (Del. Supr. 2000).*

Pre-suit demand will be excused in a derivative suit alleging directors failed to make an informed decision if the particularized facts in the complaint create a reasonable doubt that the informational component of the directors' decisionmaking process, measured by concepts of gross negligence, included consideration of all material information reasonably available. *Brehm v. Eisner, 746 A.2d 244 (Del. Supr. 2000).*

Minority shareholders could not bring claim against directors of merged corporation for failing to exercise due care in responding to merger proposal when directors' special committee (1) consulted with independent legal and financial advisors, (2) considered merger proposal on at least four occasions over six week period, (3) consistent with advice of investment banker, concluded that offered price was fair, and (4) before accepting offered price, asked that it be raised. However, remaining directors' alleged failure to learn of parent's price commitment did state claim. *Rabkin v. Philip A Hunt Chemical Corp, 547 A.2d 963 (Del. Ch 1986).*

A board of directors does not have a duty to monitor the personal affairs of the corporation's founder and CEO. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961 (Del. Ch. 2003).*

.6 Duty when selling corporation. — Target's directors violated fiduciary duty to shareholders by granting lock-up and no-shop guarantees to white knight in exchange for protection of rights of holders of notes that target had exchanged earlier for stock in order to deter takeover by hostile tender offeror. Lock-up and no-shop guarantees harmed shareholders because guarantees foreclosed further bidding in active bidding situation and were made in directors' self-interest because they promoted agreement that relieved directors of potentially damaging consequences

(suit by noteholders) of their own defensive policies. *Revlon, Inc v. MacAndrews & Forbes Holdings, Inc, 506 A.2d 173 (Del. Supr. 1986).*

Revlon applies when merger consolidation is split roughly evenly between cash and stock. *In re Smurfit-Stone Container Corp. Shareholder Litigation, C.A. 6164 (Del. Ch. 2011).*

The determination of whether directors breached their fiduciary duties of loyalty and due care when the directors did not conduct an active market survey, but instead relied on the advice of an investment bank to evaluate the fairness to shareholders of a change of control not involving outside bidders, is to be made on the basis of the adequacy of information available to the directors and in light of relevant circumstances. *Barkan v. Amsted Industries, Inc, 567 A.2d 1279 (Del. Ch. 1989).*

Stockholders failed to state a claim against board for accepting lower of two offers where they did not establish breach of duty of loyalty and even if they could establish breach of duty of due care, that claim was barred by exculpatory charter provision under Sec. 102(b)(7). *Malpiede v. Townson, 780 A.2d 1075 (Del. Supr. 2001).*

Where the board's approval of a buyout proposed by the CEO was preceded by an active and aggressive search for a third party buyer, and where a special independent committee bargained hard with the CEO, and where the buyout agreement allowed the committee to consider overtures from other buyers, the burden of showing entire fairness was met. *In re Cysive, Inc. Shareholders Litigation, 836 A.2d 531 (Del. Ch. 2003).*

.7 Parent-subsidiary transaction. — Parent did not breach its fiduciary duty to its wholly owned subsidiary, which was soon to be spun-off, when it caused subsidiary's directors to approve agreement arguably favorable to parent and unfavorable to subsidiary because purchasers of when-issued stock in subsidiary were owed no duties by subsidiary before spin-off, so parent was dealing with itself when it caused subsidiary to approve disputed agreement. *Anadarko Petroleum Corp v. Panhandle Eastern Corp, 521 A.2d 624 (Ch. Ct. 1987).*

Directors following the summary procedure authorized by Sec. 253 do not have to establish the entire fairness of the transaction. *Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001).*

Interlocking director is not personally liable for allegedly failing to have subsidiary demand timely payment of parent's debts, when there is no showing of bad faith, negligence or gross abuse of discretion. *Chasin v. Gluck, 282 A.2d 188 (Ch. Ct. 1971).*

Merger between parent and subsidiary was fair to subsidiary's minority shareholders when directors' decision to delegate subsidiary's asset valuation to engineering firm was proper exercise of business judgment. *Rosenblatt v. Getty Oil Co, 493 A.2d 929 (Del. Supr. 1985).*

.8 Duty of disclosure. — Until the conclusion of the tender offer, acquiror owed no fiduciary duty to target's shareholders, nor did target's board bear legal responsibility for alleged nondisclosures in acquiror's offer to purchase, absent some proof that the two boards engaged in joint conduct to mislead shareholders. *Citron v. Fairchild Camera and Instrument Corp, 569 A.2d 53 (Del. Supr. 1989)*.

Shareholders of acquiring corporation failed to state a claim for money damages based on the defendant directors' failure to disclose that the corporation would not

have had to pay a premium had it agreed to appoint a new CEO because the complaint did not allege any compensable harm to the shareholders. *In re J.P. Morgan Chase & Co., Shareholder Lit., 906 A.2d 6766 (Del. Supr. 2006).*

Tender offeror could not prevent target's cash self-tender offer and repurchase plan by alleging violations of Sec. 13(e), Sec. 14(a) and Sec. 14(e) of the Securities Exchange Act of 1934. Court held that target's disclosures were adequate considering its pending patent infringement litigation, and therefore its recommendation that shareholders not accept tender offeror's bid did not indicate target was withholding information. Also, a reasonable shareholder could have discovered that self-tender offer was a defensive tactic. *Shamrock Holdings Inc v. Polaroid Corp, 709 F. Supp. 1311 (D. Del. 1989)*.

Under Delaware law, there is no per se rule that would allow damages for all director breaches of the fiduciary duty of disclosure. *Loudon v. Archer-Daniels-Midland Co., 700 A.2d 135 (Del. Supr. 1997)*.

A director's duty to disclose material information is the same whether the stockholders are voting on a merger or whether they are only deciding whether to seek an appraisal. Stockholders are not entitled to more information where appraisal is an option. *Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170 (Del. Supr. 2000)*.

Directors who knowingly disseminate false information that results in injury to a stockholder violate their fiduciary duty of disclosure and may be accountable even in the absence of a request for shareholder action. *Malone v. Brincat, 722 A.2d 5 (Del. Supr. 1998)*.

Plaintiffs successfully alleged that directors breached their duty to disclose. They alleged that the directors failed to disclose that one of the reasons they pursued a merger was that they initiated a stock buy back program because they felt the stock was undervalued. This was material information that stockholders would want in considering the merger. *Krasner v. Moffett, 826 A.2d 277 (Del. Supr. 2003).*

Partial and elliptical disclosures' cannot facilitate the protection of the business judgment rule under the *Corwin* doctrine, which holds that approval of a transaction by a fully-informed, uncoerced majority of the disinterested stockholders invokes the business judgment standard of review. *Morrison v. Berry,* No. 445, 2017 (Del. Supr. 2018).

.9 Corporate opportunity. — Fiduciary may not take for himself or herself business opportunities which rightfully belong to the corporation. Opportunity belongs to corporation if (1) it is within corporation's line of business and would be of practical advantage to corporation, (2) corporation has an interest or expectation in the opportunity and (3) corporation is financially able to take advantage of opportunity. *Guth v. Loft, 5 A.2d 503 (Del. Supr. 1939).*

When real estate corporation sold lots to its president at less than fair market value, and he made profit on sale of homes he built there, he is liable to corporation for diverting corporate opportunity; liability is profit on sale of houses, not merely difference between price of lots and their fair value. *Maclary v. Pleasant Hills, Inc, 109 A.2d 830 (Ch. Ct. 1954)*.

Officers of mining corporation who took private advantage of new mining project and profited by its subsequent sale to corporation were not liable to stockholders for breach of fiduciary duty for appropriating corporate opportunity; corporation was not financially able then to use opportunity, officers acted in good faith, and

corporation benefited from officers' dealings. *Fliegler v. Lawrence, 361 A.2d 218 (Del. Supr. 1976)*.

Where inventor of new product was unwilling to permit corporation to use his invention, and corporation was neither inclined nor financially able to develop new products, inventor's concept was not an opportunity available to corporation, and employee could legally seize it for himself and compete against employer. *Science Accessories Corp v. Summagraphics Corp, 425 A.2d 957 (Del. Supr. 1980)*.

Court refused to accept recommendation of corporation's special litigation committee and dismiss shareholders' derivative suit alleging that directors and officers diverted corporate opportunity to themselves where committee was not independent and did not establish reasonable basis for its conclusions that opportunity to purchase stock in another corporation was not corporate opportunity. *Lewis v. Fuqua, 502 A.2d 962 (Ch. Ct. 1985)*.

Director of corporation did not usurp a corporate opportunity to acquire a cellular phone license where the opportunity was presented to the director in his individual capacity, the corporation had been divesting itself of similar cellular holdings, the director had discussed the opportunity with other directors of the corporation who had expressed no interest in the opportunity, and at the time the opportunity was presented the corporation, the corporation was not financially able to purchase the license. *Broz v. Cellular Information Systems, Inc, 673 A.2d 148 (Del. Supr. 1996).*

Complaint did not sufficiently allege that defendants usurped a corporate opportunity by selling large blocks of the corporation's stock to third parties. The corporation was a consumer products company and not an investment company and therefore the sale of stock was not within the corporation's line of business. It also had no expectation or interest in the issuance of stock to raise capital. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961 (Del. Ch. 2003).*

Former director usurped a corporate opportunity by buying an office building in his individual capacity that the corporation had been interested in buying. *Personal Touch Holding Corp. v. Glaubach*, 2019 Del. Ch. LEXIS 66.

.10 Quorum. — Resolution authorizing issuance of stock at directors' meeting where no quorum was present is illegal and stock may be cancelled unless action is later ratified at meeting at which quorum is present, but mere approval of minutes of illegal meeting at subsequent meeting is not sufficient to be ratification of unauthorized act. *Belle Isle Corp v. MacBean, 49 A.2d 5 (Ch. Ct. 1946)*.

Unfilled directorships are not counted for quorum purposes. *Belle Isle Corp v. MacBean, 61 A.2d 699 (Ch. Ct. 1948).*

When bylaws provide for board of from three to seven, and seven directors are elected but two decline to serve, any three of remaining five constitute quorum. *Bush v. Thompson Automatic Arms Corp, 64 A.2d 581 (Del. Supr. 1948).*

Directors who stayed away from meeting to prevent quorum are not estopped from questioning validity of action taken at meeting. T*omlinson v. Loew's, Inc, 134 A.2d 518 (Ch. Ct.)*, *aff'd, 135 A.2d 136 (Del. Supr. 1957)*.

Directors' meeting with required quorum present of persons elected and qualified to act as directors is valid even though there were present other directors who were not qualified to act. *Lippman v. Kehoe Stenograph Co, 98 A 943 (Ch. Ct. 1916)*, *aff'd, 102 A 988 (1918)*.

.11 Election of directors. — Corporation's board, even though acting in subjective good faith, could not validly act for primary purpose of preventing or impeding unaffiliated majority of shareholders from expanding board and electing new majority. However, citing inability to foresee all future settings in which board might seek to thwart shareholder vote, court refused to adopt per se rule invalidating every board action for such a purpose. *Blasius Industries, Inc v. Atlas Corp, 564 A.2d 651 (Ch. Ct. 1988)*.

The vote by a majority of directors to ratify the issuance of stock to certain persons cured any technical defect in the issuance of stock due to the directors' failure to approve the issuance at a meeting or upon written consent. Thus, the directors voted in by those persons were validly elected. *Kalageorgi v. Victor Kamkin, Inc., 750 A.2d 531 (Del. Ch. 1999).*

Where a Certificate of Incorporation only empowered a Holdover board of directors to determine the number of directors and divide them into classes, the board was not empowered to elect itself as the first board of directors and the stockholders had to elect the first board. *Comac Partners, L.P. v. Ghaznavi, 793 A.2d 372 (Del. Ch. 2001).*

A board of directors could not increase the size of the board and appoint 2 new directors in order to prevent the election of 2 directors nominated by a shareholder who was attempting a takeover. The board failed to demonstrate a compelling justification for its actions, which interfered with the effective exercise of the stockholders' franchise. *MM Companies, Inc. v. Liquid Audio, Inc. 813 A.2d 1118 (Del. Supr. 2003).*

Enhanced scrutiny applied to board's plan to reduce the number of directors because the plan affected the election of directors and deprived stockholders of their right to vote. *Pell v. Kill, 135 A.3d 164 (Del. Ch. 2016).*

.12 Removal of directors. — Stockholders have power to remove director for cause, even though there is no statutory provision providing for removal of directors by stockholder action, and even though corporate bylaws provide for cumulative voting. *Campbell v. Loew's, Inc, 134 A.2d 852 (Ch. Ct. 1957)*.

Directors and officers of first corporation were removable by resolution of board of second corporation that owned all stock of first corporation, on termination of their employment, even if it was shown their ouster was reprisal step taken by board of second corporation against ousted directors for instituting action, or that affairs of corporation had taken worse turn owing to ouster. *Beach v. KDI Corp, 336 F. Supp. 229 (D. Del. 1971).*

Even though funds were available to pay preferred dividend arrearages, common stockholder could not have election of board of directors set aside for their wrongful refusal to pay such dividends without showing fraud and gross abuse of discretion by board in refusing to order such dividends; corporate charter gave preferred stockholders right to elect majority of board as long as payment of preferred dividends was in arrears. *Baron v. Allied Artists Pictures Corp, 337 A.2d 653 (Ch. Ct. 1975)*.

Under GCL Sec. 141(d), corporation's certificate may give shareholder class right to elect certain directors. Certificate need not specify terms or voting rights of those directors. If not, one-year term and one vote per director is the rule. Under GCL Sec. 141(k), class-designated directors may be removed by shareholders without cause. *Insituform of North America, Inc v. Chandler, 534 A.2d 257 (Ch. Ct. 1987)*.

.13 Staggered term directors. — Bylaw permitting removal of directors at any time by vote of majority of stockholders is in conflict with certificate of incorporation proving for staggered three-year terms for directors, and so bylaw is invalid and court will void stockholders' action that removed three of six directors at one time. *Essential Enterprises Corp v. Automatic Steel Products, Inc, 159 A.2d 288 (Ch. Ct. 1960)*.

Bylaw cannot set one year term for directors if charter provides for staggered three year terms; directors elected under such invalid bylaw serve only as de facto directors whose terms can be terminated at any time by stockholder action. *Prickett v. American Steel and Pump Corp, 251 A.2d 576 (Ch. Ct. 1969)*.

Under GCL Sec. 141(k), shareholders may amend certificate of incorporation to eliminate bylaw setting up classified board so shareholders can remove director without cause. Directors of Delaware corporation have no vested right to hold office in defiance of properly expressed will of majority. *Roven v. Cotter, 547 A.2d 603 (Ch. Ct. 1988)*.

.14 Compensation. — Director who increased his own salary must justify increase as reasonable; factors include value of services, IRS allowance, salary range within corporation and within industry, and corporation's financial health. *Wilderman v. Wilderman, 315 A.2d 610 (Ch. Ct. 1974).*

Where director compensation is challenged, the defendant directors, and not plaintiffs, must prove the reasonableness of the compensation paid. *Telxon Corporation v. Meyerson, 802 A.2d 257 (Del. Supr. 2002).*

Stockholders could maintain suit alleging directors breached their fiduciary duties by granting themselves unfair and excessive compensation. Stockholders did not ratify the specific awards under the plan and therefore the defense of ratification could not be used to dismiss the complaint. *In re Investors Bancorp, Inc. Stockholder Litigation*, *177 A.3d 1208.*

.15 Loans. — Loans by directors and their relatives to shore up staggering corporation were made in arms length dealing, so directors' claim could not be postponed to claims of subordinated lenders. *New York Stock Exchange v. Pickard & Co, 296 A.2d 143 (Ch. Ct. 1972)*.

.16 Committees. — A demand by a stockholder to investigate and remedy alleged abuses is not voided because the demand was refused by the Executive Committee rather than the full board where the board of directors had passed a resolution, as authorized by GCL Sec. 141(c), appointing the committee and allowing it to review the investigation by the Special Committee and refuse plaintiff's pre-suit demand. To show reasonable doubt that her demand was properly refused, the plaintiff would have to make particularized allegations that the Executive Committee was biased, lacked independence or failed to conduct a reasonable investigation. *Scattered Corp v. Chicago Stock Exchange, Inc, 701 A.2d 70 (Del. Supr. 1997)*.

The use of a special litigation committee to investigate the circumstances surrounding an alleged improper acquisition of stock based on inside information immediately preceding the corporation's tender offer, did not constitute a waiver by the board of directors of its right to challenge the stockholder's allegation that demand was excused. *Spiegel v. Buntrock, 571 A.2d 767 (Del. Supr. 1990)*.

.17 Reliance on experts. — Reliance on a compensation report prepared by a consulting firm did not provide a director with a defense under Sec. 141(e).Holding otherwise would replace the court's role in determining entire fairness with that of

experts hired to give advice. *Valeant Pharmaceuticals International v. Jerney, 921 A.2d 732 (Del. Ch. 2007).*

.18 Derivative suit standing. — The doctrine of equitable standing will not be extended to allow a director to bring a derivative suit where it is not necessary to prevent a complete failure of justice. *Schoon v. Smith*, *953 A.2d 196 (Del. Supr. 2008).*

.19 Duty of oversight.— Directors have a duty to exercise oversight and monitor a corporation's operational viability, legal compliance, and financial performance. A board's utter failure to attempt to assure a reasonable information and reporting system exists is an act of bad faith in breach of the duty of loyalty. *In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).*

Dismissal of the stockholder's *Caremark* claim was improper, as he plead facts supporting a fair inference that no reasonable compliance system and protocols were established, that the ice cream company's board's lack of efforts resulted in it not receiving official notices of food safety deficiencies, and that its failure to take remedial action exposed consumers to listeria. *Marchand v. Barnhill*, *No. 533, 2018 (Del. Supr. 6/18/19).*

Where a shareholder derivative action alleged that directors breached their fiduciary duties by failing to adequately oversee and manage a corporation's exposure to business risks, allowing a plaintiff to succeed on such a theory would undermine the well settled policy that a court should not perform hindsight evaluations of business decisions. *In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106 (Del. Ch. 2009).*

.20 Acting in bad faith.—Bad faith encompasses either an intent to harm by the directors or an intentional dereliction of duty. Gross negligence, without more, can never constitute bad faith. *In re Walt Disney Co. Deriv. Litig*., *906 A.2d 27 (Del. Supr. 2006)*.

In the context of a "*Caremark*", or duty of oversight claim, the Court made it clear that liability requires a showing that directors knew they were not discharging their fiduciary duties. *Stone v. Ritter*, *911 A.2d 362 (Del. Supr. 2006).*

Summary judgment should have been granted in favor of the directors on a *Revlon* claim that they acted in bad faith where the Chancery Court erred in imposing *Revlon* duties before the directors decided to sell the company, read *Revlon* as creating a set of requirements that must be satisfied, and equated an arguably imperfect attempt to carry out *Revlon* duties with a knowing disregard of one's duties. *Lyondell Chemical Company v. Ryan*, *970 A.2d 235 (Del. Supr. 2009).*

.21 Independent Directors. — Plaintiffs must plead a non-exculpated claim for breach of fiduciary duty against an independent director protected by an exculpatory charter provision or that director will be entitled to be dismissed from the suit. The rule applies regardless of the underlying standard of review for the transaction. *Leal v. Meeks (In re Cornerstone Theraputics, Inc.), 115 A.3d 1173 (Del. Supr. 2015).*

§142 OFFICERS; TITLES, DUTIES, SELECTION, TERM; FAILURE TO ELECT; VACANCIES

(a) Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a

resolution of the board of directors which is not inconsistent with the bylaws and as may be necessary to enable it to sign instruments and stock certificates which comply with Sec. 103(a)(2) and 158 of this title. One of the officers shall have the duty to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose. Any number of offices may be held by the same person unless the certificate of incorporation or bylaws otherwise provide.

(b) Officers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body. Each officer shall hold office until such officer's successor is elected and qualified or until such officer's earlier resignation or removal. Any officer may resign at any time upon written notice to the corporation.

(c) The corporation may secure the fidelity of any or all of its officers or agents by bond or otherwise.

(d) A failure to elect officers shall not dissolve or otherwise affect the corporation.

(e) Any vacancy occurring in any office of the corporation by death, resignation, removal or otherwise, shall be filled as the bylaws provide. In the absence of such provision, the vacancy shall be filled by the board of directors or other governing body. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Election of officers. — Election of president was invalid because it preceded his election as director, even though both elections took place at same meeting. *Young v. Janas, 103 A.2d 299 (Ch. Ct. 1954)*.

Illegally constituted board of directors is ineffectual to elect officers. *Gow v. Consolidated Coppermines Corp, 165 A 137 (Ch. Ct. 1939)*.

.2 Officers as corporate agents. — Corporation can only act through its agents; its officers are its agents. *Joseph Greenspon's Sons Iron & Steel Co v. Pecos Valley Gas Co, 156 A 350 (Ch. Ct. 1931)*.

General manager who is also executive vice president and treasurer and who is vested with entire control of corporation's business has implied power to borrow for corporate purposes from anyone willing to lend, notwithstanding existence of resolutions authorizing him to borrow from two specified banks, when those resolutions merely established borrowing procedure and did not limit his borrowing procedures and did not limit his borrowing powers. *Petition of Mulco Products, Inc, 123 A.2d 95 (Super. Ct.)*, *aff'd, Mulco Products, Inc v. Black, 127 A.2d 851 (1956)*.

Two director-officers do not have implied authority to bind corporation to contract to hire architect for construction of race track, when such contract is not in ordinary course of corporation's business, nor do they have apparent authority to do so, when they never so acted in past and such powers as they did exercise did not justify reliance on their authority to bind corporation to so unusual contract. *Colish v. Brandywine Raceway Assoc, 119 A.2d 887 (Super Ct 1955)*.

.3 Officers' fiduciary duties. — The fiduciary duties of officers of Delaware corporations are the same as those of directors. *Gantler v. Stephens*, *965 A.2d 695 (Del. Supr. 2009*).

.4 Compensation of officers. — Deferred compensation plan is valid under which corporation may award to key employees (1) "units" whose value depends on increase, if any, in market value of corporation's stock between time they are awarded and time they are payable and (2) "dividend" credits equal to dividends employee would have received if he owned as many actual shares as "units," (3) when plan insures receipt by corporation of services it seeks. *Lieberman v. Koppers Co, 149 A.2d 756 (Ch. Ct.)*, *aff'd, Lieberman v. Becker, 155 A.2d 597 (1959)*.

Corporate officer cannot recover compensation for period during which he violated his fiduciary duty by participating in formation of competitive business while in corporation's employ. *Craig v. Graphic Arts Studio, Inc, 166 A.2d 444 (Ch. Ct. 1960)*.

.5 Powers of president. — President has implied power to perform all acts of ordinary nature which by usage or necessity are incidents to his office, and he may enter contract and bind corporation in matters arising from and dealing with usual course of corporate business. *Joseph Greenspon's Sons Iron & Steel Co v. Pecos Valley Gas Co, 156 A 350 (Ch. Ct. 1931); Canister Co v. National Can Corp, 63 F. Supp. 361 (D. Del. 1945).*

President has no implied power or presumed authority to bind corporation by contract of guaranty in which it has no apparent interest. *Atlantic Refining Co v. Ingallis & Co, 185 A 885 (Del. Supr. 1936)*.

Presumption is that president has authority to bind corporation by execution and transfer of negotiable paper in ordinary course of corporation's business. *Italo-Petroleum Corp of America v. Hannigan, 14 A.2d 401 (Del. Supr. 1940)*.

President cannot bind his corporation upon contract which corporation itself is powerless to make. *West Penn Chemical & Mfg Co v. Prentice, 236 F. 891 (3d Cir 1916); Acker v. Girard Trust Co, 42 F.2d 37 (3d Cir 1930).*

President has no implied or inherent power to consent to appointment of receiver for purpose of winding up corporate affairs. *Bruch v. National Guarantee Credit Corp, 116 A 738 (Ch. Ct. 1922)*.

President and sole stockholder of corporation signing contract on its behalf is unhampered by either absence of authorizing bylaws or by restraining force of existing bylaws. *Community Stores, Inc v. Bean, 14 A.2d 633 (1940)*.

Employee cannot hold corporate president personally liable for unpaid bonus employee was promised, when it is shown that president's authority to authorize sale of machine such promise personally; but employee does have cause of action against corporation. *Brown v. Colonial Chevrolet Co, 249 A.2d 439 (Del. Supr. 1968)*.

Corporation will be liable for employee's retirement benefits if, at trial, it is shown (1) president of corporation, who owned 80% of its stock, completely dominated and ran corporation's business without directors' action or approval, and (2) he repeatedly assured employee corporation will pay retirement benefits under such circumstances, president's promise need not be ratified by directors, nor does he need written authority from corporation to make promise. *Hessler, Inc v. Farrell, 226 A.2d 708 (Del. Supr. 1967)*.

.6 Same-estoppel to deny authority of. — Corporation that does not deny authority of its president to speak for it is estopped from repudiating representations made by him in its name. F*razer v. Couthy Land Co, 149 A 428 (Ch. Ct. 1929)*.

.7 Vice-president. — Agency of vice-president cannot be proved by his statement that his authority has been enlarged and that he has been instructed by corporation's president to do certain things in connection with company's business. *Colvocoresses v. W S Wasserman Co, 4 A.2d 800 (Ch. Ct. 1939)*.

.8 Liability of officers. — Former officers of debtor corporation that exchanged stock for minority interest in second corporation as part of reorganization were not indebted to first corporation for withdrawals they made against accrued salaries, when salaries were part of first corporation's long term indebtedness of which second corporation was constructively aware; however, officers remained liable to second corporation for notes executed to first corporation in payment of key-man insurance policies on their lives. *Beach v. KDI Corp, 344 F. Supp. 1230 (D. Del. 1972)*.

Corporate officer can be held personally liable for the torts he commits, including unfair competition, and cannot shield himself behind a corporation when he is an actual participant in the tort. Corporation may also be vicariously or secondarily liable if the officer commits tort while acting on corporation's behalf, but officer remains personally liable. *Brandywine Mushroom Co v. Hockessin Mushroom Products, Inc, 682 F. Supp. 1307 (D. Del. 1988)*.

§143 LOANS TO EMPLOYEES AND OFFICERS; GUARANTY OF OBLIGATIONS OF EMPLOYEES AND OFFICERS

Any corporation may lend money to, or guarantee any obligation of, or otherwise assist any officer or other employee of the corporation or of its subsidiary, including any officer or employee who is director of the corporation or its subsidiary, whenever, in the judgment of the directors, such loan, guaranty or assistance may reasonably be expected to benefit the corporation. The loan, guaranty or other assistance may be with or without interest, and may be unsecured, or secured in such manner as the board of directors shall approve, including, without limitation, a pledge of shares of stock of the corporation. Nothing in this section contained shall be deemed to deny, limit or restrict the powers of guaranty or warranty of any corporation at common law or under any statute.

§144 INTERESTED DIRECTORS; QUORUM

(a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:

(1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the stockholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Interested directors. — Directors are not liable for profits they make on interest in land they acquired, larger than that bought by corporation, when it is shown corporation was financially unable to invest more into project, they informed other directors what they were doing, and so they took no opportunity away from corporation. *Lipkin v. Jacoby, 202 A.2d 572 (Ch. Ct. 1964)*.

GCL Sec. 144 which allows ratification of interested director transactions is not only means of validation. Ratification process contemplated by statute presupposes functioning of corporate constituencies capable of providing approval. Just as statute cannot sanction unfairness neither can it invalidate fairness if, on judicial

review, transaction withstands close scrutiny of its intrinsic elements. Lower court therefore properly applied intrinsic fairness test in determining validity of interested director transaction when steps afforded under statute were unavailable because of director-shareholder deadlock. *Marciano v. Nakash, 535 A.2d 400 (Del. Supr. 1987)*.

A conflict of interest transaction may be permitted if fair and a neutral body approves. In the case of a charitable corporation, the neutral body may be the disinterested directors or a court. *Oberly v. Kirby, 592 A.2d 445 (Del. Supr. 1991).*

The presentation and rejection of a corporate opportunity by a corporation's CEO does not create a safe harbor for an interested director. The opportunity must be considered by the full board. *Telxon Corporation v. Meyerson, 802 A.2d 257 Del. Supr. (2002).*

Directors' decision to pay themselves and executives large cash bonuses was subject to analysis under Sec. 144 and because all directors received bonuses and shareholder ratification was not sought defendants had burden of provision entire fairness. *Valeant Pharmaceuticals International v. Jerney, 921 A.2d 732 (Del. Ch. 2007).*

Where board of directors of corporation seeking financing voted to issue and sell preferred stock to a company in which one of the directors was also a director, officer and stockholder, Sec. 144 applied. But because interested director's role was known to defendant directors and plaintiffs failed to prove allegations of use of confidential information or improper motive, business judgment rule protected defendants. *Benihana of Tokyo, Inc. v. Benihana, Inc. 906 A.2d 114 (Del. Supr. 2006).*

Stockholders' approval of charter amendment and stock incentive plan that resulted in distribution of stock to officers who were insider majority directors did not ratify the director's actions where the proxy failed to disclose material information regarding the directors' true intent. *Sample v. Morgan, 914 A.2d 647 (Del. Ch. 2007).*

§145 INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS; INSURANCE

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with

respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

(d) Any indemnification under subsections (a) and (b) of this section (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee or agent is proper in the circumstances because the person has met the applicable

standard of conduct set forth in subsections (a) and (b) of this section. Such determination shall be made, with respect to a person who is a director or officer of the corporation at the time of such determination,

(1) by a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum, or

(2) by a committee of such directors designated by majority vote of such directors, even though less than a quorum, or

(3) if there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion, or

(4) by the stockholders.

(e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

(f) The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office. A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to the certificate of incorporation or the bylaws after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee

or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section.

(h) For purposes of this section, references to "the corporation" shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under this section with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued.

(i) For purposes of this section, references to "other enterprises" shall include employee benefit plans; references to "fines" shall include any excise taxes assessed on a person with respect to any employee benefit plan; and references to "serving at the request of the corporation" shall include any service as a director, officer, employee or agent of the corporation which imposes duties on, or involves services by, such director, officer, employee, or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this section.

(j) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(k) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agree-

ment, vote of stockholders or disinterested directors, or otherwise. The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees). (Last amended by Ch. 96, L. '11, eff. 8-1-11.)

Decisions

.1 No indemnification when misconduct shown. — Under bylaw that says director cannot be indemnified if he is adjudged "liable because of failure in the performance of his duties as a director, or to any compromise of any such liability," he is liable even if compromise was made before his liability was finally determined. *Essential Enterprises Corp v. Dorsey Corp, 182 A.2d 647 (Del. Ch. 1962)*.

Directors cannot be indemnified for legal fees they incurred in defending criminal action against them, when they are found guilty of overall charge of conspiracy, even though one aspect of charge, namely fraud, is withdrawn and dismissed; that is not vindication justifying indemnification within statute's intent. *Merritt-Chapman & Scott Corp v. Wolfson, 264 A.2d 358 (Del. Supr. 1970)*.

A provision in an indemnification agreement purporting to require a corporation to indemnify plaintiffs for fees and expenses incurred regardless of their success on the merits is invalid. *Levy v. HLI Operating Co., Inc., 924 A.2d 210 (Del. Ch. 2007).*

.2 Indemnity by reason of being director. — Corporation does not have to indemnify officer-director for his legal expenses in defending suits questioning stock options and employment contract he got before becoming director when by law indemnifies only expenses incurred by reason of his being or having been officer or director of corporation. *Sorensen v. The Overland Corp, 142 F. Supp. 354 (D. Del. 1956)*.

Corporation must pay litigation expenses of directors who successfully defend their right to hold office. *Essential Enterprises Corp v. Automatic Steel Products, Inc, 164 A.2d 437 (1960).* See also, *Hibbert v. Hollywood Park, Inc, 457 A.2d 339 (1983).*

Dismissal without prejudice of stockholder's action against director solely to avoid duplicity of actions did not entitle officer to indemnification, since dismissal was not vindication on merits nor did it result from technical defense that made it unnecessary to defend on merits. *Galdi v. Berg, 359 F. Supp. 698 (D. Del. 1973)*.

The former president of a corporation was not entitled to an advancement of his defense expenses in an action for breach of loyalty brought by the corporation. The court distinguished indemnification from advancement of expenses, and held that, while GCL Sec. 145(e) authorizes such advancements, it leaves to the business judgment of the board of directors the determination of whether the advancement is in the best interest of the corporation. *Advanced Mining Systems, Inc v. Fricke, 623 A.2d 82 (Ch. Ct. 1992).*

Where a corporation agreed to indemnify directors, but where the corporation had a right to choose counsel, a director did not waive his right to indemnification by refusing the corporation's unreasonable demand to be represented by counsel who was providing inadequate defense. *Chamison v. Healthtrust, Inc.-Hospital Company, 735 A.2d 735 (Ch. Ct 1999)*.

.3 Contract to indemnify. — Contract to indemnify officer or director for expenses incurred in defending suit is enforceable even though he never entered action and was never served with process, but was named in complaint; contract is also enforceable as long as he was involved in litigation by reason of his being or having been officer or director. *Mooney v. Willys-Overland Motors, Inc, 204 F.2d 888 (3d Cir 1953)*.

.4 Parent and subsidiary corporations. — Where a parent corporation elected a director to the board of its wholly-owned subsidiary, the director was deemed to be serving the subsidiary at the request of the parent and was entitled to indemnification from the parent. *VonFeldt v. Stifel Financial Corp., 714 A.2d 79 (Del. 1998).*

.5 Stay. — Court would not dismiss or stay former corporate officer's indemnification suit for expenses involved in his successful defense of criminal charge that he used false corporate financial statements to obtain loan because, although officer was involved in Texas civil litigation involving common issues, (1) officer was not claiming indemnification for civil litigation and (2) requisites for recovery under GCL Sec. 145(a) and (b) are not requisites for recovery under relevant section, GCL Sec. 145(c). *Green v. The Westcap Corp of Delaware, 492 A.2d 260 (1985)*.

.6 Entitlement to indemnification or advancement of expenses. — An attorney alleged to have engaged in wrongdoing in his capacity as outside counsel for a corporation was not entitled to advancement of expenses under Sec. 145 as the claims did not arise from his actions as an agent. However, where it was alleged that the attorney made factual misrepresentations to third parties as an agent of the corporation, and where that conduct could expose the corporation to liability, the attorney met the definition of agent and was entitled to advancement of expenses as to his costs in defending those allegations only. *Fasciana v. Electronic Data Systems Corporation, 829 A.2d 160 (Del.Ch. 2003).*

Once a co-indemnitor fully reimburses its indemnitee for expenses, the indemnitee lacks standing to asset an indemnification claim against the other indemnitor in the indemnitee's own right. *Levy v. HLI Operating Co., Inc., 924 A.2d 210 (Del. Ch. 2007).*

Where substance of corporation's complaint against former director was that he used confidential information obtained while in office, director was entitled to advancement of expenses as claim arose out of director's former position as director. *Brown v. Liveops, 903 A.2d 324 (Del. Ch. 2006).*

Amendment to bylaws eliminating advancement rights of former directors terminated right of plaintiff to receive advancement in connection with lawsuit brought by the corporation where no claims were contemplated against him at the time of the amendment. *Schoon v. Troy Corp.*, *948 A.2d 1157 (Del. Ch. 2008).*

Where the indemnification and advancement charter provision did not state that it could be amended retroactively or that a director would lose coverage upon ceasing to serve, the corporation could not amend the coverage retroactively and the coverage continued for the former director. *Marino v. Patriot Rail Co. LLC, 131 A.3d 325 (Del. Ch. 2016).*

.7 Recovery of expenses to obtain indemnification. — Indemnification for fees incurred in successfully prosecuting an indemnification suit are permissible under Sec. 145(a). *Stifel Financial Corp. v. Cochran*, *809 A.2d 555 (Del. Supr. 2002).*

A fees on fees award to the plaintiff must be proportionate to the success the plaintiff achieved and the efforts required to obtain that success. *Fasciana v. Electronic Data Systems Corporation, 829 A.2d 160 (Ch. Ct. 2003).*

.8 Statute of Limitations. — Where extraordinary circumstances exist court does not have to apply 3 year statute of limitations for action seeking indemnification and where officer's delay was reasonable and corporation was not prejudiced court laches doctrine can extend deadline to sue. *InterActiveCorp. v. O'Brien, No. 629, 2010 (Del. Supr. 2011).*

§146 SUBMISSION OF MATTERS FOR STOCKHOLDER VOTE

A corporation may agree to submit a matter to a vote of its stockholders whether or not the board of directors determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that the stockholders reject or vote against the matter. (Added by Ch. 84, L. '03, eff. 8-1-03.)

Subchapter V
STOCK AND DIVIDENDS

§151 CLASSES AND SERIES OF STOCK; REDEMPTION; RIGHTS

(a) Every corporation may issue 1 or more classes of stock or 1 or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value and which classes or series may have such voting powers, full or limited, or no voting powers, and such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation. Any of the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of any such class or series of stock may be made dependent upon facts ascertainable outside the certificate of incorporation or of any amendment thereto, or outside the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to

authority expressly vested in it by its certificate of incorporation, provided that the manner in which such facts shall operate upon the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of such class or series of stock is clearly and expressly set forth in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors. The term "facts," as used in this subsection, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation. The power to increase or decrease or otherwise adjust the capital stock as provided in this chapter shall apply to all or any such classes of stock.

(b) Any stock of any class or series may be made subject to redemption by the corporation at its option or at the option of the holders of such stock or upon the happening of a specified event; provided, however, that immediately following any such redemption the corporation shall have outstanding 1 or more shares of 1 or more classes or series of stock, which share, or shares together, shall have full voting powers. Notwithstanding the limitation stated in the foregoing proviso:

(1) Any stock of a regulated investment company registered under the Investment Company Act of 1940, as heretofore or hereafter amended, may be made subject to redemption by the corporation at its option or at the option of the holders of such stock.

(2) Any stock of a corporation which holds (directly or indirectly) a license or franchise from a governmental agency to conduct its business or is a member of a national securities exchange, which license, franchise or membership is conditioned upon some or all of the holders of its stock possessing prescribed qualifications, may be made subject to redemption by the corporation to the extent necessary to prevent the loss of such license, franchise or membership or to reinstate it.

Any stock which may be made redeemable under this section may be redeemed for cash, property or rights, including securities of the same or another corporation, at such time or times, price or prices, or rate or rates, and with such adjustments, as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to subsection (a) of this section.

(c) The holders of preferred or special stock of any class or of any series thereof shall be entitled to receive dividends at such rates, on such conditions and at such times as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of

such stock adopted by the board of directors as hereinabove provided, payable in preference to, or in such relation to, the dividends payable on any other class or classes or of any other series of stock, and cumulative or noncumulative as shall be so stated and expressed. When dividends upon the preferred and special stocks, if any, to the extent of the preference to which such stocks are entitled, shall have been paid or declared and set apart for payment, a dividend on the remaining class or classes or series of stock may then be paid out of the remaining assets of the corporation available for dividends as elsewhere in this chapter provided.

(d) The holders of the preferred or special stock of any class or of any series thereof shall be entitled to such rights upon the dissolution of, or upon any distribution of the assets of, the corporation as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided.

(e) Any stock of any class or of any series thereof may be made convertible into, or exchangeable for, at the option of either the holder or the corporation or upon the happening of a specified event, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation, at such price or prices or at such rate or rates of exchange and with such adjustments as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors.

(f) If any corporation shall be authorized to issue more than 1 class of stock or more than 1 series of any class, the powers, designations, preferences and relative, participating, optional, or other special rights of each class of stock or series thereof and the qualifications, or restrictions of such preferences and/or rights shall be set forth in full or summarized on the face or back of the certificate which the corporation shall issue to represent such class or series of stock, provided that, except as otherwise provided in Sec. 202 of this title, in lieu of the foregoing requirements, there may be set forth on the face or back of the certificate which the corporation shall issue to represent such class or series of stock, a statement that the corporation will furnish without charge to each stockholder who so requests the powers, designations, preferences and relative, participating, optional, or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights. Within a reasonable

time after the issuance or transfer of uncertificated stock, the registered owner thereof shall be given a notice, in writing or by electronic communication, containing the information required to be set forth or stated on certificates pursuant to this section or Sec. 156, 202(a), 218(a) or 364 of this title or with respect to this section a statement that the corporation will furnish without charge to each stockholder who so requests the powers, designations, preferences and relative participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights. Except as otherwise expressly provided by law, the rights and obligations of the holders of uncertificated stock and the rights and obligations of the holders of certificates representing stock of the same class and series shall be identical.

(g) When any corporation desires to issue any shares of stock of any class or of any series of any class of which the powers, designations, preferences and relative, participating, optional or other rights, if any, or the qualifications, limitations or restrictions thereof, if any, shall not have been set forth in the certificate of incorporation or in any amendment thereto but shall be provided for in a resolution or resolutions adopted by the board of directors pursuant to authority expressly vested in it by the certificate of incorporation or any amendment thereto, a certificate of designations setting forth a copy of such resolution or resolutions and the number of shares of stock of such class or series as to which the resolution or resolutions apply shall be executed, acknowledged, filed and shall become effective, in accordance with Sec. 103 of this title. Unless otherwise provided in any such resolution or resolutions, the number of shares of stock of any such series to which such resolution or resolutions apply may be increased (but not above the total number of authorized shares of the class) or decreased (but not below the number of shares thereof then outstanding) by a certificate likewise executed, acknowledged and filed setting forth a statement that a specified increase or decrease therein had been authorized and directed by a resolution or resolutions likewise adopted by the board of directors. In case the number of such shares shall be decreased the number of shares so specified in the certificate shall resume the status which they had prior to the adoption of the first resolution or resolutions. When no shares of any such class or series are outstanding, either because none were issued or because no issued shares of any such class or series remain outstanding, a certificate setting forth a resolution or resolutions adopted by the board of directors that none of the autho-

rized shares of such class or series are outstanding, and that none will be issued subject to the certificate of designations previously filed with respect to such class or series, may be executed, acknowledged and filed in accordance with Sec. 103 of this title and, when such certificate becomes effective, it shall have the effect of eliminating from the certificate of incorporation all matters set forth in the certificate of designations with respect to such class or series of stock. Unless otherwise provided in the certificate of incorporation, if no shares of stock have been issued of a class or series of stock established by a resolution of the board of directors, the voting powers, designations, preferences and relative, participating, optional or other rights, if any, or the qualifications, limitations or restrictions thereof, may be amended by a resolution or resolutions adopted by the board of directors. A certificate which (1) states that no shares of the class or series have been issued, (2) sets forth a copy of the resolution or resolutions and (3) if the designation of the class or series is being changed, indicates the original designation and the new designation, shall be executed, acknowledged and filed and shall become effective, in accordance with Sec. 103 of this title. When any certificate filed under this subsection becomes effective, it shall have the effect of amending the certificate of incorporation; except that neither the filing of such certificate nor the filing of a restated certificate of incorporation pursuant to Sec. 245 of this title shall prohibit the board of directors from subsequently adopting such resolutions as authorized by this subsection. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

Decisions

.1 Value of stock. — Value of stock depends upon value of corporation's capital or assets; in case of par value stock it may be par or more or less than par. *Bodell v. General Gas & Electric Corp, 132 A 442 (Ch. Ct. 1926)*.

.2 Status of subscriber. — Subscriber to stock under employees' stock purchase plan is stockholder, not creditor, and is not entitled to file claim with receiver for amount he paid on his subscription. *Hegarty v. American Commonwealth Power Corp, 174 A 273 (Ch. Ct. 1934)*.

.3 Voting rights. — A right of approval and consent regarding mergers granted to preferred stockholders in the certificate of designation did not constitute a right to a statutory vote on mergers. *Matulich v. Aegis Communications Group, 942 A.2d 596 (Del. Supr. 2008).*

Corporation equally owned by two groups of stockholders can create new class of non-participating voting stock, and issue one share to odd numbered new director able to break deadlock; arrangement (1) is not voting trust subject to ten-year limit,

since stockholders retained their voting rights; (2) does not violate any public policy by issuance of voting stock with no proprietary rights; and (3) is not unlawful delegation of directors' duties, since it was approved by unanimous vote of stockholders and effected through charter amendment. *Lehrman v. Cohen, 222 A.2d 800 (Del. Supr. 1966)*.

Amendment to articles of incorporation creating special class of stock equal in all respects to existing class of stock except that no person could be elected director if 40% of new stock was voted against him is not a voting right of stock, but was veto power, and not within law's intendment. *Aldridge v. Franco Wyoming Oil Co, 14 A.2d 380 (Del. Supr. 1940)*.

Corporate charter provision for voting power based upon size of individual shareholder's holding rather than class differentiations was not invalid and corporation could gear its quorum definition to specified number of shares to be present rather than number of stockholders. *Providence and Worcester Co v. Baker, 378 A.2d 121 (Del. Supr. 1977)*.

Corporation must have express authority in its charter before it can issue special kinds of stock restricting voting rights of certain shares. *Standard Scale & Supply Corp v. Chappel, 141 A 191 (Del. Ch. 1928)*.

Voting trustee can enforce stockholders' agreement giving one class of stock right to elect majority of board, even though certificate of incorporation does not show those voting rights, when they are set out in bylaws. *In re Farm Industries, Inc, 196 A.2d 582 (Del. Ch. 1963)*.

.4 Legality of issue. — Stockholder can maintain action for cancellation of another's stock for which corporation did not receive agreed consideration. *Bennett v. Breuil Petroleum Corp, 99 A.2d 236 (Ch. Ct. 1953); Ellis v. Penn Beef Co, 80 A 666 (Del. Ch. 1911)*.

Action can be brought against majority stockholders who issue new shares mainly to freeze out minority, regardless whether price paid for stock is fair or not.*Bennett v. Breuil Petroleum Corp, 99 A.2d 236 (Del. Ch. 1953).*

The Supreme Court of Delaware reversed lower court's award of common stock to plaintiff, defendant-company's former CEO and president. Based on trial court's findings, court held that preferred convertible shares originally issued to plaintiff were invalid and void under Delaware law, that legitimate common shares could not issue from invalid preferred shares and, consequently, lower court's grant to plaintiff of common stock as equitable relief for his personal guarantee Court in earlier case. *STAAR Surgical Co v. Waggoner, 588 A.2d 1130 (Del. Supr. 1991).*

Where a corporation satisfied the requirements of Sec. 151 and the only infirmity with the issuance of convertible preferred stock was that the conversion rights were not fully enforceable because of a failure to increase authorized shares, this did not nullify the issuance of the preferred stock. An invalid term of an otherwise valid contract, if severable, will not defeat the contract. *Hildreth v. Castle Dental Centers, Inc*., *939 A.2d 1281 (Del. Supr. 2007).*

Sec. 151 does not require that preferred stock grant holders a right to dividends. *Shintom Co., Ltd. v. Audiovox Corporation*, *888 A.2d 225 (Del. Supr. 2005).*

.5 Description of preferences. — Mere designation of stock in charter as preferred is ineffectual without description of preferences. *Pennington v. Com Hotel Const Co, 151 A 228 (Ch. Ct. 1930)*.

Stock preferences will not be recognized when they are so obscurely expressed in certificate of incorporation as to be irreconcilably in conflict with each other. *Holland v. National Automotive Fibres, Inc, 194 A 124 (Ch. Ct. 1937)*, *reaff'd, 2 A.2d 124 (Ch. Ct. 1938)*.

Unless certificate of incorporation provides for preferred stock, corporation cannot issue it, and so charter provisions relating to preferred stock cannot be altered or enlarged by bylaw enactment. *Gaskill v. Gladys Belle Oil Co, 146 A 337 (Ch. Ct. 1929)*.

Continued retention of preferred stock by finder created virtual veto power over those corporate matters that require consent of all classes, since it was only outstanding stock in its class, so stock was returnable, when stock acquisition agreement in connection with which stock was issued failed to close for lack of effective registration statement, and finder's fee was contemplated only upon successful stock acquisition. *Eckmar Corp v. Malchin, 297 A.2d 446 (Ch. Ct. 1972)*.

.6 Rights and liabilities of preferred stockholders. — Holders of preferred stock are stockholders, not creditors. *In re Hawkeye Oil Co, 19 F.2d 151 (D. Del. 1927)*.

Holders of certificates of "contingent obligation" are treated as though they were stockholders instead of creditors of issuing corporation. *Moore v. American Finance & Securities Co, 73 A.2d 47 (Ch. Ct. 1950)*.

Liquidation clause in charter providing only that preferred stockholders get the par value of their stock before common stockholders get anything is exhaustive, and so all assets remaining after paying preferred stockholders their stocks' par value must be paid to common stockholders. *Mohawk Carpet Mills, Inc v. Delaware Rayon Co, 110 A.2d 305 (Ch. Ct. 1954)*.

Preferred shareholders' interest could be eliminated in tender offer-reverse cash-out merger at price less than liquidated value of preferred stock in corporate charter because (1) liquidation preference could only be paid in event of liquidation of assets, (2) merger was not a liquidation, (3) minority interest along with its preferential rights, can be eliminated by merger, and (4) payment was fair to preferred shareholders. *Rothschild International Corp v. Liggett Group Inc, 474 A.2d 133 (1984)*.

Minority holder of preferred stock could not enjoin proposed merger as being unfair to preferred shareholders when they were offered less for their stock than offer to common shareholders because (1) preferred shares had no legal right to equivalent consideration in merger, (2) apportionment of consideration between preferred and common shareholders was fair, (3) majority shareholder did not have duty to include preferred shareholders in increased price he paid common shareholders out of his own funds, and (4) preferred shareholders were not injured by majority shareholder's timing of merger. *Jedwab v. MGM Grand Hotels, Inc, 509 A.2d 584 (Ch. Ct. 1986)*.

Corporations were not entitled to participate fund set up by settlement agreement to repay preferred shareholders for property confiscated by People's Republic of China because, although corporations had possession of preferred stock certificates delivered to them by their customers as security deposits, (1) they were not bona fide purchasers of stock, (2) their names do not appear as record owners of stock and they had no other proof of title, and (3) they did not have security interest

in stock when debtor-creditor relation no longer existed with customers. *S A Judah v. Shanghai Power Co, 494 A.2d 1244 (1985)*.

A certificate of designation which gave a majority shareholder the right to hold no less than 51% of the shares, did not prohibit corporation from issuing shares that reduced the majority shareholder ownership. At most it gave rise to a claim by the majority shareholder to a right to additional shares. *Superwire.com, Inc. v. Hampton, 805 A.2d 904 (Ch. Ct. 2002).*

§152 ISSUANCE OF STOCK; LAWFUL CONSIDERATION; FULLY PAID STOCK

The consideration, as determined pursuant to §153(a) and (b) of this title, for subscriptions to, or the purchase of, the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine. The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof. The resolution authorizing the issuance of capital stock may provide that any stock to be issued pursuant to such resolution may be issued in 1 or more transactions in such numbers and at such times as are set forth in or determined by or in the manner set forth in the resolution, which may include a determination or action by any person or body, including the corporation, provided the resolution fixes a maximum number of shares that may be issued pursuant to such resolution, a time period during which such shares may be issued and a minimum amount of consideration for which such shares may be issued. The board of directors may determine the amount of consideration for which shares may be issued by setting a minimum amount of consideration or approving a formula by which the amount or minimum amount of consideration is determined. The formula may include or be made dependent upon facts ascertainable outside the formula, provided the manner in which such facts shall operate upon the formula is clearly and expressly set forth in the formula or in the resolution approving the formula. In the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive. The capital stock so issued shall be deemed to be fully paid and nonassessable stock upon receipt by the corporation of such consideration; provided, however, nothing contained herein shall prevent the board of directors from issuing partly paid shares under §156 of this title. (Last amended by Ch. 40, L. ‘15, eff. 8-1-15.)

Decisions

.1 Board approval of issuance. — An oral promise made by a corporation to sell its CEO 10% of its future private stock offerings at a price no more than it could charge other investors, could cost the corporation freedom to raise capital and could have lowered the price it could charge for its capital stock and therefore Sec. 152 mandates board approval of the promise. *Grimes v. Alteon, Inc., 804 A.2d 256 (Del. Supr. 2002).*

§153 CONSIDERATION FOR STOCK

(a) Shares of stock with par value may be issued for such consideration, having a value not less than the par value thereof, as determined from time to time by the board of directors, or by the stockholders if the certificate of incorporation so provides.

(b) Shares of stock without par value may be issued for such consideration, as is determined from time to time by the board of directors, or by the stockholders if the certificate of incorporation so provides.

(c) Treasury shares may be disposed of by the corporation for such consideration as may be determined from time to time by the board of directors, or by the stockholders if the certificate of incorporation so provides.

(d) If the certificate of incorporation reserves to the stockholders the right to determine the consideration for the issue of any shares, the stockholders shall, unless the certificate requires a greater vote, do so by a vote of a majority of the outstanding stock entitled to vote thereon. (Last amended by Ch. 148, L. '69, eff. 7-15-69.)

Decisions

.1 Subscription contract. — Subscriber cannot compel corporation to issue to him shares of its authorized nonpar stock as contracted for, when he failed to advance working capital called for under subscription contract. *Riegel v. The Only Package Pie, Inc, 128 A 110 (Ch. Ct. 1925)*.

Subscriber to stock under employee stock purchase plan is stockholder, not creditor, and cannot make claim with receiver for amount paid on subscription. *Hegarty v. American Commonwealth Power Corp, 174 A 273 (Ch. Ct. 1934)*.

.2 Consideration for stock. — No par stock, as well as par stock, cannot be issued except for money paid, labor done, or personal property, real estate, or leases

actually acquired by corporation. *Bodell v. General Gas and Electric Corp, 132 A 442 (Ch. Ct. 1926)*.

Fact that corporation may be required to expend money in future to protect its interests in property rights acquired, and for which it has issued stock, does not necessarily render consideration invalid. *West v. Sirian Lamp Co, 37 A.2d 835 (Ch. Ct. 1944)*.

When stock is issued without legal consideration, but equities favor stockholder, court will grant him election to retain stock on payment of fair price. *Maclary v. Pleasant Hills, Inc, 109 A.2d 830 (Ch. Ct. 1954)*.

Stockholder has burden of showing constructive fraud when he brings action to cancel increase in number of shares under alleged fraudulent plan for inadequate consideration. *Bennett v. Breuil Petroleum Corp, 99 A.2d 236 (Ch. Ct. 1953)*.

Stock that promoters get is for inadequate consideration when (1) it is issued in return for patent license which promoters had acquired for no consideration, (2) and value of which lay in its successful exploitation which promoters were not equipped to do, and (3) initial capital was not raised by promoters. *Pipelife Corp v. Bedford, 145 A.2d 206 (Ch. Ct. 1958)*.

.3 Valuation of consideration. — In absence of fraud, directors' valuation of labor done or property received for stock issue is conclusive. *Butler v. New Keystone Copper Co, 93 A 380 (Ch. Ct. 1915)*.

Prospective profits or future services do not constitute lawful consideration for stock. *Scully v. Automobile Finance Co, 101 A 908, 109 A 49 (Ch. Ct. 1917)*.

Directors cannot delegate, except in such manner as may be explicitly provided by statute, duty to determine value of property acquired as consideration for issuance of stock. *Field v. Carlisle Corp, 68 A.2d 817 (Ch. Ct. 1949)*.

Directors cannot evaluate their own services as consideration for issuance of stock. *Maclary v. Pleasant Hills, Inc, 109 A.2d 830 (Ch. Ct. 1954)*.

Par value stock issued for cash must be for full amount of par, and cannot be for promise to pay something less. *Bowen v. Imperial Theatres, Inc, 115 A 918 (Ch. Ct. 1922)*.

Treasury stock may be sold for less than par. *Belle Isle Corp v. MacBean, 61 A.2d 699 (Ch. Ct. 1948).*

Release of valid unliquidated claim against corporation is adequate consideration for stock issuance, and directors' judgment as to proper settlement amount is conclusive. *Blish v. Thompson Automatic Arms Corp, 64 A.2d 581 (1948)*; see also, *Manacher v. Reynolds, 165 A.2d 741 (Ch. Ct. 1960)*.

.4 Stock issued for notes. — Promissory note is not sufficient consideration for issuance of fully paid nonassessable stock. *Lofland v. Cahall, 118 A 1 (Ch. Ct. 1922); Phillips v. Slocomb, 167 A 698 (1933)*.

Negotiable promissory note secured by proper collateral may be legal consideration for stock issue, but note secured by shares of corporation making note is not valid consideration when those shares are in fact valueless. *Sohland v. Baker, 141 A 277 (Ch. Ct. 1927)*.

Corporation cannot get summary judgment to cancel shares issued, with directors' and stockholders' approval, in consideration of ten-year promissory notes together with promise by recipient of shares that he will become corporation's employee, when he may show (1) he did become corporation's salaried employee,

(2) he paid some of his notes in full and paid interest on others, (3) initial shares issued to him were treasury shares, that are not subject to same strict consideration restrictions as original shares, and (4) these treasury shares were deposited by him as collateral for issuance of original shares. *Highlights for Children, Inc v. Crown, 227 A.2d 118 (Ch. Ct. 1966)*.

.5 Stock issued for organization services. — Pre-incorporation services (promotional or underwriting) are good consideration for stock issuance. *Blish v. Thompson Automatic Arms Corp, 64 A.2d 581 (1948)*.

Services in selling shares is consideration for stock issuance, but directors selling par value stock have duty to authorize its issuance only for property equaling its full par value. *Bodell v. General Gas & Electric Corp, 132 A 442 (Ch. Ct. 1926)*.

Also, payment of reasonable commissions to selling agents for marketing stock is lawful, provided it is not mere guise to conceal evasion of rule, even for purchases by agent himself as well as sales to others. *Yasik v. Wachtel, 17 A.2d 309 (Ch. Ct. 1941)*; see also, *Diamond State Brewery, Inc v. De La Rigaudiere, 17 A.2d 313 (Ch. Ct. 1941)*.

Issuance of stock by directors to themselves for services in organizing corporation and selling stock is unlawful unless authorized by charter, bylaws or stockholders. *Lofland v. Cahall, 118 A 1 (1922)*; see also, *Birbeck v. American Toll Bridge Co, 2 A.2d 158 (Ch. Ct. 1938)*.

.6 Stock issued for property. — Unconditional license to use patent right is property for which, ordinarily, corporate stock can be issued. *West v. Sirian Lamp Co, 37 A.2d 835 (Ch. Ct. 1944)*.

Corporation can issue its capital stock in exchange for property less in value than par, but agreement that such stock, so issued, shall be fully paid and nonassessable, is void against company and its creditors. *Peters v. U.S. Mortgage Co, 114 A 598 (Ch. Ct. 1921)*.

.7 Illegally issued stock. — Preferred stockholders have right to question legality of issuance of common stock. *Scully v. Automobile Finance Co, 101 A 908 (Ch. Ct. 1917), 109 A 49 (Ch. Ct. 1920)*.

Stockholder, or his personal representative, who has knowledge of and acquiesces in illegal issue of stock by corporation cannot maintain suit to declare issue void. *Topkis v. Delaware Hardware Co, 2 A.2d 114 (Ch. Ct. 1938)*.

In suit to cancel illegally issued stock, court of equity has power to compel stockholder who has disposed illegally issued shares to surrender legally issued shares presently owned by him. *Belle Isle Corp v. MacBean, 49 A.2d 5 (Ch. Ct. 1946)*.

When undisputed facts show stock was illegally issued, court will issue preliminary injunction to prevent exercise of prerogatives which otherwise attach to stock ownership. *Belle Isle Corp v. MacBean, 49 A.2d 5 (Ch. Ct. 1946)*.

§154 DETERMINATION OF AMOUNT OF CAPITAL; CAPITAL, SURPLUS AND NET ASSETS DEFINED

Any corporation may, by resolution of its board of directors, determine that only a part of the consideration which shall be received by the corporation for any of the shares of its capital stock which it shall issue

from time to time shall be capital; but, in case any of the shares issued shall be shares having a par value, the amount of the part of such consideration so determined to be capital shall be in excess of the aggregate par value of the shares issued for such consideration having a par value, unless all the shares issued shall be shares having a par value, in which case the amount of the part of such consideration so determined to be capital need be only equal to the aggregate par value of such shares. In each such case the board of directors shall specify in dollars the part of such consideration which shall be capital. If the board of directors shall not have determined (1) at the time of issue of any shares of the capital stock of the corporation issued for cash or (2) within 60 days after the issue of any shares of the capital stock of the corporation issued for consideration other than cash what part of the consideration for such shares shall be capital, the capital of the corporation in respect of such shares shall be an amount equal to the aggregate par value of such shares having a par value, plus the amount of the consideration for such shares without par value. The amount of the consideration so determined to be capital in respect of any shares without par value shall be the stated capital of such shares. The capital of the corporation may be increased from time to time by resolution of the board of directors directing that a portion of the net assets of the corporation in excess of the amount so determined to be capital be transferred to the capital account. The board of directors may direct that the portion of such net assets so transferred shall be treated as capital in respect of any shares of the corporation of any designated class or classes. The excess, if any, at any given time, of the net assets of the corporation over the amount so determined to be capital shall be surplus. Net assets means the amount by which total assets exceed total liabilities. Capital and surplus are not liabilities for this purpose. Notwithstanding anything in this section to the contrary, for purposes of this section and §160 and §170 of this title, the capital of any nonstock corporation shall be deemed to be zero. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

§155 FRACTIONS OF SHARES

A corporation may, but shall not be required to, issue fractions of a share. If it does not issue fractions of a share, it shall (1) arrange for the disposition of fractional interests by those entitled thereto, (2) pay in cash the fair value of fractions of a share as of the time when those

entitled to receive such fractions are determined or (3) issue scrip or warrants in registered form (either represented by a certificate or uncertificated) or in bearer form (represented by a certificate) which shall entitle the holder to receive a full share upon the surrender of such scrip or warrants aggregating a full share. A certificate for a fractional share or an uncertificated fractional share shall, but scrip or warrants shall not unless otherwise provided therein, entitle the holder to exercise voting rights, to receive dividends thereon and to participate in any of the assets of the corporation in the event of liquidation. The board of directors may cause scrip or warrants to be issued subject to the conditions that they shall become void if not exchanged for certificates representing the full shares of uncertificated full shares before a specified date, or subject to the conditions that the shares for which scrip or warrants are exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of scrip or warrants, or subject to any other conditions which the board of directors may impose. (Last amended by Ch. 112, L. '83, eff. 7-1-83.)

Decisions

.1 Stock Split. — Sec. 155 is available to corporation proposing reverse/forward stock split intended to cash out shareholders below a certain ownership level. *Applebaum v. Avaya, Inc.*, *805 A.2d 196 (Ch. Ct. 2002).*

§156 PARTLY PAID SHARES

Any corporation may issue the whole or any part of its shares as partly paid and subject to call for the remainder of the consideration to be paid therefor. Upon the face or back of each stock certificate issued to represent any such partly paid shares, or upon the books and records of the corporation in the case of uncertificated partly paid shares, the total amount of the consideration to be paid therefor and the amount paid thereon shall be stated. Upon the declaration of any dividend on fully paid shares, the corporation shall declare a dividend upon partly paid shares of the same class, but only upon the basis of the percentage of the consideration actually paid thereon. (Last amended by Ch. 112, L. '83, eff. 7-1-83.)

§157 RIGHTS AND OPTIONS RESPECTING STOCK

(a) Subject to any provisions in the certificate of incorporation, every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors.

(b) The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration may be determined) for which any such shares may be acquired from the corporation upon the exercise of any such right or option, shall be such as shall be stated in the certificate of incorporation, or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. A formula by which such consideration may be determined may include or be made dependent upon facts ascertainable outside the formula, provided the manner in which such facts shall operate upon the formula is clearly and expressly set forth in the formula or in the resolution approving the formula. In the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.

(c) The board of directors may, by a resolution adopted by the board, authorize one or more officers of the corporation to do one or both of the following: (i) designate officers and employees of the corporation or of any of its subsidiaries to be recipients of such rights or options created by the corporation and (ii) determine the number of such rights or options to be received by such officers and employees; provided, however, that the resolution so authorizing such officer or officers shall specify the total number of rights or options such officer or officers may so award. The board of directors may not authorize an officer to designate himself or herself as a recipient of any such rights or options.

(d) In case the shares of stock of the corporation to be issued upon the exercise of such rights or options shall be shares having a par value, the consideration so to be received therefor shall have a value not less than the par value thereof. In case the shares of stock so to be issued

shall be shares of stock without par value, the consideration therefor shall be determined in the manner provided in §153 of this title. (Last amended by Ch. 40, L. '15, eff. 8-1-15.)

Decisions

.1 Stock options. — Stock options are internal corporate matter and governed by law of state of incorporation. *Beard v. Elster, 160 A.2d 731 (1960)*, reversing *Elster v. American Airlines, Inc, 128 A.2d 801 (Ch. Ct. 1957)*; on remand, *Elster v. American Airlines, Inc, 167 A.2d 231 (Ch. Ct. 1961)*.

Stock options granted directors are valid when (1) they are exercisable only after five years' service with corporation, (2) option price is double market price, (3) stockholders have ratified them, and (4) they served as incentive to retain directors who successfully negotiated acquisition of several other companies to offset corporation's considerable tax loss. *Olson Brothers, Inc v. Englehart, 245 A.2d 166 (1968)*.

Stockholder-ratified stock option plan proposed by disinterested board of directors is valid if directors believe it will benefit corporation by enabling it to retain services of valued employees, and if options cannot be exercised unless optionees are still employed by corporation. *Elster v. American Airlines, Inc, 167 A.2d 231 (Ch. Ct. 1961)*.

Requirement of optionee's continued employment is legal consideration for restricted stock option plan, and burden is on one who is attacking plan's validity to show that this consideration in fact does not exist in plan. *Gottlieb v. Hayden Chemical Corp, 99 A.2d 507 (Ch. Ct. 1953)*.

But when the burden is met, and it is shown that plan does not require continued employment on optionee's part, since he could exercise his option immediately after it was issued and then resign, court will void the options. *Kerbs v. California Eastern Airways, Inc, 90 A.2d 652 (1952)*.

Stock option may be granted for unlimited time, and if corporation, by voluntarily dissolving, renders itself powerless to honor option, optionee can recover on liquidation amount he would have received were the owner of the shares (less option price); but lapse of long time and great increase in stock's value may make enforcement of option inequitable, and corporation has burden to prove this inequity. *Gamble v. Penn Valley Crude Oil Corp, 104 A.2d 257 (Ch. Ct. 1954)*.

When only possible consideration to corporation at time of granting options to its executives was a return to be derived by corporation from increased job satisfaction, such option is invalid for lack of consideration. *Frankel v. Donovan, 120 A.2d 311 (Ch. Ct. 1956)*.

Provision that employee must remain with corporation for two years before he can exercise consecutive stock options means two years from time of the new stock option without tacking on time still remaining on previous options. *Stemerman v. Ackerman, 184 A.2d 28 (Ch. Ct. 1962)*.

Court will cancel stock options and shares issued under them, if optionees conspired with management to vote those shares for management. *Schwartz v. Miner, 146 A.2d 801 (Ch. Ct. 1958)*.

Corporation can buy back shares optioned to discharged employee, when he signed stock option agreement allowing it to do so if his employment terminated in five years; that is so, even though employee claims he accepted position because of stock option opportunities mentioned in job description that did not disclose such options were subject to company's buy-back provisions; job description is merely invitation to make offer or to negotiate terms of employment. *Keene Corp v. Hoofe, 267 A.2d 618 (Ch. Ct. 1970)*.

Directors adopted Rights Plan as preventive measure to ward off future advances by corporate raiders. Adoption of Plan was appropriate exercise of directors' business judgment when (1) action was not taken for entrenchment purposes, and (2) Plan was reasonable reaction by directors to perceived threat to corporation of coercive acquisition techniques. *Moran v. Household International, Inc, 500 A.2d 1346 (1985)*.

Claims by stockholders that they may hold their shares free of the restrictions of a Rights Plan, that the Rights Plan restricted the transferability of their stock, and that their stock was impermissibly altered by the placement of a legend incorporating the terms of the Rights Plan must be dismissed under the principle of stare decisis based on Moran and progeny. *Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245 (Del. Supr. 2001).*

.2 Warrants. — Corporation is liable to holders of stock warrants that required notice of dissolution, and so corporation's failure to give such notice entitles holders to amount they would have received upon distribution had they exercised their warrants. *Tisch Family Foundations Inc, v. Texas National Petroleum Co, 326 F. Supp. 1128 (D. Del. 1971)*.

Undeliverable warrants are held in trust for unlocated stockholders; trustees cannot exercise warrants before expiration date and must deposit property or proceeds resulting therefrom into court to await claims of missing stockholders. *Pathe Industries Inc v. Cadence Industries Corp, 425 A.2d 952 (1981)*.

.3 Rights. — An oral promise made by a corporation to sell its CEO 10% of its future private stock offerings was a right to purchase stock and therefore was invalid because it was not approved in writing by the board as required by Sec. 157. *Grimes v. Alteon, Inc., 804 A.2d 256 (Del. Supr. 2002).*

4. Spring loaded options. — Plaintiffs adequately alleged a violation of the duty of loyalty and duty of good faith in regard to the granting of spring loaded options where they alleged the options were issued according to a shareholder approved plan, directors possessed material, non-public information, and directors issued the options to circumvent otherwise valid shareholder approved restrictions upon the exercise price. *In re Tyson Foods Consol. Shareholder Lit., 919 A.2d 563 (Del. Ch. 2007).*

§158 STOCK CERTIFICATES; UNCERTIFICATED SHARES

The shares of a corporation shall be represented by certificates, provided that the board of directors of the corporation may provide by

resolution or resolutions that some or all of any or all classes or series of its stock shall be uncertificated shares. Any such resolution shall not apply
to shares represented by a certificate until such certificate is surrendered to the corporation. Every holder of stock represented by certificates shall be entitled to have a certificate signed by, or in the name of the corporation by any two authorized officers of the corporation representing the number of shares registered in certificate form. Any or all the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the corporation with the same effect as if such person were such officer, transfer agent or registrar at the date of issue. A corporation shall not have power to issue a certificate in bearer form. (Last amended by Ch. 265, L. '16, eff. 8-1-16.)

Decisions

.1 Certificates as evidence of shares. — Issuance by corporation of certificate for its stock constitutes representation that person to whom certificate issued is holder of number of shares thereon indicated, upon which bona fide purchaser for value can rely. *Delaware-New Jersey Ferry Co v. Leeds, 186 A 913 (Ch. Ct. 1936)*.

Certificates of stock are only evidence of shares and not shares themselves. *Baker v. Banker's Mortgage Co, 135 A 486 (Ch. Ct. 1926)*.

When terms of respective rights and obligations of corporation and stockholders are set forth in certificate of stock it becomes also contract between corporation and stockholder. *Lehigh Structural Steel Co v. CIR, 127 F.2d 67 (3d Cir 1942)*.

Certificates for shares of corporate stock are "securities" notwithstanding fact that they merely represent particular interest of owner in corporate capital and in its surplus assets on dissolution. *Equitable Trust Co v. Marshall, 17 A.2d 13 (Ch. Ct. 1940)*.

Provisions in stock certificate contrary to certificate of incorporation are void. *Delaware-New Jersey Ferry Co v. Leeds, 186 A 913 (Ch. Ct. 1936); Standard Scale & Supply Corp v. Chappel, 141 A 191 (Ch. Ct. 1928).*

Either actual or constructive delivery is essential before certificate of stock can be said to have been issued. *Smith v. Universal Service Motors Co, 147 A 247 (Ch. Ct. 1929)*.

.2 Reissuing certificate without restrictive legend. — Corporation had to reissue certificate to shareholder without transfer restriction where proposed transfer would be exempt from registration under Sec. 4(1) of 1933 Act and corporation's reluctance to reissue certificate was to further individual interests of CEO/principal shareholder. *Bender v. Memory Metals, Inc, 514 A.2d 1109 (Ch. Ct. 1986)*.

§159 SHARES OF STOCK; PERSONAL PROPERTY, TRANSFER AND TAXATION

The shares of stock in every corporation shall be deemed personal property and transferable as provided in Article 8 of Subtitle I of Title 6. No stock or bonds issued by any corporation organized under this chapter shall be taxed by this State when the same shall be owned by non-residents of this State, or by foreign corporations. Whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of transfer if, when the certificates are presented to the corporation for transfer or uncertificated shares are requested to be transferred, both the transferor and transferee request the corporation to do so. (Last amended by Ch. 112, L. '83, eff. 7-1-83.)

Decisions

.1 Shares as personal property. — Shares of stock are personal property and as such are subject to conversion, regardless whether certificate for them has been issued or not. *Haskell v. Middle States Petroleum Corp, 165 A 562 (1933)*.

.2 Transfer of shares. — It is not necessary to legal ownership of stock that it be transferred on corporation's books. *Drug, Inc v. Hunt, 168 A 87 (1933); Lippman v. Kehoe Sten Co, 98 A 943 (Ch. Ct. 1916)*, *aff'd, 102 A 988 (1918)*.

Until transferor surrenders his certificate to corporation for transfer, transferee cannot compel corporation to issue certificate for share supposed to have been transferred. *Berl v. Va Production Co, 163 A 641 (Ch. Ct. 1932)*, *reh'g denied*, *164 A 402 (Ch. Ct. 1933)*.

Transferee who purchased stock with full knowledge of infirmity in its issuance, and that corporation had cancelled it, cannot compel corporation to issue new certificate to him. *Bowen v. Imperial Theatres, Inc, 115 A 918 (Ch. Ct. 1922)*.

Bona fide transferees, who purchased stock from original subscriber and received certificates marked as fully paid, are not liable to corporate creditors when they had no knowledge or notice that there was unpaid balance due upon this stock. *Smith v. Donges, 73 F.2d 620 (3d Cir 1934)*.

Stockholder who endorses his stock in blank for transfer, and delivers it to another, loses title to such other, even though that stock was not transferred on corporation's books. *Chadwick v. Parkhill Corp, 141 A 823, 141 A 827 (Ch. Ct. 1928)*.

.3 Pledged shares. — No record on corporation's books is needed to vest title in stock's pledgee, and such transfer of title is unaffected by later attachment in suit against record holder. *Banker's Mortgage Co v. Sohland, 138 A 361 (1927).*

.4 Conversion of stock. — Where certificate of conversion required transmittal of notice, followed by surrender of preferred certificate, the conversion date was the date of transmittal of notice. *AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1188 (Ch. Ct 1999).*

§160 CORPORATION'S POWERS RESPECTING OWNERSHIP, VOTING, ETC., OF ITS OWN STOCK; RIGHTS OF STOCK CALLED FOR REDEMPTION

(a) Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares; provided, however, that no corporation shall:

(1) Purchase or redeem its own shares of capital stock for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation, except that a corporation other than a nonstock corporation may purchase or redeem out of capital any of its own shares which are entitled upon any distribution of its assets, whether by dividend or in liquidation, to a preference over another class or series of its stock, or, if no shares entitled to such a preference are outstanding, any of its own shares, if such shares will be retired upon their acquisition and the capital of the corporation reduced in accordance with Sec. 243 and 244 of this title. Nothing in this subsection shall invalidate or otherwise affect a note, debenture or other obligation of a corporation given by it as consideration for its acquisition by purchase, redemption or exchange of its shares of stock if at the time such note, debenture or obligation was delivered by the corporation its capital was not then impaired or did not thereby become impaired;

(2) Purchase, for more than the price at which they may then be redeemed, any of its shares which are redeemable at the option of the corporation; or

(3) In the case of a corporation other than a nonstock corporation, redeem any of its shares, unless their redemption is authorized by §151(b) of this title and then only in accordance with such section and the certificate of incorporation, or (ii) in the case of a nonstock corporation, redeem any of its membership interests, unless their redemption is authorized by the certificate of incorporation and then only in accordance with the certificate of incorporation.

(b) Nothing in this section limits or affects a corporation's right to resell any of its shares theretofore purchased or redeemed out of surplus and which have not been retired, for such consideration as shall be fixed by the board of directors.

(c) Shares of its own capital stock belonging to the corporation or to another corporation, if a majority of the shares entitled to vote in the

election of directors of such other corporation is held, directly or indirectly, by the corporation, shall neither be entitled to vote nor be counted for quorum purposes. Nothing in this section shall be construed as limiting the right of any corporation to vote stock, including but not limited to its own stock, held by it in a fiduciary capacity.

(d) Shares which have been called for redemption shall not be deemed to be outstanding shares for the purpose of voting or determining the total number of shares entitled to vote on any matter on and after the date on which notice of redemption has been sent to holders thereof and a sum sufficient to redeem such shares has been irrevocably deposited or set aside to pay the redemption price to the holders of the shares upon surrender of certificates therefor. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Purchase out of capital. — Corporation cannot buy its own stock when that would cause impairment of capital. *West Penn Chemical & Mfg Co v. Prentice, 236 F 891 (3d Cir 1916); Acker v. Girard Trust Co, 42 F.2d 37 (3d Cir 1930);In re International Radiator Co, 92 A 255 (Ch. Ct. 1914); Pasotti v. U.S. Guardian Corp, 156 A 255 (Ch. Ct. 1931).*

.2 Permissible purchases. — Courts will not interfere with directors' decision to purchase corporation's own stock unless there is misconduct or fraud. *Bankers Securities Corp v. Kresge Dept Stores, Inc, 54 F. Supp. 378 (D. Del. 1944)*.

Directors can authorize their corporation to buy large block of its own stock to avoid possible battle for control by seller if purchase did not impair capital, price paid and incidental expenses of purchase were not excessive, market price of stock rose substantially thereafter, and there was no mismanagement of corporation. *Kors v. Carey, 158 A.2d 136 (Ch. Ct. 1960)*.

Directors are not liable for having corporation buy block of its shares at premium prices to fend off purchase by outsiders that they reasonably believed posed threat to corporation's continued existence. *Cheff v. Mathes, 199 A.2d 548 (1964)*.

Corporation cannot purchase its own shares when its only purpose is to perpetuate control by dominant shareholder, when there is no showing that any real threat to corporate policy has occurred. *Propp v. Sadacca, 175 A.2d 33 (Ch. Ct. 1961)*.

Burden of proving entire fairness of repurchases did not shift to the plaintiff minority shareholder where the negotiations were conducted by an interested board member and a one-man committee composed on a disinterested director who did not review a related repurchase agreement and did not adequately protect the minority shareholders. *Strassburger v. Early, 752 A.2d 557 (Ch. Ct. 2000)*.

Absent improper purpose, corporation has right to buy back shares from dissident shareholders. No Delaware law exists to support plaintiffs' contention that GM directors had duty to extend Perot buyback to all GM shareholders. *In re*

General Motors Class E Stock Buyout Securities Litigation, 694 F. Supp. 1119 (D. Del. 1988).

.3 Capital defined. — Word "capital" does not mean just assets but is intended to mean that funds and property of corporation should not be used to purchase its own shares when value of its assets is less than aggregate amount of all shares of its issued capital stock. *In re International Radiator Co, 92 A 255 (Ch. Ct. 1914)*.

.4 Pledge of unissued stock. — Corporation can pledge its unissued shares of capital stock as collateral security for loan made to it, and upon corporation's insolvency, pledgee must return stock held when he files claim as creditor. *Claude Banta, Inc v. Wilmington Suburban Water Co, 46 A.2d 876 (Ch. Ct. 1946).*

.5 Treasury stock. — Treasury stock should not be counted in determining quorum at stockholders' meeting. *Atterbury v. Consolidated Copper Mines Corp, 20 A.2d 743 (Ch. Ct. 1941)*.

Stock of parent corporation registered in name of subsidiary corporation cannot be voted by subsidiary at stockholders' meeting of parent for election of parent's directors. *Italo Petroleum Corp of America v. Producers' Oil Corp of America, 174 A 276 (Ch. Ct. 1934)*.

.6 Redemption of common stock. — Fact that common stock is subject to specific restrictions placed upon it in charter, does not bring it within category of "special shares"; special shares derive their status from favors and rights they enjoy, whereas common stock is under limitation of burdens and restrictions. *Starring v. American Hair & Felt Co, 191 A 887 (Ch. Ct. 1937)*.

Charter provision authorizing directors at any time to call common stock of any stockholder, who was not employee, was unreasonable restraint of alienation. *Greene v. E H Rollins & Sons, Inc, 2 A.2d 249 (Ch. Ct. 1938)*.

.7 Redemption of preferred stock. — When corporation that has preferred stock with accumulated dividend arrearages is being reorganized, plan of reorganization can contemplate redemption of preferred shares and substitution of new low-interest bonds for them. *In re United Gas Corp, 58 F. Supp. 501 (D. Del. 1944)*.

Selective redemption of preferred stock, prior to expiration of voting trust agreement giving control to certain directors and officers, was barred since it appeared that redemption would assure continued control of corporation by such directors and officers. *Petty v. Penntech Papers, Inc, 347 A.2d 140 (Ch. Ct. 1975)*.

Creditors of insolvent post-merger corporation could not recover from former directors of pre-merger corporation amount of deposit of corporate funds made in connection with redemption of pre-merger corporation's preferred stock, where plaintiffs were not "creditors" of pre-merger corporation because they did not have claim against pre-merger corporation before it went out of existence. J*ohnston v. Wolf, 487 A.2d 1132 (1985)*.

.8 Reclassification of preferred stock. — Stockholder who acquiesces in change in capital structure which results in change of his preferred stock into shares of different character and extinguishes cumulated dividends cannot compel corporation to pay him those dividend arrearages, nor can he compel restoration of original capital stock structure on ground that change was illegal. *Trounstine v. Remington Rand, Inc, 194 A 95 (Ch. Ct. 1937)*.

.9 Conflict of laws. — Panama law governs issue of whether a Panamanian corporation's Delaware subsidiary may vote shares it holds in parent company under

circumstances prohibited by Delaware law, but not Panamanian law. *McDermott Inc v. Lewis, 531 A.2d 206 (1987)*.

.10 Circular ownership. — In some circumstances, stock owned by subsidiary may belong to issuer and be barred from voting even if issuer does not hold majority of shares entitled to vote at election of subsidiary's directors. *Speiser v. Baker, 525 A.2d 1001 (Ch. Ct. 1987)*.

§161 ISSUANCE OF ADDITIONAL STOCK; WHEN AND BY WHOM

The directors may, at any time and from time to time, if all of the shares of capital stock which the corporation is authorized by its certificate of incorporation to issue have not been issued, subscribed for, or otherwise committed to be issued, issue or take subscriptions for additional shares of its capital stock up to the amount authorized in its certificate of incorporation.

§162 LIABILITY OF STOCKHOLDER OR SUBSCRIBER FOR STOCK NOT PAID IN FULL

(a) When the whole of the consideration payable for shares of a corporation has not been paid in, and the assets shall be insufficient to satisfy the claims of its creditors, each holder of or subscriber for such shares shall be bound to pay on each share held or subscribed for by such holder or subscriber the sum necessary to complete the amount of the unpaid balance of the consideration for which such shares were issued or are to be issued by the corporation.

(b) The amounts which shall be payable as provided in subsection (a) of this section may be recovered as provided in Sec. 325 of this title, after a writ of execution against the corporation has been returned unsatisfied as provided in said Sec. 325.

(c) Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be personally liable for any unpaid portion of such consideration, but the transferor shall remain liable therefor.

(d) No person holding shares in any corporation as collateral security shall be personally liable as a stockholder but the person pledging such

shares shall be considered the holder thereof and shall be so liable. No executor, administrator, guardian, trustee or other fiduciary shall be personally liable as a stockholder, but the estate or funds held by such executor, administrator, guardian, trustee or other fiduciary in such fiduciary capacity shall be liable.

(e) No liability under this section or under Sec. 325 of this title shall be asserted more than 6 years after the issuance of the stock or the date of the subscription upon which the assessment is sought.

(f) In any action by a receiver or trustee of an insolvent corporation or by a judgment creditor to obtain an assessment under this section, any stockholder or subscriber for stock of the insolvent corporation may appear and contest the claim or claims of such receiver or trustee. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Liability of stockholders. — Corporation cannot make subscription contracts which will free subscribers from liability to pay for their shares for benefit of creditors, since principle is that shares of stock in corporation are substitute for personal liability of partners. *John W Cooney Co v. Arlington Hotel Co, 101 A 879 (Ch. Ct. 1917)*, *aff'd*, *Du Pont v. Ball, 106 A 39 (1918).*

When one takes shares in order to qualify to be director, he cannot subsequently escape liability for assessment by showing he never had any beneficial interest in stock but held it for another to whom he had delivered certificate with transfer endorsed on it. *Fell v. Securities Co of North America, 100 A 788 (Ch. Ct. 1917)*; see also, *Taggart v. Leo B Booker & Co, 28 A.2d 690 (1942)*.

.2 Liability of bona fide purchasers. — Transferee of stock from original subscriber is not liable to corporation's creditors for unpaid balance on stock issued and marked as paid for in full if transferee is bona fide purchaser without notice. *Smith v. Donges, 73 F.2d 620 (3d Cir 1934)*.

Innocent purchaser for value must bear burden of establishing his claim as such. *Blair v. F H Smith Co, 156 A 207 (Ch. Ct. 1931)*.

.3 Enforcement of liability. — Liability to pay balance due on stock may be enforced by bill in chancery brought by receiver. *Cooper v. Eastern Horse & Mule Co, 110 A 666 (Ch. Ct. 1920)*.

Court will grant petition of receiver of insolvent corporation that assessment be levied upon stockholders of corporation who have not paid par value for their stock to raise fund to pay corporate creditors. *Shaw v. Lincoln Hotel Corp, 156 A 199 (Ch. Ct. 1931)*.

Receiver must show there is deficiency of corporate assets to meet outstanding claims of creditors before court will permit him to levy assessment on stockholders for unpaid portion of their stock. *Philips v. Slocomb, 167 A 698 (1933)*; see also, *Cahall v. Lofland, 108 A 732 (Ch. Ct. 1920)*.

§163 PAYMENT FOR STOCK NOT PAID IN FULL

The capital stock of a corporation shall be paid for in such amounts and at such times as the directors may require. The directors may, from time to time, demand payment, in respect of each share of stock not fully paid, of such sum of money as the necessities of the business may, in the judgment of the board of directors, require, not exceeding in the whole the balance remaining unpaid on said stock, and such sum so demanded shall be paid to the corporation at such times and by such installments as the directors shall direct. The directors shall give notice of the time and place of such payments, which notice shall be given at least 30 days before the time for such payment, to each holder of or subscriber for stock which is not fully paid at such holder's or subscriber's last known address. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Applicability of section. — This section applies only to corporations while they are going concerns. *Philips v. Slocomb, 167 A 698 (1933)*.

.2 Subscribers. — In event of dissolution, employee-subscribers are stockholders and are subject to same liabilities as others; their motive in making subscription does not affect its validity. *Hegarty v. Amer Commonwealth Power Corp, 174 A 273 (Ch. Ct. 1934)*.

Subscribers who are delinquent in paying their subscriptions cannot be converted into creditors by issuance of certificates of indebtedness and cancellation of right to subscribe. *Pasotti v. US Guardian Corp, 156 A 255 (Ch. Ct. 1931)*.

Distinction between subscription to stock and purchase of stock is question of agreement's construction, but, generally, if transaction is with corporation and involves stock not previously issued, it is a subscription and not purchase. *Louisiana Oil Exploration Co v. Raskob, 127 A 713 (1925)*.

When corporation issues its stock to agent for resale to bona fide purchasers, who receive certificates marked full-paid and non-assessable," such purchasers are not subscribers. *Smith v. Donges, 73 F.2d 620 (3d Cir 1934)*.

Corporations cannot accept subscriptions on special terms which are fraudulent as to other stockholders; such subscriptions are void as to those special terms but otherwise valid. *Cahall v. Lofland, 114 A 224 (Ch. Ct. 1921)*.

.3 Necessity for assessment and call. — Before corporation can maintain action against alleged stockholder to recover unpaid subscription for stock, or unpaid purchase price for newly issued stock, it must show that assessment and call has been made upon alleged stockholder for amount required from him. *Louisiana Oil Exploration Co v. Raskob*, *127 A 713 (1925)*; see also, *Cahill v. Burbage, 119 A 574 (Ch. Ct. 1922); Philips v. Slocomb, 167 A 698 (1933)*.

.4 Liability as between principal and agent. — When shares of stock which stand on corporate books in name of one person are held as agent for another, either principal or agent is liable for unpaid subscription for such shares. *Fell v. Securities Co of North America, 100 A 788 (Ch. Ct. 1917)*.

.5 Fraud as defense to action for unpaid subscription. — If subscription contract is induced by fraud, subscriber may set it up as defense to action for balance due on subscription and amounts already paid in ignorance of fraud may be recovered. *Grone v. Economic Life Ins Co, 80 A 809 (Ch. Ct. 1911)*.

§164 FAILURE TO PAY FOR STOCK; REMEDIES

When any stockholder fails to pay any installment or call upon such stockholder's stock which may have been properly demanded by the directors, at the time when such payment is due, the directors may collect the amount of any such installment or call or any balance thereof remaining unpaid, from the said stockholder by an action at law, or they shall sell at public sale such part of the shares of such delinquent stockholder as will pay all demands then due from such stockholder with interest and all incidental expenses, and shall transfer the shares so sold to the purchaser, who shall be entitled to a certificate therefor.

Notice of the time and place of such sale and of the sum due on each share shall be given by advertisement at least 1 week before the sale, in a newspaper of the county in this State where such corporation's registered office is located, and such notice shall be mailed by the corporation to such delinquent stockholder at such stockholder's last known post-office address, at least 20 days before such sale.

If no bidder can be had to pay the amount due on the stock, and if the amount is not collected by an action at law, which may be brought within the county where the corporation has its registered office, within 1 year from the date of the bringing of such action at law, the said stock and the amount previously paid in by the delinquent stockholder on the stock shall be forfeited to the corporation. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§165 REVOCABILITY OF PREINCORPORATION SUBSCRIPTIONS

Unless otherwise provided by the terms of the subscription for stock of a corporation to be formed shall be irrevocable, except with the consent of all other subscribers or the corporation, for a period of 6 months from its date.

§166 FORMALITIES REQUIRED OF STOCK SUBSCRIPTIONS

A subscription for stock of a corporation, whether made before or after the formation of a corporation, shall not be enforceable against a subscriber, unless in writing and signed by the subscriber or by such subscriber's agent. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§167 LOST, STOLEN OR DESTROYED STOCK CERTIFICATES; ISSUANCE OF NEW CERTIFICATE OR UNCERTIFICATED SHARES

A corporation may issue a new certificate of stock or uncertificated shares in place of any certificate theretofore issued by it, alleged to have been lost, stolen or destroyed, and the corporation may require the owner of the lost, stolen or destroyed certificate, or such owner's legal representative to give the corporation a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new certificate or uncertificated shares. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Proper delivery of certificate. — Acceptance by stockholder's mail of registered letter containing shares of stock was good delivery of shares to him; corporation can demand that he post indemnity bond for new certificates. *Graham v. Commercial Credit Co, 200 A.2d 828 (1964)*.

.2 Issuance of new certificate-bond. — New certificate must be issued for lost certificate on filing of bond. *In re Francis, 108 A 31 (1919)*.

.3 False loss claim. — When stockholder of record sells his certificate and later obtains new one by claiming that original was lost, issuing corporation is liable for converting vendee's shares but may be protected by statute of limitations which begins to run when new certificate is issued, even if vendee does not know about it. *Mastellone v. Argo Oil Corp, 82 A.2d 379 (1951)*.

.4 Certificate never issued. — If certificates have never been issued, this section of law does not apply. *Smith v. Universal Service Motors Co, 147 A 247 (Ch. Ct. 1929)*.

Before issuing replacement certificates for those lost, stolen or destroyed, trust could require brokerage houses to supply independent credible evidence that they were beneficial owners of stock registered in their names because brokerage houses had held stock in "street name" so there was no presumption that shareholder of record was also beneficial owner. *Merrill Lynch Pierce Fenner & Smith, Inc v. North European Oil Royalty Trust, 490 A.2d 558 (1985)*.

§168 JUDICIAL PROCEEDINGS TO COMPEL ISSUANCE OF NEW CERTIFICATE OR UNCERTIFICATED SHARES

(a) If a corporation refuses to issue new uncertificated shares or a new certificate of stock in place of a certificate theretofore issued by it, or by any corporation of which it is the lawful successor, alleged to have been lost, stolen or destroyed, the owner of the lost, stolen or destroyed certificate or such owner's legal representatives may apply to the Court of Chancery for an order requiring the corporation to show cause why it should not issue new uncertificated shares or a new certificate of stock in place of the certificate so lost, stolen or destroyed. Such application shall be by a complaint which shall state the name of the corporation, the number and date of the certificate, if known or ascertainable by the plaintiff, the number of shares of stock represented thereby and to whom issued, and a statement of the circumstances attending such loss, theft or destruction. Thereupon the court shall make an order requiring the corporation to show cause at a time and place therein designated, why it should not issue new uncertificated shares or a new certificate of stock in place of the one described in t he complaint. A copy of the complaint and order shall be served upon the corporation at least 5 days before the time designated in the order.

(b) If, upon hearing, the court is satisfied that the plaintiff is the lawful owner of the number of shares of capital stock, or any part thereof, described in the complaint, and that the certificate therefor has been lost, stolen or destroyed, and no sufficient cause has been shown why new uncertificated shares or a new certificate should not be issued in place thereof, it shall make an order requiring the corporation to issue and deliver to the plaintiff new uncertificated shares or a new certificate for such shares. In its order the court shall direct that, prior to the issuance and delivery to the plaintiff of such new uncertificated shares or a new certificate, the plaintiff give the corporation a bond in such form and with such security as to the court appears sufficient to indemnify the corporation against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new uncertificated shares or new certificate. No corporation which has issued uncertificated shares or a certificate pursuant to an order of the court entered hereunder shall be liable in an amount in excess of the amount specified in such bond. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Successor to assets. — Alleged successor to assets of former brokerage firm cannot compel corporation, some of whose stock is registered in firm's name, to declare him owner of stock, issue him new certificate, and pay him past unpaid dividends, when he cannot prove his claim with reasonable certainty. *Keech v. Zenith Radio Corp, 276 A.2d 270 (Ch. Ct. 1971)*.

.2 Loss of certificate. — Stockholder can make corporation issue new stock certificates to her, when these certificates were lost and she had never authorized their sale, even though corporation had transferred them to innocent purchaser for value. *Scott v. Ametek Inc, 277 A.2d 714 (Ch. Ct. 1971)*.

§169 SITUS OF OWNERSHIP OF STOCK

For all purposes of title action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

Decisions

.1 Situs of stock. — Shares of stock of Delaware corporation have their situs in Delaware. *Blumenthal v. Blumenthal, 59 A.2d 216 (Ch. Ct. 1944); Cantor v. Sachs, 162 A 73 (Ch. Ct. 1932); Hodgman v. Atlantic Refining Co, 274 F 104 (D. Del. 1921)*.

No stockholder who accepts stock in Delaware corporation can be heard in court to deny its Delaware situs. *Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co, 127 A 56 (Ch. Ct. 1924)*.

Transfer of stock of Delaware corporation is controlled by laws of Delaware since, for all purposes other than taxation, situs of its stock is there. *Drug, Inc v. Hunt, 168 A 87 (Super Ct 1933); Pennington v. Commonwealth Hotel Const Co, 156 A 259 (Ch. Ct. 1931)*.

Statute determining Delaware to be fictional situs of stock could not be used to sequester stock and thus gain jurisdiction over out-of-state corporate directors since it was unconstitutional for not satisfying due process standards; directors' only contact with state was ownership of stock in Delaware corporation that had nothing to do with shareholder's cause of action. *Shaffer v. Heitner, 433 US 186 (1977)*.

.2 Power of court. — Court has power to order partition of shares of stock of Delaware corporation since they constitute res located in state. *Wightman v. San Francisco Bay Toll-Bridge Co, 142 A 782 (Ch. Ct. 1928)*.

Suit for cancellation or specific recovery of stock can be brought in federal court for district of Delaware and service on defendants residing elsewhere can be made under Judicial Code. *Myers v. Occidental Oil Corp, 288 F 997 (D. Del. 1923)*.

.3 Attachment. — Under provisions of this section and Sec. 324, it is not necessary that Delaware corporation be doing business in state before attachment is issued against shares of its capital stock, since corporation itself is not being summoned as garnishee. *Morgan v. Ownbey, 100 A 411 (Ch. Ct. 1916)*.

.4 Domicile in fact in another state. — Even though Delaware corporation executes trust whose entire corpus is stock in Delaware corporation, situs of trust is not in Delaware, since indenture was signed by corporation outside state, its provisions provided that trust be administered under another state's law, and in fact was so administered. *Baltimore Nat'l Bank v. Central Public Utility Corp, 28 A.2d 244 (Ch. Ct. 1942)*.

.5 Subsidiary's stock. — Alien parent corporation that incorporated subsidiary in Delaware for purpose of purchasing another corporation's stock cannot claim that mere ownership of stock in subsidiary is insufficient contact between it and state to permit jurisdiction, since subsidiary was created to reap benefits and protections of state's laws and there existed significant contacts between state, parent and litigation. *Papendick v. Robert Bosch GmbH, 389 A.2d 1315 (1979)*.

§170 DIVIDENDS; PAYMENT; WASTING ASSET CORPORATIONS

(a) The directors of every corporation, subject to any restrictions contained in its certificate of incorporation, may declare and pay dividends upon the shares of its capital stock either (1) out of its surplus, as defined in and computed in accordance with Sec. 154 and 244 of this title, or (2) in case there shall be no such surplus, out of its net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year. If the capital of the corporation, computed in accordance with Sec. 154 and 244 of this title, shall have been diminished by depreciation in the value of its property, or by losses, or otherwise, to an amount less than the aggregate amount of the capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets, the directors of such corporation shall not declare and pay out of such net profits any dividends upon any shares of any classes of its capital stock until the deficiency in the amount of capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets shall have been repaired. Nothing in this subsection shall invalidate or otherwise affect a note, debenture or other obligation of the corporation paid by it as a dividend on shares of its stock, or any payment made thereon, if at the time such

note, debenture or obligation was delivered by the corporation, the corporation had either surplus or net profits as provided in clause (1) or (2) of this subsection from which the dividend could lawfully have been paid.

(b) Subject to any restrictions contained in its certificate of incorporation, the directors of any corporation engaged in the exploitation of wasting assets (including but not limited to a corporation engaged in the exploitation of natural resources or other wasting assets, including patents, or engaged primarily in the liquidation of specific assets) may determine the net profits derived from the exploitation of such wasting assets or the net proceeds derived from such liquidation without taking into consideration the depletion of such assets resulting from lapse of time, consumption, liquidation or exploitation of such assets. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Nature of dividend. — Corporation's distribution to its stockholders of stock it owns in another corporation under compulsion of court divestiture order is not payment of dividend, but is return of capital to stockholders that diminishes corporation's asset value, so that stockholder husband, who is obligated by separation agreement to give to his wife any dividends he receives, does not have to turn over this stock distribution to her. *Fulweiler v. Spruance, 222 A.2d 555 (1966)*.

Dividend is payment to stockholders as a return upon their investment. *Pennington v. Commonwealth Hotel Const Corp, 155 A 514 (Ch. Ct. 1931)*.

Directors and majority stockholders of corporation which, instead of paying dividends, provided stockholders with access to pool of railroad cars did not breach fiduciary duty to bankrupt minority stockholder that could no longer make use of this service. *Matter of Reading Co, 711 F.2d 509 (3d Cir 1983)*.

.2 When is dividend payable. — In ascertaining whether there are funds available for dividends, capital must be put down at its paid in and not at its par value. *Peters v. US Mortgage Co, 114 A 598 (Ch. Ct. 1921)*.

Net earnings retained for period of years as capital may be distributed as dividends and are then profits and not capital. *Bryan v. Aiken, 86 A 674 (1913)*.

Assets for dividend purposes should be computed with allowance for depreciation; they cannot be counted at cost regardless of present worth. *Vogtman v. Merchants Mtge & Credit Co, 178 A 99 (Ch. Ct. 1935)*.

Dividends cannot be paid out of unrealized appreciated assets. *Kingston v. Home Life Ins Co of America, 101 A 898 (Ch. Ct. 1917)*, *aff'd, 104 A 25 (1918)*.

In absence of fraud or bad faith, directors' valuation of assets for dividend purposes on basis of acceptable data and by standards which directors are entitled to believe reasonably reflect present "values" is proper; court cannot substitute its

view of valuation for that of directors. *Morris v. Standard Gas & Electric Co, 63 A.2d 577 (Ch. Ct. 1949)*.

Charter provision permitting cumulative dividends out of "net earnings" means out of any earnings legally available; "net earnings" is not restricted to earned surplus, and includes current earnings. *Weinberg v. Baltimore Brick Co, 114 A.2d 812 (1955)*.

.3 Right to dividends. — Stockholders cannot compel directors to declare dividends even though there is large surplus and corporation is holding company whose articles say its purpose is to receive and distribute dividends; directors' accumulation of surplus to buy out other companies is not abuse of discretion. *Leibert v. Grinnell Corp, 194 A.2d 846 (Ch. Ct. 1963)*.

Directors need not pay arrearages to preferred stockholders from capital surplus realized out of sale of corporation's business assets if they are retaining it in good faith to buy new business and sale for that purpose has been approved by majority stockholders. *Treves v. Menzies, 142 A.2d 520 (Ch. Ct. 1958)*.

Shareholder has no property interest in profits of business carried on by corporation until dividend has been declared out of such profits. *Pyle v. Gallaker, 75 A 373 (1908); Carson v. Allegheny Window Glass Co, 189 F 791 (D. Del. 1911)*.

Dividends declared but unpaid can, if due, be recovered in action at law. *Jefferis v. Wm D Mullen Co, 132 A 687 (Ch. Ct. 1926)*.

Declaration of lawful dividend makes stockholder creditor of corporation and gives him right of action in contract against company. *Selly v. Fleming Coal Co, 180 A 326 (1935)*.

Money earned by corporation does not become property of its stockholders until it is distributed to them as dividends or on dissolution. *Managers Security Co v. Mallery, 77 F.2d 186 (3d Cir 1935); Bryan v. Aiken, 86 A 674 (Ch. Ct. 1913)*.

When parent corporation merged with subsidiary by buying out subsidiary's minority stockholders, minority could not compel parent to declare and pay dividend that would have been forthcoming for subsidiary had merger not taken place, because minority did not object to adequacy of price paid for their stock. *Gabelli & Co Profit Sharing Plan v. Liggett Group Inc, 444 A.2d 261 (Ch. Ct. 1982)*.

Common stockholder could not have election of board of directors set aside for their wrongful refusal to pay such dividends without showing fraud and gross abuse of discretion by board in refusing to order such dividends. *Baron v. Allied Artists Pictures Corp, 337 A.2d 653 (Ch. Ct. 1975)*.

.4 Declaration as business judgment. — Minority shareholders could not compel corporation's board to pay quarterly dividend once corporation had merged and shareholders received cash for value of shares because board's failure to declare dividend was exercise of its business judgment. *Gabelli & Co Profit Sharing Plan v. Ligget Group Inc, 479 A.2d 276 (1984)*.

Court refused to grant preliminary injunction to block street sweep of target corporation's stock executed by target's largest shareholder during hostile tender offer by outsider, where declaration of dividend was protected by business judgment rule, the transactions in question were not motivated by single entrenchment purpose, street sweep was not coercive to sellers; market forces propelled the sale; and defensive measures were reasonable in relation to threat posed. *Ivanhoe Partners v. Newmont Mining Corp, 533 A.2d 585 (Ch. Ct. 1987)*.

§171 SPECIAL PURPOSE RESERVES

The directors of a corporation may set apart out of any of the funds of the corporation available for dividends a reserve or reserves for any proper purpose and may abolish any such reserve.

§172 LIABILITY OF DIRECTORS AND COMMITTEE MEMBERS AS TO DIVIDENDS OR STOCK REDEMPTION

A member of the board of directors, or a member of any committee designated by the board of directors, shall be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of its officers or employees, or committees of the board of directors, or by any other person as to matters the director reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation, as to the value and amount of the assets, liabilities and/or net profits of the corporation, or any other facts pertinent to the existence and amount of surplus or other funds from which dividends might properly be declared and paid, or with which the corporation's stock might properly be purchased or redeemed. (Last amended by Ch. 136, L. '87, eff. 7-1-87.)

§173 DECLARATION AND PAYMENT OF DIVIDENDS

No corporation shall pay dividends except in accordance with this chapter. Dividends may be paid in cash, in property, or in shares of the corporation's capital stock. If the dividend is to be paid in shares of the corporation's theretofore unissued capital stock the board of directors shall, by resolution, direct that there be designated as capital in respect of such shares an amount which is not less than the aggregate par value of par value shares being declared as a dividend and, in the case of shares without par value being declared as a dividend, such amount as shall be determined by the board of directors. No such designation as capital shall be necessary if shares are being distributed by a cor-

poration pursuant to split-up or division of its stock rather than as payment of a dividend declared payable in stock of the corporation. (Last amended by Ch. 127, L. '85, eff. 7-1-85.)

Decisions

.1 To whom paid. — Dividends should be paid to party in whose name stock upon which they are declared is registered. *Wilmington Trust Co v. Nye Odorless Incinerator Corp, 159 A 844 (Ch. Ct. 1932)*.

All dividends which are unpaid on cumulative preferred stock at time of dissolution of corporation must be paid out of funds in receiver's hands before anything is paid on common stock. *Garrett v. Edge Moor Iron Co, 199 A 671 (1938)*.

Dividends on pledged stock belong to pledgee and cannot be attached in suit to another creditor of pledgor, and this is so regardless whether stock has been transferred into name of pledgee on corporation's books; pledgee is under duty to apply dividends to reduction of pledgor's debt. *Womack v. De Witt, 10 A.2d 504 (1939)*.

Permitting class of stockholders to purchase with their dividends no par common stock at value considerably below market price does not amount to declaration of additional dividend to favored class even though stock so bought could be sold at profit, since such profit was not being taken out of corporation's earnings. *Bodell v. General Gas & Electric Corp, 132 A 442 (Ch. Ct. 1926)*.

Upon reclassification of stock by which preferred stock was changed into stock of different character and its dividend arrearages extinguished, stockholder, who acquiesced in change and accepted dividends on new stock, has no standing in court to complain against change and ask for dividend arrearages on his old shares. *Trounstine v. Remington Rand, Inc, 194 A 95 (Ch. Ct. 1937)*.

.2 Business judgment, dividend payment. — Minority shareholders could not compel corporation's board to pay quarterly dividend once corporation had merged and shareholders received cash for value of shares because board's failure to declare dividend was exercise of its business judgment. *Gabelli & Co Profit Sharing Plan v. Liggett Group Inc, 479 A.2d 276 (1984)*.

§174 LIABILITY OF DIRECTORS FOR UNLAWFUL PAYMENT OF DIVIDEND OR UNLAWFUL STOCK PURCHASE OR REDEMPTION; EXONERATION FROM LIABILITY; CONTRIBUTION AMONG DIRECTORS; SUBROGATION

(a) In case of any wilful or negligent violation of Sec. 160 or 173 of this title, the directors under whose administration the same may happen

shall be jointly and severally liable, at any time within 6 years after paying such unlawful dividend or after such unlawful stock purchase or redemption, to the corporation, and to its creditors in the event of its dissolution or insolvency, to the full amount of the dividend unlawfully paid, or to the full amount unlawfully paid for the purchase or redemption of the corporation's stock, with interest from the time such liability accrued. Any director who may have been absent when the same was done, or who may have dissented from the act or resolution by which the same was done, may be exonerated from such liability by causing his or her dissent to be entered on the books containing the minutes of the proceedings of the directors at the time the same was done, or immediately after such director has notice of the same.

(b) Any director against whom a claim is successfully asserted under this section shall be entitled to contribution from the other directors who voted for or concurred in the unlawful dividend, stock purchase or stock redemption.

(c) Any director against whom a claim is successfully asserted under this section shall be entitled, to the extent of the amount paid by such director as a result of such claim, to be subrogated to the rights of the corporation against stockholders who received the dividend on, or assets for the sale or redemption of, their stock with knowledge of facts indicating that such dividend, stock purchase or redemption was unlawful under this chapter, in proportion to the amounts received by such stockholders respectively. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Liability of directors. — Since statute permits it, directors can pay preferred stock dividends out of net profits for current or preceding year; charter provision that dividends could be paid only out of "net earnings" did not restrict directors' power when, at time charter provision was adopted, statute permitted dividends only out of "surplus or net profits." *Weinberg v. Baltimore Brick Co, 108 A.2d 81 (Ch. Ct. 1954)*.

Parent corporation which dominates subsidiary's board of directors not liable to it in derivative action for dividends paid by subsidiary in excess of earnings when such payments were made out of surplus net profits in compliance with state statute since no showing that (1) dividend declaration resulted from fraud or overreaching by parent, or (2) parent received benefit to exclusion of subsidiary's minority stockholders. *Sinclair Oil Corp v. Levien, 280 A.2d 717 (1971)*.

Subchapter VI
STOCK TRANSFERS

§201 TRANSFER OF STOCK, STOCK CERTIFICATE AND UNCERTIFICATED STOCK

Except as otherwise provided in this chapter, the transfer of stock and the certificates of stock which represent the stock or uncertificated stock shall be governed by Article 8 of Subtitle I of Title 6. To the extent that any provision of this chapter is inconsistent with any provision of subtitle I of Title 6, of this chapter shall be controlling. (Last amended by Ch. 112, L. '83, eff. 7-1-83.)

§202 RESTRICTION ON TRANSFER AND OWNERSHIP OF SECURITIES

(a) A written restriction or restrictions on the transfer or registration of transfer of a security of a corporation, or on the amount of the corporation's securities that may be owned by any person or group of persons, if permitted by this section and noted conspicuously on the certificate or certificates representing the security or securities so restricted or, in the case of uncertificated shares, contained in the notice or notices given pursuant to subsection (f) of Sec. 151 of this title, may be enforced against the holder of the restricted security or securities or any successor or transferee of the holder including an executor, administrator, trustee, guardian or other fiduciary entrusted with like responsibility for the person or estate of the holder. Unless noted conspicuously on the certificate or certificates representing the security or securities so restricted or, in the case of uncertificated shares, contained in the notice or notices given pursuant to subsection (f) of Sec. 151 of this title, a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction.

(b) A restriction on the transfer or registration of transfer of securities of a corporation, or on the amount of a corporation's securities that may be owned by any person or group of persons, may be imposed by the certificate of incorporation or by the bylaws or by an agreement among any number of security holders or among such holders and the corporation. No restrictions so imposed shall be binding with respect to

securities issued prior to the adoption of the restriction unless the holders of the securities are parties to an agreement or voted in favor of the restriction.

(c) A restriction on the transfer or registration of transfer of securities of a corporation or on the amount of such securities that may be owned by any person or group of persons is permitted by this section if it:

(1) Obligates the holder of the restricted securities to offer to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing, a prior opportunity, to be exercised within a reasonable time, to acquire the restricted securities; or

(2) Obligates the corporation or any holder of securities of the corporation or any other person or any combination of the foregoing, to purchase the securities which are the subject of an agreement respecting the purchase and sale of the restricted securities; or

(3) Requires the corporation or the holders of any class or series of securities of the corporation to consent to any proposed transfer of the restricted securities or to approve the proposed transferee of the restricted securities, or to approve the amount of securities of the corporation that may be owned by an person or group of persons; or

(4) Obligates the holder of the restricted securities to sell or transfer an amount of restricted securities to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing, or causes or results in the automatic sale or transfer of an amount of restricted securities to the corporation or to any holders of securities of the corporation or to any other person or to any combination of the foregoing; or

(5) Prohibits or restricts the transfer of the restricted securities to, or the ownership of restricted securities by, designated persons or classes of persons or groups of persons, and such designation is not manifestly unreasonable.

(d) Any restriction on the transfer or the registration of transfer of the securities of a corporation, or on the amount of securities of a corporation that may be owned by a person or group of persons, for any of the following purposes shall be conclusively presumed to be for a reasonable purpose:

(1) maintaining any local, state, federal, or foreign tax advantage to the corporation or its stockholders, including without limitation (i) maintaining the corporation's status as an electing small business corporation under subchapter S of the United States Internal Revenue Code 26 U.S.C.A.

Sec. 1371 et seq., or (ii) maintaining or preserving any tax attribute (including without limitation net operating losses), or (iii) qualifying or maintaining the qualification of the corporation as a real estate investment trust pursuant to the United States Internal Revenue Code or regulations adopted pursuant to the United States Internal Revenue Code, or

(2) maintaining any statutory or regulatory advantage or complying with any statutory or regulatory requirements under applicable local, state, federal, or foreign law.

(e) Any other lawful restriction on transfer or registration of transfer of securities, or on the amount of securities that may be owned by any person or group of persons, is permitted by this section. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

Decisions

.1 Validity of transfer restrictions. — Restrictions as to transfer placed upon stock certificates without authority in statute, articles of incorporation or bylaws are invalid. *Standard Scale and Supply Corp v. Chappel, 141 A 191 (Ch. Ct. 1928)*.

Compelling stockholder to sell his stock to corporation whenever directors see fit to require him to do so is unreasonable and invalid restraint upon alienation of stock. *Greene v. E H Rollins & Sons, Inc, 2 A.2d 249 (Ch. Ct. 1938)*.

Restraint against sale of voting trust certificate holders' interest for ten years is unreasonable and so makes voting trust agreement itself invalid. *Tracey v. Franklin, 61 A.2d 780 (Ch. Ct. 1948)*, *67 A.2d 56 (1949)*.

Transfer restriction requiring stockholder first to offer his shares to corporation for fixed period of time before selling to outsiders is reasonable and valid. *Lawson v. Household Finance Corp, 152 A 723 (1930)*.

Restrictions placed on voting trust agreements subject to reasonableness test even though statute permits any "lawful" restrictions. *Grynberg v. Burke, 378 A.2d 139 (Ch. Ct. 1977)*.

Bylaw restricting stock transfers to aliens in excess of "permitted percentage" to be determined by board of directors could not be imposed on shares issued and outstanding before bylaw's adoption unless shareholder was party to an agreement or voted in favor of bylaw, even though restriction notice was imprinted on all stock certificates transferred since bylaw's adoption. *Joseph E Seagram & Sons, Inc v. Conoco, Inc, 519 F. Supp. 506 (D. Del. 1981)*.

.2 Sale of restricted stock. — Shares were governed by a restriction agreement that prohibited a sale until a future date. Buyer and seller attempted to contract around that restriction by buyer immediately receiving all economic interest in the shares, while the seller executed a proxy giving the buyer voting rights, and having the buyer receive full ownership after the future date. Because that resulted in the buyer immediately receiving the functional equivalent of full ownership it violated the contractual restriction. *Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. Supr. 2010).*

§203 BUSINESS COMBINATIONS WITH INTERESTED STOCKHOLDERS

(a) Notwithstanding any other provisions of this chapter, a corporation shall not engage in any business combination with any interested stockholder for a period of 3 years following the time that such stockholder became an interested stockholder, unless:

(1) prior to such time the board of directors of the corporation approved either the business combination or the transaction which resulted in the stockholder becoming an interested stockholder, or

(2) upon consummation of the transaction which resulted in the stockholder becoming an interested stockholder, the interested stockholder owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced, excluding for purposes of determining the voting stock outstanding (but not the outstanding voting stock owned by the interested stockholder) those shares owned (i) by persons who are directors and also officers and (ii) employee stock plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer, or

(3) at or subsequent to such time the business combination is approved by the board of directors and authorized at an annual or special meeting of stockholders, and not by written consent, by the affirmative vote of at least 66% of the outstanding voting stock which is not owned by the interested stockholder.

(b) The restrictions contained in this section shall not apply if:

(1) the corporation's original certificate of incorporation contains a provision expressly electing not to be governed by this section;

(2) the corporation, by action of its board of directors, adopts an amendment to its bylaws within 90 days of the effective date of this section, expressly electing not to be governed by this section, which amendment shall not be further amended by the board of directors.

(3) The corporation, by action of its stockholders, adopts an amendment to its certificate of incorporation or bylaws expressly electing not to be governed by this section; provided that, in addition to any other vote required by law, such amendment to the certificate of incorporation or bylaws must be adopted by the affirmative vote of a majority of the outstanding stock entitled to vote thereon. In the case of a corporation that both (i) has never had a class of voting stock that falls within any of the 2 categories set out in paragraph (b)(4) of this section, and (ii) has not elected by a provision in its original certificate of incorporation

or any amendment thereto to be governed by this section, such amendment shall become effective upon (i) in the case of an amendment to the certificate of incorporation, the date and time at which the certificate filed in accordance with §103 of this title becomes effective thereunder or (ii) in the case of an amendment to the bylaws, the date of the adoption of such amendment. In all other cases, an amendment adopted pursuant to this paragraph shall become effective (i) in the case of an amendment to the certificate of incorporation, 12 months after the date and time at which the certificate filed in accordance with §103 of this title becomes effective thereunder or (ii) in the case of an amendment to the bylaws, 12 months after the date of the adoption of such amendment, and, in either case, the election not to be governed by this section shall not apply to any business combination between such corporation and any person who became an interested stockholder of such corporation on or before (A) in the case of an amendment to the certificate of incorporation, the date and time at which the certificate filed in accordance with §103 of this title becomes effective thereunder; or (B) in the case of an amendment to the bylaws, the date of the adoption of such amendment. A bylaw amendment adopted pursuant to this paragraph shall not be further amended by the board of directors;

(4) the corporation does not have a class of voting stock that is: (i) Listed on a national securities exchange; (ii) or held of record by more than 2,000 stockholders, unless any of the foregoing results from action taken, directly or indirectly, by an interested stockholder or from a transaction in which a person becomes an interested stockholder;

(5) a stockholder becomes an interested stockholder inadvertently and (i) as soon as practicable divests itself of ownership of sufficient shares so that the stockholder ceases to be an interested stockholder and (ii) would not, at any time within the 3 year period immediately prior to a business combination between the corporation and such stockholder, have been an interested stockholder but for the inadvertent acquisition of ownership;

(6) the business combination is proposed prior to the consummation or abandonment of and subsequent to the earlier of the public announcement or the notice required hereunder of a proposed transaction which (i) constitutes one of the transactions described in the second sentence of this paragraph; (ii) is with or by a person who either was not an interested stockholder during the previous 3 years or who became an interested stockholder with the approval of the corporation's board of directors or during the period described in paragraph (7)

of this subsection (b); and (iii) is approved or not opposed by a majority of the members of the board of directors then in office (but not less than 1) who were directors prior to any person becoming an interested stockholder during the previous 3 years or were recommended for election or elected to succeed such directors by a majority of such directors. The proposed transactions referred to in the preceding sentence are limited to (x) a merger or consolidation of the corporation (except for a merger in respect of which, pursuant to section 251 (f) of the chapter, no vote of the stockholders of the corporation is required); (y) a sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions), whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation (other than to any direct or indirect wholly-owned subsidiary or to the corporation) having an aggregate market value equal to 50% or more of either that aggregate market value of all of the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation; or (z) a proposed tender or exchange offer for 50% or more of the outstanding voting stock of the corporation. The corporation shall give not less than 20 days notice to all interested stockholders prior to the consummation of any of the transactions described in clauses (x) or (y) of the second sentence of this paragraph; or

(7) The business combination is with an interested stockholder who became an interested stockholder at a time when the restrictions contained in this section did not apply by reason of any paragraphs (1) through (4) of this subsection (b), provided, however, that this paragraph (7) shall not apply if, at the time such interested stockholder became an interested stockholder, the corporation's certificate of incorporation contained a provision authorized by the last sentence of this subsection (b).

Notwithstanding paragraphs (b)(1), (2), (3) and (4) of this section, a corporation may elect by a provision of its original certificate of incorporation or any amendment thereto to be governed by this section; provided that any such amendment to the certificate of incorporation shall not apply to restrict a business combination between the corporation and an interested stockholder of the corporation if the interested stockholder became such before the date and time at which the certificate filed in accordance with §103 of this title becomes effective thereunder.

(c) As used in this section only, the term:

(1) “affiliate” means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, another person.

(2) “associate,” when used to indicate a relationship with any person, means (i) any corporation, partnership, unincorporated association or other entity of which such person is a director, officer or partner or is, directly or indirectly, the owner of 20% or more of any class of voting stock, (ii) any trust or other estate in which such person has at least a 20% beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (iii) any relative or spouse of such person, or any relative of such spouse, who has the same residence as such person.

(3) “business combination,” when used in reference to any corporation and any interested stockholder of such corporation, means:

(i) any merger or consolidation of the corporation or any direct or indirect majority-owned subsidiary of the corporation with (A) the interested stockholder, or (B) with any other corporation, partnership, unincorporated association or other entity if the merger or consolidation is caused by the interested stockholder and as a result of such merger or consolidation subsection (a) of this section is not applicable to the surviving entity;

(ii) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions), except proportionately as a stockholder of such corporation, to or with the interested stockholder, whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation which assets have an aggregate market value equal to 10% or more of either the aggregate market value of all the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation;

(iii) any transaction which results in the issuance or transfer by the corporation or by any direct or indirect majority-owned subsidiary of the corporation of any stock of the corporation or of such subsidiary to the interested stockholder, except (A) pursuant to the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary which securities were outstanding prior to the time that the interested stockholder became such,

(B) pursuant to a merger under Section 251(g) of this title;

(C) pursuant to a dividend or distribution paid or made, or the exercise, exchange or conversion of securities exercisable for, exchangeable

for or convertible into stock of such corporation or any such subsidiary which security is distributed, pro rata to all holders of a class or series of stock of such corporation subsequent to the time the interested stockholder became such,

(D) pursuant to an exchange offer by the corporation to purchase stock made on the same terms to all holders of said stock, or

(E) any issuance or transfer of stock by the corporation, provided however, that in no case under (C)-(E) above shall there be an increase in the interested stockholder's proportionate share of the stock of any class or series of the corporation or of the voting stock of the corporation;

(iv) any transaction involving the corporation or any direct or indirect majority-owned subsidiary of the corporation which has the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series, or securities convertible into the stock of any class or series, of the corporation or of any such subsidiary which is owned by the interested stockholder, except as a result of immaterial changes due to fractional share adjustments or as a result of any purchase or redemption of any shares of stock not caused, directly or indirectly, by the interested stockholder; or

(v) any receipt by the interested stockholder of the benefit, directly or indirectly (except proportionately as a stockholder of such corporation) of any loans, advances, guarantees, pledges, or other financial benefits (other than those expressly permitted in subparagraphs (i)-(iv) above) provided by or through the corporation or any direct or indirect majority owned subsidiary.

(4) "control," including the term "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise. A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary. Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more owners who do not individually or as a group have control of such entity.

(5) “interested stockholder” means any person (other than the corporation and any direct or indirect majority-owned subsidiary of the corporation) that (i) is the owner of 15% or more of the outstanding voting stock of the corporation, or (ii) is an affiliate or associate of the corporation and was the owner of 15% or more of the outstanding voting stock of the corporation at any time within the 3-year period immediately prior to the date on which it is sought to be determined whether such person is an interested stockholder; and the affiliates and associates of such person; provided, however, that the term “interested stockholder” shall not include (x) any person who (A) owned shares in excess of the 15% limitation set forth herein as of, or acquired such shares pursuant to a tender offer commenced prior to, December 23, 1987, or pursuant to an exchange offer announced prior to the aforesaid date and commenced within 90 days thereafter and either (I) continued to own shares in excess of such 15% limitation or would have but for action by the corporation or (II) is an affiliate or associate of the corporation and so continued (or so would have continued but for action by the corporation) to be the owner of 15% or more of the outstanding voting stock of the corporation at any time within the 3-year period immediately prior to the date on which it is sought to be determined whether such a person is an interested stockholder or (B) acquired said shares from a person described in (A) above by gift, inheritance or in a transaction in which no consideration was exchanged; or (y) any person whose ownership of shares in excess of the 15% limitation set forth herein in the result of action taken solely by the corporation provided that such person shall be an interested stockholder if thereafter such person acquires additional shares of voting stock of the corporation, except as a result of further corporate action not caused, directly or indirectly, by such person. For the purpose of determining whether a person is an interested stockholder, the voting stock of the corporation deemed to be outstanding shall include stock deemed to be owned by the person through application of paragraph (9) of this subsection but shall not include any other unissued stock of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(6) “person” means any individual, corporation, partnership, unincorporated association or other entity.

(7) “Stock” means, with respect to any corporation, capital stock and, with respect to any other entity, any equity interest.

(8) “Voting stock” means, with respect to any corporation, stock of any class or series entitled to vote generally in the election of directors

and, with respect to any entity that is not a corporation, any equity interest entitled to vote generally in the election of the governing body of such entity. Every reference to a percentage of voting stock shall refer to such percentage of the votes of such voting stock.

(9) "owner" including the terms "own" and "owned" when used with respect to any stock means a person that individually or with or through any of its affiliates or associates:

(i) beneficially owns such stock, directly or indirectly; or

(ii) has (A) the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time) pursuant to any agreement, arrangement or understanding, or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered stock is accepted for purchase or exchange; or (B) the right to vote such stock pursuant to any agreement, arrangement or understanding; provided, however, that a person shall not be deemed the owner of any stock because of such person's right to vote such stock if the agreement, arrangement or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made to 10 or more persons; or

(iii) has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in item (B) of clause (ii) of this paragraph), or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

(d) No provision of a certificate of incorporation or bylaw shall require, for any vote of stockholders required by this section a greater vote of stockholders than that specified in this section.

(e) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all matters with respect to this section. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

Decisions

.1 Constitutionality. — Tender offeror's motion for preliminary injunction against target corporation to enjoin it from utilizing or enforcing the Delaware Busi-

ness Combination Statute was denied when tender offeror failed to show irreparable injury, because (1) Section 203 could not stand as major roadblock to proposed merger when tender offeror could opt out of statute, and with or without Section 203, tender offeror's position would be exactly the same; and (2) tender offeror failed to show that Section 203's presence could affect its ability to complete tender offer because of a possible confusion in the marketplace about its constitutionality. *The Black and Decker Corp v. American Standard Inc, 679 F. Supp. 1183 (D. Del. 1988)*.

Court declined to issue preliminary injunction barring enforcement of Delaware's antitakeover statute, which restricts business transactions with interested shareholders. Plaintiff failed to establish reasonable probability of proving that statute is preempted by Williams Act 15 USC Sec. 78m(d)-(e); 78n(d)-(f) or violates Commerce Clause. In addition, plaintiff failed to establish reasonable probability that target's directors violated fiduciary duties to shareholders by refusing to redeem poison pill rights. Refusal to redeem was reasonable in light of risk posed by plaintiff's offer. *BNS Inc v. Koppers Co, 683 F. Supp. 458 (D. Del. 1988)*.

Sec. 203's exceptions are not illusory and it does not block all hostile takeovers. The legislature established the 85% threshold after great debate and consideration and its judgment should not disturbed. *RP Acquisition Corp v. Staley Continental, Inc, 686 F. Supp. 476 (D. Del. 1988)*.

Limited partnership making tender offer failed to convince federal court to enjoin enforcement of Delaware's antitakeover law as unconstitutional. Court rejected argument that law improperly delegates governmental authority to boards of private corporations in Delaware. *City Capital Associates Limited Partnership v. Interco, Inc, 696 F. Supp. 1551 (D. Del. 1988)*.

Tender offeror could not seek a declaratory judgment that two-thirds residual vote requirement of GCL Sec. 203(a)(3) was unconstitutional as applied to potential all shares hostile tender offer. No justiciable case or controversy existed because the all shares tender offer had not been commenced. Court therefore dismissed plaintiff's complaint. *SWT Acquisition Corp v. TW Services, Inc, 700 F. Supp. 1323 (D. Del. 1988)*.

.2 Triggering of provision. — Where the board of directors of the corporation to be acquired in a merger approved the transaction which resulted in the acquiror becoming an interested stockholder, the preclusive provisions of Sec. 203 were not triggered. *Matador Capital Management Corp. v. BRC Holdings, Inc., 729 A.2d 280 (Ch. Ct. 1998)*.

.3 ESOP. — Court upheld validity of employee stock ownership plan adopted by target partly in response to acquisition overtures by outsider. Given ESOP's confidential tendering provisions, its antitakeover effect did not make it less than fair. ESOPs with that feature are not suspect under GCL Sec. 203 because they do not necessarily interfere with bidder's ability to obtain 85% of target's voting stock. *Shamrock Holdings, Inc v. Polaroid Corp, 559 A.2d 257 (Ch. Ct. 1989)*.

.4 Standing to sue. — Stockholder had standing to enforce a target corporation's agreement with an acquiror to retain Sec. 203's three year standstill period for one year. *Arkansas Teacher's Retirement System v. Alon USA Energy, Inc*., 2019 Del. Ch. LEXIS 245.

§204. RATIFICATION OF DEFECTIVE CORPORATE ACTS AND STOCK

(a) Subject to subsection (f) of this section, no defective corporate act or putative stock shall be void or voidable solely as a result of a failure of authorization if ratified as provided in this section or validated by the Court of Chancery in a proceeding brought under §205 of this title.

(b)(1) In order to ratify 1 or more defective corporate acts pursuant to this section (other than the ratification of an election of the initial board of directors pursuant to paragraph (b)(2) of this section), the board of directors of the corporation shall adopt resolutions stating:

(A) The defective corporate act or acts to be ratified;

(B) The date of each defective corporate act or acts;

(C) If such defective corporate act or acts involved the issuance of shares of putative stock, the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued;

(D) The nature of the failure of authorization in respect of each defective corporate act to be ratified; and

(E) That the board of directors approves the ratification of the defective corporate act or acts.

Such resolutions may also provide that, at any time before the validation effective time in respect of any defective corporate act set forth therein, notwithstanding the approval of the ratification of such defective corporate act by stockholders, the board of directors may abandon the ratification of such defective corporate act without further action of the stockholders. The quorum and voting requirements applicable to the ratification by the board of directors of any defective corporate act shall be the quorum and voting requirements applicable to the type of defective corporate act proposed to be ratified at the time the board adopts the resolutions ratifying the defective corporate act; provided that if the certificate of incorporation or bylaws of the corporation, any plan or agreement to which the corporation was a party or any provision of this title, in each case as in effect as of the time of the defective corporate act, would have required a larger number or portion of directors or of specified directors for a quorum to be present or to approve the defective corporate act, such larger number or portion of such directors or such specified directors shall be required for a quorum to be present or to adopt the resolutions to ratify the defective corporate act, as applicable, except that the presence or approval of any director elected, appointed or nominated by holders of any class or series of

which no shares are then outstanding, or by any person that is no longer a stockholder, shall not be required.

(2) In order to ratify a defective corporate act in respect of the election of the initial board of directors of the corporation pursuant to §108 of this title, a majority of the persons who, at the time the resolutions required by this paragraph (b)(2) of this section are adopted, are exercising the powers of directors under claim and color of an election or appointment as such may adopt resolutions stating:

(A) The name of the person or persons who first took action in the name of the corporation as the initial board of directors of the corporation;

(B) The earlier of the date on which such persons first took such action or were purported to have been elected as the initial board of directors; and

(C) That the ratification of the election of such person or persons as the initial board of directors is approved.

(c) Each defective corporate act ratified pursuant to paragraph (b)(1) of this section shall be submitted to stockholders for approval as provided in subsection (d) of this section, unless:

(1)(A) No other provision of this title, and no provision of the certificate of incorporation or bylaws of the corporation, or of any plan or agreement to which the corporation is a party, would have required stockholder approval of such defective corporate act to be ratified, either at the time of such defective corporate act or at the time the board of directors adopts the resolutions ratifying such defective corporate act pursuant to paragraph (b)(1) of this section; and (B) Such defective corporate act did not result from a failure to comply with §203 of this title; or

(2) As of the record date for determining the stockholders entitled to vote on the ratification of such defective corporate act, there are no shares of valid stock outstanding and entitled to vote thereon, regardless of whether there then exist any shares of putative stock.

(d) If the ratification of a defective corporate act is required to be submitted to stockholders for approval pursuant to subsection (c) of this section, due notice of the time, place, if any, and purpose of the meeting shall be given at least 20 days before the date of the meeting to each holder of valid stock and putative stock, whether voting or nonvoting, at the address of such holder as it appears or most recently appeared, as appropriate, on the records of the corporation. The notice shall also be given to the holders of record of valid stock and putative

stock, whether voting or nonvoting, as of the time of the defective corporate act (or, in the case of any defective corporate act that involved the establishment of a record date for notice of or voting at any meeting of stockholders, for action by written consent of stockholders in lieu of a meeting, or for any other purpose, the record date for notice of or voting at such meeting, the record date for action by written consent, or the record date for such other action, as the case may be), other than holders whose identities or addresses cannot be determined from the records of the corporation. The notice shall contain a copy of the resolutions adopted by the board of directors pursuant to paragraph (b)(1) of this section or the information required by paragraphs (b)(1)(A) through (E) of this section and a statement that any claim that the defective corporate act or putative stock ratified hereunder is void or voidable due to the failure of authorization, or that the Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the applicable validation effective time. At such meeting, the quorum and voting requirements applicable to ratification of such defective corporate act shall be the quorum and voting requirements applicable to the type of defective corporate act proposed to be ratified at the time of the approval of the ratification, except that:

(1) If the certificate of incorporation or bylaws of the corporation, any plan or agreement to which the corporation was a party or any provision of this title in effect as of the time of the defective corporate act would have required a larger number or portion of stock or of any class or series thereof or of specified stockholders for a quorum to be present or to approve the defective corporate act, the presence or approval of such larger number or portion of stock or of such class or series thereof or of such specified stockholders shall be required for a quorum to be present or to approve the ratification of the defective corporate act, as applicable, except that the presence or approval of shares of any class or series of which no shares are then outstanding, or of any person that is no longer a stockholder, shall not be required;

(2) The approval by stockholders of the ratification of the election of a director shall require the affirmative vote of the majority of shares present at the meeting and entitled to vote on the election of such director, except that if the certificate of incorporation or bylaws of the corporation then in effect or in effect at the time of the defective election require or required a larger number or portion of stock or of any class or series thereof or of specified stockholders to elect such director,

the affirmative vote of such larger number or portion of stock or of any class or series thereof or of such specified stockholders shall be required to ratify the election of such director, except that the presence or approval of shares of any class or series of which no shares are then outstanding, or of any person that is no longer a stockholder, shall not be required; and

(3) In the event of a failure of authorization resulting from failure to comply with the provisions of §203 of this title, the ratification of the defective corporate act shall require the vote set forth in §203(a)(3) of this title, regardless of whether such vote would have otherwise been required.

Shares of putative stock on the record date for determining stockholders entitled to vote on any matter submitted to stockholders pursuant to subsection (c) of this section (and without giving effect to any ratification that becomes effective after such record date) shall neither be entitled to vote nor counted for quorum purposes in any vote to ratify any defective corporate act.

(e) If a defective corporate act ratified pursuant to this section would have required under any other section of this title the filing of a certificate in accordance with §103 of this title, then, whether or not a certificate was previously filed in respect of such defective corporate act and in lieu of filing the certificate otherwise required by this title, the corporation shall file a certificate of validation with respect to such defective corporate act in accordance with §103 of this title. A separate certificate of validation shall be required for each defective corporate act requiring the filing of a certificate of validation under this section, except that (i) 2 or more defective corporate acts may be included in a single certificate of validation if the corporation filed, or to comply with this title would have filed, a single certificate under another provision of this title to effect such acts, and (ii) 2 or more overissues of shares of any class, classes or series of stock may be included in a single certificate of validation, provided that the increase in the number of authorized shares of each such class or series set forth in the certificate of validation shall be effective as of the date of the first such overissue. The certificate of validation shall set forth:

(1) Each defective corporate act that is the subject of the certificate of validation (including, in the case of any defective corporate act involving the issuance of shares of putative stock, the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued), the date of such

defective corporate act, and the nature of the failure of authorization in respect of such defective corporate act;

(2) A statement that such defective corporate act was ratified in accordance with this section, including the date on which the board of directors ratified such defective corporate act and the date, if any, on which the stockholders approved the ratification of such defective corporate act; and

(3) Information required by 1 of the following paragraphs:

a. If a certificate was previously filed under §103 of this title in respect of such defective corporate act and no changes to such certificate are required to give effect to such defective corporate act in accordance with this section, the certificate of validation shall set forth (x) the name, title and filing date of the certificate previously filed and of any certificate of correction thereto and (y) a statement that a copy of the certificate previously filed, together with any certificate of correction thereto, is attached as an exhibit to the certificate of validation;

b. If a certificate was previously filed under §103 of this title in respect of the defective corporate act and such certificate requires any change to give effect to the defective corporate act in accordance with this section (including a change to the date and time of the effectiveness of such certificate), the certificate of validation shall set forth (x) the name, title and filing date of the certificate so previously filed and of any certificate of correction thereto, (y) a statement that a certificate containing all of the information required to be included under the applicable section or sections of this title to give effect to the defective corporate act is attached as an exhibit to the certificate of validation, and (z) the date and time that such certificate shall be deemed to have become effective pursuant to this section; or

c. If a certificate was not previously filed under §103 of this title in respect of the defective corporate act and the defective corporate act ratified pursuant to this section would have required under any other section of this title the filing of a certificate in accordance with §103 of this title, the certificate of validation shall set forth (x) a statement that a certificate containing all of the information required to be included under the applicable section or sections of this title to give effect to the defective corporate act is attached as an exhibit to the certificate of validation, and (y) the date and time that such certificate shall be deemed to have become effective pursuant to this section.

A certificate attached to a certificate of validation pursuant to paragraph (e)(3)b. or c. of this section need not be separately executed and

acknowledged and need not include any statement required by any other section of this title that such instrument has been approved and adopted in accordance with the provisions of such other section.

(f) From and after the validation effective time, unless otherwise determined in an action brought pursuant to §205 of this title:

(1) Subject to the last sentence of subsection (d) of this section, each defective corporate act ratified in accordance with this section shall no longer be deemed void or voidable as a result of the failure of authorization described in the resolutions adopted pursuant to subsection (b) of this section and such effect shall be retroactive to the time of the defective corporate act; and

(2) Subject to the last sentence of subsection (d) of this section, each share or fraction of a share of putative stock issued or purportedly issued pursuant to any such defective corporate act shall no longer be deemed void or voidable and shall be deemed to be an identical share or fraction of a share of outstanding stock as of the time it was purportedly issued.

(g) In respect of each defective corporate act ratified by the board of directors pursuant to subsection (b) of this section, prompt notice of the ratification shall be given to all holders of valid stock and putative stock, whether voting or nonvoting, as of the date the board of directors adopts the resolutions approving such defective corporate act, or as of a date within 60 days after such date of adoption, as established by the board of directors, at the address of such holder as it appears or most recently appeared, as appropriate, on the records of the corporation. The notice shall also be given to the holders of record of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act, other than holders whose identities or addresses cannot be determined from the records of the corporation. The notice shall contain a copy of the resolutions adopted pursuant to subsection (b) of this section or the information specified in paragraphs (b)(1)(A) through (E) or paragraphs (b)(2)(A) through (C) of this section, as applicable, and a statement that any claim that the defective corporate act or putative stock ratified hereunder is void or voidable due to the failure of authorization, or that the Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the later of the validation effective time or the time at which the notice required by this subsection is given. Notwithstanding the foregoing, (i) no such notice shall be required if notice of the ratifi-

cation of the defective corporate act is to be given in accordance with subsection (d) of this section, and (ii) in the case of a corporation that has a class of stock listed on a national securities exchange, the notice required by this subsection and the second sentence of subsection (d) of this section may be deemed given if disclosed in a document publicly filed by the corporation with the Securities and Exchange Commission pursuant to §§13, 14 or 15(d) [15 U.S.C. §§78m, 77n or 78o(d)] of the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder, or the corresponding provisions of any subsequent United States federal securities laws, rules or regulations. If any defective corporate act has been approved by stockholders acting pursuant to §228 of this title, the notice required by this subsection may be included in any notice required to be given pursuant to §228(e) of this title and, if so given, shall be sent to the stockholders entitled thereto under §228(e) and to all holders of valid and putative stock to whom notice would be required under this subsection if the defective corporate act had been approved at a meeting other than any stockholder who approved the action by consent in lieu of a meeting pursuant to §228 of this title or any holder of putative stock who otherwise consented thereto in writing. Solely for purposes of subsection (d) of this section and this subsection, notice to holders of putative stock, and notice to holders of valid stock and putative stock as of the time of the defective corporate act, shall be treated as notice to holders of valid stock for purposes of §§222 and 228, 229, 230, 232 and 233 of this title.

(h) As used in this section and in §205 of this title only, the term:

(1) "Defective corporate act" means an overissue, an election or appointment of directors that is void or voidable due to a failure of authorization, or any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time such act or transaction was purportedly taken would have been, within the power of a corporation under subchapter II of this chapter (without regard to the failure of authorization identified in §204(b)(1)(D) of this title), but is void or voidable due to a failure of authorization;

(2) "Failure of authorization" means: (i) the failure to authorize or effect an act or transaction in compliance with (A) the provisions of this title, (B) the certificate of incorporation or bylaws of the corporation, or (C) any plan or agreement to which the corporation is a party or the disclosure set forth in any proxy or consent solicitation statement, if and to the extent such failure would render such act or transaction void or voidable; or (ii) the failure of the board of directors or any officer of the

corporation to authorize or approve any act or transaction taken by or on behalf of the corporation that would have required for its due authorization the approval of the board of directors or such officer;

(3) "Overissue" means the purported issuance of:

a. Shares of capital stock of a class or series in excess of the number of shares of such class or series the corporation has the power to issue under §161 of this title at the time of such issuance; or

b. Shares of any class or series of capital stock that is not then authorized for issuance by the certificate of incorporation of the corporation;

(4) "Putative stock" means the shares of any class or series of capital stock of the corporation (including shares issued upon exercise of options, rights, warrants or other securities convertible into shares of capital stock of the corporation, or interests with respect thereto that were created or issued pursuant to a defective corporate act) that:

a. But for any failure of authorization, would constitute valid stock; or

b. Cannot be determined by the board of directors to be valid stock;

(5) "Time of the defective corporate act" means the date and time the defective corporate act was purported to have been taken;

(6) "Validation effective time" with respect to any defective corporate act ratified pursuant to this section means the latest of:

a. The time at which the defective corporate act submitted to the stockholders for approval pursuant to subsection (c) of this section is approved by such stockholders or if no such vote of stockholders is required to approve the ratification of the defective corporate act, the time at which the board of directors adopts the resolutions required by paragraph (b)(1) or (b)(2) of this section;

b. Where no certificate of validation is required to be filed pursuant to subsection (e) of this section, the time, if any, specified by the board of directors in the resolutions adopted pursuant to paragraph (b)(1) or (b)(2) of this section, which time shall not precede the time at which such resolutions are adopted; and

c. The time at which any certificate of validation filed pursuant to subsection (e) of this section shall become effective in accordance with §103 of this title.

(7) "Valid stock" means the shares of any class or series of capital stock of the corporation that have been duly authorized and validly issued in accordance with this title.

In the absence of actual fraud in the transaction, the judgment of the board of directors that shares of stock are valid stock or putative stock

shall be conclusive, unless otherwise determined by the Court of Chancery in a proceeding brought pursuant to §205 of this title.

(i) Ratification under this section or validation under §205 of this title shall not be deemed to be the exclusive means of ratifying or validating any act or transaction taken by or on behalf of the corporation, including any defective corporate act, or any issuance of stock, including any putative stock, or of adopting or endorsing any act or transaction taken by or in the name of the corporation prior to the commencement of its existence, and the absence or failure of ratification in accordance with either this section or validation under §205 of this title shall not, of itself, affect the validity or effectiveness of any act or transaction or the issuance of any stock properly ratified under common law or otherwise, nor shall it create a presumption that any such act or transaction is or was a defective corporate act or that such stock is void or voidable. (Last amended by Ch. 354, L. '18, eff. for acts ratified or to be ratified pursuant to resolutions adopted on or after 8-1-18.)

§205. PROCEEDINGS REGARDING VALIDITY OF DEFECTIVE CORPORATE ACTS AND STOCK

(a) Subject to subsection (f) of this section, upon application by the corporation, any successor entity to the corporation, any member of the board of directors, any record or beneficial holder of valid stock or putative stock, any record or beneficial holder of valid or putative stock as of the time of a defective corporate act ratified pursuant to §204 of this title, or any other person claiming to be substantially and adversely affected by a ratification pursuant to §204 of this title, the Court of Chancery may:

(1) Determine the validity and effectiveness of any defective corporate act ratified pursuant to §204 of this title;

(2) Determine the validity and effectiveness of the ratification of any defective corporate act pursuant to §204 of this title;

(3) Determine the validity and effectiveness of any defective corporate act not ratified or not ratified effectively pursuant to §204 of this title;

(4) Determine the validity of any corporate act or transaction and any stock, rights or options to acquire stock; and

(5) Modify or waive any of the procedures set forth in §204 of this title to ratify a defective corporate act.

(b) In connection with an action under this section, the Court of Chancery may:

(1) Declare that a ratification in accordance with and pursuant to §204 of this title is not effective or shall only be effective at a time or upon conditions established by the Court;

(2) Validate and declare effective any defective corporate act or putative stock and impose conditions upon such validation by the Court;

(3) Require measures to remedy or avoid harm to any person substantially and adversely affected by a ratification pursuant to §204 of this title or from any order of the Court pursuant to this section, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;

(4) Order the Secretary of State to accept an instrument for filing with an effective time specified by the Court, which effective time may be prior or subsequent to the time of such order, provided that the filing date of such instrument shall be determined in accordance with §103(c)(3) of this title;

(5) Approve a stock ledger for the corporation that includes any stock ratified or validated in accordance with this section or with §204 of this title;

(6) Declare that shares of putative stock are shares of valid stock or require a corporation to issue and deliver shares of valid stock in place of any shares of putative stock;

(7) Order that a meeting of holders of valid stock or putative stock be held and exercise the powers provided to the Court under §227 of this title with respect to such a meeting;

(8) Declare that a defective corporate act validated by the Court shall be effective as of the time of the defective corporate act or at such other time as the Court shall determine;

(9) Declare that putative stock validated by the Court shall be deemed to be an identical share or fraction of a share of valid stock as of the time originally issued or purportedly issued or at such other time as the Court shall determine; and

(10) Make such other orders regarding such matters as it deems proper under the circumstances.

(c) Service of the application under subsection (a) of this section upon the registered agent of the corporation shall be deemed to be service upon the corporation, and no other party need be joined in order for the Court of Chancery to adjudicate the matter. In an action filed by the

corporation, the Court may require notice of the action be provided to other persons specified by the Court and permit such other persons to intervene in the action

(d) In connection with the resolution of matters pursuant to subsections (a) and (b) of this section, the Court of Chancery may consider the following:

(1) Whether the defective corporate act was originally approved or effectuated with the belief that the approval or effectuation was in compliance with the provisions of this title, the certificate of incorporation or bylaws of the corporation;

(2) Whether the corporation and board of directors has treated the defective corporate act as a valid act or transaction and whether any person has acted in reliance on the public record that such defective corporate act was valid;

(3) Whether any person will be or was harmed by the ratification or validation of the defective corporate act, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;

(4) Whether any person will be harmed by the failure to ratify or validate the defective corporate act; and

(5) Any other factors or considerations the Court deems just and equitable.

(e) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions brought under this section.

(f) Notwithstanding any other provision of this section, no action asserting:

(1) That a defective corporate act or putative stock ratified in accordance with §204 of this title is void or voidable due to a failure of authorization identified in the resolution adopted in accordance with 204(b) of this title; or

(2) That the Court of Chancery should declare in its discretion that a ratification in accordance with §204 of this title not be effective or be effective only on certain conditions, may be brought after the expiration of 120 days from the later of the validation effective time and the time notice, if any, that is required to be given pursuant to §204(g) of this title is given with respect to such ratification, except that this subsection shall not apply to an action asserting that a ratification was not accomplished in accordance with §204 of this title or to any person to whom notice of the ratification was required to have been given pursuant to §204(d) or (g) of this title, but to whom such notice was not given. (Last

amended by Ch. 40, L. '15, eff. for acts and stock ratified or to be ratified pursuant to resolutions adopted on or after 8-1-15.)

Decisions

.1 Court validation. — The court declined to ratify one stock issuance where there was no evidence to establish any board approval of the issuance and therefore there was no act to validate. However, the court validated the remaining stock issuances where the evidence showed the parties operated for years assuming the capital structure based on those issuances was the actual capital structure, where a shareholder could lose a significant voting interest absent validation, and where validation would put the shareholders where they expected to be. *In re Numoda Corporation Shareholders Litigation*, *C.A. No. 9163 (Del. Ch. 2015).*

Sec. 204 cannot be used to validate actions taken in pursuing financing that were declared void because the majority stockholder revoked his consent. That was not a failure of authorization but a rejection of a corporate proposal. *Nguyen v. View, Inc., C.A. No. 11138 (Del. Ch. 2017).*

Defects involving the dating of consents can be validated where most stockholders validly executed the consents, the consents had been treated as if they were valid, and all stockholders, other than plaintiff, intended to vote in favor of the merger. *Cirillo Family Trust v. Moezinia, C.A. No. 10116 (Del. Ch. 2018).*

Subchapter VII
MEETINGS, ELECTIONS, VOTING AND NOTICE

§211 MEETINGS OF STOCKHOLDERS

(a)(1) Meetings of stockholders may be held at such place, either within or without this State, as may be designated by or in the manner provided in the certificate of incorporation or bylaws or, if not so designated, as determined by the board of directors. If, pursuant to this paragraph (a)(1) or the certificate of incorporation or the bylaws of the corporation, the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a)(2) of this Section 211.

(2) If authorized by the board of directors in its sole discretion, and subject to such guidelines and procedures as the board of directors may adopt, stockholders and proxyholders not physically present at a meeting of stockholders may, by means of remote communication:

(A) participate in a meeting of stockholders; and

(B) be deemed present in person and vote at a meeting of stockholders whether such meeting is to be held at a designated place or solely by means of remote communication, provided that (i) the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder, (ii) the corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any stockholder or proxyholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.

(b) Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws. Stockholders may, unless the certificate of incorporation otherwise provides, act by written consent to elect directors; provided, however, that, if such consent is less than unanimous, such action by written consent may be in lieu of holding an annual meeting only if all of the directorships to which directors could be elected at an annual meeting held at the effective time of such action are vacant and are filled by such action. Any other proper business may be transacted at the annual meeting.

(c) A failure to hold the annual meeting at the designated time or to elect a sufficient number of directors to conduct the business of the corporation shall not affect otherwise valid corporate acts or work a forfeiture or dissolution of the corporation except as may be otherwise specifically provided in this chapter. If the annual meeting for election of directors is not held on the date designated therefor or action by written consent to elect directors in lieu of an annual meeting has not been taken, the directors shall cause the meeting to be held as soon as is convenient. If there be a failure to hold the annual meeting or to take action by written consent to elect directors in lieu of an annual meeting

for a period of 30 days after the date designated for the annual meeting, or if no date has been designated, for a period of 13 months after the latest to occur of the organization of the corporation, its last annual meeting or the last action by written consent to elect directors in lieu of an annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director. The shares of stock represented at such meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the certificate of incorporation or bylaws to the contrary. The Court of Chancery may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of such meeting, the record date or dates for determination of stockholders entitled to notice of the meeting and to vote thereat, and the form of notice of such meeting.

(d) Special meetings of the stockholders may be called by the board of directors or by such person or persons as may be authorized by the certificate of incorporation or by the bylaws.

(e) All elections of directors shall be by written ballot, unless otherwise provided in the certificate of incorporation; if authorized by the board of directors, such requirement of a written ballot shall be satisfied by a ballot submitted by electronic transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder or proxy holder. (Last amended by Ch. 14, L. '09, eff. 8-1-09.)

Decisions

.1 Postponement of meeting. — Court will not order postponement of stockholders' meeting called to consider proposed acquisition of certain assets, so as to enable stockholder to submit wholly unrelated proposal to other stockholders. *American Hardware Corp v. Savage Arms Corp, 136 A.2d 690 (Ch. Ct. 1957)*.

Court will postpone proposed stockholders' meeting to future date to enable court to pass on issues presented in stockholder's action against certain directors, who had allegedly caused corporation to pay for their solicitation of proxies in connection with such proposed meeting. *Campbell v. Loew's Inc, 134 A.2d 565 (Ch. Ct. 1957)*. See also, *Lenahan v. Nat'l Computer Analysis Corp, 310 A.2d 661 (Ch. Ct. 1973)*.

Corporate directors, faced with imminent proxy fight with dissident stockholders, cannot advance corporate meeting date by amending corporation's bylaws to provide for such earlier date, since newly set date handicaps dissident stockholders in

their proxy fight, and it is inequitable and contrary to established principles of corporate democracy. *Schnell v. Christ-Craft Industries, 285 A.2d 437 (1971)*.

Court granted preliminary injunction barring directors from postponing meeting on evening before meeting was to be held. Postponement would cause irreparable harm to proxy contestants; postponement could defeat record date, thereby voiding plaintiffs' proxies, and this might thwart will of majority. *Aprahamiam v. HBO & Co, 531 A.2d 1204 (Ch. Ct. 1987).*

Preliminary injunction was properly denied to 30 percent shareholder asking that a corporation's board of directors be required to hold annual shareholders' meeting by certain date, where the board's decision to postpone the meeting was a reasonable response to the perceived threat posed by shareholder's tender offer. *Stahl v. Apple Bancorp Inc, 579 A.2d 1115 (Ch. Ct. 1990)*.

.2 Special meetings. — In determining whether written request to call special meeting of stockholders complies with by-law, corporation must count signatures of those persons who were registered stockholders at date of delivery of such request; thus, though signatory to request was not registered stockholder at time of signing, but was such at date of delivery, his shares should be counted. *Richman v. DeVal Aerodynamics Inc, 183 A.2d 569 (Ch. Ct. 1962)*.

Proxy to vote stock does not give proxy holder power to call special stockholders' meeting; where bylaw gives holders of 1/4 of the outstanding voting stock power to call special stockholders' meeting, call by holders of less than the required amount of stock is invalid. *Josephson v. Cosmo Color Corp, 64 A.2d 35 (Ch. Ct. 1949)*.

Court refused to enjoin special meeting of shareholders to vote on recapitalization plan after public announcement of offer by investment companies to buy corporation because, although offer is of enormous significance to shareholders in voting on recapitalization, they were not threatened with irreparable injury. *In re Anderson, Clayton Shareholders Litigation, 519 A.2d 694 (Ch. Ct. 1986)*.

.3 Court order to hold meeting. — Receiver can get court order convening stockholder meeting to elect directors even though majority stockholder opposes calling meeting, when it is shown there has not been stockholders' meeting for thirteen months. *Prickett v. American Steel and Pump Corp, 251 A.2d 576 (Ch. Ct. 1969)*.

Court can summarily fix date of annual meeting on application of stockholder, when more than 15 months had elapsed since last meeting; however, though fact that more time was needed to clear directors' proxy statements with SEC does not justify failure to hold meeting, but court will consider it in mitigation in fixing of annual meeting date. *Tweedy, Browne & Knapp v. The Cambridge Fund Inc, 318 A.2d 635 (Ch. Ct. 1974)*.

When corporation failed to hold shareholders' meeting for purpose of electing directors within 13 months, court could summarily act on shareholder's action and order meeting, even though action was pending in federal court among same parties on alleged federal securities violations as well as this election issue. *Coaxial Communications, Inc v. CNA Financial Corp, 367 A.2d 994 (1976).*

Once requirements of GCL Sec. 211 are met, right to order compelling annual meeting is virtually absolute. Plaintiff's acquiescence or connivance in failure to hold annual meeting is not affirmative defense in action to compel annual meeting. *Speiser v. Baker, 525 A.2d 1001 (Ch. Ct. 1987)*.

Where a shareholder sought to have an annual meeting held as part of his plan to circumvent important registration and disclosure elements of federal securities laws, the court used its discretion to deny the shareholder's petition for a court ordered meeting. *Clabault v. Caribbean Select, Inc., 805 A.2d 913 (Ch. Ct. 2002).*

.4 Annual meetings. — Written consent action taken pursuant to GCL Sec. 228 did not satisfy the mandatory requirement of GCL Sec. 211 that an annual meeting of shareholders be held. *Hoschett v. TSI International Software, 683 A.2d 43 (Ch. Ct. 1996).*

§212 VOTING RIGHTS OF STOCKHOLDERS; PROXIES; LIMITATIONS

(a) Unless otherwise provided in the certificate of incorporation and subject to the provisions of Sec. 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder. If the certificate of incorporation provides for more or less than 1 vote for any share, on any matter, every reference in this chapter to a majority or other proportion of stock, voting stock or shares shall refer to such majority or other proportion of the votes of such stock, voting stock or shares.

(b) Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after 3 years from its date, unless the proxy provides for a longer period.

(c) Without limiting the manner in which a stockholder may authorize another person or persons to act for such stockholder as proxy pursuant to subsection (b) of this section, the following shall constitute a valid means by which a stockholder may grant such authority:

(1) A stockholder may execute a document authorizing another person or persons to act for such stockholder as proxy. Execution may be accomplished by the stockholder or such stockholder's authorized officer, director, employee or agent.

(2) A stockholder may authorize another person or persons to act for such stockholder as proxy by transmitting or authorizing the transmission of an electronic transmission to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person who will be the holder of the proxy to receive such transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the telegram, cable-

gram or other electronic transmission was authorized by the stockholder. If it is determined that such transmissions are valid, the inspectors or, if there are no inspectors, such other persons making that determination shall specify the information upon which they relied.

(d) Any copy, facsimile telecommunication or other reliable reproduction of the document (including any electronic transmission) created pursuant to subsection (c) of this section may be substituted or used in lieu of the original document for any and all purposes for which the original document could be used, provided that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original document.

(e) A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only as long as, it is coupled with an interest sufficient in law to support an irrevocable power. A proxy may be made irrevocable regardless of whether the interest with which it is coupled is an interest in the stock itself or an interest in the corporation generally. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Enforcement of voting agreement. — Voting trustee can enforce agreement that gives him the right to vote stock as trustee or as holder of an irrevocable proxy even though he never filed the agreement or had shares deposited as the statute called for, when failure to do so did not affect any parties outside the agreement. *In the Matter of Farm Industries, Inc, 196 A.2d 582 (Ch. Ct. 1963)*.

.2 Ratification of. — Shareholder ratification is limited to circumstances where a fully informed shareholder vote approves director action that does not legally require shareholder approval in order to become legally effective. The only director action or conduct that can be ratified is that which the shareholders are specifically asked to approve. The effect of a ratifying vote is to subject the challenged action to the business judgment rule as opposed to extinguishing the claim altogether. *Gantler v. Stephens*, *965 A.2d 695 (Del. Supr. 2009*).

.3 Injunction. — Court will enjoin corporation's sale of authorized but unissued common stock, when evidence shows purpose was to deprive shareholder of its voting control. *Canada Southern Oils Ltd v. Manabi Exploration Co, 96 A.2d 810 (Ch. Ct. 1953)*.

Injunction seeking to stop target corporation from holding shareholder meeting and soliciting or voting proxies in favor of proposed charter amendment was denied because tender offeror and target's shareholders would not be irreparably harmed. *FMC Corp v. R P Scherer Corp, 545 F. Supp. 318 (D. Del. 1982)*.

.4 Who may vote. — Only stockholder of record, voting trustee with whom stock has been deposited although not transferred on the books, a fiduciary, a pled-

gor whose shares have been transferred to the pledgee without power to vote, or holder of a valid and unrevoked proxy can vote at a corporate election. *In re Chilson, 168 A 82 (1933)*; as to voting trustees, see *Smith v. First Personal Bankers Corp, 171 A 839 (1934)*. As to other trustees, see *Gans v. Delaware Terminal Corp, 2 A.2d 154 (Ch. Ct. 1938)*.

Record holder of stock can vote it or give proxy although he has transferred it, transferee being unable to have it transferred on books because books have been closed or record date has been set prior to stockholders' meeting, but in appropriate case court of equity may control record holder's exercise of this right in favor of transferee's interests. *In re Giant Portland Cement Co, 21 A.2d 697 (Ch. Ct. 1941)*.

Stock of the parent corporation, registered in the name of subsidiary corporation, cannot be voted by subsidiary at stockholders' meeting of parent for the election of directors of parent corporation. *Italo Petroleum Corp of America v. Producers' Oil Corp of America, 174 A 276 (1934)*.

Partnership record holder can vote the stock without direction of beneficial owner in the absence of peculiar inequitable circumstances affecting the right of the real beneficial owner. *McLain v. Lanova Corp, 39 A.2d 209 (Ch. Ct. 1944)*.

Holder of stock in escrow, or under agreement contingent on profits to be earned by issuer, was not legal owner, and so cannot vote stock at stockholders' meeting. *Norton v. Digital Applications, Inc, 305 A.2d 656 (Ch. Ct. 1973)*.

Ownership of shares including right to vote did not pass on mere delivery to escrow agent so as to entitle purchaser to vote when purpose of escrow was to ensure full payment for shares before purchaser could assume control. *Kern v. NCD Industries, Inc, 316 A.2d 576 (Ch. Ct. 1937)*.

Voting trustee can validly vote Class A voting stock that is converted from Class B non-voting stock for election of directors, when Civil Aeronautics Board so permitted and charter permits Class B shares to be converted to Class A shares after beneficial ownership of those shares has been transferred to person not initial holder. *Sundlun v. Executive Jet Aviation Inc, 273 A.2d 282 (Ch. Ct. 1970)*.

.5 Right to change voting power. — Amendment of certificate of incorporation changing voting power of stock and having no further purpose is not conceived in fraud. *Topkis v. Delaware Hardware Co, 2 A.2d 114 (Ch. Ct. 1938)*.

.6 Silence of stockholder. — Silence of stockholder at meeting estops him from later objecting to receipt of improper votes unless he did not know of infirmity in tendered votes or did not avail himself of available means of information in order to learn thereof. *Vogtman v. Merchants Mtge & Credit Co, 194 A 19 (Ch. Ct. 1937)*.

.7 Bylaw altering. — Bylaw that attempts to alter or restrict voting power of stock is void. *Brooks v. State ex rel Richards, 79 A 790 (1911)*.

.8 Compliance with conditions. — Conditions in charter giving preferred shareholders voting rights must be met before rights may be exercised; but once met, shareholders cannot be prevented from exercising these rights. *Petroleum Rights Corp v. Midland Royalty Corp, 167 A 835 (Ch. Ct. 1933)*.

.9 Stockholder motives or interest. — Motive of stockholder in voting will not be inquired into by the court. *Gans v. Delaware Terminal Corp, 2 A.2d 154 (Ch. Ct. 1938)*. Likewise, stockholder's right to vote is in no way vitiated by a personal interest. *Du Pont v. Du Pont, 256 F 129 (3d Cir 1919)*, modifying *251 F 937 (D. Del. 1918);*

Heil v. Standard Gas and Elec Co, 151 A 303 (Ch. Ct. 1930); Allied Chemical & Dye Corp v. Sheet & Tube Co, 120 A 486 (Ch. Ct. 1923).

Shareholder's vote is disqualified when given for a lucrative employment contract. *Hall v. Isaacs, 146 A.2d 602 (Ch. Ct. 1958)*.

Registered holder of stock will not be recognized in equity as entitled to vote the same hostility to the wishes and desires of its owners who lack only the formality of a transfer on the books to make not only their title but as well the evidence thereof complete and absolute in all respects. *In re Canal Constr Co, 182 A 545 (Ch. Ct. 1936)*.

.10 Rights of transferees. — Twenty days before meeting would have been March 17. Stockholders of record on the 25th were notified of the meeting. Court ruled that neither transferees nor transferors could vote stock transferred in the 20-day period. *Moon v. Moon Motor Car Co, 151 A 298 (Ch. Ct. 1930)*. This is contrary toopinion of same court in *In re Associated Automatic Sprinkler Co, 102 A 787 (Ch. Ct. 1917)*.

Stock, registration of the transfer of which on the books of the corporation is deliberately and for an ulterior purpose prevented by the corporation or its transfer agent until the twenty days prior to the meeting, at which it is sought to vote the stock, have commenced to run, is entitled to be voted at the meeting. *Italo Petroleum Corp of America v. Producers' Oil Corp of America, 174 A 276 (Ch. Ct. 1934)*.

.11 Use of facsimile signature. — Inspectors of election can count proxies stamped with stockholders' facsimile signatures, unless those disputing the proxies show such signatures were unauthorized. *Schott v. Climax Molybdenum Co, 154 A.2d 221 (Ch. Ct. 1959)*.

.12 Power of proxy holder. — Unlimited proxy given to committee to vote shares at annual meeting and authorizing committee to attend and vote "with all powers the undersigned would possess if personally present" held to authorize proxy to vote on all matters that might come before meeting since stockholder is bound to know what might come before annual meeting. *Gow v. Consolidated Coppermines Corp, 165 A 136 (Ch. Ct. 1933)*.

Stockholder appointing directors as proxies held not bound by proxies' vote for resolution directing issuance to themselves of stock certificates. *Rice & Hutchins v. Triplex Shoe Co, 147 A 317 (Ch. Ct. 1929)*, *aff'd*, *152 A 342 (Ch. Ct. 1930); Blair v. F H Smith Co, 156 A 207 (Ch. Ct. 1931)*.

Attorney in fact given unrestricted proxy is presumed to act in accordance with will of stockholder in proper exercise of power. *Hexter v. Columbia Baking Co, 145 A 115 (Ch. Ct. 1929); Chandler v. Belanca Aircraft Corp, 162 A 63 (Ch. Ct. 1932)*.

.13 False or misleading solicitation. — Annual meeting for election of directors would not be enjoined at suit of director on his complaint that stockholders who gave proxies to management did not know that after the proxy solicitation his name had been dropped from the slate and that they were thus misled. The authority of the proxy-holders (management) was unrestricted and it would be assumed that the stockholders expected that their proxies would be voted according to management's wishes. *Hauth v. Giant Portland Cement Co, 95 A.2d 233 (Ch. Ct. 1953)*.

Proxy statement did not contain false or misleading statements where directors did, as stated therein, thoroughly consider facts relating to asset valuation. *Schiff v. RKO Pictures Corp, 104 A.2d 267 (Ch. Ct. 1954)*.

Proxy material is not fraudulently misleading although it gives the impression that one director, rather than four, out of eleven opposed the plan to be voted on. *American Hardware Corp v. Savage Arms Corp, 135 A.2d 725 (Ch. Ct. 1957)*, *136 A.2d 690 (1957)*.

Corporation may maintain action to enjoin respondents from voting proxies which were procured by them after sending notices of meeting, proxy statements and proxies purportedly pursuant to authority given by incumbent board of directors but which were not in fact so authorized. *Empire Southern Gas Co v. Gray, 46 A.2d 741 (Ch. Ct. 1946)*.

Proxies cannot be voted for removal of director for cause when director is not given opportunity to present his defense to stockholders, at corporation's expense, by statement accompanying or preceding solicitation of the proxies. *Campbell v. Loew's Inc, 134 A.2d 565 (Ch. Ct. 1957)*.

Investors in company could get preliminary injunction barring wholly owned subsidiary from soliciting tender of company's shares in exchange for its stock when prospectus allegedly violated Exchange Act by not disclosing that major result of merger would be surrendering their one vote per share right and getting scale voting. *Blanchette v. Providence and Worcester Co, 428 F. Supp. 347 (D. Del. 1977)*.

Court enjoined consummation of corporation's recapitalization plan that established ESOP controlling 25% interest in corporation because (1) proxy supplemental statement circulated on eve of shareholders' vote to approve recapitalization materially misled shareholders as to directors real attitude towards tender offer and (2) meaning and effect of shareholders' vote was further clouded by extremely short period shareholders had to receive, consider, and act upon significant new information contained in proxy statement. *In re Anderson, Clayton Shareholders' Litigation, 519 A.2d 669 (Ch. Ct. 1986)*.

Court enjoined implementation of recapitalization plan because shareholder vote approving issuance of supervoting common stock was fatally flawed when (1) principal shareholder/chief executive officer, for whose benefit stock had been fashioned, threatened to block transactions that may be in best interest of corporation, unless plan was approved and (2) proxy statement presents substantial risk of misleading shareholder on material point concerning principal shareholder's status as restricted person. *Lacos Land Co v. Arden Group, Inc, 517 A.2d 271 (Ch. Ct. 1986)*.

A preliminary agreement on a subsidy rate reached between an airline and the Civil Aeronautics Board subsidy staff was correctly held immaterial for purposes of a proxy disclosure, where the result of the negotiations did not introduce a significant new fact into the mix of financial data that was already available to the shareholders and that the agreement was tentative in that it had been reached at the staff level and was subject to approval and possible modification by the Civil Aeronautics Board. *Kahn v. Household Acquisition Corp and Household Finance Corp, 591 A.2d 166 (1991)*.

.14 Forged signature. — Inspectors of election cannot pass upon possible forgeries in execution of proxies and cannot take cognizance of alleged variance in signatures on two proxies in name of single stockholder, but court will hear evidence as to alleged forgery in execution of corporate proxy and will require strict proof, i.e., nothing less than testimony of person whose signature was allegedly forged should be recognized unless such testimony is unavailable for reasons having substantial merit. *Investment Associates, Inc v. Standard Power & Light Corp, 48 A.2d 501 (Ch. Ct. 1946)*.

.15 Proxy expenses. — Solicitation of proxies through advertisement by directors was held to be legitimate corporate expense where information disseminated in advertisement related to management policies and proxies were not sought solely for retention of their offices by incumbent directors. *Hall v. Trans-Lux Daylight Picture Screen Corp, 171 A 226 (1934)*.

Court will not preliminarily enjoin management from expending corporate funds to hire professional proxy solicitors to solicit support for management in contest with stockholders where legality of management's course turned on sharp questions of fact which could only be determined after final hearing. *Hand v. Missouri-Kansas Pipe Line Co, 54 F. Supp. 649 (D. Del. 1944)*.

.16 Filling in blanks. — Proxies executed in France by French holders of stock in Delaware corporation before outbreak of World War II between United States and Germany, mailed to and received in this country after outbreak of War and thereafter filled in here by person to whom they were sent with his name and name of another as proxy holders, were valid and directors elected at the meeting in which they were voted were validly elected. *Aldridge v. Franco-Wyoming Securities Corp, 39 A.2d 246 (Ch. Ct. 1943)*.

.17 Who may sign. — Stock in name of two persons who are in fact husband and wife, although certificate does not show that, is held in tenancy by entirety and stock could not be voted on proxy signed merely by one of the two. *In re Giant Portland Cement Co, 21 A.2d 697 (Ch. Ct. 1941)*.

Where proxy for stock recorded in partnership name, sent out by stockholder, purports to be signed in partnership name, it is prima facie evidence that signature thereto is authorized and it need not appear that person who signed partnership name was authorized to do so. *McLain v. Lanova Corp, 39 A.2d 209 (Ch. Ct. 1944)*.

.18 Ballot. — Any form of ballot that shows voters' intent may be used in election of directors, unless particular form is prescribed. *Chappel v. Standard Scale & Supply Corp, 158 A 74 (Ch. Ct. 1927)*, *decree rev'd, Standard Scale & Supply Corp v. Chappel, 141 A 191 (Ch. Ct. 1928)*.

.19 Buying proxy. — Stockholder cannot vote irrevocable proxies for election of his slate of directors, when he obtains such proxies from other stockholders by paying nominal price for them, since it is against public policy for any stockholder to sell his vote for consideration personal to himself, such sale being void; this is so even though price paid is nominal and stock itself is valueless. *Chew v. Inverness Management Corp, 352 A.2d 426 (Ch. Ct. 1976)*.

.20 Irrevocable proxies. — A proxy is revocable where the only mention of irrevocability is in the notarized acknowledgment. The word irrevocable must appear in the proxy, and an acknowledgment is not part of the proxy. *Eliason v. Englehart, 733 A.2d 944 (Del. 1999)*.

§213 FIXING DATE FOR DETERMINATION OF STOCKHOLDERS OF RECORD

(a) In order that the corporation may determine the stockholders entitled to notice of any meeting of stockholders or any adjournment the-

reof, the board of directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the board of directors, and which record date shall not be more than 60 nor less than 10 days before the date of such meeting. If the board of directors so fixes a date, such date shall also be the record date for determining the stockholders entitled to vote at such meeting unless the board of directors determines, at the time it fixes such record date, that a later date on or before the date of the meeting shall be the date for making such determination. If no record date is fixed by the board of directors, the record date for determining stockholders entitled to notice of and to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the board of directors may fix a new record date for determination of stockholders entitled to vote at the adjourned meeting, and in such case shall also fix as the record date for stockholders entitled to notice of such adjourned meeting the same or an earlier date as that fixed for determination of stockholders entitled to vote in accordance with the foregoing provisions of this Section 213(a) at the adjourned meeting.

(b) In order that the corporation may determine the stockholders entitled to consent to corporate action in writing without a meeting, the board of directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the board of directors, and which date shall not be more than ten days after the date upon which the resolution fixing the record date is adopted by the board of directors. If no record date has been fixed by the board of directors, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting, when no prior action by the board of directors is required by this chapter, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the corporation by delivery to its registered office in this State, its principal place of business, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded. Delivery made to a corporation’s registered office shall be by hand or by certified or registered mail, return receipt requested. If no

record date has been fixed by the board of directors and prior action by the board of directors is required by this chapter, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting shall be at the close of business on the day on which the board of directors adopts the resolution taking such prior action.

(c) In order that the corporation may determine the stockholders entitled to receive payment of any dividend or other distribution or allotment of any rights or the stockholders entitled to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the board of directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted, and which record date shall be not more than sixty days prior to such action. If no record date is fixed, the record date for determining stockholders for any such purpose shall be at the close of business on the day on which the board of directors adopts the resolution relating thereto. (Last amended by Ch. 14, L. '09, eff. 8-1-09.)

Decisions

.1 Closing transfer books. — Record holder of stock is entitled to vote it or to give proxy although he has transferred it, transferee being unable to have it transferred on books because books have been closed or a record date has been set prior to the stockholders' meeting; but in appropriate case court of equity may control record holder's exercise of this right in favor of transferee's interests. *In re Giant Portland Cement Co, 21 A.2d 697 (Ch. Ct. 1941)*.

.2 Written consents. — Group of dissident shareholders could use statutory consent procedure to attempt to remove directors of widely held public corporation, even though they did not hold absolute majority of shares, since language of statute includes all Delaware corporations and does not limit shareholders who may exercise right; but written consents obtained were void because: (1) dissidents' consent statement that written consent would remain in force for 7 months misstated GCL Sec. 213 which placed 60 day limit on consent; and (2) dissidents' consent statement that revocation of consent represented unsettled area of law was wrong. *Pabst Brewing Co v. Jacobs, 549 F. Supp. 1068 (D. Del. 1982)*.

Court refused to enjoin corporation's directors from setting on October 10 a record date of November 18 for shareholder's October 7 notice of solicitation of shareholder consents to remove and replace directors. Shareholder's notice in its October 7 demand letter that consents would be solicited did not establish October 7 as day on which first written consent was expressed when demand letter disclosed only in part full extent of action to be undertaken by shareholder consent. *Empire of Carolina, Inc v. The Deltona Corp, 514 A.2d 1091 (1986)*.

Record date for determining which shareholders are entitled to vote in consent procedure initiated by group of shareholders seeking control of corporation was date on which first consent was expressed and corporation's directors did not have power to change date because it would (1) cause confusion and uncertainty among shareholders and (2) give unwarranted advantage to incumbent management in takeover struggle. *Midway Airlines, Inc v. Carlson, 628 F. Supp. 244 (D. Del. 1985)*.

.3 Postponement of meeting to defeat record date. — Court granted preliminary injunction barring directors from postponing meeting on evening before meeting was to be held. Postponement would cause irreparable harm to proxy contestants; postponement could defeat record date, thereby voiding plaintiffs' proxies, and this might thwart will of majority. *Aprahamian v. HBO & Co, 531 A.2d 1204 (Ch. Ct. 1987)*.

.4 Setting record date. — Sec. 213 looks at the number of days before the meeting date to determine a valid period of time within which a record date may be set. In the case where the meeting date was July 25, 1 day before would be July 24, 2 days before July 23, etc. Continuing counting the number of days in this manner ends with May 26 as the 60th day before July 25. Therefore, the corporation's May 25 record date was 61 days before the annual meeting and was not valid under Sec. 213. *McKesson Corporation v. Derdiger, 793 A.2d 385 (Ch. Ct. 2002).*

§214 CUMULATIVE VOTING

The certificate of incorporation of any corporation may provide that at all elections of directors of the corporation, or at elections held under specified circumstances, each holder of stock or of any class or classes or of a series or series thereof shall be entitled to as many votes as shall equal the number of votes which (except for such provision as to cumulative voting) such holder would be entitled to cast for the election of directors with respect to such holder's shares of stock multiplied by the number of directors to be elected by such holder, and that such holder may cast all of such votes for a single director or may distribute them among the number to be voted for, or for any 2 or more of them as such holder may see fit. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Removal of directors. — Directors elected by cumulative voting can be removed for cause. *Campbell v. Loew' s, Inc, 134 A.2d 565 (Ch. Ct. 1957)*.

.2 Straight voting. — Certificate of incorporation may be amended to provide for straight voting for directors instead of cumulative voting. *Maddock v. Vorclone Corp, 147 A 255 (Ch. Ct. 1929)*.

When votes were cumulated in mistaken belief that cumulative voting was permitted, but in fact had not been provided for in the certificate of incorporation, judges of election should have counted these votes as straight votes for the persons designated; that is, count the number of shares voted by each ballot for each individual voted for. *Standard Scale & Supply Corp v. Chappel, 141 A 191 (1928)*.

§215 VOTING RIGHTS OF MEMBERS OF NONSTOCK CORPORATIONS; QUORUM; PROXIES

(a) Sections 211 through 214 and 216 of this title shall not apply to nonstock corporations, except that §211(a) and (d) of this title and §212(c), (d), and (e) of this title shall apply to such corporations, and, when so applied, all references therein to stockholders and to the board of directors shall be deemed to refer to the members and the governing body of a nonstock corporation, respectively; and all references to stock, capital stock, or shares thereof shall be deemed to refer to memberships of a nonprofit nonstock corporation and to membership interests of any other nonstock corporation.

(b) Unless otherwise provided in the certificate of incorporation or the bylaws of a nonstock corporation, and subject to subsection (f) of this section, each member shall be entitled at every meeting of members to 1 vote on each matter submitted to a vote of members. A member may exercise such voting rights in person or by proxy, but no proxy shall be voted on after 3 years from its date, unless the proxy provides for a longer period.

(c) Unless otherwise provided in this chapter, the certificate of incorporation or bylaws of a nonstock corporation may specify the number of members having voting power who shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business. In the absence of such specification in the certificate of incorporation or bylaws of a nonstock corporation:

(1) One-third of the members of such corporation shall constitute a quorum at a meeting of such members;

(2) In all matters other than the election of the governing body of such corporation, the affirmative vote of a majority of such members present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the members, unless the vote of a greater number is required by this chapter;

(3) Members of the governing body shall be elected by a plurality of the votes of the members of the corporation present in person or represented by proxy at the meeting and entitled to vote thereon; and

(4) Where a separate vote by a class or group or classes or groups is required, a majority of the members of such class or group or classes or groups, present in person or represented by proxy, shall constitute a quorum entitled to take action with respect to that vote on that matter and, in all matters other than the election of members of the governing body, the affirmative vote of the majority of the members of such class or group or classes or groups present in person or represented by proxy at the meeting shall be the act of such class or group or classes or groups.

(d) If the election of the governing body of any nonstock corporation shall not be held on the day designated by the bylaws, the governing body shall cause the election to be held as soon thereafter as convenient. The failure to hold such an election at the designated time shall not work any forfeiture or dissolution of the corporation, but the Court of Chancery may summarily order such an election to be held upon the application of any member of the corporation. At any election pursuant to such order the persons entitled to vote in such election who shall be present at such meeting, either in person or by proxy, shall constitute a quorum for such meeting, notwithstanding any provision of the certificate of incorporation or the bylaws of the corporation to the contrary.

(e) If authorized by the governing body, any requirement of a written ballot shall be satisfied by a ballot submitted by electronic transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the member or proxy holder.

(f) Except as otherwise provided in the certificate of incorporation, in the bylaws, or by resolution of the governing body, the record date for any meeting or corporate action shall be deemed to be the date of such meeting or corporate action; provided, however, that no record date may precede any action by the governing body fixing such record date. (Last amended by Ch. 253, L. ‘10, eff. 8-1-10.)

§216 QUORUM AND REQUIRED VOTE FOR STOCK CORPORATIONS

Subject to this chapter in respect of the vote that shall be required for a specified action, the certificate of incorporation or bylaws of any cor-

poration authorized to issue stock may specify the number of shares and/or the amount of other securities having voting power the holders of which shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting, except that, where a separate vote by a class or series or classes or series is required, a quorum shall consist of no less than one-third of the shares of such class or series or classes or series. In the absence of such specification in the certificate of incorporation or bylaws of the corporation:

(1) A majority of the shares entitled to vote, present in person or represented by proxy, shall constitute a quorum at a meeting of stockholders;

(2) In all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders;

(3) Directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors; and

(4) Where a separate vote by a class or series or classes or series is required, a majority of the outstanding shares of such class or series or classes or series, present in person or represented by proxy, shall constitute a quorum entitled to take action with respect to that vote on that matter and, in all matters other than the election of directors, the affirmative vote of the majority of shares of such class or series or classes or series present in person or represented by proxy at the meeting shall be the act of such class or series or classes or series.

A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors. (Last amended by Ch. 145, L. '07, eff. 8-1-07.)

Decisions

.1 Stockholder's withdrawal from meeting-effect on quorum. — All sessions of stockholders' meetings are but part of meeting and so quorum need not remain continuously throughout the meeting. *Atterbury v. Consolidated Copper Mines Corp, 20 A.2d 743 (Ch. Ct. 1941)*.

Where there is a required quorum when meeting convenes, there is deemed to be a quorum for the entire meeting and the subsequent withdrawal before election of directors of holders of sufficient proxies to reduce voting shares below quorum needs will not invalidate such election. *Duffy v. Loft, Inc, 151 A 223 (Ch. Ct.), aff'd, 152 A 849 (1930)*.

When a number of stockholders left the meeting before shares were counted to ascertain whether a quorum was present, such shares could not later be presumed to have been present in order to establish a quorum. *In re Gulia, 115 A 317 (Ch. Ct. 1921)*.

Where two 50% shareholders constitute all shareholders of the corporation, and one leaves the meeting before official action is taken, no corporate action can be taken at the shareholders' meeting without the concurrence of both shareholders. *Testa v. Jarvis, No. 12847 (Ch. Ct. 12-30-93)*.

.2 No record of stockholders present. — When less than majority voted and no records of those present were kept, then there was no quorum present to hold the meeting. *Leamy v. Sinaloa Exploration & Development Co, 130 A 282 (Ch. Ct. 1925)*.

.3 What shares may be counted. — Treasury stock should not be counted for quorum purposes. However, when stockholders appeared at annual meeting in their capacity as such and also owned shares registered in their names as nominees but had to authority to vote these shares, such nominee stock should be counted in determining whether a quorum is present. *Atterbury v. Consolidated Copper Mines Corp, 20 A.2d 743 (Ch. Ct. 1941).*

Stockholder's shares cannot be counted for quorum purposes when he attended meeting solely to protest its legality and was ejected from the meeting before voting took place. *Leamy v. Sinaloa Exploration & Development Co, 130 A 282 (Ch. Ct. 1925)*.

Corporate charter provision for voting power based upon size of individual shareholder's holding rather than class differentiations was not invalid and corporation could gear its quorum definition to specified number of shares to be present rather than number of stockholders. *Providence and Worcester Co v. Baker, 378 A.2d 121 (1977)*.

.4 "Shares present" v. "voting power present". — Court upheld distinction between shares present for quorum purposes and voting power present for voting purposes. Thus, shareholder represented by limited proxy may be present for quorum purposes, but if proxy does not empower holder to vote on particular proposal, shares represented by proxy cannot be considered as part of voting power present with respect to that proposal. *Berlin v. Emerald Partners, 552 A.2d 482 (1989)*.

§217 VOTING RIGHTS OF FIDUCIARIES, PLEDGORS AND JOINT OWNERS OF STOCK

(a) Persons holding stock in a fiduciary capacity shall be entitled to vote the shares so held. Persons whose stock is pledged shall be entitled to vote, unless in the transfer by the pledgor on the books of the corpo-

ration such person has expressly empowered the pledgee to vote thereon, in which case only the pledgee, or such pledgee's proxy, may represent such stock and vote thereon.

(b) If shares or other securities having voting power stand of record in the names of 2 or more persons, whether fiduciaries, members of a partnership, joint tenants, tenants in common, tenants by the entirety or otherwise, or if 2 or more persons have the same fiduciary relationship respecting the same shares, unless the secretary of the corporation is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided, their acts with respect to voting shall have the following effect:

(1) If only 1 votes, such person's act binds all;

(2) If more than 1 vote, the act of the majority so voting binds all;

(3) If more than 1 vote, but the vote is evenly split on any particular matter each faction may vote the securities in question proportionally, or any person voting the shares, or a beneficiary, if any, may apply to the Court of Chancery or such other court as may have jurisdiction to appoint an additional person to act with the persons so voting the shares, which shall then be voted as determined by a majority of such persons and the person appointed by the Court. If the instrument so filed shows that any such tenancy is held in unequal interests, a majority or even split for the purpose of this subsection shall be a majority or even split in interest. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Right of broker to vote. — Brokers' proxies covering shares in margin accounts are valid when beneficial owners have not objected, their beneficial interest does not appear on corporate stockbook, and there is no showing proxies are voted contrary to beneficial owners' instructions. *Schott v. Climax Molybdenum Co, 154 A.2d 221 (Ch. Ct. 1959)*.

.2 Fiduciaries. — Stock registered in decedent's name may be voted by an executor or administrator. *Investment Associates v. Standard Power & Light Corp, 48 A.2d 501 (Ch. Ct. 1947)*.

Guardian's proxy for shares registered in ward's name (latter having been adjudged mentally incompetent) should be counted, since incompetency once established is presumed to continue until contrary is shown. *Gow v. Consolidated Coppermines Corp, 165 A 136 (Ch. Ct. 1933)*.

.3 Right of pledgor to vote. — Pledgor has right to vote stock registered in the name of pledgee unless in transfer on the books pledgor has expressly empowered

pledgee to vote the shares. *Italo Petroleum Corp of America v. Producers' Oil Corp of America, 174 A 276 (Ch. Ct. 1934)*.

§218 VOTING TRUSTS AND OTHER VOTING AGREEMENTS

(a) One stockholder or 2 or more stockholders may by agreement in writing deposit capital stock of an original issue with or transfer capital stock to any person or persons, or entity or entities authorized to act as trustee, for the purpose of vesting in such person or persons, entity or entities, who may be designated voting trustee, or voting trustees, the right to vote thereon for any period of time determined by such agreement, upon the terms and conditions stated in such agreement. The agreement may contain any other lawful provisions not inconsistent with such purpose. After delivery of a copy of the agreement to the registered office of the corporation in this State, or the principal place of business of the corporation, which copy shall be open to the inspection of any stockholder of the corporation or any beneficiary of the trust under the agreement daily during business hours, certificates of stock or uncertificated stock shall be issued to the voting trustee or trustees to represent any stock of an original issue so deposited with such voting trustee or trustees, and any certificates of stock or uncertificated stock so transferred to the voting trustee or trustees shall be surrendered and cancelled and new certificates or uncertificated stock shall be issued therefore to the voting trustee or trustees. In the certificate so issued, if any, it shall be stated that it is issued pursuant to such agreement, and that fact shall also be stated in the stock ledger of the corporation. The voting trustee or trustees may vote the stock so issued or transferred during the period specified in the agreement. Stock standing in the name of the voting trustee or trustees may be voted either in person or by proxy, and in voting the stock, the voting trustee or trustees shall incur no responsibility as stockholder, trustee or otherwise, except for their own individual malfeasance. In any case where 2 or more persons or entities are designated as voting trustees, and the right and method of voting any stock standing in their names at any meeting of the corporation are not fixed by the agreement appointing the trustees, the right to vote the stock and the manner of voting it at the meeting shall be determined by a majority of the trustees, or if they be equally divided as to the right and manner of voting the stock in any particular case, the vote of the stock in such case shall be divided equally among the trustees.

(b) Any amendment to a voting trust agreement shall be made by a written agreement, a copy of which shall be delivered to the registered office of the corporation in this State or principal place of business of the corporation.

(c) An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them.

(d) This section shall not be deemed to invalidate any voting or other agreement among stockholders or any irrevocable proxy which is not otherwise illegal. (Last amended by Ch. 327, L. '14, eff. 8-1-14.)

Decisions

.1 Construction. — Agreement between two groups of stockholders, each owning equal amount of corporation's stock, to create new class of non-participating voting stock and issue one share to new director so he can break deadlock, is not voting trust subject to ten-year limit, since stockholders retained their voting rights; nor does issuance of voting stock with no proprietary rights violate public policy. *Lehrman v. Cohen, 222 A.2d 800 (1966)*.

Agreement to transfer stock to another, with transferor retaining right to surrender at any time certificate received in lieu of stock and receive back his stock or without so doing to receive blank proxy to vote his stock, is not a voting trust agreement. *Aldridge v. Franco Wyoming Oil Co, 7 A.2d 753 (Ch. Ct. 1939)*.

.2 Definition. — Voting trust as commonly understood is device whereby two or more persons owning stock with voting powers divest voting right thereof from ownership. They retain ownership in themselves and transfer voting rights to trustees. *Peyton v. Peyton Corp, 194 A.2d 106 (Ch. Ct. 1937)*.

.3 Enforceability. — Party to voting trust agreement may attack it or its renewal for failure of compliance with this section and may not be prevented from asserting such illegality because of existence of facts calling for application of doctrine of clean hands and estoppel. *Appon v. Belle Isle Corp, 46 A.2d 749 (Ch. Ct.)*, *aff'd, 49 A.2d 1 (1946).* See also, *Belle Isle Corp v. Mac Bean, 49 A.2d 5 (Ch. Ct. 1946)*.

.4 Validity. — Restraint on alienation of voting trust certificates which is unreasonable makes voting trust agreement invalid; restraint against sale of voting trust certificate holder's interest for almost ten years is unreasonable. *Tracey v. Franklin, 61 A.2d 780 (Ch. Ct. 1948)*, *aff'd, 67 A.2d 56 (1949)*.

Where stock rights plan precluded 30 percent holder from forming joint slate with other shareholders or otherwise entering revocable stock voting agreements but plan was likely to have a minimal impact upon 30 percent holder's proxy campaign, court denied motion for partial summary judgment as to whether stock rights plan's definition of beneficial ownership caused plan to have inequitable

effect on corporate franchise. Despite restrictions, plaintiff was able to put forth slate of candidates and communicate his position, and other shareholders were free to vote for slate without restriction. *Stahl v. Apple Bancorp Inc, 579 A.2d 1115 (Ch. Ct. 1990)*.

.5 Beneficial owner of stock has title. — Beneficial owner of stock has title as against one in whose name stock stands on corporation's books. *Chadwick v. Parkhill Corp, 141 A 823 (Ch. Ct. 1928)*.

.6 Rights of trustees other than voting trustees. — Validity of election of directors cannot be made to turn on (1) fact that directors were elected by shares voted by proxies of trustees of inter vivos trust who were not registered as owners of shares and on (2) fact that trust, although created by trustor having legal right to do so, was improperly motivated. *Gans v. Delaware Terminal Corp, 2 A.2d 154 (Ch. Ct. 1938)*.

.7 Rights of voting trustees. — Trustees of stock in voting trust can, by proxy, delegate exercise of voting power to others, even in discretionary matters, under this section. The provision in this section that trustees may vote by proxy extends only to delegating to others ministerial act of voting after voting trustees have determined how vote shall be cast. *Chandler v. Bellanca Aircraft Corp, 162 A 63 (Ch. Ct. 1932); Smith v. First Personal Bankers' Corp, 171 A 839 (Ch. Ct. 1934)*.

.8 Removal of voting trustees. — The court will remove voting trustees who are personally interested adversely to corporation in outcome of election of directors. *Lippard v. Parish, 191 A 829 (Ch. Ct. 1937)*.

.9 Rights of holders of voting trust certificates. — Fact that directors of holding company serve as voting trustees and can perpetuate themselves in office is not ground for preliminary injunction, in absence of fraud or overreaching. *Adams v. Clearance Corp, 116 A.2d 893 (Ch. Ct. 1955)*, *aff'd, 121 A.2d 302 (1956)*.

Restrictions on voting trust agreements must be reasonable. *Grynberg v. Burke, 378 A.2d 139 (Ch. Ct. 1977)*.

.10 Termination of voting trust. — Corporation as sole settlor, depositing stockholder, and beneficiary of voting trust can terminate it against consent of voting trustees. *H M Byllesby and Co v. Doriot, 12 A.2d 603 (Ch. Ct. 1940)*.

Irrevocable voting trust agreement may not be terminated by notice of depositing shareholder without consent of trustees, other voting trust certificate holders or banks holding outstanding loans to corporation. *Hearst v. Consolidated Newspapers, 51 F. Supp. 171 (D. Del. 1943)*.

Court may terminate voting trust agreement that does not comply strictly with requirements of this section. *Belle Isle Corp v. Corcoran, 49 A.2d 1 (1946)*.

§219 LIST OF STOCKHOLDERS ENTITLED TO VOTE; PENALTY FOR REFUSAL TO PRODUCE; STOCK LEDGER

(a) The corporation shall prepare, at least 10 days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting; provided, however, if the record date for determining the stockholders entitled to vote is less than 10 days before the meeting

date, the list shall reflect the stockholders entitled to vote as of the tenth day before the meeting date, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Nothing contained in this section shall require the corporation to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the examination of any stockholder for any purpose germane to the meeting for a period of at least 10 days prior to the meeting: (i) on a reasonably accessible electronic network, provided that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the principal place of business of the corporation. In the event that the corporation determines to make the list available on an electronic network, the corporation may take reasonable steps to ensure that such information is available only to stockholders of the corporation. If the meeting is to be held at a place, then a list of stockholders entitled to vote at the meeting shall be produced and kept at the time and place of the meeting during the whole time thereof and may be examined by any stockholder who is present. If the meeting is to be held solely by means of remote communication, then such list shall also be open to the examination of any stockholder during the whole time of the meeting on a reasonably accessible electronic network, and the information required to access such list shall be provided with the notice of the meeting.

(b) If the corporation, or an officer or agent thereof, refuses to permit examination of the list by a stockholder, such stockholder may apply to the Court of Chancery for an order to compel the corporation to permit such examination. The burden of proof shall be on the corporation to establish that the examination such stockholder seeks is for a purpose not germane to the meeting. The Court may summarily order the corporation to permit examination of the list upon such conditions as the Court may deem appropriate, and may make such additional orders as may be appropriate, including, without limitation, postponing the meeting or voiding the results of the meeting.

(c) For purposes of this chapter, “stock ledger” means 1 or more records administered by or on behalf of the corporation in which the names of all of the corporation's stockholders of record, the address and number of shares registered in the name of each such stockholder, and all issuances and transfers of stock of the corporation are recorded in accordance with §224 of this title. The stock ledger shall be the only evidence as to who are the stockholders entitled by this section to

examine the list required by this section or to vote in person or by proxy at any meeting of stockholders. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

Decisions

.1 Who may inspect. — Record owner can inspect stock ledger, even though he is acting for beneficial owner. *Trans World Airlines, Inc v. State, 183 A.2d 174 (Del. 1962)*.

.2 Failure to maintain proper stockholders' list. — Corporation that did not maintain stock ledger and ignored other corporate formalities could not object to inspection of books and records on ground that shareholder seeking inspection was not shareholder of record, but wholly owned subsidiary of shareholder of record. *Pan Ocean Navigation, Inc v. Rainbow Navigation, Inc, 535 A.2d 1357 (Del. 1987)*.

.3 Changing corporate record. — Group of shareholders was not entitled to damages when corporation delayed five months in changing name on its records from group's nominee account to names of individual shareholders, because they did not suffer any deprivation of their shareholder rights since they could have exercised rights at any time through nominee. *Loretto Literary & Benevolent Institution v. Blue Diamond Coal Co, 444 A.2d 256 (Del. Ch. 1982)*.

.4 Record owners. — Neither parent corporation nor directors of wholly owned subsidiary owe fiduciary duties to subsidiary's prospective shareholders after parent declares its intention to spin off subsidiary. Prior to distribution of assets in spinoff, prospective shareholders' interests in subsidiary are insufficient to impose fiduciary duties on parent or subsidiary's directors. Under GCL Sec. 219, stock ledger is only evidence as to stockholders of record. However, this only applies to listing of present stockholders of existing entities and not to prospective shareholders of subsidiary being spun off. *Anadarko Petroleum Corp v. Panhandle Eastern Corp, 545 A.2d 1171 (Del. 1988)*.

§220 INSPECTION OF BOOKS AND RECORDS

(a) As used in this section:

(1) "Stockholder" means a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person.

(2) "Subsidiary" means any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises control, and includes, without limitation, corporations,

partnerships, limited partnerships, limited liability partnerships, limited liability companies, statutory trusts and/or joint ventures.

(3) "Under oath" includes statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state.

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

(1) The corporation's stock ledger, a list of its stockholders, and its other books and records; and

(2) A subsidiary's books and records, to the extent that:

a. The corporation has actual possession and control of such records of such subsidiary; or

b. The corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand:

1. The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation; and

2. The subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.

In every instance where the stockholder is other than a record holder of stock in a stock corporation, or a member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence is a true and correct copy of what it purports to be. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business.

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to subsection (b) of this section or does

not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The Court may summarily order the corporation to permit the stockholder to inspect the corporation's stock ledger, an existing list of stockholders, and its other books and records, and to make copies or extracts therefrom; or the Court may order the corporation to furnish to the stockholder a list of its stockholders as of a specific date on condition that the stockholder first pay to the corporation the reasonable cost of obtaining and furnishing such list and on such other conditions as the Court deems appropriate. Where the stockholder seeks to inspect the corporation's books and records, other than its stock ledger or list of stockholders, such stockholder shall first establish that:

(1) Such stockholder is a stockholder;

(2) Such stockholder has complied with this section respecting the form and manner of making demand for inspection of such documents; and

(3) The inspection such stockholder seeks is for a proper purpose.

Where the stockholder seeks to inspect the corporation's stock ledger or list of stockholders and establishes that such stockholder is a stockholder and has complied with this section respecting the form and manner of making demand for inspection of such documents, the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper. The Court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon such terms and conditions as the order may prescribe.

(d) Any director shall have the right to examine the corporation's stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to the director's position as a director. The Court of Chancery is hereby vested with the exclusive jurisdiction to determine whether a director is entitled to the inspection sought. The Court may summarily order the corporation to permit the director to inspect any and all books and records, the stock ledger and the list of stockholders and to make copies or extracts therefrom. The burden of

proof shall be upon the corporation to establish that the inspection such director seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other and further relief as the Court may deem just and proper. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Scope of inspection. — Sec. 220(a) (3) only obligates the parent to produce documents that are in the subsidiary's possession and control that can be obtained through the parent's exercise of control over the subsidiary. *Weinstein Enterprises, Inc. v. Orloff, 870 A.2d 499 (Del. Supr. 2005).*

Stockholder with proper purpose may inspect and copy stockholder list even though no meeting of stockholders is imminent; stockholder is entitled to breakdown of Cede & Co. and similar listings that indicate stock held for brokerage firms and financial institutions; stockholder is entitled to daily transfer sheets, computer tapes, and similar data that is available to corporation regarding its lists of stockholders. *Hatleigh Corp v. Lane Bryant Inc, 428 A.2d 350 (Del. Ch. 1981)*.

Garner doctrine, which allows stockholders to invade a corporation's attorney client privilege to prove fiduciary duty breaches upon showing of good cause, applies to Sec. 220 actions. However, the court must determine that records sought are necessary and essential to proper purpose. *Wal-Mart Stores, Inc. v. Indiana EWPTF IBEW, 2014 Del. LEXIS 336.*

Sec. 220 requires production of emails and other electronically stored information. *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016). Stockholder was entitled to inspect emails from management where no other records were available to investigate the board's action due to its failure to comply with corporate formalities. *KT4 Partners LLC v. Palantir Technologies, Inc., 203 A.3d 738 (Del. Supr. 2019).*

.2 Purpose in demanding inspection. — Stockholder may inspect stockholders' list, when he wants to use same for proxy solicitation, even though he may have other purpose such as corporate takeover or merger. *Schnell v. Chris-Craft Industries, Inc, 283 A.2d 852 (Del. Ch. 1971).*

Stockholder cannot inspect stockholders' list when he states that his purpose is to communicate with other stockholders with reference to special meeting of stockholders. *Northwest Industries, Inc v. B F Goodrich Co, 260 A.2d 428 (Del. Supr. 1969)*.

Stockholder cannot examine corporation's books and records for alleged purpose of informing himself about economics of proposed merger, when it is shown (1) his interest in merger is primarily as potential competitor, (2) certain records he demands to examine are subject to secrecy agreement signed by corporation, and (3) he can get enough information about merger from proxy statement to oppose it and get appraisal for his shares if he wishes. *State v. Gulf Sulphur Corp, 233 A.2d 457 (Del. Supr. 1967)*.

Stockholder was entitled to inspection of corporate books and records to value his shares in order to negotiate sale of his stock, even though request could have been thinly veiled attempt to force corporation to buy stock at unfairly inflated price so it could keep its financial information secret, because stockholder's primary purpose for inspection was proper and once proper purpose had been established, any ulterior motives of stockholder became irrelevant. *CM&M Group Inc v. Carroll, 453 A.2d 788 (Del. Supr. 1982)*.

Shareholder's desire for valuation of minority interest in closely held corporation whose shares were not publicly traded and subject to restrictions that made their sale difficult; shareholder's desire to determine corporation's present and past ability to pay dividends; and shareholder's necessity to inform himself of corporate transactions about which he could have otherwise learned and voted upon if given proper notice were valid purposes. *Helmsman Management Services, Inc v. A & S Consultants, Inc, 525 A.2d 160 (Del. Ch 1987)*.

Because a stockholder admitted he had no idea what he would do with a stockholder list, and because it is a sufficient defense for a corporation to show that the list was sought for idle curiosity, the corporation met its burden of proving that the demand to inspect the stockholder list was not for a proper purpose. *Security First v. U.S. Die Casting & Development, 687 A.2d 563 (Del. Supr. 1997).*

A shareholder was not entitled to an inspection of letters from executive officers where the court determined that the shareholder's real purpose was to publicize confidential information during a proxy contest. *Pershing Square, L.P. v. Ceridian Corp., 923 A.2d 810 (Del. Ch. 2007).*

Stockholder's demand to inspect books and records was not for proper purpose, even though purportedly to prepare for proxy fight, where stockholder knew all information necessary to carry on proxy fight and real purpose was to have rhetorical platform regarding alleged mismanagement. *Highland Select Equity v. Motient Corp., 906 A.2d 156 (Del. Ch. 2006).*

Where plaintiff's purpose in seeking inspection was to obtain information to replead demand futility in a second derivative suit after first was dismissed, the purpose was not reasonably related to stockholder's interest a stockholder as plaintiff was not a proper plaintiff due to issue preclusion. *West Coast Management & Capital, LLC v. Carrier Access Corp., 914 A.2d 636 (Del. Ch. 2006).*

Books and records action was not brought for a proper purpose when it was brought to help stockholder replead a viable claim for demand excusal in federal derivative action. *King v. Verifone Holdings, Inc., 994 A.2d 354 (Del. Ch. 2010).*

When one of the stockholder's purposes for seeking an inspection was to determine whether the board complied with its fiduciary duties in refusing to accept the resignations of three directors, tendered pursuant to a "plurality plus" bylaw adopted by the board, the *Blasius* standard should not be applied when reviewing that decision because it would improperly to shift to the corporation the plaintiff's burden to establish a proper purpose. *City of Westmoreland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, *1 A.3d 281 (Del. Supr. 2010).*

There is no bright line rule which holds that a stockholder lacks a proper purpose and is thus barred from pursuing an inspection under Sec. 220 solely because the stockholder filed a derivative action first. *King v. Verifone Holdings, Inc.*, *12 A.3d 1140(Del. Supr. 2011)*.

Plaintiff was entitled to inspect documents that the CEO had reviewed but the directors had not in order to investigate possible wrongdoing on the part of the CEO and directors in the hiring and subsequent firing without cause of the corporation's COO where the plaintiff had established a credible basis to suspect wrongdoing in connection with the COO's hiring and firing. *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016).

.3 Prerequisites for inspection. — Stockholder must make written demand under oath to get inspection. *Petrick v. B-K Dynamics, Inc, 283 A.2d 696 (Ch. Ct. 1971)*.

Written demand for inspection that failed to state that redacted monthly brokerage statement that accompanied demand as documentary evidence of shareholder's beneficial ownership of stock was true and correct copy of what it purported to be, failed to comply with requirements of Sec. 220. *Seinfeld v. Verizon Communications, Inc., 873 A.2d 316 (Del. Ch. 2005).*

A stockholder seeking inspection under Sec. 220 is required to show some evidence to suggest a credible basis for wrongdoing. *Seinfeld v. Verizon Communications, Inc., 909 A.2d 117 (Del. Supr. 2006).*

Failure to attach documentary evidence of beneficial ownership of stock is statutorily fatal to Sec. 220 demand action. *Central Laborers Pension Fund v. News Corp., 45 A.3d 139 (Del. Supr. 2012)*.

When ordering production of documents, the court may condition the production on the plaintiff's incorporating by reference into any Delaware action complaint the full scope of the documents produced. *Amalgamated Bank v. Yahoo! Inc.*, *132 A.3d 752 (Del. Ch. 2016).*

Plaintiff must demonstrate both that it has complied with the requirements to demand an inspection and that is a stockholder. *Weingarten v. Monster Worldwide, Inc., C.A. No. 12931 (Del. Ch. 2017)*

.4 Who may inspect. — Director who was beneficial stockholder had no inspection right. *Lenahan v. National Computer Analysis Corp, 310 A.2d 661 (Ch. Ct. 1973)*.

Inclusion on the stock ledger states a prima facie, but rebuttable case that a plaintiff is a stockholder of record for the purposes of an inspection of books and records under Sec. 220. *Pogue v. Hybrid Energy, Inc*., *C.A. No. 11563 (Del. Ch. 2016)*

Filing a suit for breach of fiduciary duty as a stockholder does not preclude the exercise of inspection rights as a director. Plaintiff director was entitled to inspect text messages and emails of defendant directors as part of is suit alleging the defendants breached their fiduciary duties in ousting him as CEO. *Schnatter v. Papa John's International, Inc*., 2019 Del. Ch. LEXIS 18.

.5 Blank or nonexistent stock ledger. — Only stockholders of record are entitled to inspect corporate books and records. It is implicit in GCL Sec. 219 and GCL Sec. 220 that Delaware corporations have affirmative duty to maintain stock ledger. When stock ledger is blank or nonexistent, Court of Chancery has power to consider other evidence to ascertain and establish stockholder status. Because stockholder's status as record stockholder was supported by evidence, its right to inspect corporation's books will be enforced. *Rainbow Navigation, Inc v. Pan Ocean Navigation, Inc, 535 A.2d 1357 (Del. Supr. 1987)*.

.6 NOBO list. — Corporation must provide information in its possession identifying certain beneficial owners of its stock (NOBO list) to shareholders soliciting proxies for election of opposition slate of directors because (1) shareholders should have

same opportunity to solicit beneficial owners that directors have, (2) list is not confidential, and (3) Rule 14a-13(b)(2) of Securities Exchange Act does not preempt Delaware law and forbid release of NOBO list. Corporation may not, as general matter, condition its release of stocklist materials but must use NOBO list exclusively for corporate communications. *Shamrock Associates v. Texas American Energy Corp, 517 A.2d 658 (Del. Ch. 1986)*.

.7 Discovery of corporate books— Family Court has authority to order non-party corporations to comply with reasonable discovery demands. Nowhere in GCL Sec. 220 is discovery of corporation's books and records by persons outside corporation barred. There is no support for assertion that GCL Sec. 220 is sole procedure for inspection of corporate books and records. Litigant's discovery was limited to those records needed to perform task, i.e., to those documents necessary and essential to valuation process. *In the Matter of B & F Towing and Salvage Co, 551 A.2d 45 (Del. Supr. 1988)*.

Garner exception did not apply where stockholder was seeking records that could not have been obtained in a separate derivative suit they filed. *Salberg v. Genworth Financial Inc.*, *C.A. No. 2017-0018 (Del. Ch. 2017).*

8. Inspection of subsidiary's documents. — To be considered a subsidiary for the purposes of Sec. 220(a)(3), the parent must have the power to control the subsidiary's affairs. *Weinstein Enterprises, Inc. v. Orloff, 870 A.2d 499 (Del. Supr. 2005).*

§221 VOTING, INSPECTION AND OTHER RIGHTS OF BONDHOLDERS AND DEBENTURE HOLDERS

Every corporation may in its certificate of incorporation confer upon the holders of any bonds, debentures, or other obligations issued or to be issued by the corporation the power to vote in respect to the corporate affairs and management of the corporation to the extent and in the manner provided in the certificate of incorporation and may confer upon such holders of bonds, debentures or other obligations the same right of inspection of its books, accounts and other records, and also any other rights, which the stockholders of the corporation have or may have by reason of this chapter or of its certificate of incorporation. If the certificate of incorporation so provides, such holders of bonds, debentures or other obligations shall be deemed to be stockholders, and their bonds, debentures or other obligations shall be deemed to be shares of stock, for the purpose of any provision of this chapter which requires the vote of stockholders as a prerequisite to any corporate action and the certificate of incorporation may divest the holders of capital stock, in whole or in part, of their right to vote on any corporate matter whatsoever, except as set forth in paragraph (2) of subsection (b) of Sec. 242 of this title. (Last amended by Ch. 127, L. '85, eff. 7-1-85.)

Decisions

.1 Exchange offer to bondholders. — Court refused to enjoin consummation of exchange offer and consent solicitation made by corporation to holders of its long-term debt securities because (1) nothing in indenture provisions granting bondholders power to veto modifications in indenture stops corporation from offering inducement to bondholders to consent to amendments, which was necessary before offer could go through, (2) consents will be granted or withheld only by those with financial interests in bonds and incentive to consent is available equally to all members of each class of bondholders, (3) offer is not functional equivalent of redemption, and (4) corporation would be irreparably harmed since it is in weak financial state and offer is integral part of major reorganization and recapitalization of corporation. *Katz v. Oak Industries Inc, 508 A.2d 873 (Ch. Ct. 1986)*.

.2 Duties owed to debenture holders. — Holders of convertible debentures are not the beneficiaries of fiduciary duties. *Simons v. Cogan, 549 A.2d 300 (Del. Supr. 1988).*

§222 NOTICE OF MEETINGS AND ADJOURNED MEETINGS

(a) Whenever stockholders are required or permitted to take any action at a meeting, a notice of the meeting shall be given which shall state the place, if any, date and hour of the meeting, the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such meeting, the record date for determining the stockholders entitled to vote at the meeting, if such date is different from the record date for determining stockholders entitled to notice of the meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called.

(b) Unless otherwise provided in this chapter, the notice of any meeting shall be given not less than 10 nor more than 60 days before the date of the meeting to each stockholder entitled to vote at such meeting as of the record date for determining the stockholders entitled to notice of the meeting.

(c) When a meeting is adjourned to another time or place, unless the bylaws otherwise require, notice need not be given of the adjourned meeting if the time, place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken. At the adjourned meeting the corporation may transact any business which

might have been transacted at the original meeting. If the adjournment is for more than 30 days, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting. If after the adjournment a new record date for stockholders entitled to vote is fixed for the adjourned meeting, the board of directors shall fix a new record date for notice of such adjourned meeting in accordance with §213(a) of this title, and shall give notice of the adjourned meeting to each stockholder of record entitled to vote at such adjourned meeting as of the record date fixed for notice of such adjourned meeting. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Effect of improper notice. — Stockholder who gave general proxy for annual meeting, which was voted in favor of resolutions ratifying certain acts of directors, was not estopped from later objecting to directors' acts where notice of the meeting did not state that resolutions-or any business other than stated matters-would be presented. *Gottlieb v. McKee, 107 A.2d 240 (Ch. Ct. 1954)*.

.2 Who may issue notice. — Request by voting trustee of controlling interest for further postponement of shareholders' meeting to allow time to resolve income beneficiaries' dispute over voting mandate was permissible under charter, and, even though charter requires fresh notices and agenda for reconvening meetings adjourned over 30 days, reconvened meetings would not be new meetings and would not involve delays prejudicial to income beneficiary's interest as to justify denying request for further adjournment. *Wilmington Trust Co v. Lee, 298 A.2d 358 (Del. Ch 1972)*.

.3 Applicability. — GCL Sec. 222(c) deals with adjournment after a meeting has convened and is not relevant to issue of postponement before meeting is convened. *Aprahamian v. HBO & Co, 531 A.2d 1204 (Del. Ch. 1987)*.

.4 Ripeness. — Court refused to hear appeal in dispute as to whether proposed notice of shareholders' meeting called to consider charter and bylaw amendments met requirements of candor imposed by GCL Sec. 222 and GCL Sec. 242. Parties were seeking final judicial determination of management's statutory notice technique before putting process into effect. This would inappropriately draw courts into granting advisory opinion regarding significant question of corporation law that was not ripe for judicial intervention. *Stroud v. Milliken Enterprises, Inc, 552 A.2d 476 (Del. Supr. 1989)*.

§223 VACANCIES AND NEWLY CREATED DIRECTORSHIPS

(a) Unless otherwise provided in the certificate of incorporation or bylaws:

(1) Vacancies and newly created directorships resulting from any increase in the authorized number of directors elected by all of the stockholders having the right to vote as a single class may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director;

(2) Whenever the holders of any class or classes of stock or series thereof are entitled to elect 1 or more directors by the certificate of incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the directors elected by such class or classes or series thereof then in office, or by a sole remaining director so elected.

If at any time, by reason of death or resignation or other cause, a corporation should have no directors in office, then any officer or any stockholder or an executor, administrator, trustee or guardian of a stockholder, or other fiduciary entrusted with like responsibility for the person or estate of a stockholder, may call a special meeting of stockholders in accordance with the provisions of the certificate of incorporation or the bylaws, or may apply to the Court of Chancery for a decree summarily ordering an election as provided in Sec. 211 or Sec. 215 of this title.

(b) In the case of a corporation the directors of which are divided into classes, any directors chosen under subsection (a) of this section shall hold office until the next election of the class for which such directors shall have been chosen, and until their successors shall be elected and qualified.

(c) If, at the time of filling any vacancy or any newly created directorship, the directors then in office shall constitute less than a majority of the whole board (as constituted immediately prior to any such increase), the Court of Chancery may, upon application of any stockholder or stockholders holding at least 10 percent of the voting stock at the time outstanding having the right to vote for such directors, summarily order an election to be held to fill any such vacancies or newly created directorships, or to replace the directors chosen by the directors then in office as aforesaid, which election shall be governed by Sec. 211 or Sec. 215 of this title as far as applicable.

(d) Unless otherwise provided in the certificate of incorporation of bylaws, when 1 or more directors shall resign from the board, effective at a future date, a majority of the directors then in office, including those who have so resigned, shall have power to fill such vacancy or vacancies, the vote thereon to take effect when such resignation or res-

ignations shall become effective, and each director so chosen shall hold office as provided in this section in the filling of other vacancies. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Vacancies. — Where bylaw allows president to call special stockholders' meeting for any purpose, president can call meeting to (1) fill director vacancies, (2) increase number of directors, (3) fill new directorships, (4) increase quorum of directors, (5) remove directors for cause, and (6) fill vacancies created thereby. *Campbell v. Loew's, Inc, 135 A.2d 565 (Del. Ch. 1957)*.

.2 Unfilled directorship. — Unfilled directorships are not vacancies which directors may fill; they must be filled by stockholders. *Belle Isle Corp v. MacBean, 61 A.2d 699 (Del. Ch. 1948)*.

.3 Term. — Bylaw cannot set one year term for directors if charter provides for staggered 3 year terms; directors elected under such invalid bylaw serve only as de facto directors whose terms can be terminated at any time by stockholder action. *Prickett v. American Steel and Pump Corp, 253 A.2d 86 (Del. Ch. 1969)*.

.4 Misleading proxy statement. — Management's proxy statement is materially misleading when it represents that its director nominees are interim directors when in fact their election was illegal under state law. *Dillon v. Scotten, Dillon Co, 335 F. Supp. 566 (D. Del. 1971)*.

§224 FORM OF RECORDS

Any records administered by or on behalf of the corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, method, or 1 or more electronic networks or databases (including 1 or more distributed electronic networks or databases), provided that the records so kept can be converted into clearly legible paper form within a reasonable time , and, with respect to the stock ledger, that the records so kept (i) can be used to prepare the list of stockholders specified in §§219 and 220 of this title, (ii) record the information specified in §§156, 159, 217(a) and 218 of this title, and (iii) record transfers of stock as governed by Article 8 of subtitle I of Title 6. Any corporation shall convert any records so kept into clearly legible paper form upon the request of any person entitled to inspect such records pursuant to any provision of this chapter. When records are kept in such manner, a clearly legible paper form prepared

from or by means of the information storage device, method, or 1 or more electronic networks or databases (including one or more distributed electronic networks or databases) shall be valid and admissible in evidence, and accepted for all other purposes, to the same extent as an original paper record of the same information would have been, provided the paper form accurately portrays the record. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

§225 CONTESTED ELECTION OF DIRECTORS; PROCEEDINGS TO DETERMINE VALIDITY

(a) Upon application of any stockholder or director, or any officer whose title to office is contested, the Court of Chancery may hear and determine the validity of any election, appointment, removal or resignation of any director or officer of any corporation, and the right of any person to hold or continue to hold such office, and, in case any such office is claimed by more than 1 person, may determine the person entitled thereto; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the corporation relating to the issue. In case it should be determined that no valid election has been held, the Court of Chancery may order an election to be held in accordance with §211 or §215 of this title. In any such application, service of copies of the application upon the registered agent of the corporation shall be deemed to be service upon the corporation and upon the person whose title to office is contested and upon the person, if any, claiming such office; and the registered agent shall forward immediately a copy of the application to the corporation and to the person whose title to office is contested and to the person, if any, claiming such office, in a postpaid, sealed, registered letter addressed to such corporation and such person at their post-office addresses last known to the registered agent or furnished to the registered agent by the applicant stockholder. The Court may make such order respecting further or other notice of such application as it deems proper under the circumstances.

(b) Upon application of any stockholder or upon application of the corporation itself, the Court of Chancery may hear and determine the result of any vote of stockholders upon matters other than the election of directors or officers. Service of the application upon the registered agent of the corporation shall be deemed to be service upon the corpo-

ration, and no other party need be joined in order for the Court to adjudicate the result of the vote. The Court may make such order respecting notice of the application as it deems proper under the circumstances.

(c) If 1 or more directors has been convicted of a felony in connection with the duties of such director or directors to the corporation, or if there has been a prior judgment on the merits by a court of competent jurisdiction that 1 or more directors has committed a breach of the duty of loyalty in connection with the duties of such director or directors to that corporation, then, upon application by the corporation, or derivatively in the right of the corporation by any stockholder, in a subsequent action brought for such purpose, the Court of Chancery may remove from office such director or directors if the Court determines that the director or directors did not act in good faith in performing the acts resulting in the prior conviction or judgment and judicial removal is necessary to avoid irreparable harm to the corporation. In connection with such removal, the Court may make such orders as are necessary to effect such removal. In any such application, service of copies of the application upon the registered agent of the corporation shall be deemed to be service upon the corporation and upon the director or directors whose removal is sought; and the registered agent shall forward immediately a copy of the application to the corporation and to such director or directors, in a postpaid, sealed, registered letter addressed to such corporation and such director or directors at their post office addresses last known to the registered agent or furnished to the registered agent by the applicant. The Court may make such order respecting further or other notice of such application as it deems proper under the circumstances. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Disputes as to result of election. — Elections held at two special directors' meetings to replace opposing faction were both void, since as to first meeting, organizers failed to give required notice of special meeting to director and as to second meeting another director's absence was secured through misrepresenting date of meeting; thus, board was constituted by those that served prior to special meetings and compromise directors elected to fill vacancies on board after opposing factions enlarged number to provide continuity and regularity in corporation's management. *Schroder v. Scotten, Dillon Co, 299 A.2d 431 (Del. Ch. 1972)*.

Even though funds were available to pay preferred dividend arrearages, common stockholder could not have election of board of directors set aside for their wrongful

refusal to pay such dividends without showing fraud and gross abuse of discretion by board in refusing to order such dividends. *Baron v. Allied Artists Pictures Corp, 337 A.2d 653 (Del. Ch. 1975)*.

.2 Election by preferred shareholders. — Election of majority directors by preferred stockholders at time of regular annual meeting is invalid, even though default in payment of dividends gave them right to elect, when they did not follow special election procedure set forth in charter. *Liese v. Jupiter Corp, 241 A.2d 492 (Del. Ch. 1968)*.

.3 Impeding shareholders' voting rights. — Corporation's board, even though acting in subjective good faith, could not validly act for primary purpose of preventing or impeding unaffiliated majority of shareholders from expanding board and electing new majority. However, citing inability to foresee all future settings in which board might seek to thwart shareholder vote, court refused to adopt per se rule invalidating every board action for such a purpose. *Blasius Industries, Inc v. Atlas Corp, 564 A.2d 651 (Del. Ch. 1988).*

Corporation's announcement of annual meeting in press release, which triggered 10 day window for nominations, was not an inequitable restraint on stockholders' franchise where stockholders could have preserved rights by carefully reading press release, stockholders' intention to nominate was not known and no director intended to limit stockholders' right to nominate and elect slate. *Accipiter Life Sciences Fund, LP v. Helfer, 905 A.2d 115 (Del. Ch. 2006).*

.**4 Scope of proceeding.** — A determination of beneficial ownership of shares cannot be made in a Sec. 225 proceeding, which is a summary proceeding, limited to determining issues pertaining to the validity of actions to elect or remove directors. *Genger v. TR Investors, LLC, No. 592, 2010 (Del. Supr. 2011).*

§226 APPOINTMENT OF CUSTODIAN OR RECEIVER OF CORPORATION ON DEADLOCK OR FOR OTHER CAUSE

(a) The Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of and for any corporation when:

(1) At any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors; or

(2) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division; or

(3) The corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets.

(b) A custodian appointed under this section shall have all the powers and title of a receiver appointed under Sec. 291 of this title, but the authority of the custodian is to continue the business of the corporation and not to liquidate its affairs and distribute its assets, except when the Court shall otherwise order and except in cases arising under paragraph (3) of subsection (a) of this section or paragraph (2) of subsection (a) of Sec. 352 of this title.

(c) In the case of a charitable nonstock corporation, the applicant shall provide a copy of any application referred to in subsection (a) of this section to the Attorney General of the State of Delaware within 1 week of its filing with the Court of Chancery. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Construction. — Statutory provision that court may appoint receiver for a deadlocked corporation is discretionary; the court does not have to appoint a receiver. *Paulman v. Kritzer Radiant Coils, Inc, 143 A.2d 272 (Del. Ch. 1958)*.

.2 When appointment is appropriate. — Custodian was appointed to resolve disputes of corporation's board of directors because shareholders were deadlocked and could not elect successor directors, thus perpetuating control of board by one 50% stockholder because legislature intended to create readily available remedy in shareholder deadlock situations to remedy injustices arising from deadlock that permits control to remain indefinitely in hands of self-perpetuating board of directors. *Giuricich v. Emtrol Corp, 449 A.2d 232 Del. Supr. 1982)*.

Chancery Court has the right to appoint a custodian for a solvent corporation where the parties were deadlocked and there was evidence the business was irreparably harmed by the dysfunction. *Shawe v. Elting*, *157 A.3d 152 (Del. Supr. 2017).*

§227 POWERS OF COURT IN ELECTIONS OF DIRECTORS

(a) The Court of Chancery, in any proceeding instituted under §211, 215 or 225 of this title may determine the right and power of persons claiming to own stock to vote at any meeting of the stockholders.

(b) The Court of Chancery may appoint a Master to hold any election provided for in Sec. 211, 215 or 225 of this title under such orders and powers as it deems proper; and it may punish any officer or director for contempt in case of disobedience of any order made by the Court; and, in case of disobedience by a corporation of any order made by the

Court, may enter a decree against such corporation for a penalty of not more than $5,000. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Jurisdiction. — Where right of stockholder to vote in contested election is illegally denied, Chancellor may disregard stock records and determine true situation. *Italo Petroleum Corp of America v. Producers' Oil Corp of America, 174 A 276 Del. Supr. 1934)*.

Chancellor may appoint master to hold stockholder's meeting to elect new directors without first ordering directors to hold the meeting. *In re Gulla, 114 A 596 (1921); In re Jackson, 81 A 992 (1911)*.

A quorum must be present at meeting called by master to elect directors. *In re Gulla, 115 A 317 (1921)*.

Chancellor will determine stockholder's right to vote in election, even though stockholder is not party to the proceedings, but court will not determine status of stockholder or his right to his shares. *Chappel v. Standard Scale & Supply Corp, 138 A 74, 141 A 191 (1927); Rosenfield v. Standard Electric Equip Corp, 83 A.2d 843 (Ch. Ct. 1951); No Amer Uranium and Oil Corp v. So Texas Oil and Gas Co, 129 A.2d 407 (Ch. Ct. 1957)*.

.2 Jurisdiction of federal court. — Federal court cannot order election of directors of Delaware corporation. *Perrott v. United States Banking Corp, 53 F. Supp. 953 (D. Del. 1944)*.

§228 CONSENT OF STOCKHOLDERS OR MEMBERS IN LIEU OF MEETING

(a) Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of such stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted and shall be delivered to the corporation by delivery to its registered office in this State, its principal place of business, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded.

Delivery made to a corporation's registered office shall be by hand or by certified or registered mail, return receipt requested.

(b) Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at a meeting of the members of a nonstock corporation, or any action which may be taken at any meeting of the members of a nonstock corporation, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members having a right to vote thereon were present and voted and shall be delivered to the corporation by delivery to its registered office in this State, its principal place of business, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of members are recorded. Delivery made to a corporation's registered office shall be by hand or by certified or registered mail, return receipt requested.

(c) No written consent shall be effective to take the corporate action referred to therein unless written consents signed by a sufficient number of holders or members to take action are delivered to the corporation in the manner required by this section within 60 days of the first date on which a written consent is so delivered to the corporation. Any person executing a consent may provide, whether through instruction to an agent or otherwise, that such a consent will be effective at a future time (including a time determined upon the happening of an event), no later than 60 days after such instruction is given or such provision is made, if evidence of such instruction or provision is provided to the corporation. Unless otherwise provided, any such consent shall be revocable prior to its becoming effective.

(d)(1) An electronic transmission consenting to an action to be taken and transmitted by a stockholder, member or proxyholder, or by a person or persons authorized to act for a stockholder, member or proxyholder, shall be deemed to be written and signed for the purposes of this section, provided that any such electronic transmission sets forth or is delivered with information from which the corporation can determine (A) that the telegram, cablegram or other electronic transmission was transmitted by the stockholder, member or proxyholder or by a person or persons authorized to act for the stockholder, member or proxyholder and (B) the date on which such stockholder, member or proxyholder or authorized person or persons transmitted such electron-

ic transmission. A consent given by electronic transmission is delivered to the corporation upon the earliest of: (i) when the consent enters an information processing system, if any, designated by the corporation for receiving consents, so long as the electronic transmission is in a form capable of being processed by that system and the corporation is able to retrieve that electronic transmission; (ii) when a paper reproduction of the consent is delivered to the corporation's principal place of business or an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders or members are recorded; (iii) when a paper reproduction of the consent is delivered to the corporation's registered office in this State by hand or by certified or registered mail, return receipt requested; or (iv) when delivered in such other manner, if any, provided by resolution of the board of directors or governing body of the corporation. Whether the corporation has so designated an information processing system to receive consents is determined by the certificate of incorporation, the bylaws or from the context and surrounding circumstances, including the conduct of the corporation. A consent given by electronic transmission is delivered under this section even if no person is aware of its receipt. Receipt of an electronic acknowledgement from an information processing system establishes that a consent given by electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

(2) Any copy, facsimile or other reliable reproduction of a consent in writing may be substituted or used in lieu of the original writing for any and all purposes for which the original writing could be used, provided that such copy, facsimile or other reproduction shall be a complete reproduction of the entire original writing.

(e) Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders or members who have not consented in writing and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for notice of such meeting had been the date that written consents signed by a sufficient number of holders or members to take the action were delivered to the corporation as provided in this section. In the event that the action which is consented to is such as would have required the filing of a certificate under any other section of this title, if such action had been voted on by stockholders or by members at a meeting thereof, the certificate filed under such other section shall state, in lieu of any statement required

by such section concerning any vote of stockholders or members, that written consent has been given in accordance with this section. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Invalid consent. — The Chancery Court would not dismiss a complaint alleging that consents were invalid where they included a pre-printed date rather than allowing signers to individually date the consent. *H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129 (Del. Ch. 2003).*

Whereas consent provided to a stockholder referenced a charter and certificate of amendment but failed to include either document the consent was not valid. *Carsanaro v. Bloodhound Techs., 65 A.3d 618 (Del. Ch. 2013).*

.2 Bylaws. — Bylaw amendments properly enacted by shareholder consent procedure were valid, although they limited function of board of directors, because amendments were permissible part of consent holder's attempt to avoid disenfranchisement as majority shareholder. *Frantz Mfg Co v. EAC Industries, 501 A.2d 401 (Del. Supr. 1985)*.

.3 Delay of consents, effect. — Corporation's bylaw, which imposed 60-day delay on shareholder action in lieu of meeting from time corporation received shareholder's notice of intent to solicit consents, was unenforceable because (1) consent action may not be lawfully deferred or thwarted on grounds not relating to legal sufficiency of consents obtained and (2) bylaw's intent to provide incumbent management with time to defeat consent action by soliciting its own proxies was unreasonable. *Datapoint Corp v. Plaza Securities Co, 496 A.2d 1031 (Del. Supr. 1985)*.

Court affirmed decision to issue preliminary injunction barring enforcement of bylaw placing 20-day delay on action by majority shareholder consent pending review of consents' validity. Exercise of right to act immediately by majority written consent may be modified or eliminated only by certificate of incorporation. Provisions for minimal, essential, ministerial review of action taken by consent may be contained in bylaws. Such provisions, however, must contain reasonable time periods and not be unduly elaborate. Bylaws that effectively abrogate exercise of shareholders' consent rights are invalid. *Allen v. Prime Computer, Inc, 540 A.2d 417 (Del. Supr. 1988)*.

.4 Record date. — Court refused to enjoin corporation's directors from setting on October, 10, 1985 a stock record date of November 18, 1985 for shareholder's October 7, 1985 notice of solicitation of shareholder consents to remove and replace directors, because (1) Shareholder's notice in its October 7 demand letter that consents would be solicited did not establish October 7 as day on which first written consent was expressed when demand letter disclosed only in part full extent of action to be undertaken by shareholder consent so directors were not precluded from fixing different record date from date stated in demand letter. (2) Directors' designation of November 18 as record date did not violate GCL Sec. 228 because directors, in exercising business judgment, may set record date that would delay

shareholder action by written consent. *Empire of Carolina, Inc v. The Deltona Corp, 514 A.2d 1091 (Del. Supr. 1986)*.

.5 Receivers, right to execute consent. — Receivers holding majority of class of corporation's stock could execute consent to remove and replace four directors. Corporation could not assert voting agreement as defense to consent when neither corporation nor its board was signatory to agreement nor third party beneficiary of agreement. Receiver could vote stock in opposition to position of some beneficial owners. *Insituform of North America, Inc v. Chandler, 534 A.2d 257 (Del. Ch. 1987)*.

.6 Impeding shareholders' voting rights. — Corporation's board, even though acting in subjective good faith, could not validly act for primary purpose of preventing or impeding unaffiliated majority of shareholders from expanding board and electing new majority. However, citing inability to foresee all future settings in which board might seek to thwart shareholder vote, court refused to adopt per se rule invalidating every board action for such a purpose. *Blasius Industries, Inc v. Atlas Corp, 564 A.2d 651 (Del. Ch. 1988)*.

§229 WAIVER OF NOTICE

Whenever notice is required to be given under any provision of this chapter or the certificate of incorporation or bylaws, a written waiver, signed by the person entitled to notice, or a waiver by electronic transmission by the person entitled to notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders, directors, or members of a committee of directors need be specified in any written waiver of notice or any waiver by electronic transmission unless so required by the certificate of incorporation or the bylaws. (Last amended by Ch. 343, L. '00, eff. 7-1-00.)

Decisions

.1 Application. — Director, who had bylaw declared invalid because he did not receive notice of directors' meeting at which it was adopted, could not thereafter, to suit his current purpose, restore bylaw's effectiveness by waiving notice of that meeting. *In re Seminole Oil & Gas Corp, 155 A.2d 887 (Del. Ch. 1959)*.

Appointments of new directors was void as not having been made at special directors' meeting, since attendance at directors' meeting constitutes waiver of notice. *Grossman v. Liberty Leasing Co, 295 A.2d 749 (Del. Ch. 1972)*.

§230 EXCEPTION TO REQUIREMENTS OF NOTICE

(a) Whenever notice is required to be given, under this chapter or of the certificate of incorporation or bylaws of any corporation, to any person with whom communication is unlawful, the giving of such notice to such person shall not be required and there shall be no duty to apply to any governmental authority or agency for a license or permit to give such notice to such person. Any action or meeting which shall be taken or held without notice to any such person with whom communication is unlawful shall have the same force and effect as if such notice had been duly given. In the event that the action taken by the corporation is such as to require the filing of a certificate under any of the other sections of this title, the certificate shall state, if such is the fact and if notice is required, that notice was given to all persons entitled to receive notice except such persons with whom communication is unlawful.

(b) Whenever notice is required to be given, under any provision of this title or the certificate of incorporation or bylaws of any corporation, to any stockholder or, if the corporation is a nonstock corporation, to any member, to whom (1) notice of 2 consecutive annual meetings, and all notices of meetings or of the taking of action by written consent without a meeting to such person during the period between such 2 consecutive annual meetings, or (2) all, and at least 2, payments (if sent by first-class mail) of dividends or interest on securities during a 12-month period, have been mailed addressed to such person at such person's address as shown on the records of the corporation and have been returned undeliverable, the giving of such notice to such person shall not be required. Any action or meeting which shall be taken or held without notice to such person shall have the same force and effect as if such notice had been duly given. If any such person shall deliver to the corporation a written notice setting forth such person's then current address, the requirement that notice be given to such person shall be reinstated. In the event that the action taken by the corporation is such as to require the filing of a certificate under any of the other sections of this Title, the certificate need not state that notice was not given to persons to whom notice was not required to be given pursuant to this subsection.

(c) The exception in Section 230(b)(1) to the requirement that notice be given shall not be applicable to any notice returned as undeliverable if the notice was given by electronic transmission. The exception in paragraph (b)(1) of this section to the requirement that notice be given shall not be applicable to any stockholder or member whose electronic mail address appears on the records of the corporation and to whom notice by electronic transmission is not prohibited by Section 232 of this title. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

§231 VOTING PROCEDURES AND INSPECTORS OF ELECTIONS

(a) The corporation shall, in advance of any meeting of stockholders, appoint 1 or more inspectors to act at the meeting and make a written report thereof. The corporation may designate 1 or more persons as alternate inspectors to replace any inspector who fails to act. If no inspector or alternate is able to act at a meeting of stockholders, the person presiding at the meeting shall appoint 1 or more inspectors to act at the meeting. Each inspector, before entering upon the discharge of the duties of inspector, shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of such inspector's ability.

(b) The inspectors shall:

(1) ascertain the number of shares outstanding and the voting power of each;

(2) determine the shares represented at a meeting and the validity of proxies and ballots;

(3) count all votes and ballots;

(4) determine and retain for a reasonable period a record of the disposition of any challenges made to any determination by the inspectors; and

(5) certify their determination of the number of shares represented at the meeting, and their count of all votes and ballots.

The inspectors may appoint or retain other persons or entities to assist the inspectors in the performance of the duties of the inspectors.

(c) The date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting shall be announced at the meeting. No ballot, proxies or votes, nor any revocations thereof or changes thereto, shall be accepted by the inspectors after the closing of the polls unless the Court of Chancery upon application by a stockholder shall determine otherwise.

(d) In determining the validity and counting of proxies and ballots, the inspectors shall be limited to an examination of the proxies, any envelopes submitted with those proxies, any information provided in accordance with Section 211(e) or Section 212(c)(2) of this title, or any information provided pursuant to Section 211(a)(2)(B)(i) or (iii), ballots and the regular books and records of the corporation, except that the inspectors may consider other reliable information for the limited purpose of reconciling proxies and ballots submitted by or on behalf of banks, brokers, their nominees or similar persons which represent more votes than the holder of a proxy is authorized by the record owner to cast or more votes than the stockholder holds of record. If the inspectors consider other reliable information for the limited purpose permitted herein, the inspectors at the time they make their certification pursuant to subsection (b)(5) of this section shall specify the precise information considered by them including the person or persons from whom they obtained the information, when the information was obtained, the means by which the information was obtained and the basis for the inspectors' belief that such information is accurate and reliable.

(e) Unless otherwise provided in the certificate of incorporation or bylaws, this section shall not apply to a corporation that does not have a class of voting stock that is:

(1) listed on a national securities exchange;

(2) authorized for quotation on an interdealer quotation system of a registered national securities association; or

(3) held of record by more than 2,000 stockholders. (Last amended by Ch. 343, L. '00, eff. 7-1-00.)

Decisions

.1 Application. — In a case arising from a control fight, a property settlement agreement between a divorced couple which gave ownership of a block of stock to the wife, but granted the husband voting rights for two years, constituted a valid proxy. The court held that, even if the parties had not originally intended the agreement to be a proxy, it met the requirements of Delaware law for such use, in that it appointed someone to vote the shares and was signed. *Lobato v. Health Concepts IV, Inc, 606 A.2d 1343 (Del. Ch. 1991)*.

.2 Conflicting proxies. — Where conflicting proxies were dated on the same date but where one proxy was postmarked after the other, the inspector erred in not counting the shares as having voted for either nominee. The shares should have been voted for the nominees named in the later postmarked proxy. *Concord Financial Group, Inc. v. Tri-Sate Motor Transit Co., 567 A.2d 1 (Del. Ch. 1989).*

Where two proxies submitted on behalf of the same owner voted for different directors, the inspector correctly concluded that the later proxy revoked the earlier. *Parshalle v. Roy, 567 A.2d 19 Del.Ch. 1989).*

§232 DELIVERY OF NOTICE; NOTICE BY ELECTRONIC TRANSMISSION

(a) Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the corporation under any provision of this chapter, the certificate of incorporation, or the bylaws may be given in writing directed to the stockholder's mailing address (or by electronic transmission directed to the stockholder's electronic mail address, as applicable) as it appears on the records of the corporation and shall be given:

(1) if mailed, when the notice is deposited in the U.S. mail, postage prepaid;

(2) if delivered by courier service, the earlier of when the notice is received or left at such stockholder's address; or

(3) if given by electronic mail, when directed to such stockholder's electronic mail address unless the stockholder has notified the corporation in writing or by electronic transmission of an objection to receiving notice by electronic mail or such notice is prohibited by subsection (e) of this section. A notice by electronic mail must include a prominent legend that the communication is an important notice regarding the corporation.

(b) Without limiting the manner by which notice otherwise may be given effectively to stockholders, but subject to subsection (e) of this section, any notice to stockholders given by the corporation under any provision of this chapter, the certificate of incorporation, or the bylaws shall be effective if given by a form of electronic transmission consented to by the stockholder to whom the notice is given. Any such consent shall be revocable by the stockholder by written notice or electronic transmission to the corporation.

(c) Notice given pursuant to subsection (b) of this section shall be deemed given:

(1) If by facsimile telecommunication, when directed to a number at which the stockholder has consented to receive notice;

(2) If by a posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of:

a. Such posting; and b. The giving of such separate notice; and

(3) If by any other form of electronic transmission, when directed to the stockholder.

(d) For purposes of this chapter:

(1) "Electronic transmission" means any form of communication, not directly involving the physical transmission of paper, including the use of, or participation in, 1 or more electronic networks or databases (including 1 or more distributed electronic networks or databases), that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process;

(2) "Electronic mail" means an electronic transmission directed to a unique electronic mail address (which electronic mail shall be deemed to include any files attached thereto and any information hyperlinked to a website if such electronic mail includes the contact information of an officer or agent of the corporation who is available to assist with accessing such files and information); and

(3) "Electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part" of the address) and a reference to an internet domain (commonly referred to as the "domain part" of the address), whether or not displayed, to which electronic mail can be sent or delivered.

(e) Notwithstanding the foregoing, a notice may not be given by an electronic transmission from and after the time that:

(1) the corporation is unable to deliver by such electronic transmission 2 consecutive notices given by the corporation; and

(2) such inability becomes known to the secretary or an assistant secretary of the corporation or to the transfer agent, or other person responsible for the giving of notice, provided, however, the inadvertent failure to discover such inability shall not invalidate any meeting or other action.

(f) An affidavit of the secretary or an assistant secretary or of the transfer agent or other agent of the corporation that notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein.

(g) No provision of this section, except for subsections (a)(1), (d)(2) and (d)(3) of this section, shall apply to §164, §296, §311, §312, or §324 of this title. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

§233 NOTICE TO STOCKHOLDERS SHARING AN ADDRESS

(a) Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the corporation under any provision of this chapter, the certificate of incorporation or the bylaws shall be effective if given by a single written notice to stockholders who share an address if consented to by the stockholders at that address to whom such notice is given. Any such consent shall be revocable by the stockholder by written notice to the corporation.

(b) Any stockholder who fails to object in writing to the corporation, within 60 days of having been given written notice by the corporation of its intention to send the single notice permitted under subsection (a) of this section, shall be deemed to have consented to receiving such single written notice.

(c) [Repealed.]

(d) This section shall not apply to Sections 164, 296, 311, 312 or 324 of this chapter. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Subchapter VIII
AMENDMENT OF CERTIFICATE OF INCORPORATION; CHANGES IN CAPITAL AND CAPITAL STOCK

§241 AMENDMENT OF CERTIFICATE OF INCORPORATION BEFORE RECEIPT OF PAYMENT FOR STOCK

(a) Before a corporation has received any payment for any of its stock, it may amend its certificate of incorporation at any time or times, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of filing the amendment.

(b) The amendment of a certificate of incorporation authorized by this section shall be adopted by a majority of the incorporators, if directors were not named in the original certificate of incorporation or have not yet been elected, or, if directors were named in the original certificate of incorporation or have been elected and have qualified, by

a majority of the directors. A certificate setting forth the amendment and certifying that the corporation has not received any payment for any of its stock, or that the corporation has no members, as applicable, and that the amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed in accordance with §103 of this title. Upon such filing, the corporation's certificate of incorporation shall be deemed to be amended accordingly as of the date on which the original certificate of incorporation became effective, except as to those persons who are substantially and adversely affected by the amendment and as to those persons the amendment shall be effective from the filing date.

(c) This section will apply to a nonstock corporation before such a corporation has any members; provided, however, that all references to directors shall be deemed to be references to members of the governing body of the corporation. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

§242 AMENDMENT OF CERTIFICATE OF INCORPORATION AFTER RECEIPT OF PAYMENT FOR STOCK; NONSTOCK CORPORATIONS

(a) After a corporation has received payment for any of its capital stock, it may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of the filing of the amendment; and, if a change in stock or the rights of stockholders, or an exchange, reclassification, subdivision, combination or cancellation of stock or rights of stockholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification, subdivision, combination or cancellation. In particular, and without limitation upon such general power of amendment, a corporation may amend its certificate of incorporation, from time to time, so as:

(1) To change its corporate name; or

(2) To change, substitute, enlarge or diminish the nature of its business or its corporate powers and purposes; or

(3) To increase or decrease its authorized capital stock or to reclassify the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the

shares, or the qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value, or shares without par value into shares with par value either with or without increasing or decreasing the number of shares, or by subdividing or combining the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares; or

(4) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared; or

(5) To create new classes of stock having rights and preferences either prior and superior or subordinate and inferior to the stock of any class then authorized, whether issued or unissued; or

(6) To change the period of its duration; or

(7) To delete:

a. Such provisions of the original certificate of incorporation which named the incorporator or incorporators, the initial board of directors and the original subscribers for shares; and

b. Such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective.

Any or all such changes or alterations may be effected by 1 certificate or amendment.

(b) Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner:

(1) If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders; provided, however, that unless otherwise expressly required by the certificate of incorporation, no meeting or vote of stockholders shall be required to adopt an amendment that effects only changes described in paragraph (a)(1) or (7) of this section. Such special or annual meeting shall be called and held upon notice in accordance with §222 of this title. The notice shall set forth such amendment in full or a brief summary of the changes to be effected thereby unless such notice constitutes a notice of internet availability of proxy materials under the rules promulgated under the

Securities Exchange Act of 1934 [15 U.S.C. §78a et seq.]. At the meeting a vote of the stockholders entitled to vote thereon shall be taken for and against any proposed amendment that requires adoption by stockholders. If no vote of stockholders is required to effect such amendment, or if a majority of the outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class has been voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed and shall become effective in accordance with §103 of this title.

(2) The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for the purposes of this paragraph. The number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of this subsection, if so provided in the original certificate of incorporation, in any amendment thereto which created such class or classes of stock or which was adopted prior to the issuance of any shares of such class or classes of stock, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock.

(3) If the corporation is a nonstock corporation, then the governing body thereof shall adopt a resolution setting forth the amendment proposed and declaring its advisability. If a majority of all the members of the governing body shall vote in favor of such amendment, a certificate thereof shall be executed, acknowledged and filed and shall become effective in accordance with §103 of this title. The certificate of incorporation of any nonstock corporation may contain a provision requiring

any amendment thereto to be approved by a specified number or percentage of the members or of any specified class of members of such corporation in which event such proposed amendment shall be submitted to the members or to any specified class of members of such corporation in the same manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation; and in the event of the adoption thereof by such members, a certificate evidencing such amendment shall be executed, acknowledged and filed and shall become effective in accordance with §103 of this title.

(4) Whenever the certificate of incorporation shall require for action by the board of directors of a corporation other than a nonstock corporation or by the governing body of a nonstock corporation, by the holders of any class or series of shares or by the members, or by the holders of any other securities having voting power the vote of a greater number or proportion than is required by any section of this title, the provision of the certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote.

(c) The resolution authorizing a proposed amendment to the certificate of incorporation may provide that at any time prior to the effectiveness of the filing of the amendment with the Secretary of State, notwithstanding authorization of the proposed amendment by the stockholders of the corporation or by the members of a nonstock corporation, the board of directors or governing body may abandon such proposed amendment without further action by the stockholders or members. (Last amended by Ch. 327, L. '14, eff. 8-1-14.)

Decisions

.1 Right to amend. — Right of controlling stockholders to amend in matters covered by this section must be exercised with fair and impartial regard for rights and interests of all stockholders of every class; any other action would be fiduciary relation of majority stockholders toward minority and would constitute fraud. *Hartford Acc & Ind Co v. Dickey Clay Mfg Co, 21 A.2d 178 (Del. Ch. 1941).*

.2 Amendment affecting preferred stock. — When charter requires vote of holders of 75% of preferred shares to change voting rights of that stock, charter cannot be amended by mere majority vote to reduce percentage requirement from 75% to 60%. *Sellers v. Joseph Bancroft & Sons Co, 2 A.2d 108 (1938)*.

To the same effect, see also, *Sellers v. Joseph Bancroft & Sons Co, 17 A.2d 831 (Del. Ch. 1941).*

Stockholder who acquiesces in change of capital stock structure, which results in change of his preferred shares into shares of different character and in extinguishment of dividends accumulated on his old shares cannot compel corporation to pay him dividends on his old shares. *Trounstine v. Remington Rand, Inc, 194 A 95 (Del. Ch. 1937)*.

Charter amendment which creates class of prior preference stock ahead of existing preference stock, but does not affect priority of preference stock over common stock, is valid, even though it may reduce probability of actual payment to preferred stockholders of their accrued but unpaid dividends. *Shanik v. White Sewing Mach Corp, 19 A.2d 831 (1941)*.

When charter provided for preferred stock, for Class A stock, and for common stock, and gave voting rights to preferred stock and common stock, in voting on charter amendment affecting Class A stock, votes of preferred and common shares were properly voted as one class, and counting of majority of these two classes together was proper, even though majority of common stock alone did not approve amendment. *Hartford Accident & Indem Co v. WS Dickey Mfg Co, 21 A.2d 178 (Del. Ch.)*, *aff'd, 24 A.2d 315 (1942)*.

.3 Amendment causing no injury to minority stockholder. — Court will not enjoin corporation from putting charter amendment into effect when minority shareholder showed no immediate and irreparable injury though deciding votes were cast by (1) corporate proxy executed by vice president without accompanying certified copy of directors' resolution showing his authority to sign proxy, and (2) later dated proxies, even if they conflict with earlier ones and there was no proof of later postmark dates; these proxies are prima facie authentic. *Levin v. Metro-Goldwyn-Mayer, Inc, 221 A.2d 499 (Del. Ch. 1966)*.

Having satisfied the requirements of GCL Sec. 242(b)(1) and 222(a) in its notice, and, since it was not soliciting proxies in connection with the meeting, a board was not required (as the plaintiffs had alleged) to include additional statements explaining the differences between proposed amendments to the charter and bylaws to be voted on at the meeting and earlier proposed amendments that had been withdrawn without being put to a vote. *Stroud v. Grace, 606 A.2d 75 (1992)*.

.4 Amendment required. — Cancellation of shares and issuance of new shares implementing an invalid agreement constituted a change in capitalization and required an amendment. *Reddy v. MBKS Co, Ltd., 945 A.2d 1080 (Del. Supr. 2008)*.

.5 Cumulative voting. — Right of common stockholder to cumulative voting is one which may be altered by amendment. *Maddock v. Vorclone Corp, 147 A 255 (Del. Ch. 1931)*.

.6 Ineffectual amendment. — Corporation cannot, by amendment of its charter, validate original issue of non-par stock which was void because of omission in charter. *Rice & Hutchins, Inc v. Triplex Shoe Co, 152 A 342 (1930)*.

A charter amendment was invalid where the shareholder consents in favor of the amendment were delivered before the shareholder consents in which the shareholders who proposed the amendment voted themselves in as directors. *AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1188 (Del. Ch. 1999).*

An amendment was invalid where the board resolution indicated that conversion prices for stock were to be adjusted but where the certificate of amendment did not

adjust the conversion prices. *Carsanaro v. Bloodhound Techs., Inc. 65 A.3d 618* (*Del. Ch. 2013).*

.7 Justiciability. — Court refused to hear appeal in dispute as to whether proposed notice of shareholders' meeting called to consider charter and bylaw amendments met requirements of candor imposed by GCL Sec. 222 and GCL Sec. 242. Parties were seeking final judicial determination of management's statutory notice technique before putting process into effect. This would inappropriately draw courts into granting advisory opinion regarding significant question of corporation law that was not ripe for judicial intervention. *Stroud v. Milliken Enterprises, Inc, 552 A.2d 476 (1989)*.

§243 RETIREMENT OF STOCK

(a) A corporation, by resolution of its board of directors, may retire any shares of its capital stock that are issued but are not outstanding.

(b) Whenever any shares of the capital stock of a corporation are retired, they shall resume the status of authorized and unissued shares of the class or series to which they belong unless the certificate of incorporation otherwise provides. If the certificate of incorporation prohibits the reissuance of such shares, or prohibits the reissuance of such shares as a part of a specific series only, a certificate stating that reissuance of the shares (as part of the class or series) is prohibited identifying the shares and reciting their retirement shall be executed, acknowledged and filed and shall become effective in accordance with Sec. 103 of this Title. When such certificate becomes effective, it shall have the effect of amending the certificate of incorporation so as to reduce accordingly the number of authorized shares of the class or series to which such shares belong or, if such retired shares constitute all of the authorized shares of the class or series to which they belong, of eliminating from the certificate of incorporation all reference to such class or series of stock.

(c) If the capital of the corporation shall be reduced by or in connection with the retirement of shares, the reduction of capital shall be effected pursuant to Sec. 244 of this title. (Last amended by Ch. 136, L. '87, eff. 7-1-87.)

§244 REDUCTION OF CAPITAL

(a) A corporation, by resolution of its board of directors, may reduce its capital in any of the following ways:

(1) By reducing or eliminating the capital represented by shares of capital stock which have been retired;

(2) By applying to an otherwise authorized purchase or redemption of outstanding shares of its capital stock some or all of the capital represented by the shares being purchased or redeemed, or any capital that has not been allocated to any particular class of its capital stock;

(3) By applying to an otherwise authorized conversion or exchange of outstanding shares of its capital stock some or all of the capital represented by the shares being converted or exchanged, or some or all of any capital that has not been allocated to any particular class of its capital stock, or both, to the extent that such capital in the aggregate exceeds the total aggregate par value or the stated capital of any previously unissued shares issuable upon such conversion or exchange; or,

(4) By transferring to surplus (i) some or all of the capital not represented by any particular class of its capital stock; (ii) some or all of the capital represented by issued shares of its par value capital stock, which capital is in excess of the aggregate par value of such shares; or (iii) some of the capital represented by issued shares of its capital stock without par value.

(b) Notwithstanding the other provisions of this section, no reduction of capital shall be made or effected unless the assets of the corporation remaining after such reduction shall be sufficient to pay any debts of the corporation for which payment has not been otherwise provided. No reduction of capital shall release any liability of any stockholder whose shares have not been fully paid. (Last amended by Ch. 112, L. '83, eff. 7-1-83.)

§245 RESTATED CERTIFICATE OF INCORPORATION

(a) A corporation may, whenever desired, integrate into a single instrument all of the provisions of its certificate of incorporation which are then in effect and operative as a result of there having theretofore been filed with the Secretary of State 1 or more certificates or other instruments pursuant to any of the sections referred to in Sec. 104 of this title, and it may at the same time also further amend its certificate of incorporation by adopting a restated certificate of incorporation.

(b) If the restated certificate of incorporation merely restates and integrates but does not further amend the certificate of incorporation, as theretofore amended or supplemented by any instrument that was

filed pursuant to any of the sections mentioned in §104 of this title, it may be adopted by the board of directors without a vote of the stockholders, or it may be proposed by the directors and submitted by them to the stockholders for adoption, in which case the procedure and vote required, if any, by §242 of this title for amendment of the certificate of incorporation shall be applicable. If the restated certificate of incorporation restates and integrates and also further amends in any respect the certificate of incorporation, as theretofore amended or supplemented, it shall be proposed by the directors and adopted by the stockholders in the manner and by the vote prescribed by §242 of this title or, if the corporation has not received any payment for any of its stock, in the manner and by the vote prescribed by §241 of this title.

(c) A restated certificate of incorporation shall be specifically designated as such in its heading. It shall state, either in its heading or in an introductory paragraph, the corporation's present name, and, if it has been changed, the name under which it was originally incorporated, and the date of filing of its original certificate of incorporation with the Secretary of State. A restated certificate shall also state that it was duly adopted in accordance with this section. If it was adopted by the board of directors without a vote of the stockholders (unless it was adopted pursuant to §241 of this title or without a vote of members pursuant to 242(b)(3) of this title), it shall state that it only restates and integrates and does not further amend (except, if applicable, as permitted under §242(a)(1) and §242(b)(1) of this title) the provisions of the corporation's certificate of incorporation as theretofore amended or supplemented, and that there is no discrepancy between those provisions and the provisions of the restated certificate. A restated certificate of incorporation may omit (a) such provisions of the original certificate of incorporation which named the incorporator or incorporators, the initial board of directors and the original subscribers for shares, and (b) such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective. Any such omissions shall not be deemed a further amendment.

(d) A restated certificate of incorporation shall be executed, acknowledged and filed in accordance with Sec. 103 of this title. Upon its filing with the Secretary of State, the original certificate of incorporation, as theretofore amended or supplemented, shall be superseded; thenceforth, the restated certificate of incorporation, including any further

amendments or changes made thereby, shall be the certificate of incorporation of the corporation, but the original date of incorporation shall remain unchanged.

(e) Any amendment or change effected in connection with the restatement and integration of the certificate of incorporation shall be subject to any other provision of this chapter, not inconsistent with this section, which would apply if a separate certificate of amendment were filed to effect such amendment or change. (Last amended by Ch. 40, L. '15, eff. 8-1-15.)

Subchapter IX
MERGER, CONSOLIDATION OR CONVERSION

§251 MERGER OR CONSOLIDATION OF DOMESTIC CORPORATIONS

(a) Any 2 or more corporations of this State may merge into a single surviving corporation, which may be any 1 of the constituent corporations or may consolidate into a new resulting corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) in the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation; (4) in the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement; (5) the manner, if any, of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or

consolidation or of cancelling some or all of such shares, and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation, or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and (6) such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with Sec. 155 of this title.

The agreement so adopted shall be executed by an authorized person, provided that if the agreement is filed, it shall be executed and acknowledged in accordance with Sec. 103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be given to each holder of stock, whether voting or nonvoting, of the corporation at the stockholder's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof. At the meeting, the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. If the agreement

shall be so adopted and certified by each constituent corporation, it shall then be filed and shall become effective, in accordance with §103 of this title. In lieu of filing the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with §103 of this title, which states:

(1) The name and state of incorporation of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, executed and acknowledged by each of the constituent corporations in accordance with this section;

(3) The name of the surviving or resulting corporation;

(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving or resulting corporation, stating the address thereof; and

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with Sec. 103 of this title, the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations; in the event the agreement of merger or consolidation is terminated after the filing of the agreement (or a certificate in lieu thereof) with the Secretary of State but before the agreement (or a certificate in lieu thereof) has become effective, a certificate of termination or merger or consolidation shall be filed in accordance with Sec. 103 of this title. Any agreement of merger or consolidation

may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with Sec. 103 of this title, provided that an amendment made subsequent to the adoption of the agreement by the stockholders of any constituent corporation shall not (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such constituent corporation, (2) alter or change any term of the certificate of incorporation of the surviving corporation to be effected by the merger or consolidation, or (3) alter or change any of the terms and conditions of the agreement if such alteration or change would adversely affect the holders of any class or series thereof of such constituent corporation; in the event the agreement of merger or consolidation is amended after the filing thereof with the Secretary of State but before the agreement has become effective, a certificate of amendment of merger or consolidation shall be filed in accordance with Sec. 103 of this title.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20% of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger. No vote of stockholders of a constitu-

ent corporation shall be necessary to authorize a merger or consolidation if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and, (1) if it has been adopted pursuant to the first sentence of this subsection, that the conditions specified in that sentence have been satisfied, or (2) if it has been adopted pursuant to the second sentence of this subsection, that no shares of stock of such corporation were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with §103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(g) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation shall be necessary to authorize a merger with or into a single direct or indirect wholly-owned subsidiary of such constituent corporation if: (1) such constituent corporation and the direct or indirect wholly-owned subsidiary of such constituent corporation are the only constituent entities to the merger; (2) each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger is converted in the merger into a share or equal fraction of share of capital stock of a holding company having the same designations, rights, powers and preferences, and the qualifications, limitations and restrictions thereof, as the share of stock of the constituent corporation being converted in the merger; (3) the holding company and the constituent corporation are corporations of this State and the direct or indirect wholly-owned subsidiary that is the other constituent entity to the merger is a corporation or limited liability company of this State; (4) the certificate of incorporation and bylaws of the holding company immediately following the effective time of the merger contain provisions

identical to the certificate of incorporation and bylaws of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate name, the registered office and agent, the initial board of directors and the initial subscribers for shares and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective); (5) as a result of the merger the constituent corporation or its successor becomes or remains a direct or indirect wholly-owned subsidiary of the holding company; (6) the directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger; (7) the organizational documents of the surviving entity immediately following the effective time of the merger contain provisions identical to the certificate of incorporation of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate or entity name, the registered office and agent, the initial board of directors and the initial subscribers for shares, references to members rather than stockholders or shareholders, references to interests, units or the like rather than stock or shares, references to managers, managing members or other members of the governing body rather than directors and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective); provided, however, that (i) if the organizational documents of the surviving entity do not contain the following provisions, they shall be amended in the merger to contain provisions requiring that (A) any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, that requires for its adoption under this chapter or its organizational documents the approval of the stockholders or members of the surviving entity shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; provided, however, that for purposes

of this clause (i)(A), any surviving entity that is not a corporation shall include in such amendment a requirement that the approval of the stockholders of the holding company be obtained for any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, which would require the approval of the stockholders of the surviving entity if the surviving entity were a corporation subject to this chapter, (B) any amendment of the organizational documents of a surviving entity that is not a corporation, which amendment would, if adopted by a corporation subject to this chapter, be required to be included in the certificate of incorporation of such corporation, shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity, and (C) the business and affairs of a surviving entity that is not a corporation shall be managed by or under the direction of a board of directors, board of managers or other governing body consisting of individuals who are subject to the same fiduciary duties applicable to, and who are liable for breach of such duties to the same extent as, directors of a corporation subject to this chapter, and (ii) the organizational documents of the surviving entity may be amended in the merger (A) to reduce the number of classes and shares of capital stock or other equity interests or units that the surviving entity is authorized to issue and (B) to eliminate any provision authorized by subsection (d) of §141 of this title; and (8)the stockholders of the constituent corporation do not recognize gain or loss for United States federal income tax purposes as determined by the board of directors of the constituent corporation. Neither subsection (g)(7)(i) of this section nor any provision of a surviving entity's organizational documents required by subsection (g)(7)(i) shall be deemed or construed to require approval of the stockholders of the holding company to elect or remove directors or managers, managing members or other members of the governing body of the surviving entity. The term 'organizational documents', as used in subsection (g)(7) and in the preceding sentence, shall, when used in reference to a corporation, mean the certificate of incorporation of such corporation and, when used in reference to a limited liability company, mean the limited liability company agreement of such limited liability company.

As used in this subsection only, the term "holding company" means a corporation which, from its incorporation until consummation of a mer-

ger governed by this subsection, was at all times a direct or indirect wholly-owned subsidiary of the constituent corporation and whose capital stock is issued in such merger. From and after the effective time of a merger adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection: (i) to the extent the restrictions of Sec. 203 of this title applied to the constituent corporation and its stockholders at the effective time of the merger, such restrictions shall apply to the holding company and its stockholders immediately after the effective time of the merger as though it were the constituent corporation, and all shares of stock of the holding company acquired in the merger shall for purposes of Sec. 203 of this title be deemed to have been acquired at the time that the shares of stock of the constituent corporation converted in the merger were acquired, and provided further that any stockholder who immediately prior to the effective time of the merger was not an interested stockholder within the meaning of Sec. 203 of this title shall not solely by reason of the merger become an interested stockholder of the holding company, (ii) if the corporate name of the holding company immediately following the effective time of the merger is the same as the corporate name of the constituent corporation immediately prior to the effective time of the merger, the shares of capital stock of the holding company into which the shares of capital stock of the constituent corporation are converted in the merger shall be represented by the stock certificates that previously represented shares of capital stock of the constituent corporation and (iii) to the extent a stockholder of the constituent corporation immediately prior to the merger had standing to institute or maintain derivative litigation on behalf of the constituent corporation, nothing in this section shall be deemed to limit or extinguish such standing. If an agreement of merger is adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection, the secretary or assistant secretary of the constituent corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in the first sentence of this subsection have been satisfied, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and become effective, in accordance with Sec. 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that

the facts stated in the certificate remain true immediately prior to such filing.

(h) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation that has a class or series of stock that is listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger by such constituent corporation shall be necessary to authorize a merger if:

(1) The agreement of merger expressly:

a. Permits or requires such merger to be effected under this subsection; and

b. Provides that such merger shall be effected as soon as practicable following the consummation of the offer referred to in paragraph (h)(2) of this section if such merger is effected under this subsection;

(2) A corporation consummates an offer for all of the outstanding stock of such constituent corporation on the terms provided in such agreement of merger that, absent this subsection, would be entitled to vote on the adoption or rejection of the agreement of merger; provided, however, that such offer may be conditioned on the tender of a minimum number or percentage of shares of the stock of such constituent corporation, or of any class or series thereof, and such offer may exclude any excluded stock and provided further that the corporation may consummate separate offers for separate classes or series of the stock of such constituent corporation;

a.-d. [Repealed.]

(3) Immediately following the consummation of the offer referred to in paragraph (h)(2) of this section, the stock irrevocably accepted for purchase or exchange pursuant to such offer and received by the depository prior to expiration of such offer, together with the stock otherwise owned by the consummating corporation or its affiliates and any rollover stock, equals at least such percentage of the shares of stock of such constituent corporation, and of each class or series thereof, that, absent this subsection, would be required to adopt the agreement of merger by this chapter and by the certificate of incorporation of such constituent corporation;

(4) The corporation consummating the offer referred to in paragraph (h)(2) of this section merges with or into such constituent corporation pursuant to such agreement; and

(5) Each outstanding share (other than shares of excluded stock) of each class or series of stock of such constituent corporation that is the

subject of and is not irrevocably accepted for purchase or exchange in the offer referred to in paragraph (h)(2) of this section is to be converted in such merger into, or into the right to receive, the same amount and kind of cash, property, rights or securities to be paid for shares of such class or series of stock of such constituent corporation irrevocably accepted for purchase or exchange in such offer.

(6) As used in this section only, the term:

a. "Affiliate" means, in respect of the corporation making the offer referred to in paragraph (h)(2) of this section, any person that (i) owns, directly or indirectly, all of the outstanding stock of such corporation or (ii) is a direct or indirect wholly-owned subsidiary of such corporation or of any person referred to in clause (i) of this definition;

b. "Consummates" (and with correlative meaning, "consummation" and "consummating") means irrevocably accepts for purchase or exchange stock tendered pursuant to an offer;

c. "Depository" means an agent, including a depository, appointed to facilitate consummation of the offer referred to in paragraph (h)(2) of this section;

d. "Excluded stock" means (i) stock of such constituent corporation that is owned at the commencement of the offer referred to in paragraph (h)(2) of this section by such constituent corporation, the corporation making the offer referred to in paragraph (h)(2) of this section, any person that owns, directly or indirectly, all of the outstanding stock of the corporation making such offer, or any direct or indirect wholly-owned subsidiary of any of the foregoing and (ii) rollover stock;

e. "Person" means any individual, corporation, partnership, limited liability company, unincorporated association or other entity;

f. "Received" (solely for purposes of paragraph (h)(3) of this section) means (a) with respect to certificated shares, physical receipt of a stock certificate accompanied by an executed letter of transmittal, (b) with respect to uncertificated shares held of record by a clearing corporation as nominee, transfer into the depository's account by means of an agent's message, and (c) with respect to uncertificated shares held of record by a person other than a clearing corporation as nominee, physical receipt of an executed letter of transmittal by the depository; provided, however, that shares shall cease to be "received" (i) with respect to certificated shares, if the certificate representing such shares was canceled prior to consummation of the offer referred to in paragraph (h)(2) of this section, or (ii) with respect to uncertificated shares, to the extent such uncertificated shares have been reduced or eliminated due

to any sale of such shares prior to consummation of the offer referred to in paragraph (h)(2) of this section; and

g. "Rollover stock" means any shares of stock of such constituent corporation that are the subject of a written agreement requiring such shares to be transferred, contributed or delivered to the consummating corporation or any of its affiliates in exchange for stock or other equity interests in such consummating corporation or an affiliate thereof; provided, however , that such shares of stock shall cease to be rollover stock for purposes of paragraph (h)(3) of this section if, immediately prior to the time the merger becomes effective under this chapter, such shares have not been transferred, contributed or delivered to the consummating corporation or any of its affiliates pursuant to such written agreement.

If an agreement of merger is adopted without the vote of stockholders of a corporation pursuant to this subsection, the secretary or assistant secretary of the surviving corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in this subsection (other than the condition listed in paragraph (h)(4) of this section) have been satisfied; provided that such certification on the agreement shall not be required if a certificate of merger is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with §103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Application of section. — Specific section that permits merger of subsidiary into parent does not bar such merger under general section providing for merger of any two domestic corporations. *Federal United Corp v. Havender, 11 A.2d 331 (Del. Supr. 1940)*.

Where Delaware corporation enters into merger, Delaware law governs issue of whether class voting was required for approval, regardless of a provision of California law that provides that California law applies to foreign corporations with significant contacts with California. *Vantagepoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. Supr. 2005)*.

.2 De facto merger. — Stockholders cannot set aside purchase by their corporation of assets of another corporation in exchange for stock on ground that this is de facto merger carried through without two-thirds approval statute calls for; it is not

merger, but simply acquisition of corporate property, even though effect may be same as if merger. *Heilbrunn v. Sun Chemical Corp, 150 A.2d 755 (Del. Supr. 1959)*.

Purchase by corporation of all the stock of several other corporations does not create a de facto merger so as to give dissenting stockholder of purchasing corporation appraisal rights. *Orzeck v. Englehart, 195 A.2d 375 (Del. Supr. 1963)*.

.3 Effect of merger. — Creditor of constituent corporation cannot bar its consolidation with another corporation, since he may pursue his remedy against consolidated corporation. *Cole v. National Cash Credit Ass'n, 156 A 183 (Del. Ch. 1931)*.

.4 Enjoining merger. — Minority shareholders of subsidiary, 84% owned by parent, cannot bar parent's vote to merge subsidiary into another subsidiary on alleged grounds merger is unfair, since no fraud or blatant overreaching is demonstrated and minority shareholders have recourse to appraisal. *David J Greene and Co v. Schenley Inc, 281 A.2d 30 (Del. Ch. 1971)*.

Long-form cash-out merger between interested parties is void when only purpose is to freeze out minority interest. Use of corporate power to eliminate minority in this manner absent valid business purpose breaches fiduciary obligation of majority to minority. *Singer v. Magnavox Co, 367 A.2d 1349 (Del. Supr. 1977)*.

Shareholder could not enjoin shareholder meeting to vote on merger because it was unlikely he could prevail on the merits, substantial premium over market price was offered to shareholders electing to participate in merger, and dissenters were entitled to full hearing and to appraisal rights. *Weinberger v. United Financial Corp of California, 405 A.2d 134 (Del. Ch. 1979)*.

Court issued preliminary injunction to prevent corporation that owned 93% of second corporation from proceeding with a cash-out merger of second corporation into a wholly owned subsidiary. Second corporation's minority shareholders challenged merger on ground that price was unfair, material facts had been misrepresented, and merger terms had not been adequately considered by a board that was dominated by parent. Plaintiffs would likely succeed in proving that parent and the directors had violated their fiduciary duty of fair dealing to second corporation's minority shareholders. When parent corporation and sub's directors stand on both sides of a merger transaction, they have burden of establishing entire fairness of merger. *Sealy Mattress Co of New Jersey, Inc v. Sealy, Inc, 532 A.2d 1324 (Del. Ch. 1987)*.

Where a shareholder alleged that the CEO controlled all merger negotiations, that he informed potential buyers that his consent was required and that he had to be paid for his consent, that the buyer agreed to his demands, that other buyers were discouraged from bidding and that the other directors acquiesced to the CEO and approved the merger at an unfair price, the complaint challenged the fairness of the process and the price and could be brought as a direct suit. *Parnes v. Bally Entertainment Corp., 722 A.2d 1243 (Del. Supr. 1999)*.

Entire fairness of merger is implicated where the same person was the majority shareholder of the acquired and acquiring corporations. *Emerald Partners v. Berlin, 726 A.2d 1214 (Del. Supr. 1999)*.

.5 Exchange of stock. — No merger occurs when one corporation acquires stock of another in exchange for its own stock, and both continue in operation. *Fidanque v. American Maracaibo Co, 92 A.2d 311 (Del. Ch. 1952)*.

.6 Measure of damages. — The appropriate measure of the damages caused by an issuer's temporary suspension of a shelf registration in violation of the terms of a merger agreement is the difference between the highest price of the shares during a reasonable time after the registration is suspended and the average price of the shares during a reasonable period after the registration is reinstated. *Duncan v. Theratx, Inc., 775 A.2d 1019 (Del. Supr. 2001).*

.7 Deal protection devices. — The board of director's decision to adopt defensive devices to completely lock up a merger mandated special scrutiny under the *Unocal* test. Where the devices robbed any stockholder vote of its effectiveness by predetermining that the merger would be approved, the devices were coercive and unenforceable. *Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. Supr. 2003).*

.8 Purchase and sale of assets. — Creditor of corporation cannot hold second corporation liable as "successor" of first when "succession" was result merely of acquiring first corporation's assets without consideration; there was no de facto merger. *Hart v. Miller, 119 A.2d 751 (Del. Supr. 1955)*.

Creditor of transferror corporation can secure judgment against transferee of all transferror's assets in exchange for stock when that stock is not issued to transferror corporation, but instead is given directly to its stockholders; that is a de facto merger. *Drug v. Hunt, 168 A 87 (Del. Supr. 1933)*.

.9 Triangular merger.—It cannot be inferred from fact that a transaction was structured as a reverse triangular merger that it was fraudulently entered into to deprive a derivative shareholder of standing. *Lewis v. Ward, 852 A.2d 896, Del. Supr. 2004).*

.10 Supermajority vote. — Chancery Court erred when it granted preliminary injunction to block merger. Provision in target's certificate requiring supermajority vote for business combinations did not apply after acquiror had reduced interest in target to less than 30%. *Berlin v. Emerald Partners, 552 A.2d 482 (Del. Supr. 1989)*.

.11 Fiduciary duty. — Direct fiduciary duty to shareholders when they approved corporation's merger after (1) failing to inform themselves of all relevant and reasonably available information and (2) failing to disclose all material information that reasonable shareholders would consider important in deciding whether to approve merger. Business judgment did not protect directors when failure to inform themselves constituted gross negligence. Directors were liable for damages to shareholders to extent fair value of shares exceeded merger price. *Smith v. Van Gorkom, 488 A.2d 858 (Del. Supr. 1985)*.

In parent-subsidiary merger, parent's directors have no duty to auction subsidiary to highest bidder pursuant to *Revlon*. Real issues are price and fairness. *Bershad v. Curtiss-Wright Corp, 535 A.2d 840 (Del. Supr. 1987)*.

Court invalidated lockup option that target had granted to favored bidder to purchase some of target's core businesses because lockup served only to end bidding for target, and board's actions did not meet rigorous standard of entire fairness. *Mills Acquisition Co v. Macmillan, Inc, 559 A.2d 1261 (Del. Supr. 1989)*.

Corporate merger was not void and corporate defendants were not liable for conversion of a shareholder's stocks where the defendants complied with all the statutory requirements for merger but made a good faith violation of the common

law duty of disclosure in the merger proxy statement. *Arnold v. Society for Savings Bancorp, Inc, 678 A.2d 533 (Del. Supr. 1996)*.

Under an objective analysis of what the directors might consider relevant to the stockholders from an investor's standpoint, the directors should have disclosed not only their primary reason for renegotiating the merger agreement, but any other reasons, including whatever consideration they had given to the stock market decline in reaching their decision. *Zirn v. VLI Corp, 621 A.2d 773 (Del. Supr. 1993)*.

Where a group of stockholders with majority voting power was irrevocably committed to voting for a merger, the board of directors had an affirmative duty to protect the minority stockholders' interests and should have contracted for an effective fiduciary out clause. *Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. Supr. 2003).*

Revlon applies when merger consideration is split roughly evenly between cash and stock. *In re Smurfit-Stone Container Corp. Shareholder Litigation, C.A. 6164 (Del. Ch. 2011).*

The business judgment rule did not apply to a challenged merger where the economic bargaining took place before the protections were in place. *Olenik v. Lodzinski, 208 A.3d 704 (Del. Supr. 2019).*

§252 MERGER OR CONSOLIDATION OF DOMESTIC AND FOREIGN CORPORATIONS; SERVICE OF PROCESS UPON SURVIVING OR RESULTING CORPORATION

(a) Any 1 or more corporations of this State may merge or consolidate with 1 or more foreign corporations, unless the laws of the jurisdiction or jurisdictions under which such foreign corporation or corporations are organized prohibit such merger or consolidation. The constituent corporations may merge into a single surviving corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new resulting corporation formed by the consolidation, which may be a corporation of the jurisdiction of organization of any 1 of the constituent corporations, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) All the constituent corporations shall enter into an agreement of merger or consolidation. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger in which the surviving corporation is a corporation of this State, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate

the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation in which the resulting corporation is a corporation of this State, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation, or of cancelling some or all of such shares, and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of, such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of the shares or other securities of the surviving or resulting corporation;

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, rights or other securities of the surviving or resulting corporation or of any other corporation or entity the shares, rights or other securities of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto, consistent with §155 of this title; and

(7) Such other provisions or facts as shall be required to be set forth in an agreement of merger or consolidation (including any provision for amendment of the certificate of incorporation (or equivalent document) of a surviving or resulting foreign corporation) by the laws of each jurisdiction under which any of the foreign corporations are organized. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term “facts,” as used in the preceding sentence, includes, but is not limited to, the occurrence of any

event, including a determination or action by any person or body, including the corporation

(c) The agreement shall be adopted, approved, certified, executed and acknowledged by each of the constituent corporations in accordance with the laws under which it is organized, and, in the case of a corporation of this State, in the same manner as is provided in §251 of this title. The agreement shall be filed and shall become effective for all purposes of the laws of this State when and as provided in §251 of this title with respect to the merger or consolidation of corporations of this State. In lieu of filing the agreement of merger or consolidation, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with §103 of this title, which states:

(1) The name and jurisdiction of organization of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with this subsection;

(3) The name of the surviving or resulting corporation;

(4) In the case of a merger in which the surviving corporation is a corporation of this State, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation in which the resulting corporation is a corporation of this State, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving or resulting corporation and the address thereof;

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving or resulting corporation, on request and without cost, to any stockholder of any constituent corporation;

(8) If the corporation surviving or resulting from the merger or consolidation is a corporation of this State, the authorized capital stock of each constituent corporation which is not a corporation of this State; and

(9) The agreement, if any, required by subsection (d) of this section.

(d) If the corporation surviving or resulting from the merger or consolidation is a foreign corporation, it shall agree that it may be served with process in this State in any proceeding for enforcement of any obligation of any constituent corporation of this State, as well as for enforcement of any obligation of the surviving or resulting corporation arising from the merger or consolidation, including any suit or other proceeding to enforce the right of any stockholders as determined in appraisal proceedings pursuant to §262 of this title, and shall irrevocably appoint the Secretary of State as its agent to accept service of process in any such suit or other proceedings and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such surviving or resulting corporation thereof by letter, directed to such surviving or resulting corporation at its address so specified, unless such surviving or resulting corporation shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process.

(e) Section 251(d) of this title shall apply to any merger or consolidation under this section; §251(e) of this title shall apply to a merger under this section in which the surviving corporation is a corporation of this State; and §251(f) and (h) of this title shall apply to any merger under this section. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

Decisions

.1 Enjoining merger. — Charge that exchange ratio of stock in merger is disproportionate is not enough to bar it; there must be showing of such gross undervaluation as to amount to fraud. *Bruce v. E L Bruce Co, 174 A.2d 29 (Ch. Ct. 1961)*.

.2 Purchase and sale of assets. — Purchase by foreign corporation of assets of Delaware corporation in exchange for stock is not merger giving stockholder of Delaware corporation any right of appraisal. *Hariton v. Arco Electronics, Inc, 182 A.2d 22*, *aff'd, 188 A.2d 123 (Del. Supr. 1963)*.

.3 Sequestration. — Shares of stock that were sequestered in aid of derivative suit were released from that sequestration when they lost their situs in Delaware as result of corporation's merger with an out of state corporation. *Union Chemical & Materials Corp v. Cannon, 148 A.2d 348 (Del. Supr. 1959)*.

.4 Waiver of Deadline Set Forth in Merger Agreement. — Corporations failed to retract waiver of deadline for members to elect their form of merger consideration where they failed to give reasonable notice of new deadline and member was prejudiced. *Amirsaleh v. Board of Trade of the City of New York, Inc.*, No. 75, 2010 (Del. Supr. 2011).

§253 MERGER OF PARENT CORPORATION AND SUBSIDIARY CORPORATION OR CORPORATIONS

(a) In any case in which: (1) at least 90% of the outstanding shares of each class of the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision required by §251(g)(7)(i) of this title), of which class there are outstanding shares that, absent this subsection, would be entitled to vote on such merger, is owned by a corporation of this State or a foreign corporation, and (2) 1 or more of such corporations is a corporation of this State, unless the laws of the jurisdiction or jurisdictions under which the foreign corporation or corporations are organized prohibit such merger, the parent corporation may either merge the subsidiary corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such other subsidiary corpora-

tions, into 1 of the subsidiary corporations by executing, acknowledging and filing, in accordance with §103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation, or the cancellation of some or all of such shares. Any of the terms of the resolution of the board of directors to so merge may be made dependent upon facts ascertainable outside of such resolution, provided that the manner in which such facts shall operate upon the terms of the resolution is clearly and expressly set forth in the resolution. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation. If the parent corporation be not the surviving corporation, the resolution shall include provision for the pro rata issuance of stock of the surviving corporation to the holders of the stock of the parent corporation on surrender of any certificates therefor, and the certificate of ownership and merger shall state that the proposed merger has been approved by a majority of the outstanding stock of the parent corporation entitled to vote thereon at a meeting duly called and held after 20 days' notice of the purpose of the meeting given to each such stockholder at the stockholder's address as it appears on the records of the corporation if the parent corporation is a corporation of this State or state that the proposed merger has been adopted, approved, certified, executed and acknowledged by the parent corporation in accordance with the laws under which it is organized if the parent corporation is a foreign corporation. If the surviving corporation is a foreign corporation:

(1) Section 252(d) of this title or (258(c) of this title, as applicable, shall also apply to a merger under this section; and

(2) The terms and conditions of the merger shall obligate the surviving corporation to provide the agreement, and take the actions, required by §252(d) of this title or §258(c) of this title, as applicable.

(b) If the surviving corporation is a Delaware corporation, it may change its corporate name by the inclusion of a provision to that effect

in the resolution of merger adopted by the directors of the parent corporation and set forth in the certificate of ownership and merger, and upon the effective date of the merger, the name of the corporation shall be so changed.

(c) Subsection (d) of §251 of this title shall apply to a merger under this section, and subsection (e) of §251 of this title shall apply to a merger under this section in which the surviving corporation is the subsidiary corporation and is a corporation of this State. References to "agreement of merger" in subsections (d) and (e) of §251 of this title shall mean for purposes of this subsection the resolution of merger adopted by the board of directors of the parent corporation. Any merger which effects any changes other than those authorized by this section or made applicable by this subsection shall be accomplished under §251, §252, §257, or §258 of this title. Section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (d) of this section.

(d) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this section is not owned by the parent corporation immediately prior to the merger, the stockholders of the subsidiary Delaware corporation party to the merger shall have appraisal rights as set forth in §262 of this title.

(e) This section shall apply to nonstock corporations if the parent corporation is such a corporation and is the surviving corporation of the merger; provided, however, that references to the directors of the parent corporation shall be deemed to be references to members of the governing body of the parent corporation, and references to the board of directors of the parent corporation shall be deemed to be references to the governing body of the parent corporation.

(f) Nothing in this section shall be deemed to authorize the merger of a corporation with a charitable nonstock corporation, if the charitable status of such charitable nonstock corporation would thereby be lost or impaired. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

Decisions

.1 Application of section. — Specific section that permits merger of subsidiary into parent does not bar such merger under general section providing for merger of any two domestic corporations. *Federal United Corp v. Havender, 11 A.2d 331 (1940)*.

Short-form cash-out merger by 97.6% stockholders with corporation they set up was void when only purpose was to freeze out minority interest and terms of merger were grossly inadequate and unfair to minority; use of corporate power, absent valid business purpose and fair transaction, breached fiduciary duty of majority to minority. *Roland International Corp v. Najjar, 407 A.2d 1032 (1979)*.

Tender offer and subsequent cash-out merger were proper when group including two key officers/directors of target put together plan whereby they were able to acquire complete ownership of target by using target's assets to finance cost of acquisition. *Field v. Allyn, 467 A.2d 1274 (1983)*.

Minority stockholders' positive vote on proposed merger was uninformed because material information was withheld by majority stockholder under circumstances amounting to breach of fiduciary duty so merger did not meet test of fair dealing or fair price and minority was entitled to appraisal. *Weinberger v. UOP Inc., 457 A.2d 701 (Del. Supr. 1983).*

Merger between parent and subsidiary was fair to subsidiary's minority shareholders where negotiations were arms length, price paid was fair, directors delegation of asset valuation was proper and subsidiary met its duty of complete candor in the proxy statement. *Rosenblatt v. Getty, Oil Co, 493 A.2d 929 (Del. Supr. 1985).*

.2 Appraisal rights. — Stockholders are not entitled to liquidating value. Only going-concern value. *Application of Delaware Racing Ass'n, 213 A.2d 203 (Del. Supr. 1965).*

Stockholders were not entitled to appraisal rights when they fail to demand payment. *Carl Marks & Co. v. Universal City Studio, Inc. 233 A.2d 63 (Del. Supr. 1967).*

Appraisal is the exclusive remedy for minority stockholders who object to a parent-subsidiary merger in the absence of fraud or illegality. *Glassman v. Unocal Exploration Corp. 777 A.2d 242 (Del. Supr. 2001).*

.3 Enjoining Merger. — Stockholder claiming sole purpose of merger was to eliminate minority stockholders at inadequate price must establish that no valid business purpose existed for merger when corporation's notice of merger gave several reasons that might constitute valid purpose. *Temple v. Combined Properties Corp, 410 A.2d 1375 (Ch. Ct. 1979)*.

Merger will cause irreparable harm when shareholders have not received sufficient information to make informed decision whether to accept merger price or elect appraisal or other judicial remedy. Irreparable harm warranting injunctive relief may be found when damages will be difficult to prove. *Sealy Mattress Co of New Jersey, Inc v. Sealy, Inc, 532 A.2d 1324 (Ch. Ct. 1987).*

.4 Challenge to merger. — Defeated tender offeror could not challenge merger between target and competing tender offeror where tender offeror had bid to control target which removed him from status of shareholder. *Kalmanovitz v. G Heileman Brewing Co, 595 F. Supp. 1385 (D. Del. 1984).*

§254 MERGEROR CONSOLIDATION OF DOMESTIC CORPORATIONS AND JOINT-STOCK OR OTHER ASSOCIATIONS

(a) The term "joint-stock association" as used in this section, includes any association of the kind commonly known as a joint-stock association

or joint-stock company and any unincorporated association, trust or enterprise having members or having outstanding shares of stock or other evidences of financial or beneficial interest therein, whether formed or organized by agreement or under statutory authority or otherwise and whether formed or organized under the laws of this State or any other jurisdiction, but does not include a corporation, partnership or limited liability company. The term "stockholder" as used in this section, includes every member of such joint-stock association or holder of a share of stock or other evidence of financial or beneficial interest therein.

(b) Any 1 or more corporations of this State may merge or consolidate with 1 or more joint-stock associations, unless the laws of the jurisdiction or jurisdictions under which such joint-stock association or associations are formed or organized prohibit such merger or consolidation. Such corporation or corporations and such 1 or more joint-stock associations may merge into a single surviving corporation or joint-stock association, which may be any 1 of such corporations or joint-stock associations, or they may consolidate into a new resulting corporation of this State or a joint-stock association, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The surviving or resulting entity may be organized for profit or not organized for profit, and if the surviving or resulting entity is a corporation, it may be a stock corporation of this State or a nonstock corporation of this State.

(c) Each such corporation and joint-stock association shall enter into a written agreement of merger or consolidation. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger in which the surviving entity is a corporation of this State, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation in which the resulting entity is a corporation of this State, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the shares of stock of each stock corporation, the interest of members of each nonstock corporation, and the shares, membership or financial or beneficial interests in each of the joint-stock associations into shares or other securities of a stock corporation or membership interests of a nonstock corporation or into shares, memberships or financial or beneficial interests of the joint-stock association surviving or resulting from such merger or consolidation, or of cancelling some or all of such shares, memberships or financial or beneficial interests, and, if any shares of any such stock corporation, any membership interests of any such nonstock corporation or any shares, memberships or financial or beneficial interests in any such joint-stock association are not to remain outstanding, to be converted solely into shares or other securities of the stock corporation or membership interests of the nonstock corporation or into shares, memberships or financial or beneficial interests of the joint-stock association surviving or resulting from such merger or consolidation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of shares of any such stock corporation, membership interests of any such nonstock corporation, or shares, memberships or financial or beneficial interests of any such joint-stock association are to receive in exchange for, or upon conversion of such shares, membership interests or shares, memberships or financial or beneficial interests, and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the stock corporation or membership interests of the nonstock corporation or shares, memberships or financial or beneficial interests of the joint-stock association surviving or resulting from such merger or consolidation;

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, rights, other securities or interests of the surviving or resulting entity or of fractional shares, rights, other securities or interests of any other corporation or entity the securities of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto, consistent with §155 of this title; and

(7) Such other provisions or facts as shall be required to be set forth in an agreement of merger or consolidation (including any provision for amendment of the governing documents of a surviving joint-stock association) or required to establish and maintain a joint-stock association

by the laws under which the joint-stock association is formed or organized.

Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(d) The agreement required by subsection (c) of this section shall be adopted, approved, certified, executed and acknowledged by each of the stock or nonstock corporations in the same manner as is provided in §251 or §255 of this title, respectively, and in the case of the joint-stock associations in accordance with the laws of the jurisdiction under which they are formed or organized. The agreement shall be filed and shall become effective for all purposes of the laws of this State when and as provided in §251 of this title with respect to the merger or consolidation of corporations of this State. In lieu of filing the agreement of merger or consolidation, the surviving or resulting entity may file a certificate of merger or consolidation, executed in accordance with §103 of this title, which states:

(1) The name, jurisdiction of formation or organization and type of entity of each of the constituent entities;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent entities in accordance with this subsection;

(3) The name of the surviving or resulting corporation or joint-stock association;

(4) In the case of a merger in which the surviving entity is a corporation of this State, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation in which the resulting entity is a corporation of this State, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving or resulting corporation or joint-stock association and the address thereof;

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving or resulting corporation or joint-stock association, on request and without cost, to any stockholder or member of any constituent entity; and

(8) The agreement, if any, required by §252(d) of this title.

(e) Sections 251(d), 251(e) to the extent the surviving entity is a corporation of this State, §§251(f), 252(d), 259 through 262 and 328 of this title shall, insofar as they are applicable, apply to mergers or consolidations between corporations and joint-stock associations; the word "corporation" where applicable, as used in those sections, being deemed to include joint-stock associations as defined herein. Where the surviving or resulting entity is a corporation, for purposes of the laws of this State, the personal liability, if any, of any stockholder of a joint-stock association existing at the time of such merger or consolidation shall not thereby be extinguished, shall remain personal to such stockholder and shall not become the liability of any subsequent transferee of any share of stock in such surviving or resulting corporation or of any other stockholder of such surviving or resulting corporation.

(f) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation or charitable joint-stock association into a stock corporation or joint-stock association if the charitable status of such nonstock corporation or joint-stock association would be thereby lost or impaired, but a stock corporation or a joint-stock association may be merged into a charitable nonstock corporation or charitable joint-stock association which shall continue as the surviving corporation or joint-stock association. (Last amended by Ch. 86, L. ‘17, eff. 8-1-17.)

§255 MERGER OR CONSOLIDATION OF DOMESTIC NONSTOCK CORPORATIONS

(a) Any 2 or more nonstock corporations of this State, whether or not organized for profit, may merge into a single surviving corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new resulting nonstock corporation, whether or not organized for profit, formed by the consolidation, pursuant to an agreement

of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) Subject to subsection (d) of this section, the governing body of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the memberships or membership interests of each of the constituent corporations into memberships or membership interests of the corporation surviving or resulting from the merger or consolidation, or of cancelling some or all of such memberships or membership interests, and, if any memberships or membership interests of any of the constituent corporations are not to remain outstanding, to be converted solely into memberships or membership interests of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such memberships or membership interests are to receive in exchange for, or upon conversion of, such memberships or membership interests, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of memberships or membership interests of the surviving or resulting corporation; and

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, rights or other securities of any other corporation or entity the shares, rights or other securities of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto, consistent with §155 of this title.

The agreement so adopted shall be executed by an authorized person, provided that if the agreement is filed, it shall be executed and acknowledged in accordance with §103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) Subject to subsection (d) of this section, the agreement shall be submitted to the members of each constituent corporation, at an annual or special meeting thereof for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be given to each member of each such corporation who has the right to vote for the election of the members of the governing body of the corporation and to each other member who is entitled to vote on the merger under the certificate of incorporation or the bylaws of such corporation, at the member's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof. At the meeting the agreement shall be considered and a vote, in person or by proxy, taken for the adoption or rejection of the agreement. If the agreement is adopted by a majority of the members of each such corporation entitled to vote for the election of the members of the governing body of the corporation and any other members entitled to vote on the merger under the certificate of incorporation or the bylaws of such corporation, then that fact shall be certified on the agreement by the officer of each such corporation performing the duties ordinarily performed by the secretary or assistant secretary of a corporation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. If the agreement shall be adopted and certified by each constituent corporation in accordance with thissection, it shall be filed and shall become effective in accordance with §103 of this title. The provisions set forth in the last sentence of §251(c) of this title shall apply to a merger under this section, and the reference therein to "stockholder" shall be deemed to include "member" here-under.

(d) Notwithstanding subsections (b) or (c) of this section, if, under the certificate of incorporation or the bylaws of any 1 or more of the consti-

tuent corporations, there shall be no members who have the right to vote for the election of the members of the governing body of the corporation, or for the merger, other than the members of the governing body themselves, no further action by the governing body or the members of such corporation shall be necessary if the resolution approving an agreement of merger or consolidation has been adopted by a majority of all the members of the governing body thereof, and that fact shall be certified on the agreement in the same manner as is provided in the case of the adoption of the agreement by the vote of the members of a corporation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement, and thereafter the same procedure shall be followed to consummate the merger or consolidation.

(e) Section 251(d) of this title shall apply to a merger under this section; provided, however, that references to the board of directors, to stockholders, and to shares of a constituent corporation shall be deemed to be references to the governing body of the corporation, to members of the corporation, and to memberships or membership interests, as applicable, respectively.

(f) Section 251(e) of this title shall apply to a merger under this section.

(g) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a nonstock corporation if such charitable nonstock corporation would thereby have its charitable status lost or impaired; but a nonstock corporation may be merged into a charitable nonstock corporation which shall continue as the surviving corporation. (Last amended by Ch. 45, L. ‘19, eff. 8-1-19.)

§256 MERGER OR CONSOLIDATION OF DOMESTIC AND FOREIGN NONSTOCK CORPORATIONS; SERVICE OF PROCESS UPON SURVIVING OR RESULTING CORPORATION

(a) Any 1 or more nonstock corporations of this State may merge or consolidate with 1 or more foreign nonstock corporations, unless the laws of the jurisdiction or jurisdictions under which such foreign nonstock corporation or corporations are organized prohibit such merger or consolidation. The constituent corporations may merge into a single surviving corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new resulting nonstock corpora-

tion formed by the consolidation, which may be a corporation of the jurisdiction of organization of any 1 of the constituent corporations, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The term "foreign nonstock corporation" means a nonstock corporation organized under the laws of any jurisdiction other than this State.

(b) All the constituent corporations shall enter into an agreement of merger or consolidation. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger in which the surviving corporation is a corporation of this State, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation in which the resulting corporation is a corporation of this State, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the memberships or membership interests of each of the constituent corporations into memberships or membership interests of the corporation surviving or resulting from the merger or consolidation, or of cancelling some or all of such memberships or membership interests, and, if any memberships or membership interests of any of the constituent corporations are not to remain outstanding, to be converted solely into memberships or membership interests of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such memberships or membership interests are to receive in exchange for, or upon conversion of, such memberships or membership interests, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of memberships or membership interests of the surviving or resulting corporation;

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, rights or other securities of any other corporation or entity the

shares, rights or other securities of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto, consistent with §155 of this title; and

(7) Such other provisions or facts as shall be required to be set forth in an agreement of merger or consolidation (including any provision for amendment of the certificate of incorporation (or equivalent document) of a surviving foreign nonstock corporation) by the laws of each jurisdiction under which any of the foreign nonstock corporations are organized.

Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement shall be adopted, approved, certified, executed and acknowledged by each of the constituent corporations in accordance with the laws under which it is organized and, in the case of a Delaware corporation, in the same manner as is provided in §255 of this title. The agreement shall be filed and shall become effective for all purposes of the laws of this State when and as provided in §255 of this title with respect to the merger of nonstock corporations of this State. Insofar as they may be applicable, the provisions set forth in the last sentence of subsection (c) of §252 of this title shall apply to a merger under this section, and the reference therein to "stockholder" shall be deemed to include "member" hereunder.

(d) If the corporation surviving or resulting from the merger or consolidation is a foreign nonstock corporation, it shall agree that it may be served with process in this State in any proceeding for enforcement of any obligation of any constituent corporation of this State, as well as for enforcement of any obligation of the surviving or resulting corporation arising from the merger or consolidation and shall irrevocably appoint the Secretary of State as its agent to accept service of process in any suit or other proceedings and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and

regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such surviving or resulting corporation thereof by letter, directed to such corporation at its address so specified, unless such surviving or resulting corporation shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served upon the Secretary of State. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being made pursuant to this subsection, and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as a part of the costs in the proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary of State, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from receipt of the service of process.

(e) Subsection (e) of §251 of this title shall apply to a merger under this section if the corporation surviving the merger is a corporation of this State.

(f) Section 251(d) of this title shall apply to a merger under this section; provided, however, that references to the board of directors, to stockholders, and to shares of a constituent corporation shall be deemed to be references to the governing body of the corporation, to members of the corporation, and to memberships or membership interests, as applicable, respectively.

(g) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a nonstock corporation, if the charitable status of such charitable nonstock corporation would thereby be lost or impaired; but a nonstock corporation may be merged into a charitable nonstock corporation which shall continue as the surviving corporation. (Last amended by Ch. 86, L. ‘17, eff. 8-1-17.)

§257 MERGER OR CONSOLIDATION OF DOMESTIC STOCK AND NONSTOCK CORPORATIONS

(a) Any 1 or more nonstock corporations of this State, whether or not organized for profit, may merge or consolidate with 1 or more stock corporations of this State, whether or not organized for profit. The constituent corporations may merge into a single surviving corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new resulting corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The surviving constituent corporation or the new corporation may be organized for profit or not organized for profit and may be a stock corporation or a nonstock corporation.

(b) The board of directors of each stock corporation which desires to merge or consolidate and the governing body of each nonstock corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the shares of stock of a stock corporation and the memberships or membership interests of a nonstock corporation into shares or other securities of a stock corporation or memberships or membership interests of a nonstock corporation surviving or resulting from such merger or consolidation or of cancelling some or all of such shares or memberships or membership interests, and, if any shares of any such stock corporation or memberships or membership interests of any such nonstock corporation are not to remain outstanding, to be converted solely into shares or other securities

of the stock corporation or memberships or membership interests of the nonstock corporation surviving or resulting from such merger or consolidation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of shares of any such stock corporation or memberships or membership interests of any such nonstock corporation are to receive in exchange for, or upon conversion of such shares or memberships or membership interests, and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of any stock corporation or memberships or membership interests of any nonstock corporation surviving or resulting from such merger or consolidation; and

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, rights or other securities of the surviving or resulting corporation or of any other corporation or entity the shares, rights or other securities of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto, consistent with §155 of this title.

Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section, in the case of each constituent stock corporation, shall be adopted, approved, certified, executed and acknowledged by each constituent corporation in the same manner as is provided in §251 of this title and, in the case of each constituent nonstock corporation, shall be adopted, approved, certified, executed and acknowledged by each of said constituent corporations in the same manner as is provided in §255 of this title. The agreement shall be filed and shall become effective for all purposes of the laws of this State when and as provided in §251 of this title with respect to the merger of stock corporations of this State. Insofar as they may be applicable, the provisions set forth in the last sentence of §251(c) of this title shall apply to a merger under this section, and the

reference therein to "stockholder" shall be deemed to include "member" hereunder.

(d) Section 251(e) of this title shall apply to a merger under this section; §251(d) of this title shall apply to any constituent stock corporation participating in a merger or consolidation under this section; and §251(f) of this title shall apply to any constituent stock corporation participating in a merger under this section.

(e) Section 251(d) of this title shall apply to a merger under this section; provided, however, that, for purposes of a constituent nonstock corporation, references to the board of directors, to stockholders, and to shares of a constituent corporation shall be deemed to be references to the governing body of the corporation, to members of the corporation, and to memberships or membership interests, as applicable, respectively.

(f) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a stock corporation, if the charitable status of such nonstock corporation would thereby be lost or impaired; but a stock corporation may be merged into a charitable nonstock corporation which shall continue as the surviving corporation. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

§258 MERGER OR CONSOLIDATION OF DOMESTIC AND FOREIGN STOCK AND NONSTOCK CORPORATIONS

(a) Any 1 or more corporations of this State, whether stock or nonstock corporations and whether or not organized for profit, may merge or consolidate with 1 or more foreign corporations, unless the laws of the jurisdiction or jurisdictions under which such foreign corporation or corporations are organized prohibit such merger or consolidation. The constituent corporations may merge into a single surviving corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new resulting corporation formed by the consolidation, which may be a corporation of the jurisdiction of organization of any 1 of the constituent corporations, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The surviving or resulting corporation may be either a domestic or foreign stock corporation or a domestic or foreign nonstock corporation, as shall be specified in the agreement of merger

or consolidation required by subsection (b) of this section. For purposes of this section, the term "foreign corporation" includes a nonstock corporation organized under the laws of any jurisdiction other than this State.

(b) The method and procedure to be followed by the constituent corporations so merging or consolidating shall be as prescribed in §257 of this title in the case of Delaware corporations. The agreement of merger or consolidation shall be as provided in §257 of this title and also set forth such other provisions or facts as shall be required to be set forth in an agreement of merger or consolidation (including any provision for amendment of the certificate of incorporation (or equivalent document) of a surviving foreign corporation) by the laws of the jurisdiction or jurisdictions which are stated in the agreement to be the laws under which the foreign corporation or corporations are organized. The agreement, in the case of foreign corporations, shall be adopted, approved, certified, executed and acknowledged in accordance with the laws under which each is organized.

(c) The requirements of §252(d) of this title as to the appointment of the Secretary of State to receive process and the manner of serving the same in the event the surviving or resulting corporation is a foreign corporation shall also apply to mergers or consolidations effected under this section and such appointment, if any, shall be included in the certificate of merger or consolidation, if any, filed pursuant to subsection (b) of this section. Section 251(e) of this title shall apply to mergers effected under this section if the surviving corporation is a corporation of this State; §251(d) of this title shall apply to any constituent corporation participating in a merger or consolidation under this section (provided, however, that for purposes of a constituent nonstock corporation, references to the board of directors, to stockholders, and to shares shall be deemed to be references to the governing body of the corporation, to members of the corporation, and to memberships or membership interests of the corporation, as applicable, respectively); and §251(f) of this title shall apply to any constituent stock corporation of this State participating in a merger under this section.

(d) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a stock corporation, if the charitable status of such nonstock corporation would thereby be lost or impaired; but a stock corporation may be merged into a charitable nonstock corporation which shall continue as the surviving corporation. (Last amended by Ch. 86, L. ‘17, eff. 8-1-17.)

§259 STATUS, RIGHTS, LIABILITIES, ETC. OF CONSTITUENT AND SURVIVING OR RESULTING CORPORATIONS FOLLOWING MERGER OR CONSOLIDATION

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of a merger of banks or trust companies, without any order or action on the part of any court or otherwise, all appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of persons mentally ill and in every other fiduciary capacity, shall be automatically vested in the corporation resulting from or surviving such merger; provided, however, that any party in interest shall have the right to apply to an appropriate

court or tribunal for a determination as to whether the surviving corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed. (Last amended by Ch. 186, L. '67, eff. 1-2-68.)

Decisions

.1 Effect of section. — Shareholder of acquired corporation cannot maintain derivative suit against surviving corporation after merger is effective; such suit is asset of acquired corporation and passes to surviving company when merger is completed. *Bokat v. Getty Oil Co, 262 A.2d 246 (Del. Supr. 1970)*.

Merger survivor owned and controlled the pre-merger privilege of a constituent corporation, including the attorney-client privilege, because the privilege passed to the survivor by operation of Sec. 259. *Great Hill Equity IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013).*

.2 Enjoining merger. — Board's decision to acquire target company at relatively high premium with resulting dilution in corporate stock prices, and refusal to back out of merger after stockholder challenge when merger agreement provided for this, were both sound business decisions, since (1) decision to merge was made after long exhaustive study and price was well within authorized range; (2) refusal to back out did not indicate any fraud; and (3) issuance of control stock to allegedly friendly shareholders was not done in order to perpetuate present management. *Muschel v. Western Union Corp, 310 A.2d 904 (Del. Ch. 1973)*.

Once merger is accomplished merged corporation ceases to exist for all purposes and former shareholder who wants to challenge validity of merger can only serve surviving corporation even though trial on merits could result in resurrection of merged corporation. *Beals v. Washington International, Inc, 386 A.2d 1156 (Del. Ch. 1978)*.

Minority shareholders of subsidiary, 84% owned by parent, cannot bar parent's vote to merge subsidiary into another subsidiary on alleged grounds merger is unfair, since no fraud or blatant overreaching is demonstrated and minority shareholders have recourse to appraisal. *David J Greene & Co v. Schenley Industries Inc, 281 A.2d 30 (Del. Ch. 1971)*.

"White knight" could not get injunction barring tender offeror from attempting to acquire it after offeror agreed to refrain from attempting to acquire control of target, which "white knight" later acquired and merged with. *Mesa Partners v. Phillips Petroleum Co, 488 A.2d 107 (Del. Ch. 1984)*.

.3 Sequestration. — Shares of stock that were sequestered in aid of derivative suit were released from that sequestration when they lost their situs in Delaware as result of corporation's merger with an out of state corporation. *Union Chemical & Materials Corp v. Cannon, 148 A.2d 348 (Del. Supr. 1959).*

.4 Collective bargaining. — While legal requirement that surviving corporation to merger constituent's obligations includes obligations created in favor of employees under collective bargaining agreement, state court cannot enforce rights and duties under agreement until appropriate federal agencies have declared or

failed to declare them. *Fitzsimmons v. Western Airlines, Inc, 290 A.2d 682 (Del. Ch. 1972)*.

.5 Mutual aid fund agreement. — Surviving corporation in merger assumed constituent's obligations under mutual aid fund agreement, even though agreement had no "successors and assigns" clause, since, on merging, constituent's obligations attach to, and are enforceable against survivor. *Western Airlines, Inc v. Allegheny Airlines, Inc, 313 A.2d 145 (Del. Ch. 1973)*.

.6 Agreement governing lender's rights. — Lender corporation, which challenged going-private merger between debtor corporation and debtor's principal shareholder, was entitled to same option to purchase shares of surviving corporation as shareholder-employees of constituent corporation received where lending corporation had obtained those option rights pursuant to merger provision in its loan agreement with debtor corporation. *American General Corp v. Continental Airlines Corp, No. 8390 (Ch. Ct. 1-26-88)*.

.7 Merger, effect on shareholder's standing. — A plaintiff who loses his shareholder status by being merged out may attack the validity of allegedly excessive termination payments, provided that he concomitantly challenges the fairness of the merger. A former shareholder who fails to attack merger's fairness is therefore without standing to pursue derivative claims. *Kramer v. Western Pacific Industries, Inc, No. 8675 (Ch. Ct. 9-11-87)*.

§260 POWERS OF CORPORATION SURVIVING OR RESULTING FROM MERGER OR CONSOLIDATION; ISSUANCE OF STOCK, BONDS OR OTHER INDEBTEDNESS

When two or more corporations are merged or consolidated, the corporation surviving or resulting from the merger may issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect the merger or consolidation. For the purpose of securing the payment of any such bonds and obligations, it shall be lawful for the surviving or resulting corporation to mortgage its corporate franchise, rights, privileges and property, real, personal or mixed. The surviving or resulting corporation may issue certificates of its capital stock or uncertificated stock if authorized to do so and other securities to the stockholders of the constituent corporations in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of the agreement of merger or consolidation in order to effect such merger or consolidation in the manner and on the terms specified in the agreement. (Last amended by Ch. 112, L. '83, eff. 7-1-83.)

§261 EFFECT OF MERGER UPON PENDING ACTIONS

Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

Decisions

.1 Effect of merger on stockholder suit. — Corporation had to pay attorney fees for stockholder who had sued corporation and lost by summary judgment, but whose appeal was rendered moot when corporation merged; there was no final decision on merits at time merger made further proceedings unnecessary. *Baron v. Allied Artists Pictures Corp, 395 A.2d 375 (Ch. Ct. 1978)*.

Majority shareholders/directors breached their fiduciary duties of fair dealing owed to minority shareholders when they approved cash-out merger because (1) merger had intended effect of terminating pending derivative litigation seeking recovery from majority shareholders/directors and (2) no independent agency, either board committee, special counsel or investment banker, provided basis to conclude that derivative claims were without value to corporation or that cash-out price was fair. *Merrit v. Colonial Foods, Inc, No. 6078 (Ch. Ct. 1986)*.

§262 APPRAISAL RIGHTS

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to Sec. 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in 1 or more shares, or

fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or consolidation to be effected pursuant to §251 (other than a merger effected pursuant to §251(g) of this title), §252, §254, §255, §256, §257, §258, §263 or §264 of this title:

(1) Provided, however, that, except as expressly provided in §363(b) of this title, no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of the meeting of stockholders to act upon the agreement of merger or consolidation (or, in the case of a merger pursuant to §251(h), as of immediately prior to the execution of the agreement of merger), were either: (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in §251(f) of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to Sec. 251, 252, 254, 255, 256, 257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 holders;

c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a. and b. of this paragraph; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a., b. and c. of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under §253 or §267 of this title is not owned

by the parent immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the provisions of this section, including those set forth in subsections (d), (e), and (g) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for notice of such meeting (or such members who received notice in accordance with §255(c) of this title) with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) of this section that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of §114 of this title. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares; provided that a demand may be delivered to the corporation by electronic transmission if directed to an information processing system (if any) expressly designated for that purpose in such notice. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to §228, §251(h), §253, or §267 of this title, then either a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of §114 of this title. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of giving such notice or, in the case of a merger approved pursuant to §251(h) of this title, within the later of the consummation of the offer contemplated by §251(h) of this title and 20 days after the date of giving such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares; provided that a demand may be delivered to the corporation by electronic transmission if directed to an information processing system (if any) expressly designated for that purpose in such notice. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice or, in the case of a merger approved pursuant to §251(h) of this title, later than the later of the consummation of the offer contemplated by §251(h) of this title and 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corpora-

tion that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) of this section hereof and who is otherwise entitled to appraisal rights, may commence an appraisal proceeding by filing a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder who has not commenced an appraisal proceeding or joined that proceeding as a named party shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) of this section hereof, upon request, given in writing (or by electronic transmission directed to an information processing system (if any) expressly designated for that purpose in the notice of appraisal), shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation (or, in the case of a merger approved pursuant to §251(h) of this title, the aggregate number of shares (other than any excluded stock (as defined in §251(h)(6)d. of this title)) that were the subject of, and were not tendered into, and accepted for purchase or exchange in, the offer referred to in §251(h)(2)), and, in either case, with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such statement shall be given to the stockholder within 10 days after such stockholder's request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) of this section hereof, whi-

chever is later. Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder. If immediately before the merger or consolidation the shares of the class or series of stock of the constituent corporation as to which appraisal rights are available were listed on a national securities exchange, the Court shall dismiss the proceedings as to all holders of such shares who are otherwise entitled to appraisal rights unless (1) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of

shares exceeds $1 million, or (3) the merger was approved pursuant to §253 or §267 of this title.

(h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause shown, and except as provided in this subsection, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. At any time before the entry of judgment in the proceedings, the surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest shall accrue thereafter as provided herein only upon the sum of (1) the difference, if any, between the amount so paid and the fair value of the shares as determined by the Court, and (2) interest theretofore accrued, unless paid at that time. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, proceed to trial upon the appraisal prior to the final determination of the stockholders entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon

the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just; provided, however that this provision shall not affect the right of any stockholder who has not commenced an appraisal proceeding or joined that proceeding as a named party to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation within 60 days after the effective date of the merger or consolidation, as set forth in subsection (e) of this section.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Appraisal value. — In determining which stockholders dissenting to merger are entitled to appraisal rights, court held pre-vote objection notice signed by one spouse of a pair of joint tenants sufficient notice for corporation and entitles holders to appraisal; but pre-vote payment demand by dissenting joint tenants must be signed by both. *Raab v. Villager Industries, Inc, 355 A.2d 888 (Del. Supr. 1976)*.

Shareholder who does not accept terms of merger may petition for court appraisal of his stock, but is then foreclosed (60 days after merger) from withdrawing his request for appraisal and resuming his rights as a stockholder unless he first obtains corporate consent. *Dofflemyer v. W F Hall Printing Co, 432 A.2d 1198 (Del. Supr. 1981)*.

The Court of Chancery erred by appraising dissenting shareholders' shares using a segmented valuation technique which valued the corporation's three operating subsidiaries as going concerns and therefore did not value the corporation on a liquidation basis. *Rapid-American Corp v. Harris, 603 A.2d 796 (Del. Supr. 1992)*.

The trial court need not give any weight to the terms of the merger or prior offers where there is no evidence that those terms represented the going concern value of the corporation. *M.P.M. Enterprises, Inc. v. Gilbert, 731 A.2d 790 (Del. Supr. 1999)*.

In appraising the shares of a corporation that held a controlling interest in two subsidiaries, the trial court acted in accordance with Sec. 262 by using a comparative acquisitions approach that used premia attributed to the corporation's controlling interests in the subsidiaries. *M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513 (Del. Supr. 1999).*

The Court of Chancery erred as a matter of law, by relying upon the net asset value as the sole criterion for determining the fair value of a corporation's stock and compounded the error by deducting the speculative future value of the stock. Because the value of dissenting stock is to be fixed on a going concern basis, net asset value, which is a liquidating value, can never be the sole criterion. *Paskill Corp. v. Alcoma Corp., 747 A.2d 549 (Del. Supr. 2000)*.

Sec. 262 requires an appraisal to be conducted by the Court of Chancery's jurists. The use of masters to determine the ultimate valuation is not permitted. *Cede & Co. v. Technicolor, Inc., 758 A.2d 485 (Del. Supr. 2000).*

The court need not defer conclusively or presumptively to the deal price as indicative of fair value in an appraisal proceeding. *Golden Telecom, Inc. v. Global GT LP, 11 A.3d 214 (Del. Supr. 2010).*

Where the court decides that neither side's expert offered a reliable basis for determining the fair value of the corporation the court may rely on the merger price to determine fair value. *Huff Fund Investment Partnership v. CKx, Inc*., *2014 Del. Ch. LEXIS 82*.

There is no presumption that in certain cases involving arm's length mergers that the merger price is the best estimate of fair value. *DFC Global Corp. v. Muirfield Value Partners, LP*, *No. 518, 2016 (Del. Supr. 2017).*

Deal price less synergies, and not unaffected market price was the appropriate determination of fair value. *Verition Partners Master Fund Ltd. V. Aruba Networks, Inc., 2019 Del. LEXIS 197.*

.2 Preferred stock. — In an appraisal of the fair value of preferred stock, the court's determination of value is determined solely from the contract rights conferred on the stock in the certificate of designation. *In re Appraisal of Metromedia Intern. Group, 971 A.2d 893 (Del. Ch. 2009).*

.3 Interest on appraised value. — Sec. 262 provides discretion to choose on a case-by-case basis whether to award interest but requires explanation for the choice. Where the trial court fails to explain its reasoning for awarding interest, the Supreme Court will remand the matter for elaboration. *M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513 (Del. Supr. 1999)*.

.4 Assessability of costs and expenses. — Litigation expenses of proceeding pursuant to this section other than costs are not assessable; costs are assessable against the corporation but may be apportioned between the parties. *Meade v. Pacific Gamble Robinson Co, 58 A.2d 415 (Del. Supr. 1948)*.

Where corporation's conduct during merger and appraisal action rose to the level of bad faith, minority shareholders were entitled to attorney and expert witness fees. *Montgomery Cellular Holding Co., Inc. v. Dobler, 880 A.2d 206 (Del. Supr. 2005).*

.5 Beneficial owner. — Corporation can disregard letter objecting to merger sent by beneficial owner of stock registered in street name, since letter did not identify them as agents for registered owner; objection by registered owner filed too late when received one-half hour after meeting, though mailed two days prior thereto. *Carl M Loeb, Rhoades & Co v. Hilton Hotels Corp, 222 A.2d 789 (Del. Supr. 1966)*.

Brokers holding stock of merged corporation in street name can get stock appraised without having to identify beneficial owners, since under merger-appraisal statute only registered owners are "stockholders"; further, in short merger of subsidiary into parent, stockholder can elect to accept offered price for portion of his stock and demand appraisal as to rest. *Olivetti Underwood Corp v. Jacques Coe & Co, 217 A.2d 683 (Del. Supr. 1966)*.

Beneficial owner of stock is not "stockholder" within this section for the purpose of objecting to a consolidation or merger and obtaining payment for his stock as a dissatisfied stockholder. *Schenck v. Salt Dome Oil Corp, 41 A.2d 583 (Del. Supr. 1945)*.

Demands for appraisal by beneficial owners that were not made in name of record shareholders were adequate because (1) corporation's proxy statement contained inadequate instructions concerning compliance with appraisal statute and (2) although beneficial owners knew that demand had to be submitted by or for record shareholders, they did not know how to comply. *Tabbi v. Pollution Control Industries, Inc, 508 A.2d 867 (Del. Ch. 1986)*.

Under GCL Sec. 262, only stockholder of record has right to appraisal. Persons whose shares are held in "street" or nominee names do not qualify as shareholders of record for appraisal purposes. *In the Matter of the Appraisal of Enstar Corp v. Senouf, 535 A.2d 1351 (Del. Supr. 1987)*.

Where mutual funds held their shares through a custodial bank, and where the bank was a member in a depository trust company, and where the company held the shares in the name of its nominee, and where the nominee was the record holder, the mutual funds were not record holders and not entitled to an appraisal. *In Re: Appraisal of Dell Inc.*, *CA No. 9322 (Del. Ch. 2016).*

.6 De facto merger. — Purchase by corporation of all the stock of several other corporations does not create a de facto merger so as to give dissenting stockholder of purchasing corporation appraisal rights. *Orzeck v. Englehart, 192 A.2d 36 (Ch. Ct.)*, *aff'd, 195 A.2d 375 (Del. Supr. 1963)*.

.7 Designation of third appraiser by court. — If stockholder objecting to merger fails to designate "disinterested" person as appraiser, as required by this section, and corporation has not waived its right to object to the person designated for lack of disinterestedness, there is no occasion for the court to designate a third appraiser, and stockholder's bill for that purpose will be dismissed. S*cott v. Arden Farms Co, 28 A.2d 81 (Del. Ch. 1942)*.

.8 Enjoining merger. —Dissenting minority stockholders could not bar merging of their corporation into subsidiary majority stockholders formed solely for purpose of merger, even though there was no showing of valid business purpose, since merger of corporation designed primarily to "freeze-out" minority and benefit parent company was not improper in absence of fraud or blatant overreaching and minority stockholders still had appraisal rights. *Singer v. Magnavox Co, 367 A.2d 1349 (Del. Ch. 1976)*.

Shareholder dissenting from corporation's merger was not foreclosed from asserting misrepresentation and fraudulent proxy statement after he petitioned for court appraisal of stock because valid issues of fraud may have existed under federal law. *Dofflemyer v. W F Hall Printing Co, 558 F. Supp. 372 (D. Del. 1983)*.

Minority holder of preferred stock could not enjoin proposed merger as being unfair to preferred shareholders when they were offered less for their stock than offer to common shareholders because (1) preferred shares had no legal right to equivalent consideration in merger, (2) apportionment of consideration between preferred and common shareholders was fair, (3) majority shareholder did not have duty to include preferred shareholders in increased price he paid common shareholders out of his own funds, and (4) preferred shareholders were not injured by majority shareholder's timing of merger. *Jedwab v. MGM Grand Hotels, Inc, 509 A.2d 584 (Del. Ch. 1986)*.

.9 Interested directors. — Charter provisions permits counting of interested directors for quorum purposes to vote on merger (or any matter that will later be submitted for stockholder approval). *Sterling v. Mayflower Hotel Corp, 89 A.2d 652 (Ch. Ct.)*, *aff'd, 83 A.2d 107 (Del. Supr. 1952)*.

.10 Parent-Subsidiary merger. — Appraisal is the exclusive remedy for minority stockholders who object to a parent-subsidiary merger in the absence of fraud or illegality. *Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. Supr. 2001).*

Stockholders of the parent corporation of a subsidiary involved in a merger were not entitled to appraisal rights because the parent was not a constituent to the merger and the stockholders were not relinquishing their stock. *City of North Miami Beach General Employees' Retirement Plan v. Dr Pepper Snapple Group, Inc.,* 2018 Del. Ch. LEXIS 175.

.11 Rights of objecting stockholders. — Majority stockholder breached fiduciary duty to minority who tendered their stock for $12 per share in response to offer that constituted less than full and frank disclosure because it failed to reveal two critical facts: (1) "highly qualified petroleum geologist" who was member of target company's management had calculated its net asset value to be significantly more

than minimum amount disclosed in offer, and (2) offeror's management had authorized open market purchases of target's stock for bids up to $15 per share. *Lynch v. Vickers Energy Corp, 383 A.2d 278 (Del. Supr. 1977)*.

Measure of damages in suit by minority who were induced to sell their stock by majority's "breach of fiduciary duty" (failure to disclose critical facts concerning tender offer) is difference between price paid and value of stock on date of court judgment, when it is impractical to return stock. *Lynch v. Vickers Energy Corp, 429 A.2d 497 (Del. Supr. 1981)*.

Stockholder could bring antifraud suit when corporation announced tender offer to buy up shares of his company at stipulated price and upon obtaining over 90% of shares consummated short-form merger in accordance with state law, giving remaining stockholders same stipulated price, since stockholder became forced seller and failure to state that he could seek appraisal rights was material omission. *Valente v. Pepsico Inc, 454 F. Supp. 1228 (D. Del. 1978)*.

Minority stockholders' positive vote on proposed merger was uninformed because material information was withheld by majority stockholder under circumstances amounting to breach of fiduciary duty so merger did not meet test of fair dealing or fair price and minority was entitled to appraisal. *Weinberger v. UOP Inc, 457 A.2d 701 (Del. Supr. 1983)*.

Minority shareholders could not enjoin merger of their corporation and majority shareholder's subsidiary because (1) even if minority's allegations of majority's unfair dealings were true, appraisal was minority's exclusive remedy, absent fraud nondisclosures, or misrepresentations; (2) majority did not manipulate timing of merger for inequitable purpose; and (3) majority did not make promise to purchase minority's stock at higher price than merger offer. *Rabkin v. Philip A Hunt Chemical Corp, 480 A.2d 653 (Del. Ch. 1984)*.

Court refused to dismiss shareholder's derivative action seeking to enjoin proposed short form merger. Although remedy would ordinarily be confined to appraisal, when appraisals may be inadequate, as in this case involving allegations of overreaching by board, other relief may be granted. *Joseph v. Shell Oil Co, 498 A.2d 1117 (Del. Ch. 1985)*.

Appraisal was not exclusive remedy when subsidiary's minority shareholders brought suit alleging that parent breached its fiduciary duty of fair dealing by purposely timing cash-out merger to avoid its one-year price commitment with subsidiary's former majority shareholder because (1) mandate in *Weinberger v. UOP, Inc* of fair dealing does not turn solely on issue of deception and (2) shareholders are not arguing questions of valuation, which are traditional subjects of appraisal, but are seeking to enforce contractual right, which they claim was unfairly destroyed by parent's manipulative conduct. *Rabkin v. Philip A Hunt Chemical Corp, 498 A.2d 1099 (Del. Supr. 1985)*.

Appraisal is not exclusive remedy in cases involving breach of duty of fair dealing. *Sealy Mattress Co of New Jersey, Inc v. Sealy, Inc, 532 A.2d 1324 (Del. Ch. 1987)*.

When informed minority shareholder either votes in merger's favor or accepts its benefits, he or she cannot thereafter attack its fairness. However, shareholders who neither vote in merger's favor nor tender their shares might be entitled to quasi appraisal remedy under *Weinberger v. UOP*, if events occurred before February 1, 1983. *Bershad v. Curtiss-Wright Corp, 535 A.2d 840 (Del. Supr. 1987)*.

Minority shareholder who has dissented from cash-out merger and begun appraisal proceeding under GCL Sec. 262 may pursue later-discovered claim of fraud in merger through action for rescissory damages against participants for breach of fiduciary duty to shareholder. Appraisal action may not be enlarged to include fraud claim since fair value of shares is only issue. Claims may be consolidated for trial, however. If fraud is found, appraisal action will be rendered moot. If not, plaintiff may still obtain appraisal. But plaintiff may not recover duplicative judgments or obtain double recovery. *Cede & Co v. Technicolor, Inc, 542 A.2d 1182 (Del. Supr. 1988)*.

In a stock valuation case, a corporate opportunity unlawfully diverted to another company has a direct bearing on the fair value of the stock, but not on the validity of the merger itself. Thus, the minority shareholder's claim is more personal than derivative and properly belongs to a GCL Sec. 262 proceeding. *Cavalier Oil Corp v. Harnett, 564 A.2d 1137 (Del. Supr. 1989)*.

.12 Time to object. — Stockholder dissenting from merger cannot have appraisal; when he does not file timely objections, even though corporation did not reject his objections till after suit begun. *In re Hilton Hotels Corp, 210 A.2d 185 (Del. Ch. 1965)*.

While surviving corporation's delay in notifying shareholders about merger should be taken into account in reckoning time available for perfecting petition for appraisal, that did not excuse dissenting shareholder for filing late appraisal petition, since it did not automatically extend time for petition and delay was not in bad faith. *Schneyer v. Shenandoah Oil Corp, 316 A.2d 570 (Del. Ch. 1974)*.

Former shareholder lost standing to bring derivative suit against corporation's officers and directors for waste after corporation merged into surviving corporation because shareholder's claim became exclusive property right of surviving corporation and its sole shareholder. *Lewis v. Anderson, 477 A.2d 1040 (Del. Supr. 1984)*.

Shareholder was not entitled to appraisal of shares pursuant to merger because its demand was untimely when demand was delivered after merger vote and shareholder had reasonable alternatives to assure timely delivery. *Tabbi v. Pollution Control Industries, Inc, 508 A.2d 867 (Del. Ch. 1986)*.

.13 Accelerating payment. — Dissenting shareholders to merger cannot ask Court to set minimum value for shares and to order payment for same, pending formal appraisal, on basis of (a) mere conjecture that surviving corporation will not be able ultimately to satisfy appraisal interest or (b) that they are being forced to subsidize corporation during period required to complete appraisal procedure. *Loeb v. Schenley Industries, Inc, 285 A.2d 829 (Del. Ch. 1971)*.

.14 Settlement. — Court rejected shareholder's proposed modification of settlement agreement which provided $2 per share to all shareholders who tender but stopped non-tendering shareholders from including any claim for breach of fiduciary duty in their appraisal actions. Settlement was fair to non-tendering shareholders who exercised their rights to appraisal because they benefitted by opportunity to tender shares at higher price. *Selfe v. Joseph, 501 A.2d 409 (Del. Supr. 1985)*.

Court does not have authority to reform a settlement agreement because neither the common law nor appraisal statute allows a court to reform an agreement that was premised upon a unilateral mistake. *In the Matter of ENSTAR Corporation, 604 A.2d 404 (Del. Supr. 1992).*

.15 Preemption. — Shareholders could not bring appraisal action following cash-out merger between two railroad corporations because appraisal remedy was preempted when Interstate Commerce Commission approved merger as "just and reasonable." *Bruno v. Western Pacific Railroad Co, 498 A.2d 171 (Del. Ch. 1985)*.

.16 Demand requirement. — When last day of limitations period for making appraisal demand falls on a Sunday, deadline for making the demand is on that Sunday, not on the Monday immediately afterward. *Nelson v. Frank E. Best Inc., 768 A.2d 473 (Del. Ch. 2000).*

.17 Right of optionholder. — The plaintiffs could not obtain an appraisal under Sec. 262 to receive the fair value of the options they were forced to give up when their corporation merged with another corporation. Sec. 262, by its own terms, applies to shares of stock and excludes options. Even though the plaintiffs presented evidence that the corporation breached a contract with them, shoehorning their contract claims into an appraisal action would distort Sec. 262's intended focus as a limited remedy focused solely on the fair value of stock. *Andaloro v. PFPC Worldwide, Inc. 830 A.2d 1232 (Del. Ch. 2003).*

.18 Consideration triggering appraisal right. — Special $6 per share dividend payable to acquired corporation's shareholders if they approved merger triggered shareholders' appraisal right as it was fundamentally cash consideration from acquirer. *Louisiana Mun. Police Ret. System v. Crawford, 918 A.2d 172 (Del. Ch. 2007).*

.19 Expert witness. — The defendants could not designate a corporation to serve as their expert witness on the subject of a corporation's value as an expert witness must be a biological person. *In Re Dole Food Co., Inc. Stockholder Litigation*, *C.A. No. 8703 and C.A. No. 9079 (Del. Ch. 2015).*

§263 MERGER OR CONSOLIDATION OF DOMESTIC CORPORATION AND PARTNERSHIPS; SERVICE OF PROCESS UPON SURVIVING OR RESULTING CORPORATION OR PARTNERSHIP

(a) Any 1 or more corporations of this State may merge or consolidate with 1 or more partnerships (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), unless the laws of the jurisdiction or jurisdictions under which such partnership or partnerships are formed prohibit such merger or consolidation. Such corporation or corporations and such 1 or more partnerships may merge with or into a surviving corporation, which may be any 1 of such corporations, or they may merge with or into a surviving partnership, which may be any 1 of such partnerships, or they may consolidate into a new resulting corporation, which corporation shall be a corporation of this State, or a partnership formed pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The term "partnership" as used in this section includes any partnership (whether general (including

a limited liability partnership) or limited (including a limited liability limited partnership)) formed under the laws of this State or the laws of any other jurisdiction.

(b) Each such corporation and partnership shall enter into a written agreement of merger or consolidation. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger in which the surviving entity is a corporation of this State, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation in which the resulting entity is a corporation of this State, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the shares of stock of each such corporation and the partnership interests of each such partnership into shares, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation or of cancelling some or all of such shares or interests, and if any shares of any such corporation or any partnership interests of any such partnership are not to remain outstanding, to be converted solely into shares, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares or partnership interests are to receive in exchange for, or upon conversion of such shares or partnership interests and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation;

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, rights, other securities or interests of the surviving or resulting corporation or partnership or of any other corporation or entity the

shares, rights, other securities or interests of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto, consistent with §155 of this title; and

(7) Such other provisions or facts as shall be required to be set forth in an agreement of merger or consolidation (including any provision for amendment of the partnership agreement and statement of partnership existence or certificate of limited partnership (or equivalent documents) of the surviving partnership) by the laws of each jurisdiction under which any of the partnerships are formed. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be adopted, approved, certified, executed and acknowledged by each of the corporations in the same manner as is provided in §251 or §255 of this title and, in the case of the partnerships, in accordance with their partnership agreements and in accordance with the laws of the jurisdiction under which they are formed. If the surviving or resulting entity is a partnership, in addition to any other approvals, each stockholder of a merging corporation who will become a general partner of the surviving or resulting partnership must approve the agreement of merger or consolidation. The agreement shall be filed and shall become effective for all purposes of the laws of this State when and as provided in §251 or §255 of this title with respect to the merger or consolidation of corporations of this State. In lieu of filing the agreement of merger or consolidation, the surviving or resulting corporation or partnership may file a certificate of merger or consolidation, executed in accordance with §103 of this title, if the surviving or resulting entity is a corporation, or by a general partner, if the surviving or resulting entity is a partnership, which states:

(1) The name, jurisdiction of formation or organization and type of entity of each of the constituent entities;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent entities in accordance with this subsection;

(3) The name of the surviving or resulting corporation or partnership;

(4) In the case of a merger in which a corporation is the surviving entity, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation in which a corporation is the resulting entity, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving or resulting corporation or partnership and the address thereof;

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving or resulting entity, on request and without cost, to any stockholder of any constituent corporation or any partner of any constituent partnership; and

(8) The agreement, if any, required by subsection (d) of this section.

(d) If the entity surviving or resulting from the merger or consolidation is a partnership formed under the laws of a jurisdiction other than this State, it shall agree that it may be served with process in this State in any proceeding for enforcement of any obligation of any constituent corporation or partnership of this State, as well as for enforcement of any obligation of the surviving or resulting corporation or partnership arising from the merger or consolidation, including any suit or other proceeding to enforce the right of any stockholders as determined in appraisal proceedings pursuant to §262 of this title, and shall irrevocably appoint the Secretary of State as its agent to accept service of process in any such suit or other proceedings and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such surviving or resulting corpora-

tion or partnership thereof by letter, directed to such surviving or resulting corporation or partnership at its address so specified, unless such surviving or resulting corporation or partnership shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary of State, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process.

(e) Sections 251 (d)-(f), 255(c) (second sentence) and (d)-(f), 259-261 and 328 of this title shall, insofar as they are applicable, apply to mergers or consolidations between corporations and partnerships.

(f) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a partnership, if the charitable status of such nonstock corporation would thereby be lost or impaired; but a partnership may be merged into a charitable nonstock corporation which shall continue as the surviving corporation. (Last amended by Ch. 86, L. ‘17, eff. 8-1-17.)

§264 MERGER OR CONSOLIDATION OF DOMESTIC CORPORATIONS AND LIMITED LIABILITY COMPANIES; SERVICE OF PROCESS UPON SURVIVING CORPORATION OR LIMITED LIABILITY COMPANY

(a) Any 1 or more corporations of this State may merge or consolidate with 1 or more limited liability companies, unless the laws of the jurisdiction or jurisdictions under which such limited liability company or

limited liability companies are formed prohibit such merger or consolidation. Such corporation or corporations and such 1 or more limited liability companies may merge with or into a surviving corporation, which may be any 1 of such corporations, or they may merge with or into a surviving limited liability company, which may be any 1 of such limited liability companies, or they may consolidate into a new resulting corporation, which corporation shall be a corporation of this State, or a limited liability company formed pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The term "limited liability company" as used in this section includes any limited liability company formed under the laws of this State or the laws of any other jurisdiction.

(b) Each such corporation and limited liability company shall enter into a written agreement of merger or consolidation. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger in which the surviving entity is a corporation of this State, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation in which the resulting entity is a corporation of this State, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the shares of stock of each such corporation and the limited liability company interests of each such limited liability company into shares, limited liability company interests or other securities of the entity surviving or resulting from such merger or consolidation or of cancelling some or all of such shares or interests, and if any shares of any such corporation or any limited liability company interests of any such limited liability company are not to remain outstanding, to be converted solely into shares, limited liability company interests or other securities of the entity surviving or resulting from such merger or consolidation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares or limited liability company interests are to receive in exchange

for, or upon conversion of such shares or limited liability company interests and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares, limited liability company interests or other securities of the entity surviving or resulting from such merger or consolidation;

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, rights, other securities or interests of the surviving or resulting corporation or limited liability company or of any other corporation or entity the shares, rights, other securities or interests of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto, consistent with §155 of this title; and

(7) Such other provisions or facts as shall be required to be set forth in an agreement of merger or consolidation (including any provision for amendment of the limited liability company agreement and certificate of formation (or equivalent documents) of the surviving limited liability company) by the laws of each jurisdiction under which any of the limited liability companies are formed.

Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be adopted, approved, certified, executed and acknowledged by each of the corporations in the same manner as is provided in §251 or §255 of this title and, in the case of the limited liability companies, in accordance with their limited liability company agreements and in accordance with the laws of the jurisdiction under which they are formed. The agreement shall be filed and shall become effective for all purposes of the laws of this State when and as provided in §251 or §255 of this title with respect to the merger or consolidation of corporations of this State. In lieu of filing the agreement of merger or consolidation, the surviving or resulting corporation or limited liability company may file a certificate of merger or consolidation, executed in accordance with

§103 of this title, if the surviving or resulting entity is a corporation, or by an authorized person, if the surviving or resulting entity is a limited liability company, which states:

(1) The name and jurisdiction of formation or organization of each of the constituent entities;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent entities in accordance with this subsection;

(3) The name of the surviving or resulting corporation or limited liability company;

(4) In the case of a merger in which a corporation is the surviving entity, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation in which a corporation is the resulting entity, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving or resulting corporation or limited liability company and the address thereof;

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving or resulting entity, on request and without cost, to any stockholder of any constituent corporation or any member of any constituent limited liability company; and

(8) The agreement, if any, required by subsection (d) of this section.

(d) If the entity surviving or resulting from the merger or consolidation is a limited liability company formed under the laws of a jurisdiction other than this State, it shall agree that it may be served with process in this State in any proceeding for enforcement of any obligation of any constituent corporation or limited liability company of this State, as well as for enforcement of any obligation of the surviving or resulting corporation or limited liability company arising from the merger or consolidation, including any suit or other proceeding to enforce the right of any stockholders as determined in appraisal proceedings pursuant to the provisions of §262 of this title, and shall irrevocably appoint the Secretary of State as its agent to accept service of process in any such suit or

other proceedings and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such surviving or resulting corporation or limited liability company thereof by letter, directed to such surviving or resulting corporation or limited liability company at its address so specified, unless such surviving or resulting corporation or limited liability company shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary of State, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process.

(e) Sections 251 (d)-(f), 255(c) (second sentence) and (d)-(f), 259-261 and 328 of this title shall, insofar as they are applicable, apply to mergers or consolidations between corporations and limited liability companies.

(f) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a limited liability company, if the charitable status of such nonstock corporation would thereby be lost or impaired; but a limited liability company may be merged into a charita-

ble nonstock corporation which shall continue as the surviving corporation. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

§265 CONVERSION OF OTHER ENTITIES TO A DOMESTIC CORPORATION

(a) As used in this section, the term "other entity" means a limited liability company, statutory trust, business trust or association, real estate investment trust, common-law trust or any other unincorporated business including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), or a foreign corporation.

(b) Any other entity may convert to a corporation of this State by complying with subsection (h) of this section and filing in the office of the Secretary of State:

(1) A certificate of conversion to corporation that has been executed in accordance with subsection (i) of this section and filed in accordance with §103 of this title; and

(2) A certificate of incorporation that has been executed, acknowledged and filed in accordance with §103 of this title. Each of the certificates required by this subsection (b) shall be filed simultaneously in the office of the Secretary of State and, if such certificates are not to become effective upon their filing as permitted by §103(d) of this title, then each such certificate shall provide for the same effective date or time in accordance with §103(d) of this title.

(c) The certificate of conversion to corporation shall state:

(1) The date on which and jurisdiction where the other entity was first created, incorporated, formed or otherwise came into being and, if it has changed, its jurisdiction immediately prior to its conversion to a domestic corporation;

(2) The name and type of entity of the other entity immediately prior to the filing of the certificate of conversion to corporation; and

(3) The name of the corporation as set forth in its certificate of incorporation filed in accordance with subsection (b) of this section.

(d) Upon the effective time of the certificate of conversion to corporation and the certificate of incorporation, the other entity shall be converted to a corporation of this State and the corporation shall thereafter be subject to all of the provisions of this title, except that notwithstanding §106 of this title, the existence of the corporation shall be deemed

to have commenced on the date the other entity commenced its existence in the jurisdiction in which the other entity was first created, formed, incorporated or otherwise came into being.

(e) The conversion of any other entity to a corporation of this State shall not be deemed to affect any obligations or liabilities of the other entity incurred prior to its conversion to a corporation of this State or the personal liability of any person incurred prior to such conversion.

(f) When another entity has been converted to a corporation of this State pursuant to this section, the corporation of this State shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the converting other entity. When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the other entity that has converted, and all property, real, personal and mixed, and all debts due to such other entity, as well as all other things and causes of action belonging to such other entity, shall remain vested in the domestic corporation to which such other entity has converted and shall be the property of such domestic corporation and the title to any real property vested by deed or otherwise in such other entity shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such other entity shall be preserved unimpaired, and all debts, liabilities and duties of the other entity that has converted shall remain attached to the corporation of this State to which such other entity has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a corporation of this State. The rights, privileges, powers and interests in property of the other entity, as well as the debts, liabilities and duties of the other entity, shall not be deemed, as a consequence of the conversion, to have been transferred to the domestic corporation to which such other entity has converted for any purpose of the laws of the State of Delaware.

(g) Unless otherwise agreed for all purposes of the laws of the State of Delaware or as required under applicable non-Delaware law, the converting other entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not be deemed to constitute a dissolution of such other entity and shall constitute a continuation of the existence of the converting other entity in the form of a corporation of this State.

(h) Prior to filing a certificate of conversion to corporation with the office of the Secretary of State, the conversion shall be approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the other entity and the conduct of its business or by applicable law, as appropriate, and a certificate of incorporation shall be approved by the same authorization required to approve the conversion.

(i) The certificate of conversion to corporation shall be signed by any person who is authorized to sign the certificate of conversion to corporation on behalf of the other entity.

(j) In connection with a conversion hereunder, rights or securities of, or interests in, the other entity which is to be converted to a corporation of this State may be exchanged for or converted into cash, property, or shares of stock, rights or securities of such corporation of this State or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, or shares of stock, rights or securities of or interests in another domestic corporation or other entity or may be cancelled. (Last amended by Ch. 273, L. '12, eff. 8-1-12.)

§266 CONVERSION OF A DOMESTIC CORPORATION TO OTHER ENTITIES

(a) A corporation of this State may, upon the authorization of such conversion in accordance with this section, convert to a limited liability company, statutory trust, business trust or association, real estate investment trust, common-law trust or any other unincorporated business including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or a foreign corporation.

(b) The board of directors of the corporation which desires to convert under this section shall adopt a resolution approving such conversion, specifying the type of entity into which the corporation shall be converted and recommending the approval of such conversion by the stockholders of the corporation. Such resolution shall be submitted to the stockholders of the corporation at an annual or special meeting. Due notice of the time, and purpose of the meeting shall be given to each holder of stock, whether voting or nonvoting, of the corporation at the address of the stockholder as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. At the meeting,

the resolution shall be considered and a vote taken for its adoption or rejection. If all outstanding shares of stock of the corporation, whether voting or nonvoting, shall be voted for the adoption of the resolution, the conversion shall be authorized.

(c) If a corporation shall convert in accordance with this section to another entity organized, formed or created under the laws of a jurisdiction other than the State of Delaware, the corporation shall file with the Secretary of State a certificate of conversion executed in accordance with §103 of this title, which certifies:

(1) The name of the corporation, and if it has been changed, the name under which it was originally incorporated;

(2) The date of filing of its original certificate of incorporation with the Secretary of State;

(3) The name and jurisdiction of the entity to which the corporation shall be converted;

(4) That the conversion has been approved in accordance with the provisions of this section;

(5) The agreement of the corporation that it may be served with process in the State of Delaware in any action, suit or proceeding for enforcement of any obligation of the corporation arising while it was a corporation of this State, and that it irrevocably appoints the Secretary of State as its agent to accept service of process in any such action, suit or proceeding; and

(6) The address to which a copy of the process referred to in paragraph (c)(5) of this section shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State in accordance with paragraph (c)(5) of this section by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of such service upon the Secretary of State in accordance with paragraph (c)(5) of this section, the Secretary of State shall forthwith notify such corporation that has converted out of the State of Delaware by letter, directed to such corporation that has converted out of the State of Delaware at the address so specified, unless such corporation shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such let-

ter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process.

(d) Upon the filing in the Office of the Secretary of State of a certificate of conversion to non-Delaware entity in accordance with subsection (c) of this section or upon the future effective date or time of the certificate of conversion to non-Delaware entity and payment to the Secretary of State of all fees prescribed under this title, the Secretary of State shall certify that the corporation has filed all documents and paid all fees required by this title, and thereupon the corporation shall cease to exist as a corporation of this State at the time the certificate of conversion becomes effective in accordance with §103 of this title. Such certificate of the Secretary of State shall be prima facie evidence of the conversion by such corporation out of the State of Delaware.

(e) The conversion of a corporation out of the State of Delaware in accordance with this section and the resulting cessation of its existence as a corporation of this State pursuant to a certificate of conversion to non-Delaware entity shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to such conversion or the personal liability of any person incurred prior to such conversion, nor shall it be deemed to affect the choice of law applicable to the corporation with respect to matters arising prior to such conversion.

(f) Unless otherwise provided in a resolution of conversion adopted in accordance with this section, the converting corporation shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not constitute a dissolution of such corporation.

(g) In connection with a conversion of a domestic corporation to another entity pursuant to this section, shares of stock, of the corpora-

tion of this State which is to be converted may be exchanged for or converted into cash, property, rights or securities of, or interests in, the entity to which the corporation of this State is being converted or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, shares of stock, rights or securities of, or interests in, another domestic corporation or other entity or may be cancelled.

(h) When a corporation has been converted to another entity or business form pursuant to this section, the other entity or business form shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the corporation. When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the corporation that has converted, and all property, real, personal and mixed, and all debts due to such corporation, as well as all other things and causes of action belonging to such corporation, shall remain vested in the other entity or business form to which such corporation has converted and shall be the property of such other entity or business form, and the title to any real property vested by deed or otherwise in such corporation shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such corporation shall be preserved unimpaired, and all debts, liabilities and duties of the corporation that has converted shall remain attached to the other entity or business form to which such corporation has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as such other entity or business form. The rights, privileges, powers and interest in property of the corporation that has converted, as well as the debts, liabilities and duties of such corporation, shall not be deemed, as a consequence of the conversion, to have been transferred to the other entity or business form to which such corporation has converted for any purpose of the laws of the State of Delaware.

(i) No vote of stockholders of a corporation shall be necessary to authorize a conversion if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the conversion.

(j) Nothing in this section shall be deemed to authorize the conversion of a charitable nonstock corporation into another entity, if the charitable status of such charitable nonstock corporation would thereby be lost or impaired. (Last amended by Ch. 290, L. ‘10, eff. 8-2-10.)

§267 MERGER OF PARENT ENTITY AND SUBSIDIARY CORPORATION OR CORPORATIONS

(a) In any case in which: (1) at least 90% of the outstanding shares of each class of the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision required by §251(g)(7)(i) of this title), of which class there are outstanding shares that, absent this subsection, would be entitled to vote on such merger, is owned by an entity, and (2) 1 or more of such corporations is a corporation of this State, unless the laws of the jurisdiction or jurisdictions under which such entity or such foreign corporations are formed or organized prohibit such merger, the entity having such stock ownership may either merge the corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such corporations, into 1 of the other corporations by (a) authorizing such merger in accordance with such entity's governing documents and the laws of the jurisdiction under which such entity is formed or organized and (b) acknowledging and filing with the Secretary of State, in accordance with §103 of this title, a certificate of such ownership and merger certifying (i) that such merger was authorized in accordance with such entity's governing documents and the laws of the jurisdiction under which such entity is formed or organized, such certificate executed in accordance with such entity's governing documents and in accordance with the laws of the jurisdiction under which such entity is formed or organized and (ii) the type of entity of each constituent entity to the merger; provided, however, that in case the entity shall not own all the outstanding stock of all the corporations, parties to a merger as aforesaid, (A) the certificate of ownership and merger shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving constituent party upon surrender of each share of the corporation or corporations not owned by the entity, or the cancellation of some or all of such shares and (B) such terms and conditions of the merger may not result in a holder of stock in a corporation becoming a general partner in a surviving entity that is a partnership (other than a limited liability partnership or a limited liability limited partnership). Any of the terms of the merger may be made dependent upon facts ascertainable outside of the certificate of ownership and merger, provided that the manner in which such facts shall operate upon the terms of the merger is clearly and expressly set forth in the certificate of ownership

and merger. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the entity. If the surviving constituent party is an entity formed or organized under the laws of a jurisdiction other than this State, (1) §252(d) of this title shall also apply to a merger under this section; if the surviving constituent party is the entity, the word "corporation" where applicable, as used in §252(d) of this title, shall be deemed to include an entity as defined herein; and (2) the terms and conditions of the merger shall obligate the surviving constituent party to provide the agreement, and take the actions, required by §252(d) of this title.

(b) Sections 259, 261, and 328 of this title shall, insofar as they are applicable, apply to a merger under this section, and §260 and §251(e) of this title shall apply to a merger under this section in which the surviving constituent party is a corporation of this State. For purposes of this subsection, references to "agreement of merger" in §251(e) of this title shall mean the terms and conditions of the merger set forth in the certificate of ownership and merger, and references to "corporation" in §§259-261 of this title, and §328 of this title shall be deemed to include the entity, as applicable. Section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (c) of this section.

(c) In the event all of the stock of a Delaware corporation party to a merger effected under this section is not owned by the entity immediately prior to the merger, the stockholders of such Delaware corporation party to the merger shall have appraisal rights as set forth in §262 of this title.

(d) As used in this section only, the term:

(1) "constituent party" means an entity or corporation to be merged pursuant to this section;

(2) "entity" means a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), limited liability company, any association of the kind commonly known as a joint-stock association or joint-stock company and any unincorporated association, trust or enterprise having members or having outstanding shares of stock or other evidences of financial or beneficial interest therein, whether formed or organized by agreement or under statutory authority or otherwise and whether formed or organized under the laws of this State or the laws of any other jurisdiction; and

(3) “governing documents” means a partnership agreement, limited liability company agreement, articles of association or any other instrument containing the provisions by which an entity is formed or organized. (As amended by Ch. 86, L. ‘17, eff. 8-1-17.)

Subchapter X
SALE OF ASSETS, DISSOLUTION AND WINDING UP

§271 SALE, LEASE OR EXCHANGE OF ASSETS; CONSIDERATION; PROCEDURE

(a) Every corporation may at any meeting of its board of directors or governing body sell, lease or exchange all or substantially all of its property and assets, including its goodwill and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or other property, including shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors or governing body deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon or, if the corporation is a nonstock corporation, by a majority of the members having the right to vote for the election of the members of the governing body and any other members entitled to vote thereon under the certificate of incorporation or the bylaws of such corporation, at a meeting duly called upon at least 20 days' notice. The notice of the meeting shall state that such a resolution will be considered.

(b) Notwithstanding authorization or consent to a proposed sale, lease or exchange of a corporation’s property and assets by the stockholders or members, the board of directors or governing body may abandon such proposed sale, lease or exchange without further action by the stockholders or members, subject to the rights, if any, of third parties under any contract relating thereto.

(c) For purposes of this section only, the property and assets of the corporation include the property and assets of any subsidiary of the corporation. As used in this subsection, “subsidiary” means any entity wholly-owned and controlled, directly or indirectly, by the corporation

and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, and/or statutory trusts. Notwithstanding subsection (a) of this section, except to the extent the certificate of incorporation otherwise provides, no resolution by stockholders or members shall be required for a sale, lease or exchange of property and assets of the corporation to a subsidiary. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Sale of assets. — If power is given in charter to sell substantially all the property of the company with the assent of holders of 3/4 of the stock everyone taking shares is bound by that provision. *Butler v. New Keystone Copper Co, 93 A 380 (Del. Ch. 1915)*.

Sale of corporate assets which has been approved by stockholders who have lost voting rights will be set aside. *Macht v. Merchants Mtge & Credit Co, 194 A 23 (Del. Ch. 1937)*.

Proposed sale of corporation's Canadian operations, which constituted 51% of corporation's assets and which generated approximately 45% of corporation's 1980net sales, would, if consummated, constitute a sale of substantially all of corporation's assets requiring approval by a majority of stockholders at a stockholders' meeting. *Katz v. Bregman, 431 A.2d 1274 (De. Ch. 1981)*.

Although corporate sale of property to officer shareholders for less than adequate consideration is generally voidable at corporation's option, in this case, to avoid windfall to shareholder who treated corporate assets as his own, officers/shareholders who bought the property had to pay the difference between property's purchase price and market value corporation. *Warren v. Warren, 460 A.2d 526 (Del. Supr. 1983)*.

A board of directors' decision to structure an asset sale as a bankruptcy sale had to be enjoined where the purpose was to avoid having the stockholders vote on the asset sale. *Esopus Creek Value LP v. Hauf, 913 A.2d 593 (Del. Ch. 2006).*

.2 Consideration. — Sale of corporate assets, where buying corporation issues stock and notes in exchange for assets bought, cannot be attacked on ground that notes are void for lack of consideration absent proof of overvaluation of assets of selling corporation. *.Gott v. Live Poultry Transit Co, 156 A 292 (Ch Ct)*, *aff'd, 161 A 150 (1932)*.

Though consideration offered on sale of assets was much less than book value, disparity was not so great as to be violation of fiduciary duty by directors and majority stockholders when earnings per share had dropped about 80% in four years and outlook for further profitable operation was dim. *Baron v. Pressed Metals of America, Inc, 123 A.2d 848 (Del. Supr. 1956)*.

Although not all the directors were conversant with the value factors involved in fixing consideration for sale of assets, the board's approval is nevertheless valid; capitalization rate of seven or eight times normal earnings was reasonable for a

family corporation in heavy industry. *Cottrell v. The Pawcatuck Co, 128 A.2d 225 (Del. Supr. 1956)*.

Minority stockholders in 95% owned subsidiary that sold its assets to parent and liquidated cannot get additional compensation for their surrendered shares when the sale price is supported by an uncontradicted expert appraisal, even though their corporation could have gotten a higher price by sale to a third party, or by an exchange of its stock with a third corporation that controlled both buyer and seller. *Abelow v. Mid-States Oil Corp, 189 A.2d 675 (Del. Supr. 1963)*.

.3 Power of president to dispose of corporate assets. — President cannot make contract which divests the corporation of all its assets, absent corporate authorization or ratification. *Andrew Jergens Co v. Woodbury, Inc, 273 F. 952 (D. Del. 1921)*.

.4 Buyer's liability. — Corporation that purchased manufacturer's industrial products division was not independently liable for failing to warn manufacturer's customers of asbestos danger when (1) Delaware law would apply because it was place of tort and Delaware does not require warning by successor and (2) even if Pennsylvania law applies, corporation had no contractual obligations regarding manufacturer's allegedly defective asbestos products. *In re Asbestos Litigation (Bell), 517 A.2d 697 (Del. Supr. 1986)*.

Court, applying Delaware law, found that buyer could not be held liable under continuation theory of successor liability for seller's allegedly defective product, even though buyer used seller's officers and employees, and maintained some of seller's business where dale of business was arms-length transaction, successor had different owners than predecessor, and portion of business pertaining to product's manufacture was not continued. *Elmer v. Tenneco Resins, Inc, 698 F. Supp. 535 (D. Del. 1988).*

.5 Preferred stockholders. — Sale of assets under a plan of reorganization manifestly unfair to preferred stockholders should be set aside. *Eagleson v. Pacific Timber Co, 270 F. 1008 (D. Del. 1920)*.

Directors need not pay arrearages to preferred stockholders from capital surplus realized out of sale of corporation's business assets if they are keeping it in good faith to buy new business and sale for that purpose has been approved by majority stockholders. *Treves v. Menzies, 142 A.2d 520 (Del. Ch. 1958)*.

.6 Rights of minority stockholders. —Majority shareholders did not breach fiduciary duty to corporation by benefiting themselves at the expense of minority shareholders when corporation was dissolved and assets sold, because: (1) non-competition and consulting agreements negotiated by majority shareholders with a purchaser of some of company's assets did not come at the expense of corporation since agreements were desired by purchaser and freely negotiated and (2) price paid by majority shareholders on their purchase of remaining corporate assets was fair. *Jacobs v. Hanson, 525 F. Supp. 292 (D. Del. 1981)*.

.7 De facto merger. — Transaction is valid in which Ecks Corporation buys Wye Corporation's stock from Wye's stockholders, then exchanges the Wye stock for substantially all Wye's assets; this is not a de facto merger giving right of appraisal to dissenting stockholders in Wye; price for Wye's stock, and thus for its assets, is adequate when it was reached after arm's-length bargaining. *Alcott v. Hyman, 202 A.2d 501 (Del. Supr. 1965)*.

.8 Spin off. — Parent did not breach its fiduciary duty to its wholly owned subsidiary, which was soon to be spun-off, when it caused subsidiary's directors to

approve agreement arguably favorable to parent and unfavorable to subsidiary because purchasers of when-issued stock in subsidiary were owed no duties by subsidiary before spin-off, so parent was dealing with itself when it caused subsidiary to approve disputed agreement. *Anadarko Petroleum Corp v. Panhandle Eastern Corp, 521 A.2d 624 (Del. Ch. 1987)*.

.9 Liability of controlling shareholders. — Controlling shareholders of a corporation who signed a letter of intent to sell their stock in another company, which constituted the principal asset of the corporation, without disclosing the opportunity to the corporation's board of directors, were liable in damages for money they had received for signing a letter of intent and for expenses the corporation incurred to accommodate the majority shareholders' pursuit of their own interests. The controlling shareholders were liable despite the fact that they could have vetoed the action, which constituted the sale of substantially all of the corporation's assets, if it had been undertaken by the corporation. *Thorpe v. CERBCO, Inc, 676 A.2d 436 (Del. Supr. 1996)*.

§272 MORTGAGE OR PLEDGE OF ASSETS

The authorization or consent of stockholders to the mortgage or pledge of a corporation's property and assets shall not be necessary, except to the extent that the certificate of incorporation otherwise provides.

§273 DISSOLUTION OF JOINT VENTURE CORPORATION HAVING 2 STOCKHOLDERS

(a) If the stockholders of a corporation of this State, having only 2 stockholders each of which own 50% of the stock therein, shall be engaged in the prosecution of a joint venture and if such stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing of the assets used in such venture, either stockholder may, unless otherwise provided in the certificate of incorporation of the corporation or in a written agreement between the stockholders, file with the Court of Chancery a petition stating that it desires to discontinue such joint venture and to dispose of the assets used in such venture in accordance with a plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporation be dissolved. Such petition shall have attached thereto a copy of the proposed plan of discontinuance and distribution and a certificate stating that copies of such petition and plan have been transmitted in writing to the other stockholder and to the directors and officers of such

corporation. The petition and certificate shall be executed and acknowledged in accordance with Sec. 103 of this title.

(b) Unless both stockholders file with the Court of Chancery within 3 months of the date of the filing of such petition, a certificate similarly executed and acknowledged stating that they have agreed on such plan, or a modification thereof, and (2) within 1 year from the date of the filing of such petition, a certificate similarly executed and acknowledged stating that the distribution provided by such plan had been completed, the Court of Chancery may dissolve such corporation and may by appointment of 1 or more trustees or receivers with all the powers and title of a trustee or receiver appointed under Sec. 279 of this title, administer and wind up its affairs. Either or both of the above periods may be extended by agreement of the stockholders, evidenced by a certificate similarly executed, acknowledged and filed with the Court of Chancery prior to the expiration of such period.

(c) In the case of a charitable nonstock corporation, the petitioner shall provide a copy of any petition referred to in subsection (a) of this section to the Attorney General of the State of Delaware within 1 week of its filing with the Court of Chancery. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Purpose; evidence permitted. — Purpose of GCL Sec. 273 is to provide mechanism for dissolving joint venture that obviates a deadlocked vote of two equal shareholders. A shareholder seeking dissolution under this provision may use any competent evidence to prove that the shareholders cannot agree on the desirability of discontinuing the joint venture and disposing of assets. *In re Venture Advisers, Inc, No. 9439 (Ch. Ct. 12-1-88)*.

.2 Limitations on remedy. — Actions that are adversarial in nature cannot be raised in dissolution proceeding. Issues in dissolution proceeding are narrowly limited to those concerns directly related to dissolution. *In re Cambridge Financial Group, Ltd, No. 9279 (Ch. Ct. 11-9-87)*.

.3 Elements of a joint venture corporation. — In an action to dissolve a corporation under Sec. 273, the Court of Chancery determined that the subject corporation was a joint venture corporation where the facts demonstrated that the two corporate investors each owned a half interest in the performance of the third corporation; shared profits and losses of the third corporation; maintained equal control in the subject corporation; and impliedly agreed to engage in business for each one's mutual benefit. *Wah Chang Smelting and Refining Co of America, Inc v. Cleveland Tungsten Inc, No. 1324-K (Ch. Ct. 8-19-96)*.

.4 Court's role. — Once the requirements of Sec. 273 are met, the court's exercise of its discretion in determining whether to grant the petition is limited to de-

termining whether or not a bona fide inability to agree exists between the two shareholders. *In the Matter of Bermor, Inc., C.A. No. 8401, (Del. Ch. 2015).*

§274 DISSOLUTION BEFORE THE ISSUANCE OF SHARES OR BEGINNING OF BUSINESS; PROCEDURE

If a corporation has not issued shares or has not commenced the business for which the corporation was organized, a majority of the incorporators, or, if directors were named in the certificate of incorporation or have been elected, a majority of the directors, may surrender all of the corporation's rights and franchises by filing in the office of the Secretary of State a certificate, executed and acknowledged by a majority of the incorporators or directors, stating: that no shares of stock have been issued or that the business or activity for which the corporation was organized has not been begun; the date of filing of the corporation's original certificate of incorporation with the Secretary of State; that no part of the capital of the corporation has been paid, or, if some capital has been paid, that the amount actually paid in for the corporation's shares, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto; that if the corporation has begun business but it has not issued shares, all debts of the corporation have been paid; that if the corporation has not begun business but has issued stock certificates, all issued stock certificates, if any, have been surrendered and cancelled; and that all rights and franchises of the corporation are surrendered. Upon such certificate becoming effective in accordance with Sec. 103 of this title, the corporation shall be dissolved. (Last amended by Ch. 290, L. '10, eff. 8-2-10.)

§275 DISSOLUTION GENERALLY; PROCEDURE

(a) If it should be deemed advisable in the judgment of the board of directors of any corporation that it should be dissolved, the board, after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, shall cause notice of the adoption of the resolution and of a meeting of stockholders to take action upon the resolution to be given to each stockholder entitled to vote thereon as of the record date for determining the stockholders entitled to notice of the meeting.

(b) At the meeting a vote shall be taken upon the proposed dissolution. If a majority of the outstanding stock of the corporation entitled to

vote thereon shall vote for the proposed dissolution, a certification of dissolution shall be filed with the Secretary of State pursuant to subsection (d) of this Section.

(c) Dissolution of a corporation may also be authorized without action of the directors if all the stockholders entitled to vote thereon shall consent in writing and a certificate of dissolution shall be filed with the Secretary of State pursuant to subsection (d) of this Section.

(d) If dissolution is authorized in accordance with this Section, a certificate of dissolution shall be executed, acknowledged and filed, and shall become effective, in accordance with Sec. 103 of this Title. Such certificate of dissolution shall set forth:

(1) the name of the corporation;

(2) the date dissolution was authorized;

(3) that the dissolution has been authorized by the board of directors and stockholders of the corporation, in accordance with subsections (a) and (b) of this Section, or that the dissolution has been authorized by all of the stockholders of the corporation entitled to vote on a dissolution, in accordance with subsection (c) of this section;

(4) the names and addresses of the directors and officers of the corporation; and

(5) The date of filing of the corporation's original certificate of incorporation with the Secretary of State.

(e) The resolution authorizing a proposed dissolution may provide that notwithstanding authorization or consent to the proposed dissolution by the stockholders, or the members of a nonstock corporation pursuant to Sec. 276 of this title, the board of directors or governing body may abandon such proposed dissolution without further action by the stockholders or members.

(f) Upon a certificate of dissolution becoming effective in accordance with Sec. 103 of this title, the corporation shall be dissolved. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Compelling dissolution. — Minority stockholder in personal holding company cannot compel dissolution because (1) company's shares sell at substantial discount from asset value when stockholder knew this at time he bought share, or (2) its status as holding company compels it to pay substantial taxes and expenses, or (3) it lost opportunities to buy additional shares of affiliated company's stock, when it could not do that due to its need to distribute most of its income. *Warshaw v. Calhoun, 221 A.2d 487 (1966)*.

§276 DISSOLUTION OF NONSTOCK CORPORATION; PROCEDURE

(a) Whenever it shall be desired to dissolve any nonstock corporation, the governing body shall perform all the acts necessary for dissolution which are required by §275 of this title to be performed by the board of directors of a corporation having capital stock. If any members of a nonstock corporation are entitled to vote for the election of members of its governing body or are entitled to vote for dissolution under the certificate of incorporation or the bylaws of such corporation, such members shall perform all the acts necessary for dissolution which are contemplated by §275 of this title to be performed by the stockholders of a corporation having capital stock, including dissolution without action of the members of the governing body if all the members of the corporation entitled to vote thereon shall consent in writing and a certificate of dissolution shall be filed with the Secretary of State pursuant to §275(d) of this title. If there is no member entitled to vote thereon, the dissolution of the corporation shall be authorized at a meeting of the governing body, upon the adoption of a resolution to dissolve by the vote of a majority of members of its governing body then in office. In all other respects, the method and proceedings for the dissolution of a nonstock corporation shall conform as nearly as may be to the proceedings prescribed by §275 of this title for the dissolution of corporations having capital stock.

(b) If a nonstock corporation has not commenced the business for which the corporation was organized, a majority of the governing body or, if none, a majority of the incorporators may surrender all of the corporation rights and franchises by filing in the office of the Secretary of State a certificate, executed and acknowledged by a majority of the incorporators or governing body, conforming as nearly as may be to the certificate prescribed by §274 of this title. (Last amended by Ch. 253, L. ‘10, eff. 8-1-10.)

§277 PAYMENT OF FRANCHISE TAXES BEFORE DISSOLUTION, MERGER, TRANSFER OR CONVERSION

No corporation shall be dissolved, merged, transferred (without continuing its existence as a corporation of this State) or converted under this chapter until:

(1) All franchise taxes due to or assessable by the State including all franchise taxes due or which would be due or assessable for the entire calendar month during which such dissolution, merger, transfer or conversion becomes effective have been paid by the corporation; and

(2) All annual franchise tax reports including a final annual franchise tax report for the year in which such dissolution, merger, transfer or conversion becomes effective have been filed by the corporation;

notwithstanding the foregoing, if the Secretary of State certifies that an instrument to effect a dissolution, merger, transfer or conversion has been filed in the Secretary of State's office, such corporation shall be dissolved, merged, transferred or converted at the effective time of such instrument. (Last amended by Ch. 96, L. '11, eff. 8-1-11.)

§278 CONTINUATION OF CORPORATION AFTER DISSOLUTION FOR PURPOSES OF SUIT AND WINDING UP AFFAIRS

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

Sections 279 through 282 of this title shall apply to any corporation that has expired by its own limitation, and when so applied, all references in those sections to a dissolved corporation or dissolution shall include a corporation that has expired by its own limitation and to such expiration, respectively. (Last amended by Ch. 290, L. '10, eff. 8-2-10.)

Decisions

.1 Continuing corporate existence. —Neither dissolution nor the expiration of the three-year winding-up extinguishes the possibility of reverter held by a corporation. *Addy v. Short, 89 A.2d 136 (Del. Supr. 1952)*.

Attorneys can recover judgment against dissolved corporation for services rendered though action begun three years after corporation's dissolution, when they were employed within three-year period. *Ross v. Venezuelan-American Independent Oil Producers Ass'n, Inc, 230 F. Supp. 701 (D. Del. 1964)*.

A winding up provision like Sec. 278 precludes stockholder liability under a common law trust fund theory. Therefore, because the plaintiff's ability to sue a dissolved corporation had expired the plaintiff could not hold the corporation's stockholder liable for the corporation's debts. *Territory of USVI v. Goldman, Sachs & Co., 937 A.2d 760 (Del. Ch. 2007).*

.2 Appointment of receiver. — Delaware corporation that had been dissolved by gubernatorial proclamation ceased to exist legally after expiration of three year continuation period of GCL Sec. 278 even though a receiver had been appointed to protect rights of certain former shareholders. *U.S. v. McDonald &Eide, Inc, 670 F. Supp. 1226 (D. Del. 1987*).

.3 Liquidating trust. — The Delaware Supreme Court determined that because a liquidating trust that was the successor to a dissolved corporation and was established to hold assets for both the shareholders and creditors of the corporation was a separate entity, it was not subject to the three year period imposed by Sec. 278 and as such was liable for payment of a creditor's claim asserted after the three year period. *City Investing Company Liquidating Trust v. Continental Casualty Co, 624 A.2d 1191 (Del. Supr. 1993)*.

It is within the Chancery Court's discretion to create a successor trust to an expiring liquidating trust rather than extending the expiring trust. *Rosenbloom v. Esso Virgin Islands, Inc., 766 A.2d 451 (Del. Supr. 2000).*

§279 TRUSTEES OR RECEIVERS FOR DISSOLVED CORPORATIONS; APPOINTMENT; POWERS; DUTIES

When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the directors of the corporation to be trustees, or appoint 1 or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be

necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid. (Last amended by Ch. 136, L. '87, eff. 7-1-87.)

Decisions

.1 Appointment of receiver. — Court will not appoint a liquidating receiver for a solvent well-managed, close corporation on the ground that the directors (1) keep inadequate books and records, if the records meet Internal Revenue Service requirements and, (2) deny minority stockholders the right to make an independent audit, and (3) refuse to declare dividends. *Hall v. John S Isaacs & Sons Farms, Inc, 163 A.2d 288 (Del. Supr. 1960)*.

Claimants with pending asbestos claims against a dissolved corporation were entitled to the appointment of a receiver to enable them to pursue their claims where the corporation owned insurance policies that were capable of vesting. Thus the Chancery Court erred in holding the corporation had no undistributed assets. *Anderson v. Krafft-Murphy Co., Inc., 82 A.3d 696 (Del. Supr. 2013).*

A receiver is an agent appointed by the court to take charge of, conserve, and, in most cases, to administer the assets of a corporation; his appointment is for the benefit of all interested parties, including those who may ultimately establish rights in the case. *Jersawit v. Banning, 118 A 727 (Del. Supr. 1922)*.

.2 Administration-court control. — In pending receivership of corporation, court need not, either because it lacks jurisdiction or because it exercises its discretion not to exercise it if it has it, order receiver to sell enough authorized but unissued stock to stockholder to pay corporate indebtedness and discharge receivership. *In re Public Service Holding Corp, 24 A.2d 584 (Del. Supr. 1942)*.

.3 Trustees' duties. — Trustees of dissolved corporation were negligent in relying only on one broker for sale of corporate assets, a large tract of land, but could not be surcharged, absent loss to trust corpus or showing of self-dealing, since cash terms of sale were reasonable and consistent with principal purpose of trust. *Lockwood v. OFB Corp, 305 A.2d 636 (Ch. Ct. 1973)*.

.4 Effect on three-year continuation period. — Delaware corporation that had been dissolved by gubernatorial proclamation ceased to legally exist after expiration of three year continuation period of GCL Sec. 278 even though a receiver had been appointed to protect rights of certain former shareholders because Court of Chancery refused to extend corporate existence; receiver had been appointed after three year period; and corporation had distributed all its assets and ceased doing business. The defunct corporation, therefore, was not required to file returns or pay taxes. *U.S. v. McDonald &Eide, Inc, 670 F. Supp. 1226 (D. Del. 1987)*.

§280 NOTICE TO CLAIMANTS; FILING OF CLAIMS

(a)(1) After a corporation has been dissolved in accordance with the procedures set forth in this chapter, the corporation or any successor entity may give notice of the dissolution, requiring all persons having a claim against the corporation other than a claim against the corporation in a pending action, suit or proceeding to which the corporation is a party to present their claims against the corporation in accordance with such notice. Such notice shall state:

a. That all such claims must be presented in writing and must contain sufficient information reasonably to inform the corporation or successor entity of the identity of the claimant and the substance of the claim;

b. The mailing address to which such a claim must be sent;

c. The date by which such a claim must be received by the corporation or successor entity, which date shall be no earlier than 60 days from the date thereof; and

d. That such claim will be barred if not received by the date referred to in subparagraph c. of this subsection; and

e. That the corporation or a successor entity may make distributions to other claimants and the corporation's stockholders or persons interested as having been such without further notice to the claimant; and

f. The aggregate amount, on an annual basis, of all distributions made by the corporation to its stockholders for each of the 3 years prior to the date the corporation dissolved.

Such notice shall also be published at least once a week for 2 consecutive weeks in a newspaper of general circulation in the county in which the office of the corporation's last registered agent in this State is located and in the corporation's principal place of business and, in the case of a corporation having $10,000,000 or more in total assets at the time of its dissolution, at least once in all editions of a daily newspaper with a national circulation. On or before the date of the first publication of such notice, the corporation or successor entity shall mail a copy of such notice by certified or registered mail, return receipt requested, to each known claimant of the corporation including persons with claims asserted against the corporation in a pending action, suit or proceeding to which the corporation is a party.

(2) Any claim against the corporation required to be presented pursuant to this subsection is barred if a claimant who was given actual notice under this subsection does not present the claim to the dissolved

corporation or successor entity by the date referred to in subparagraph (1)c. of this subsection.

(3) A corporation or successor entity may reject, in whole or in part, any claim made by a claimant pursuant to this subsection by mailing notice of such rejection by certified or registered mail, return receipt requested, to the claimant within 90 days after receipt of such claim and, in all events, at least 150 days before the expiration of the period described in Sec. 278 of this title; provided, however, that in the case of a claim filed pursuant to Sec. 295 of this title against a corporation or successor entity for which a receiver or trustee has been appointed by the Court of Chancery the time period shall be as provided in Sec. 296 of this title, and the 30-day appeal period provided for in Sec. 296 of this title shall be applicable. A notice sent by a corporation or successor entity pursuant to this subsection shall state that any claim rejected therein will be barred if an action, suit or proceeding with respect to the claim is not commenced within 120 days of the date thereof, and shall be accompanied by a copy of Sec. 278-283 of this title and, in the case of a notice sent by a court-appointed receiver or trustee and as to which a claim has been filed pursuant to Sec. 295 of this title, copies of Sec. 295 and 296 of this title.

(4) A claim against a corporation is barred if a claimant whose claim is rejected pursuant to paragraph (3) of this subsection does not commence an action, suit or proceeding with respect to the claim no later than 120 days after the mailing of the rejection notice.

(b)(1) A corporation or successor entity electing to follow the procedures described in subsection (a) of this section shall also give notice of the dissolution of the corporation to persons with contractual claims contingent upon the occurrence or nonoccurrence of future events or otherwise conditional or unmatured, and request that such persons present such claims in accordance with the terms of such notice. Provided however, that as used in this section and in Sec. 281 of this title, the term “contractual claims” shall not include any implied warranty as to any product manufactured, sold, distributed or handled by the dissolved corporation. Such notice shall be in substantially the form, and sent and published in the same manner, as described in subsection (a)(1) of this section.

(2) The corporation or successor entity shall offer any claimant on a contract whose claim is contingent, conditional or unmatured such security as the corporation or successor entity determines is sufficient to provide compensation to the claimant if the claim matures. The corpo-

ration or successor entity shall mail such offer to the claimant by certified or registered mail, return receipt requested, within 90 days of receipt of such claim and, in all events, at least 150 days before the expiration of the period described in Sec. 278 of this title. If the claimant offered such security does not deliver in writing to the corporation or successor entity a notice rejecting the offer within 120 days after receipt of such offer for security, the claimant shall be deemed to have accepted such security as the sole source from which to satisfy the claim against the corporation.

(c) (1) A corporation or successor entity which has given notice in accordance with subsection (a) of this section shall petition the Court of Chancery to determine the amount and form of security that will be reasonably likely to be sufficient to provide compensation for any claim against the corporation which is the subject of a pending action, suit or proceeding to which the corporation is a party other than a claim barred pursuant to subsection (a) of this section.

(2) A corporation or successor entity which has given notice in accordance with subsections (a) and (b) of this section shall petition the Court of Chancery to determine the amount and form of security that will be sufficient to provide compensation to any claimant who has rejected the offer for security made pursuant to subsection (b)(2) of this section.

The Court of Chancery may appoint a guardian ad litem in respect of any such proceeding brought under this subsection. The reasonable fees and expenses of such guardian, including all reasonable expert witness fees, shall be paid by the petitioner in such proceeding.

(3) A corporation or successor entity which has given notice in accordance with subsection (a) of this section shall petition the Court of Chancery to determine the amount and form of security which will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation or successor entity, are likely to arise or to become known to the corporation or successor entity within 5 years after the date of dissolution or such longer period of time as the Court of Chancery may determine not to exceed 10 years after the date of dissolution.

(d) The giving of any notice or making of any offer pursuant to the provisions of this section shall not revive any claim then barred or constitute acknowledgment by the corporation or successor entity that any person to whom such notice is sent is a proper claimant and shall not

operate as a waiver of any defense or counterclaim in respect of any claim asserted by any person to whom such notice is sent.

(e) As used in this section, the term "successor entity" shall include any trust, receivership or other legal entity governed by the laws of this State to which the remaining assets and liabilities of a dissolved corporation are transferred and which exists solely for the purposes of prosecuting and defending suits, by or against the dissolved corporation, enabling the dissolved corporation to settle and close the business of the dissolved corporation, to dispose of and convey the property of the dissolved corporation, to discharge the liabilities of the dissolved corporation, and to distribute to the dissolved corporation's stockholders any remaining assets, but not for the purpose of continuing the business for which the dissolved corporation was organized.

(f) The time periods and notice requirements of this section shall, in the case of a corporation or successor entity for which a receiver or trustee has been appointed by the Court of Chancery, be subject to variation by, or in the manner provided in, the Rules of the Court of Chancery.

(g) In the case of a nonstock corporation, any notice referred to in the last sentence of paragraph (a)(3) of this section shall include a copy of §114 of this title. In the case of a nonprofit nonstock corporation, provisions of this section regarding distributions to members shall not apply to the extent that those provisions conflict with any other applicable law or with that corporation's certificate of incorporation or bylaws. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

§281 PAYMENT AND DISTRIBUTION TO CLAIMANTS AND STOCKHOLDERS

(a) A dissolved corporation or successor entity which has followed the procedures described in Sec. 280 of this title:

(1) Shall pay the claims made and not rejected in accordance with Sec. 280(a) of this title,

(2) Shall post the security offered and not rejected pursuant to Sec. 280(b)(2) of this title,

(3) Shall post any security ordered by the Court of Chancery in any proceeding under Sec. 280(c) of this title, and

(4) Shall pay or make provision for all other claims that are mature, known and uncontested or that have been finally determined to be owing by the corporation or such successor entity.

Such claims or obligations shall be paid in full and any such provision for payment shall be made in full if there are sufficient assets.

If there are insufficient assets, such claims and obligations shall be paid or provided for according to their priority, and, among claims of equal priority, ratably to the extent of assets legally available therefor. Any remaining assets shall be distributed to the stockholders of the dissolved corporation; provided, however, that such distribution shall not be made before the expiration of 150 days from the date of the last notice of rejections given pursuant to Sec. 280(a)(3) of this title. In the absence of actual fraud, the judgment of the directors of the dissolved corporation or the governing persons of such successor entity as to the provision made for the payment of all obligations under paragraph (4) of this subsection shall be conclusive.

(b) A dissolved corporation or successor entity which has not followed the procedures described in Sec. 280 of this title shall, prior to the expiration of the period described in Sec. 278 of this title, adopt a plan of distribution pursuant to which the dissolved corporation or successor entity (i) shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims known to the corporation or such successor entity, (ii) shall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the corporation which is the subject of a pending action, suit or proceeding to which the corporation is a party and (iii) shall make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation or successor entity, are likely to arise or to become known to the corporation or successor entity within 10 years after the date of dissolution. The plan of distribution shall provide that such claims shall be paid in full and any such provision for payment made shall be made in full if there are sufficient assets. If there are insufficient assets, such plan shall provide that such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of assets legally available therefor. Any remaining assets shall be distributed to the stockholders of the dissolved corporation.

(c) Directors of a dissolved corporation or governing persons of a successor entity which has complied with subsections (a) or (b) of this section shall not be personally liable to the claimants of the dissolved corporation.

(d) As used in this section, the term "successor entity" has the meaning set forth in Sec. 280(e) of this title.

(e) The term "priority", as used in this section, does not refer either to the order of payments set forth in subsection (a)(1)-(4) of this section or to the relative times at which any claims mature or are reduced to judgment.

(f) In the case of a nonprofit nonstock corporation, provisions of this section regarding distributions to members shall not apply to the extent that those provisions conflict with any other applicable law or with that corporation's certificate of incorporation or bylaws. (Last amended by Ch. 253, L. '10, eff. 8-1-10.)

Decisions

.1 Officer as creditor. — While an insolvent corporation can prefer one creditor to another it cannot prefer a director-creditor. In applying this rule the court will disregard the fiction of corporate entity to reach the real parties and real situation in issue. *Pennsylvania Co v. South Broad St Theatre Co, 174 A 112 (Del. Supr. 1934)*.

.2 Medium of distribution to creditors. —Debentures and preferred stock issued by domestic corporation could not participate in distribution of lump sum settlement made by foreign government that confiscated all of corporation's property, since currency to which securities were tied had lost all value through devaluation as to make it impossible to set dollar equivalent for those securities. *Shanghai Power Co v. Delaware Trust Co, 316 A.2d 589 (Del. Ch. 1974)*.

.3 Preferred creditors. —Creditors of dissolved corporation that were left unsatisfied after distribution of assets to stockholders could recover directly from distributees, since assets were impressed with lien in their favor. *John Julian Constr Co v. Monarch Builders Inc, 306 A.2d 29 (Del. Supr. 1973)*.

In an action against corporation and its directors for breach of fiduciary duty by defendants' failure to make reasonable provisions to pay all claims and obligations known to defendants at time corporation was dissolved pursuant to GCL Sec. 281, court found directors owed plaintiffs, as creditors, a fiduciary duty upon corporation's dissolution and placement of its assets in trust for the benefit of the corporation's creditors and stockholders. *Kidde Indus, Inc v. Weaver Corp, 593 A.2d 563 (Del. Supr. 1991)*.

.4 Status of stockholders. — On dissolution of the corporation unpaid cumulative dividends on the preferred stock must be paid out of the funds in the receiver's hands before anything is paid on the common stock. *Garrett v. Edge Moor Iron Co, 199 A 671 (Del. Supr. 1938)*.

Sec. 281(b)(i) is designed to protect creditors and not preferred stockholders and has never been applied to protect a corporation's decision to reserve the full dollar

for dollar amount of a contingent liability which has the effect of favoring a single class of preferred stockholder. *Blue Chip Capital Fund II LP v. Tubergen, 906 A.2d 827 (Del. Ch. 2007).*

§282 LIABILITY OF STOCKHOLDERS OF DISSOLVED CORPORATIONS

(a) A stockholder of a dissolved corporation the assets of which were distributed pursuant to Sec. 281(a) or (b) of this title shall not be liable for any claim against the corporation in an amount in excess of such stockholder's pro rata share of the claim or the amount so distributed to such stockholder, whichever is less.

(b) A stockholder of a dissolved corporation the assets of which were distributed pursuant to Sec. 281(a) of this title shall not be liable for any claim against the corporation on which an action, suit or proceeding is not begun prior to the expiration of the period described in Sec. 278 of this title.

(c) The aggregate liability of any stockholder of a dissolved corporation for claims against the dissolved corporation shall not exceed the amount distributed to such stockholder in dissolution. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Fraudulent conveyance. — Sec. 282 does not limit the ability of a court to recover for the benefit of a creditor or receiver, funds fraudulently conveyed to a corporation's stockholders before dissolution, the transfer of which left the corporation insolvent. *In re Rego Co., 623 A.2d 92 (Del. Ch. 1992).*

§283 JURISDICTION

The Court of the Chancery shall have jurisdiction of any application prescribed in this subchapter and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require. (Added by Ch. 136, L. '87, eff. 7-1-87.)

§284 REVOCATION OR FORFEITURE OF CHARTER; PROCEEDINGS

(a) Upon motion by the Attorney General, the Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises. The Attorney General shall proceed for this purpose by complaint in the Court of Chancery .

(b) The Court of Chancery shall have power, by appointment of trustees, receivers or otherwise, to administer and wind up the affairs of any corporation whose charter shall be revoked or forfeited by the Court of Chancery under this section, and to make such orders and decrees with respect thereto as shall be just and equitable respecting its affairs and assets and the rights of its stockholders and creditors.

(c) No proceeding shall be instituted under this section for nonuse of any corporation's powers, privileges or franchises during the first two years after its incorporation. (Last amended by Ch. 354, L. '18, eff. 8-1-18.)

Decisions

.1 Proceedings under section. — The section applies to an action to dissolve a non-profit corporation for abuse of franchises by seeking to operate as a profit corporation. *Southerland v. Decimo Club, Inc, 142 A 736 (Del. Ch. 1928)*.

§285 DISSOLUTION OR FORFEITURE OF CHARTER BY DECREE OF COURT; FILING

Whenever any corporation is dissolved or its charter forfeited by decree or judgment of the Court of Chancery, the decree or judgment shall be forthwith filed by the Register in Chancery of the county in which the decree or judgment was entered, in the office of the Secretary of State, and a note thereof shall be made by the Secretary of State on the corporation's charter or certificate of incorporation and on the index thereof. (Last amended by Ch. 136, L. '87, eff. 7-1-87.)

Subchapter XI
INSOLVENCY; RECEIVERS AND TRUSTEES

§291 RECEIVERS FOR INSOLVENT CORPORATIONS; APPOINTMENT AND POWERS

Whenever a corporation shall be insolvent, the Court of Chancery, on the application of any creditor or stockholder thereof, may, at any time, appoint one or more persons to be receivers of and for the corporation, to take charge of its assets, estate, effects, business and affairs, and to collect the outstanding debts, claims, and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by the corporation and which may be necessary or proper. The powers of the receivers shall be such and shall continue so long as the Court shall deem necessary.

Decisions

.1 Application for receivership. — Only stockholders or creditors of the corporation can seek a receiver on the ground of insolvency. *Frantz v. Templeman Oil Co, 134 A 100 (Del. Ch. 1926)*.

Court will delay appointing a receiver for an insolvent corporation to give creditors and majority stockholders, who wished to continue corporation, time to show that they could put corporation's operations on a current basis; upon such showing, the court in the exercise of its discretion will dismiss the petition. *Foster v. Del Drug Co, 114 A.2d 228 (Del. Ch. 1955)*.

.2 Receiver pendente lite and injunction. — Receiver pendente lite should not be appointed or injunction issued in case of active and prosperous corporation simply because of dissensions among its owners over questions of business policy. *Salnita Corp v. Walter Holding Corp, 168 A 74 (Del. Supr. 1933)*.

.3 Grounds for receivership. — Court will appoint a receiver of a solvent corporation which is run by its majority stockholder for his own convenience and in disregard of the rights of the minority as evidenced by the majority stockholder's misuse of the corporation's credit and his ignoring corporate law formalities. *Tansey v. Oil Producing Royalties, Inc, 133 A.2d 141 (Del. Ch. 1957)*.

Court will not appoint a receiver for a solvent, close corporation whose controlling directors (1) concealed financial data from a minority stockholders, if they did not issue false reports' or dissipate assets and the corporation's books met Internal Revenue requirements and (2) paid themselves salaries not authorized by a disinte-

rested board of directors or ratified by independent stockholder vote, if the salaries might be justifiable. *Hall v. Isaacs, 146 A.2d 602 (Del. Ch. 1958)*.

Where corporation's only assets were insurance policies that insurers had no obligation to pay under the policies had no value, and the corporation had no undistributed assets to justify the appointment of a receiver. (*In the Matter of Krafft-Murphy Co., Inc., 62 A.3d 94(Del. Ch. 2013).*

.4 Determination of insolvency. — That general receiver has been appointed elsewhere is immaterial on question of corporation's insolvency. In suit for receiver on that ground, it must be shown by clear and convincing evidence. *Manning v. Middle States Oil Corp, 137 A 79 (Del. Supr. 1927)*.

Because its assets were in the hands of temporary receivers appointed in another state it was held that the corporation was not necessarily insolvent, although its officers were no longer able to pay obligations as they matured. Ample funds were in hands of receiver who was appointed because of fraud and mismanagement. The receiver paid all obligations he knew of as they matured. *Bruch v. Nat'l Guarantee Credit Corp, 116 A 738 (Del. Supr. 1922)*.

Insolvency is either inability to pay debts as they mature in the ordinary course of business or an excess of liabilities over assets. Neither definition is to be adopted to the exclusion of the other. *Sill v. Ky Coal & Timber Development Co, 97 A 617 (Del. Supr. 1916)*.

In suit for receiver for foreign holding company, foreign receiver having been appointed without admission of insolvency, insolvency must be proved independently, unaided by adjudication or admission of its existence. *Rogers v. Bancokentucky Co, 156 A 217 (Del. Supr. 1931)*.

.5 Powers of receiver. — A receiver of an insolvent corporation is not bound by its executory contracts and may repudiate burdensome lease without paying year's rent. *Conover v. Sterling Stores Corp, 120 A 740 (1923)*.

A receiver cannot assert claim in behalf of general creditors which corporation could not have asserted as against special creditors claiming lien on corporation assets. *Denny v. Wilmington Ice & Coal Co, 128 A 123 (Del. Supr. 1925)*.

.6 Receiver-duties. — State receiver of corporation subsequently adjudicated bankrupt must turn over property of corporation to trustee in bankruptcy. If he has received compensation out of assets of the estate by state court order he must include same in property turned over to receiver and have any allowance he may be entitled to fixed by bankruptcy court. *Taylor v. Sternberg, 293 US 470 (1935)*.

.7 Power of court to appoint receiver. — Under this section allegations that defendant is heavily indebted is without credit and is threatened with several suits are insufficient without showing of immediate danger of irreparable loss to require appointment of receiver pendente lite. *Moore v. Associated Producing & Refining Corp, 121 A 655 (Del. Supr. 1923)*.

Power of the chancellor to appoint a receiver is discretionary. *Noble v. European Mortgage & Investment Corp, 165 A 157 (Del. Supr. 1933)*.

Except in extreme cases, the appointment of a receiver for a domestic corporation should be made whenever a foreign court has appointed a receiver, if the jurisdictional facts exist. *Stone v. The Jewett Bigelow & Brooks Coal Co, 125 A 340 (Del. Supr. 1924)*.

Where assets of corporation have been collected and sold by receiver in another state, court can refuse to appoint receiver even though funds realized have not been distributed to stockholders. *Jones v. Maxwell Motor Corp, 15 A 312 (Del. Supr. 1921)*.

.8 Title of receiver to corporate property. — Transfer of title of property to the receiver takes place as of the beginning of the day he qualifies. Hence a judgment filed at 4:30 P.M. on the same day was not a lien against the property of the corporation as it had already passed to the receivers. *Ferris v. Chic-Mint Gum Co, 125 A 343 (Del. Supr. 1924)*.

.9 Claims. — Where claim against an insolvent corporation is improperly verified under Chancery Rule 156 leave will be granted to amend the verification notwithstanding time for filing claims has passed. *Hawkins v. Lewes Journal Co, 119 A 243 (Del. Supr. 1922)*.

As against stockholders, the assets of an insolvent corporation are regarded as a trust fund for creditors. *Asmussen v. Quaker City Corp, 156 A 180 (1931)*.

While insolvent corporation can prefer one creditor over another, it cannot prefer a director-creditor. In applying this rule the court will disregard fiction of corporate entity to reach the real parties and real situation in issue. *Pennsylvania Co v. South Broad St Theatre Co, 174 A 112 (Del. Supr. 1934)*.

Subscriber to stock under employees' stock purchase plan is stockholder and not creditor and is not entitled to file claim with receiver for amount paid on subscription. *Hegarty v. American Commonwealths Power Corp, 174 A 273 (Del. Supr. 1934)*.

§292 TITLE TO PROPERTY; FILING ORDER OF APPOINTMENT; EXCEPTION

(a) Trustees or receivers appointed by the Court of Chancery of and for any corporation, and their respective survivors and successors, shall, upon their appointment and qualification or upon the death, resignation or discharge of any cotrustee or coreceiver, be vested by operation of law and without any act or deed, with the title of the corporation to all of its property, real, personal or mixed of whatsoever nature, kind, class or description, and wheresoever situate, except real estate situate outside this State.

(b) Trustees or receivers appointed by the Court or Chancery shall, within 20 days from the date of their qualification, file in the office of the Recorder in each county in this State, in which any real estate belonging to the corporation may be situated, a certified copy of the order of their appointment and evidence of their qualification.

(c) This section shall not apply to receivers appointed pendente lite.

§293 NOTICES TO STOCKHOLDERS AND CREDITORS

All notices required to be given to stockholders and creditors in any action in which a receiver or trustee for a corporation was appointed shall be given by the Register in Chancery, unless otherwise ordered by the Court of Chancery.

§294 RECEIVERS OR TRUSTEES; INVENTORY; LIST OF DEBTS AND REPORT

Trustees or receivers shall, as soon as convenient, file in the office of the Register in Chancery of the county in which the proceeding is pending, a full and complete itemized inventory of all the assets of the corporation which shall show their nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained. They shall make a report to the Court of their proceedings, whenever and as often as the Court shall direct.

§295 CREDITORS' PROOFS OF CLAIMS; WHEN BARRED; NOTICE

All creditors shall make proof under oath of their respective claims against the corporation, and cause the same to be filed in the office of the Register in Chancery of the county in which the proceeding is pending within the time fixed by and in accordance with the procedure established by the Rules of the Court of Chancery. All creditors and claimants failing to do so, within the time limited by this section, or the time prescribed by the order of the Court, may, by direction of the Court, be barred from participating in the distribution of the assets of the corporation. The Court may also prescribe what notice, by publication or otherwise, shall be given to the creditors of the time fixed for the filing and making proof of claims. (Last amended by Ch. 106, L. '73, eff. 7-1-73.)

§296 ADJUDICATION OF CLAIMS; APPEAL

(a) The Register in Chancery, immediately upon the expiration of the time fixed for the filing of claims, in compliance with the provisions of Sec. 295 of this title, shall notify the trustee or receiver of the filing of the claims, and the trustee or receiver, within 30 days after receiving

the notice, shall inspect the claims, and if the trustee or receiver or any creditor shall not be satisfied with the validity or correctness of the same, or any of them, the trustee or receiver shall forthwith notify the creditors whose claims are disputed of such trustee's or receiver's decision. The trustee or receiver shall require all creditors whose claims are disputed to submit themselves to such examination in relation to their claims as the trustee or receiver shall direct, and the creditors shall produce such books and papers relating to their claims as shall be required. The trustee or receiver shall have power to examine, under oath or affirmation, all witnesses produced before such trustee or receiver touching the claims, and shall pass upon and allow or disallow the claims, or any part thereof, and notify the claimants of such trustee's or receiver's determination.

(b) Every creditor or claimant who shall have received notice from the receiver or trustee that such creditor's or claimant's claim has been disallowed in whole or in part may appeal to the Court of Chancery within 30 days thereafter. The Court, after hearing, shall determine the rights of the parties. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§297 SALE OF PERISHABLE OR DETERIORATING PROPERTY

Whenever the property of a corporation is at the time of the appointment of a receiver or trustee encumbered with liens of any character, and the validity, extent or legality of any lien is disputed or brought in question, and the property of the corporation is of a character which will deteriorate in value pending the litigation respecting the lien, the Court of Chancery may order the receiver or trustee to sell the property of the corporation, clear of all encumbrances, at public or private sale, for the best price that can be obtained therefor, and pay the net proceeds arising from the sale thereof after deducting the costs of the sale into the Court, there to remain subject to the order of the Court, and to be disposed of as the Court shall direct.

§298 COMPENSATION, COSTS AND EXPENSES OF RECEIVER OR TRUSTEE

The Court of Chancery, before making distribution of the assets of a corporation among the creditors or stockholders thereof, shall allow a

reasonable compensation to the receiver or trustee for such receiver's or trustee's services, and the costs and expenses incurred in and about the execution of such receiver's or trustee's trust, and the costs of the proceedings in the Court, to be first paid out of the assets. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§299 SUBSTITUTION OF TRUSTEE OR RECEIVER AS PARTY; ABATEMENT OF ACTIONS

A trustee or receiver, upon application by such receiver or trustee in the court in which any suit is pending, shall be substituted as party plaintiff in the place of the corporation in any suit or proceeding which was so pending at the time of such receiver's or trustee's appointment. No action against a trustee or receiver of a corporation shall abate by reason of such receiver's or trustee's death, but, upon suggestion of the facts on the record, shall be continued against such receiver's or trustee's successor or against the corporation in case no new trustee or receiver is appointed. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§300 EMPLOYEE'S LIEN FOR WAGES WHEN CORPORATION INSOLVENT

Whenever any corporation of this State, or any foreign corporation doing business in this State, shall become insolvent, the employees doing labor or service of whatever character in the regular employ of the corporation, shall have a lien upon the assets thereof for the amount of the wages due to them, not exceeding 2 months' wages respectively, which shall be paid prior to any other debt or debts of the corporation. The word "employee" shall not be construed to include any of the officers of the corporation.

Decisions

.1 Service must be regular employment. — One employed to procure band of musicians for advertising by parades cannot get priority of claim for services. *Garretson v. Del. State Fair Inc, 123 A 919 (Ch. Ct. 1925)*.

.2 Priority to mortgage debt. — Where the realty proceeds of insolvent corporation were insufficient to discharge a mortgage debt, wage claimants could not claim preference thereto. *Clough v. Superior Equipment Corp, 156 A 249 (Ch. Ct. 1931)*.

.3 Effect of preference under a local law. — Extent to which a wage claimant received payment under a local law would abate his claim under this section. *Di Angelo v. McCormick Bros Inc, 168 A 79 (Ch. Ct. 1933)*.

.4 "Officer" construed. — Word "officer" includes directors even though director may be a foreman and in that sense an employee. *In re Peninsula Cut Stone Co, 82 A 689 (Ch. Ct. 1912)*.

§301 DISCONTINUANCE OF LIQUIDATION

The liquidation of the assets and business of an insolvent corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the Court of Chancery in its discretion, and subject to such condition as it may deem appropriate, may dismiss the proceedings and direct the receiver or trustee to redeliver to the corporation all of its remaining property and assets.

§302 COMPROMISE OR ARRANGEMENT BETWEEN CORPORATION AND CREDITORS OR STOCKHOLDERS

(a) Whenever the provision permitted by paragraph (2) of subsection (b) of Sec. 102 of this title is included in the original certificate of incorporation of any corporation, all persons who become creditors or stockholders thereof shall be deemed to have become such creditors or stockholders subject in all respects to that provision and the same shall be absolutely binding upon them. Whenever that provision is inserted in the certificate of incorporation of any such corporation by an amendment of its certificate all persons who become creditors or stockholders of such corporation after such amendment shall be deemed to have become such creditors or stockholders subject in all respects to that provision and the same shall be absolutely binding upon them.

(b) The Court of Chancery may administer and enforce any compromise or arrangement made pursuant to the provision contained in paragraph (2) of subsection (b) of Sec. 102 of this title and may restrain, pendente lite, all actions and proceedings against any corporation with respect to which the Court shall have begun the administration and enforcement of that provision and may appoint a temporary receiver for such corporation and may grant the receiver such powers as it deems

proper, and may make and enforce such rules as it deems necessary for the exercise of such jurisdiction.

§303 PROCEEDING UNDER THE FEDERAL BANKRUPTCY CODE OF THE UNITED STATES; EFFECTUATION

(a) Any corporation of this State, an order for relief with respect to which has been entered pursuant to the Federal Bankruptcy Code, 11 U.S.C. §101 et seq., or any successor statute, may put into effect and carry out any decrees and orders of the court or judge in such bankruptcy proceeding and may take any corporate action provided or directed by such decrees and orders, without further action by its directors or stockholders. Such power and authority may be exercised, and such corporate action may be taken, as may be directed by such decrees or orders, by the trustee or trustees of such corporation appointed or elected in the bankruptcy proceeding (or a majority thereof), or if none be appointed or elected and acting, by designated officers of the corporation, or by a representative appointed by the court or judge, with like effect as if exercised and taken by unanimous action of the directors and stockholders of the corporation.

(b) Such corporation may, in the manner provided in subsection (a) of this section, but without limiting the generality or effect of the foregoing, alter, amend or repeal its bylaws; constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in addition to all or some of the directors or officers then in office; amend its certificate of incorporation, and make any change in its capital or capital stock, or any other amendment, change, or alteration, or provision, authorized by this chapter; be dissolved, transfer all or part of its assets, merge or consolidate as permitted by this chapter, in which case, however, no stockholder shall have any statutory right of appraisal of such stockholder's stock; change the location of its registered office, change its registered agent, and remove or appoint any agent to receive service of process; authorize and fix the terms, manner and conditions of, the issuance of bonds, debentures or other obligations, whether or not convertible into stock of any class, or bearing warrants or other evidences of optional rights to purchase or subscribe for stock of any class; or lease its property and franchises to any corporation, if permitted by law.

(c) A certificate of any amendment, change or alteration, or of dissolution, or any agreement of merger or consolidation, made by such corporation pursuant to the foregoing provisions, shall be filed with the Secretary of State in accordance with §103 of this title, and, subject to subsection (d) of said §103 of this title, shall thereupon become effective in accordance with its terms and the provisions hereof. Such certificate, agreement of merger or other instrument shall be made, executed and acknowledged, as may be directed by such decrees or orders, by the trustee or trustees appointed or elected in the bankruptcy proceeding (or a majority thereof), or, if none be appointed or elected and acting, by the officers of the corporation, or by a representative appointed by the court or judge, and shall certify that provision for the making of such certificate, agreement or instrument is contained in a decree or order of a court or judge having jurisdiction of a proceeding under such Federal Bankruptcy Code or successor statute.

(d) This section shall cease to apply to such corporation upon the entry of a final decree in the bankruptcy proceeding closing the case and discharging the trustee or trustees, if any; provided however, that the closing of a case and discharge of trustee or trustees, if any, will not affect the validity of any act previously performed pursuant to subsections (a) through (c) of this section.

(e) On filing any certificate, agreement, report or other paper made or executed pursuant to this section, there shall be paid to the Secretary of State for the use of the State the same fees as are payable by corporations not in bankruptcy upon the filing of like certificates, agreements, reports or other papers. (Last amended by Ch. 326, L. '04, eff. 8-1-04.)

Subchapter XII
RENEWAL, REVIVAL, EXTENSION AND RESTORATION OF CERTIFICATE OF INCORPORATION OR CHARTER

§311 REVOCATION OF VOLUNTARY DISSOLUTION, RESTORATION OF EXPIRED CERTIFICATE OF INCORPORATION

(a) At any time prior to the expiration of 3 years following the dissolution of a corporation pursuant to §275 of this title or such longer period as the Court of Chancery may have directed pursuant to §278 of

this title, or at any time prior to the expiration of 3 years following the expiration of the time limited for the corporation's existence as provided in its certificate of incorporation or such longer period as the Court of Chancery may have directed pursuant to §278 of this title, a corporation may revoke the dissolution theretofore effected by it or restore its certificate of incorporation after it has expired by its own limitation in the following manner:

(1) For purposes of this section, the term "stockholders" shall mean the stockholders of record on the date the dissolution became effective or the date of expiration by limitation.

(2) The board of directors shall adopt a resolution recommending that the dissolution be revoked in the case of a dissolution or that the certificate of incorporation be restored in the case of an expiration by limitation and directing that the question of the revocation or restoration be submitted to a vote at a special meeting of stockholders.

(3) Notice of the special meeting of stockholders shall be given in accordance with §222 of this title to each of the stockholders.

(4) At the meeting a vote of the stockholders shall be taken on a resolution to revoke the dissolution in the case of a dissolution or to restore the certificate of incorporation in the case of an expiration by limitation. If a majority of the stock of the corporation which was outstanding and entitled to vote upon a dissolution at the time of its dissolution, in the case of a revocation of dissolution, or which was outstanding and entitled to vote upon an amendment to the certificate of incorporation to change the period of the corporation's duration at the time of its expiration by limitation, in the case of a restoration, shall be voted for the resolution, a certificate of revocation of dissolution or a certificate of restoration shall be executed, acknowledged and filed in accordance with §103 of this title, which shall be specifically designated as a certificate of revocation of dissolution or a certificate of restoration in its heading and shall state:

a. The name of the corporation;

b. The address (which shall be stated in accordance with §131(c) of this title) of the corporation's registered office in this State, and the name of its registered agent at such address;

c. The names and respective addresses of its officers;

d. The names and respective addresses of its directors;

e. That a majority of the stock of the corporation which was outstanding and entitled to vote upon a dissolution at the time of its dissolution have voted in favor of a resolution to revoke the dissolution, in the case of

a revocation of dissolution, or that a majority of the stock of the corporation which was outstanding and entitled to vote upon an amendment to the certificate of incorporation to change the period of the corporation's duration at the time of its expiration by limitation, in the case of a restoration, have voted in favor of a resolution to restore the certificate of incorporation; or, if it be the fact, that, in lieu of a meeting and vote of stockholders, the stockholders have given their written consent to the revocation or restoration in accordance with §228 of this title; and

f. In the case of a restoration, the new specified date limiting the duration of the corporation's existence or that the corporation shall have perpetual existence.

(b) Upon the effective time of the filing in the office of the Secretary of State of the certificate of revocation of dissolution or the certificate of restoration, the revocation of the dissolution or the restoration of the corporation shall become effective and the corporation may again carry on its business.

(c) Upon the effectiveness of the revocation of the dissolution or the restoration of the corporation as provided in subsection (b) of this section, the provisions of §211(c) of this title shall govern, and the period of time the corporation was in dissolution or was expired by limitation shall be included within the calculation of the 30-day and 13-month periods to which §211(c) of this title refers. An election of directors, however, may be held at the special meeting of stockholders to which subsection (a) of this section refers, and in that event, that meeting of stockholders shall be deemed an annual meeting of stockholders for purposes of §211(c) of this title.

(d) If after the dissolution became effective or after the expiration by limitation any other corporation organized under the laws of this State shall have adopted the same name as the corporation, or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation, or any foreign corporation shall have qualified to do business in this State under the same name as the corporation or under a name so nearly similar thereto as not to distinguish it from the corporation, then, in such case, the corporation shall not be reinstated under the same name which it bore when its dissolution became effective or it expired by limitation, but shall adopt and be reinstated or restored under some other name, and in such case the certificate to be filed under this section shall set forth the name borne by the corporation at the time its dissolution became effective or it expired by limitation and the new name under which the corporation is to be reinstated or restored.

(e) Nothing in this section shall be construed to affect the jurisdiction or power of the Court of Chancery under §279 or §280 of this title.

(f) At any time prior to the expiration of 3 years following the dissolution of a nonstock corporation pursuant to §276 of this title or such longer period as the Court of Chancery may have directed pursuant to §278 of this title, or at any time prior to the expiration of 3 years following the expiration of the time limited for a nonstock corporation's existence as provided in its certificate of incorporation or such longer period as the Court of Chancery may have directed pursuant to §278 of this title, a nonstock corporation may revoke the dissolution theretofore effected by it or restore its certificate of incorporation after it has expired by limitation in a manner analogous to that by which the dissolution was authorized or, in the case of a restoration, in the manner in which an amendment to the certificate of incorporation to change the period of the corporation's duration would have been authorized at the time of its expiration by limitation including (i) if applicable, a vote of the members entitled to vote, if any, on the dissolution or the amendment and (ii) the filing of a certificate of revocation of dissolution or a certificate of restoration containing information comparable to that required by paragraph (a)(4) of this section. Notwithstanding the foregoing, only subsections (b), (d), and (e) of this section shall apply to nonstock corporations.

(g) Any corporation that revokes its dissolution or restores its certificate of incorporation pursuant to this section shall file all annual franchise tax reports that the corporation would have had to file if it had not dissolved or expired and shall pay all franchise taxes that the corporation would have had to pay if it had not dissolved or expired. No payment made pursuant to this subsection shall reduce the amount of franchise tax due under Chapter 5 of this title for the year in which such revocation or restoration is effected. (Last amended by Ch. 265, L. '16, eff. 8-1-16.) (Last amended by Ch. 273, L. '12, eff. 8-1-12.)

§312 REVIVAL OF CERTIFICATE OF INCORPORATION

(a) As used in this section, the term "certificate of incorporation" includes the charter of a corporation organized under any special act or any law of this State.

(b) Any corporation whose certificate of incorporation has become forfeited or void pursuant to this title or whose certificate of incorpora-

tion has been revived, but, through failure to comply strictly with the provisions of this chapter, the validity of whose revival has been brought into question, may at any time procure a revival of its certificate of incorporation, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original certificate of incorporation and all amendments thereto, by complying with the requirements of this section. Notwithstanding the foregoing, this section shall not be applicable to a corporation whose certificate of incorporation has been revoked or forfeited pursuant to §284 of this title.

(c) The revival of the certificate of incorporation may be procured as authorized by the board of directors or members of the governing body of the corporation in accordance with subsection (h) of this section and by executing, acknowledging and filing a certificate of revival in accordance with §103 of this title.

(d) The certificate required by subsection (c) of this section shall state:

(1) The date of filing of the corporation's original certificate of incorporation; the name under which the corporation was originally incorporated; the name of the corporation at the time its certificate of incorporation became forfeited or void pursuant to this title; and the new name under which the corporation is to be revived to the extent required by subsection (f) of this section;

(2) The address (which shall be stated in accordance with §131(c) of this title) of the corporation's registered office in this State and the name of its registered agent at such address;

(3) That the corporation desiring to be revived and so reviving its certificate of incorporation was organized under the laws of this State;

(4) The date when the certificate of incorporation became forfeited or void pursuant to this title, or that the validity of any revival has been brought into question; and

(5) That the certificate of revival is filed by authority of the board of directors or members of the governing body of the corporation in accordance with subsection (h) of this section.

(e) Upon the filing of the certificate in accordance with §103 of this title the corporation shall be revived with the same force and effect as if its certificate of incorporation had not been forfeited or void pursuant to this title. Such revival shall validate all contracts, acts, matters and things made, done and performed within the scope of its certificate of incorporation by the corporation, its directors or members of its govern-

ing body, officers, agents and stockholders or members during the time when its certificate of incorporation was forfeited or void pursuant to this title, with the same force and effect and to all intents and purposes as if the certificate of incorporation had at all times remained in full force and effect. All real and personal property, rights and credits, which belonged to the corporation at the time its certificate of incorporation became forfeited or void pursuant to this title and which were not disposed of prior to the time of its revival, and all real and personal property, rights and credits acquired by the corporation after its certificate of incorporation became forfeited or void pursuant to this title shall be vested in the corporation, after its revival, as if its certificate of incorporation had at all times remained in full force and effect, and the corporation after its revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its directors or members of its governing body, officers, agents and stockholders or members prior to its revival, as if its certificate of incorporation had at all times remained in full force and effect.

(f) If, since the certificate of incorporation became forfeited or void pursuant to this title, any other corporation organized under the laws of this State shall have adopted the same name as the corporation sought to be revived or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation to be revived or any foreign corporation qualified in accordance with §371 of this title shall have adopted the same name as the corporation sought to be revived or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation to be revived, then in such case the corporation to be revived shall not be revived under the same name which it bore when its certificate of incorporation became forfeited or void pursuant to this title, but shall be revived under some other name as set forth in the certificate to be filed pursuant to subsection (c) of this section.

(g) Any corporation that revives its certificate of incorporation under this chapter shall pay to this State a sum equal to all franchise taxes, penalties and interest thereon due at the time its certificate of incorporation became forfeited or void pursuant to this title; provided, however, that any corporation that revives its certificate of incorporation under this chapter whose certificate of incorporation has been forfeited or void for more than 5 years shall, in lieu of the payment of the franchise taxes and penalties otherwise required by this subsection, pay a sum equal to 3 times the amount of the annual franchise tax that would be due and payable by such corporation for the year in which the revival

is effected, computed at the then current rate of taxation. No payment made pursuant to this subsection shall reduce the amount of franchise tax due under Chapter 5 of this title for the year in which the revival is effected.

(h) For purposes of this section and §502(a) of this title, the board of directors or governing body of the corporation shall be comprised of the persons, who, but for the certificate of incorporation having become forfeited or void pursuant to this title, would be the duly elected or appointed directors or members of the governing body of the corporation. The requirement for authorization by the board of directors under subsection (c) of this section shall be satisfied if a majority of the directors or members of the governing body then in office, even though less than a quorum, or the sole director or member of the governing body then in office, authorizes the revival of the certificate of incorporation of the corporation and the filing of the certificate required by subsection (c) of this section. In any case where there shall be no directors of the corporation available for the purposes aforesaid, the stockholders may elect a full board of directors, as provided by the bylaws of the corporation, and the board so elected may then authorize the revival of the certificate of incorporation of the corporation and the filing of the certificate required by subsection (c) of this section. A special meeting of the stockholders for the purpose of electing directors may be called by any officer or stockholder upon notice given in accordance with §222 of this title. For purposes of this section, the bylaws shall be the bylaws of the corporation that, but for the certificate of incorporation having become forfeited or void pursuant to this title, would be the duly adopted bylaws of the corporation.

(i) After a revival of the certificate of incorporation of the corporation shall have been effected, the provisions of §211(c) of this title shall govern and the period of time during which the certificate of incorporation of the corporation was forfeited or void pursuant to this title shall be included within the calculation of the 30-day and 13-month periods to which §211(c) of this title refers. A special meeting of stockholders held in accordance with subsection (h) of this section shall be deemed an annual meeting of stockholders for purposes of §211(c) of this title.

(j) Except as otherwise provided in §313 of this title, whenever it shall be desired to revive the certificate of incorporation of any nonstock corporation, the governing body shall perform all the acts necessary for the revival of the certificate of incorporation of the corporation which are performed by the board of directors in the case of a corpora-

tion having capital stock, and the members of any nonstock corporation who are entitled to vote for the election of members of its governing body and any other members entitled to vote for dissolution under the certificate of incorporation or the bylaws of such corporation, shall perform all the acts necessary for the revival of the certificate of incorporation of the corporation which are performed by the stockholders in the case of a corporation having capital stock. Except as otherwise provided in §313 of this title, in all other respects, the procedure for the revival of the certificate of incorporation of a nonstock corporation shall conform, as nearly as may be applicable, to the procedure prescribed in this section for the revival of the certificate of incorporation of a corporation having capital stock; provided, however, that subsection (i) of this section shall not apply to nonstock corporations. (Last amended by Ch. 265, L. '16, eff. 8-1-16).

Decisions

.1 Name. — If name used in revival proceeding unmistakably identifies original corporation which it is sought to revive, it meets statutory requirement. *Pippin v. McMahon Bros, Inc, 130 A 37 (1925)*.

.2 Franchise tax. — Corporation whose existence was limited to 20 years filed its renewal certificate making its existence perpetual. Such renewal was exempt from franchise tax. *Burris v. Jessup & Moore Co, 59 A 860 (1904)*. See also, *Ozan Lumber Co v. Davis Sewing Machine Co, 284 F. 161 (D. Del. 1922)*.

.3 Forfeiture of revived charter. — Once a forfeited charter has been revived, only the State can void it on the ground that the parties applying for renewal were not so authorized. *Engstrum v. Paul Engstrum Associates, Inc, 124 A.2d 722 (Ch. Ct. 1956)*.

Where certificate for renewal of dissolved corporation is issued by secretary of state and duly recorded, only state can question finality of record. *McKee v. Standard Minerals Corp, 156 A 193 (Ch. Ct. 1931)*.

.4 Expiration before renewal. — As to the vesting of title to property where there has been an interval between the expiration of the period of duration and the renewal thereof, see *Washington Fire Co v. Yates, 115 A 365 (Ch. Ct. 1921); Diamond State Iron Co v. Husbands, 68 A 240 (Ch. Ct. 1898); Blackstone v. Chandler, 130 A 34 (Ch. Ct. 1925); McBride v. Murphy, 124 A 798 (Ch Ct)*, *aff'd, 130 A 283 (Ch. Ct. 1925)*.

.5 Effect of revivor. — President is not personally liable on contract he signed on behalf of corporation during period its charter was forfeited for nonpayment of taxes, when charter subsequently was reinstated; reinstatement validates all acts

of officers during that forfeiture period and makes them binding on corporation. *Frederic G Krapf & Son, Inc v. Gorson, 243 A.2d 713 (1968)*.

§313 REVIVAL OF CERTIFICATE OF INCORPORATION OR CHARTER OF EXEMPT CORPORATIONS

(a) Every exempt corporation whose certificate of incorporation or charter has become forfeited, pursuant to §136(b) of this title for failure to obtain a registered agent, or inoperative and void, by operation of §510 of this title for failure to file annual franchise tax reports required, and for failure to pay taxes or penalties from which it would have been exempt if the reports had been filed, shall be deemed to have filed all the reports and be relieved of all the taxes and penalties, upon satisfactory proof submitted to the Secretary of State of its right to be classified as an exempt corporation pursuant to §501(b) of this title, and upon filing with the Secretary of State a certificate of revival in manner and form as required by §312 of this title.

(b) Upon the filing by the corporation of the proof of classification as required by subsection (a) of this section, the filing of the certificate of revival and payment of the required filing fees, the corporation shall be renewed and revived with the same force and effect as provided in §312(e) of this title for other corporations.

(c) As used in this section, the term "exempt corporation" shall have the meaning given to it in §501(b) of this title. Nothing contained in this section relieves any exempt corporation from filing the annual report required by §502 of this title. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

§314 STATUS OF CORPORATION

Any corporation desiring to renew, extend and continue its corporate existence shall, upon complying with applicable constitutional provisions of this State, continue as provided in its certificate effecting the foregoing as a corporation and shall, in addition to the rights, privileges and immunities conferred by its charter, possess and enjoy all the benefits of this chapter, which are applicable to the nature of its business, and shall be subject to the restrictions and liabilities by this

chapter imposed on such corporations. (Last amended by Ch. 265, L. '16, eff. 8-1-16.)

Subchapter XIII
SUITS AGAINST CORPORATIONS, DIRECTORS, OFFICERS OR STOCKHOLDERS

§321 SERVICE OF PROCESS ON CORPORATIONS

(a) Service of legal process upon any corporation of this State shall be made by delivering a copy personally to any officer or director of the corporation in this State, or the registered agent of the corporation in this State, or by leaving it at the dwelling house or usual place of abode in this State of any officer, director or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the corporation in this State. If the registered agent be a corporation, service of process upon it as such agent may be made by serving, in this State, a copy thereof on the president, vice-president, secretary, assistant secretary or any director of the corporate registered agent. Service by copy left at the dwelling house or usual place of abode of any officer, director or registered agent, or at the registered office or other place of business of the corporation in this State, to be effective must be delivered thereat at least 6 days before the return date of the process, and in the presence of an adult person, and the officer serving the process shall distinctly state the manner of service in such person's return thereto. Process returnable forthwith must be delivered personally to the officer, director or registered agent.

(b) In case the officer whose duty it is to serve legal process cannot by due diligence serve the process in any manner provided for by subsection (a) of this section, it shall be lawful to serve the process against the corporation upon the Secretary of State, and such service shall be as effectual for all intents and purposes as if made in any of the ways provided for in subsection (a) of this section. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or

appropriate. In the event that service is effected through the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify the corporation by letter, directed to the corporation at its principal place of business as it appears on the records relating to such corporation on file with the Secretary of State or, if no such address appears, at its last registered office. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection, and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as part of the costs in the proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary of State, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from receipt of the service of process.

(c) Service upon corporations may also be made in accordance with Sec. 3111 of Title 10 or any other statute or rule of court. (Last amended by Ch. 290, L. '10, eff. 8-2-10.)

Decisions

.1 Application of section. — Resident agent's power to accept service of process on domestic corporation is ended by dissolution of corporation; thereafter, service must be on Secretary of State. *International Pulp Equipment Co v. St Regis Kraft Co, 54 F. Supp. 745 (D. Del. 1944)*.

Service on a corporation under this section is not sufficient in garnishment proceedings to attach stock of corporation. *Fowler v. Dickson, 74 A 601 (1909)*.

This section does not present an exclusive method of procedure. *Wax v. Riverview Cemetery Co, 24 A.2d 431 (1942)*.

2. Validity of service. — Notice to president is valid notice of foreclosure, when, because of consolidation, corporation had no principal office. *Real Estate Trust Co v. Wilmington & NCRR Co, 77 A 828 (1910)*.

Corporation can open default judgment based on service on corporate secretary under statute that permits such service if president resides out of state; here president had died. *Richards v. Hammon, 178 A.2d 140 (1962)*.

Service is invalid if a copy of the process is not left with the person served. *Clough v. Superior Equipment Corp, 157 A 306 (1931)*.

Absent fraud, service on registered agent binds corporation. *Crites v. Photometric Products Corp, 169 A 164 (1933)*.

A motion to vacate service on a person as president on the ground that the person served is not president should show who the president is or show some other officer on whom service may be had or show there is no such officer.*Arnold v. Sentinel Printing Co, 77 A 966 (1910)*.

§322 FAILURE OF CORPORATION TO OBEY ORDER OF COURT; APPOINTMENT OF RECEIVER

Whenever any corporation shall refuse, fail or neglect to obey any order or decree of any court of this State within the time fixed by the court for its observance, such refusal, failure or neglect shall be a sufficient ground for the appointment of a receiver of the corporation by the Court of Chancery. If the corporation be a foreign corporation, such refusal, failure or neglect shall be a sufficient ground for the appointment of a receiver of the assets of the corporation within this State.

§323 FAILURE OF CORPORATION TO OBEY WRIT OF MANDAMUS; QUO WARRANTO PROCEEDINGS FOR FORFEITURE OF CHARTER

If any corporation fails to obey the mandate of any peremptory writ of mandamus issued by a court of competent jurisdiction of this State for a period of 30 days after the serving of the writ upon the corporation in any manner as provided by the laws of this State for the service of writs, any party in interest in the proceeding in which the writ of mandamus issued may file a statement of such fact prepared by such party or such party's attorney with the Attorney General of this State, and it shall thereupon be the duty of the Attorney General to forthwith commence proceedings of quo warranto against the corporation in a court of competent jurisdiction, and the court, upon competent proof of such state of facts and proper proceedings had in such proceeding in quo warranto, shall decree the charter of the corporation forfeited. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§324 ATTACHMENT OF SHARES OF STOCK OR ANY OPTION, RIGHT OR INTEREST THEREIN; PROCEDURE; SALE; TITLE UPON SALE; PROCEEDS

(a) The shares of any person in any corporation with all the rights thereto belonging, or any person's option to acquire the shares, or such person's right or interest in the shares, may be attached under this section for debt, or other demands, if such person appears on the books of the corporation to hold or own such shares, option, right or interest. So many of the shares, or so much of the option, right or interest therein may be sold at public sale to the highest bidder, as shall be sufficient to satisfy the debt, or other demand, interest and costs, upon an order issued therefor by the court from which the attachment process issued, and after such notice as is required for sales upon execution process. Except as to an uncertificated security as defined in section 8-102 of Title 6, the attachment is not laid and no order of sale shall issue unless section 8-112 of Title 6 has been satisfied. No order of sale shall be issued until after final judgment shall have been rendered in any case. If the debtor lives out of the county, a copy of the order shall be sent by registered or certified mail, return receipt requested, to such debtor's last known address, and shall also be published in a newspaper published in the county of such debtor's last known residence, if there be any, 10 days before the sale; and if the debtor be a nonresident of this State shall be mailed as aforesaid and published at least twice for 2 successive weeks, the last publication to be at least 10 days before the sale, in a newspaper published in the county where the attachment process issued. If the shares of stock or any of them or the option to acquire shares or any such right or interest in shares, or any part of them, be so sold, any assignment, or transfer thereof, by the debtor, after attachment, shall be void.

(b) When attachment process issues for shares of stock, or any option to acquire such or any right or interest in such, a certified copy of the process shall be left in this State with any officer or director, or with the registered agent of the corporation. Within 20 days after service of the process, the corporation shall serve upon the plaintiff a certificate of the number of shares held or owned by the debtor in the corporation, with the number or other marks distinguishing the same, or in the case the debtor appears on the books of the corporation to have an option to acquire shares of stock or any right or interest in any shares of stock of the corporation, there shall be served upon the plaintiff within 20 days

after service of the process a certificate setting forth any such option, right or interest in the shares of the corporation in the language and form in which the option, right or interest appears on the books of the corporation, anything in the certificate of incorporation or bylaws of the corporation to the contrary notwithstanding. Service upon a corporate registered agent may be made in the manner provided in Sec. 321 of this title.

(c) If, after sale made and confirmed, a certified copy of the order of sale and return and the stock certificate, if any, be left with any officer or director or with the registered agent of the corporation, the purchaser shall be thereby entitled to the shares or any option to acquire shares or any right or interest in shares so purchased, and all income, or dividends which may have been declared, or become payable thereon since the attachment laid. Such sale, returned and confirmed, shall transfer the shares or the option to acquire shares or any right or interest in shares sold to the purchaser, as fully as if the debtor, or defendant, had transferred the same to such purchaser according to the certificate of incorporation or bylaws of the corporation, anything in the certificate of incorporation or bylaws to the contrary notwithstanding. The court which issued the levy and confirmed the sale shall have the power to make an order compelling the corporation, the shares of which were sold, to issue new certificates or uncertificated shares to the purchaser at the sale and to cancel the registration of the shares attached on the books of the corporation upon the giving of an open end bond by such purchaser adequate to protect such corporation.

(d) The money arising from the sale of the shares or from the sale of the option or right or interest shall be applied and paid, by the public official receiving the same, as by law is directed as to the sale of personal property in cases of attachment. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Constitutionality. — This section held unconstitutional insofar as it authorized seizure of stock or rights or interests therein since it denied due process as against a person who was not registered as the owner of the stock on the corporate books and whose only notice of the pendency of the suit was such as might go to him from seizure or constructive seizure of the stock or rights or interests therein under writ of attachment. *Sportuno v. Woods, 192 A 689 (1937)*; followed in *Womack v. De Witt, 10 A.2d 504 (1939)*; (shares of stock standing on books of corpora-

tion in name of another for debtor cannot be subjected to attachment at the suit of the creditor although the corporation has notice or knowledge that the stock is so held).

.2 Shares subject to attachment. — Under this and the following sections, shares of Delaware corporations in names of non-residents are subject to attachment. *Haskell v. Middle States Petroleum Corp, 165 A 562 (1933)*.

This and the following sections are constitutional. They do not deprive of property without due process of law contrary to U.S. Const. *McLaughlin v. Bahre, 166 A 800 (1933)*.

Where corporation has illegally loaned money to stockholder on the security of his shares in the corporation, it still has greater rights in shares than subsequently attaching creditor. *Graham v. Young, 167 A 906 (1933)*.

.3 Nature of attachment. — An attachment looking toward the sale of stock is in the nature of an ex parte proceeding, not a garnishment, and the company in whose hands the attachment is laid need only give a certificate showing the number of shares standing in the debtor's name on its books. *State v. NY-Mexican Oil Co, 122 A 55 (1923)*.

A writ of injunction in equity cannot be employed as an attachment at law. *Cities Service Co v. McDowell, 116 A 4 (Ch. Ct. 1922)*.

.4 Power of court. — A court of equity has no power to proceed against non-residents after the manner of foreign attachments at law, and cannot acquire jurisdiction over a non-resident defendant by such seizure of defendant's stock in a domestic corporation. *Skinner v. Educational Pictures Securities Corp, 129 A 857 (1925)*.

In an attachment suit, the right to intervene is within the discretion of the court. *Banker's Mtge Co v. Sohland, 138 A 364 (1927)*.

In a suit instituted by foreign attachment, entry of appearance without giving security for costs will be permitted in some circumstances but terms will be imposed when stock attached has been pledged. *Hutchison & Hoey, Inc v. Tobin, 138 A 638 (1927)*.

.5 Corporations to which section applies. — Domestic corporations and foreign corporations doing business in Delaware are subject to its attachment laws. *Ryan v. Galliher, 168 A 77 (1933)*.

.6 Attachment. — The statute contemplates the attachment of shares of stock and it is complied with when a certificate is obtained from proper corporate officer. Garnishee answers when it gives certificate provided for by law. *Mann v. Perr, 55 A 335 (1903)*.

When copy of process was left with company, all of the stock of the defendant in that company was attached. *Gibson v. Gillispie, 138 A 600 (1927)*.

A duplicate original of a writ on foreign attachment may be served in lieu of a certified copy. *Brainard v. Canaday, 112 A.2d 862 (1955)*.

Corporation may get leave to file an amended or supplemental certificate of number of shares owned by debtor. *Morgan v. Nailor, 69 A 1067 (1909)*.

.7 Right to dividends as between attaching creditor and pledgee. — Dividends on pledged stock belong to the pledgee, whether the stock has been transferred into the name of the pledgee or not, and cannot be attached at the suit of the pledgor's creditor, the pledgee being under the duty to apply the dividends in reduction of the debt. *Womack v. De Witt, 10 A.2d 504 (1939)*.

§325 ACTIONS AGAINST OFFICERS, DIRECTORS OR STOCKHOLDERS TO ENFORCE LIABILITY OF CORPORATION; UNSATISFIED JUDGMENT AGAINST CORPORATION

(a) When the officers, directors or stockholders of any corporation shall be liable by the provisions of this chapter to pay the debts of the corporation, or any part thereof, any person to whom they are liable may have an action, at law or in equity, against any 1 or more of them, and the complaint shall state the claim against the corporation, and the ground on which the plaintiff expects to charge the defendants personally.

(b) No suit shall be brought against any officer, director or stockholder for any debt of a corporation of which such person is an officer, director or stockholder, until judgment be obtained therefor against the corporation and execution thereon returned unsatisfied. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Enforcement of liability. — Provision in Sec. 161, above, providing enforcement of that section as provided in this section does not mean that these provisions are exclusive, as such liability may be enforced by receivers in insolvency. *DuPont v. Ball, 106 A 39 (Ch. Ct. 1918)*. See also, *Roebling's Sons Co v. Mode, 43 A 480 (1899)*.

However, a receiver cannot maintain a suit to collect a note given for an unpaid stock subscription unless he shows that such collection is necessary to pay the corporate debts or for purposes of equalization among stockholders. *Philips v. Slocomb, 167 A 698 (1933)*.

Louisiana law governs transactions between directors or majority stockholders of Delaware corporation and its minority stockholders when neither the corporate charter nor Delaware statutory law apply and when the corporation's only contact with Delaware is its incorporation there. *Mansfield Hardwood Lumber Co v. Johnson, 263 'd 748 (5th Cir 1959)*, *reh'g denied, 268 F.2d 317 (5th Cir 1959)*, *cert denied, 361 US 885 (1959)*.

.2 Nature of bill. — Creditor's remedy by "bill in chancery" against a stockholder of a corporate debtor given by this section must be a creditors' bill. *DuPont v. Ball, 106 A 39 (Ch. Ct. 1918)*.

.3 Defense. — This section applies to domestic corporations and failure to comply therewith cannot be brought up as a defense when a stockholder in a foreign corporation residing in Delaware is sued by an assignee of the foreign corporation for liability as a stockholder. *Love v. Pusey & Jones Co, 52 A 542 (1902)*.

This section applies only where an attempt is made to collect corporate debts from directors or stockholders individually. It does not apply where a receiver is attempting to enforce directors' liability for illegal payment of dividends. *Cochran v. Shetler, 133 A 232 (Pa 1926)*.

This section does not apply where receiver sues stockholders for unpaid balances on subscriptions. Such suit may be maintained although creditors have not obtained judgment against corporation. *Cooney Co v. Arlington Hotel Co, 101 A 879 (Ch. Ct. 1917); DuPont v. Ball, 106 A 39 (Ch. Ct. 1918)*.

§326 ACTION BY OFFICER, DIRECTOR OR STOCKHOLDER AGAINST CORPORATION FOR CORPORATE DEBT PAID

When any officer, director or stockholder shall pay any debt of a corporation for which such person is made liable by the provisions of this chapter, such person may recover the amount so paid in an action against the corporation for money paid for its use, and in such action only the property of the corporation shall be liable to be taken, and not the property of any stockholder. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§327 STOCKHOLDER'S DERIVATIVE ACTION; ALLEGATION OF STOCK OWNERSHIP

In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Nature of derivative action. — To determine whether a claim is direct or derivative, a court must analyze the following factors (1) who suffered the alleged harm — the corporation or the stockholder, and (2) who would receive the benefit of the recovery or remedy. *Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. Supr. 2004).*

Where the plaintiff did not plead any facts from which the court could conclude that management's failure to reconsider stock options caused him harm separate and distinct from the alleged harm to the corporation, his claim was derivative. *Feldman v. Cutaia, 951 A.2d 727 (Del. Supr. 2008).*

Where plaintiff stockholder of merged corporation alleged that the former CEO's involvement in illegal kickback scheme caused the merger consideration to be re-

duced, such claim was derivative as the alleged misconduct was in connection with the core business and involved breach of duty and injury to corporation. *In re Syncor Intern. Shareholders Lit., 857 A.2d 994 (Del. Ch. 2004).*

Ratification by majority of stockholders barred stockholder's derivative action based on claim directors lacked authority to modify stock option plan and to grant new options but, since ratification was not unanimous, it did not bar stockholder's right to trial on claim of waste of corporate assets. *Michelson v. Duncan, 407 A.2d 211 (Del. Supr. 1979)*.

Stipulation of dismissal of shareholder's action was not improper because, although shareholder pleaded claims that support both individual and derivative causes of action, shareholder proceeded with suit individually so parties to stipulation did not have to comply with required notice and court approval procedures for dismissal of derivative suit. *Lipton v. News International, Plc, 514 A.2d 1075 (Del. Supr. 1986)*.

Plaintiff's abdication claim against a corporation's board of directors based on a newly awarded employment contract to the corporation's CEO failed where plaintiff failed to establish that the employment contract amounted to a "de facto" abdication of directorial authority. *Grimes v. Donald, 673 A.2d 1207 (Del. Supr. 1996)*.

Where it appeared from the complaint that a compensation and termination payout was exceedingly lucrative and the processes of the directors in approving the termination were casual, if not sloppy and perfunctory, but where the complaint was so inartfully drafted that it was properly dismissed under the pleading standards for derivative suits, the interests of justice required the dismissal of the claims for breach of fiduciary duty and waste to be without prejudice, with the plaintiffs being permitted to file an amended complaint. *Brehm v. Eisner, 746 A.2d 244 (Del. Supr. 2000)*.

Plaintiffs in a derivative suit are not entitled to discovery to assist their compliance with the particularized pleading requirement of Rule 23.1 in a case of demand refusal, particularly where they fail to use available tools such as a Sec. 220 demand for inspection. *Scattered Corp. v. Chicago Stock Exchange, Inc., 701 A.2d 70 (Del. Supr. 1997)*.

A breach of fiduciary duty claim may be brought directly or derivatively by public, minority stockholders where a controlling stockholder causes the corporation to issue excessive shares of its stock in exchange for assets of the controlling stockholder having lesser value and the exchange causes an increase in the percentage of shares owned by the controlling stockholder and a corresponding decrease in the share percentage of the public minority stockholders. *Gentile v. Rossette, 906 A.2d 91 (Del. Supr. 2006).*

An investor claiming damages based on holding stock in reliance on a company's alleged misstatements may file a direct lawsuit. While derivative claims affect all company shareholders, only those investors who held on to previously purchased stock could make this holder suit's unique common law fraud claim, so they can sue directly. *Citigroup Inc. v. AHW Investment Partnership ,No. 641,2015 (Del. Supr. 2016).*

.2 Allegation of mismanagement depressing value of stock. — Where stockholder brought class action alleging chief officer's failure to communicate to the board of directors an offer to acquire the corporation and sought damages for al-

leged loss of takeover premium, the suit was derivative in nature and the motion to dismiss was proper, since an allegation of mismanagement that depresses the value of stock is a wrong to the corporation and injury, if any, falls equally upon all stockholders. *Lewis v. Spencer, 577 A.2d 753 (Del. Supr. 1990)*.

.3 Demand on directors. — Individual stockholder can initiate derivative lawsuit on corporation's behalf but has no absolute right under Delaware law to continue suit if board of directors, acting on recommendation of independent committee that has proved its independence, good faith and reasonableness of investigation, seeks to dismiss it; court must then apply its own "business judgment" in deciding whether corporate interest and public policy is best served by dismissing suit. *Zapata Corp v. Maldonado, 430 A.2d 779 (Del. Supr. 1981)*. See also *Maldonado v. Flynn, 671 F.2d 729 (2d Cir 1982)*.

Shareholder derivative suit dismissed for failure to make demand on directors or to demonstrate futility of demand could not be appealed once demand was made since board had not yet acted and it would be premature to assume directors would take action detrimental to shareholders; however, trial court retained jurisdiction pending action by board. *Stotland v. GAF Corp, 469 A.2d 421 (Del. Supr. 1983)*.

Shareholders' demand on directors prior to filing of derivative suit alleging that certain transactions between corporation and 47% shareholder constituted waste of corporate assets was not excused as futile because shareholders had failed to allege facts with particularity indicating that directors were tainted by interest, lacked independence, or took action contrary to corporation's best interests in order to create reasonable doubt about applicability of business judgment rule. *Aronson v. Lewis, 473 A.2d 805 (Del. Supr. 1984)*.

Derivative suit, charging that directors wrongly rejected tender offer and that officer-directors received excessive payments under compensation plan keyed to market price for shares that had increased due to tender offer, was dismissed when shareholders failed to make demand that was necessary because shareholders failed to support claim that (1) directors breached fiduciary duty by rejecting tender offer solely to retain control; (2) plan, which was administered by committee of outside directors, was devoid of legitimate corporate purpose and was waste of corporate assets; (3) four officer-directors who benefitted from plan controlled other ten outside directors who had no interest in plan. *Pogostin v. Rice, 480 A.2d 619 (Del. Supr. 1984)*.

When shareholders did not make demand on directors to sue, shareholder's derivative suit alleging that directors acted unlawfully by allowing officers who held stock options to gain profits at corporate expense was dismissed because (1) majority of directors were disinterested and (2) decision by directors to cancel officers' stock option to allow them to benefit from tender offer premium was protected by business judgment rule. *Kaufman v. Belmont, 479 A.2d 282 (Del. Ch. 1984)*.

Test for demand futility should be whether well pleaded facts of particular complaint support reasonable doubt of business judgment protection, not whether facts support judicial finding that directors' actions are not protected by business judgment rule. Trial court erred in adhering to latter view. It also erred in ruling that fairness is pivotal question in demand excused cases. Fairness becomes issue only if presumption of business judgment rule is defeated. *Grobow v. Perot, 539 A.2d 180 (Del. Supr. 1988)*.

Plaintiff's failure to make demand in derivative suit may be raised as defense by "outside" defendants-those who are strangers to corporation on whose behalf suit is brought. When corporation chooses to take position regarding derivative action asserted on its behalf, it must affirmatively object to or support continuation of litigation. Neutrality as to suit constitutes tacit approval and excuses demand. *Kaplan v. Peat, Marwick, Mitchell & Co, 540 A.2d 726 (Del. Supr. 1988)*.

Plaintiff in a "first cousin to a double derivative suit" was excused from the demand requirement. The focus of the complaint was the alleged misuse of funds raised in a sale of corporate notes by the board of a corporation of which the plaintiff was a shareholder and which soon after the sale became a wholly-owned subsidiary of another corporation. The court found that there were three common directors on the boards of the two corporations who must be considered to be interested in any decision relating to the suit, and that the allegations in the complaint raised a reasonable doubt as to the independence of several other directors, so that demand on the board would be excused. *Rales v. Blasband, 634 A.2d 927 (Del. Supr. 1993)*.

Plaintiff waived the right to claim demand was excused in a derivative action alleging waste, excessive compensation and breach of duty of care where plaintiff had made an initial demand on the board with respect to related claims. *Grimes v. Donald, 673 A.2d 1207 (Del. Supr. 1996)*.

Shareholder faces same pleading burden whether claiming demand excused or demand refused. *Levine v. Smith, 591 A.2d 194 (Del. Supr. 1991)*.

Derivative suit alleging that corporation paid $3.5 million to settle harassment suits filed against CEO had to be dismissed for failure to make demand or sufficiently allege futility where demand did not provide details of harassment suits or board's knowledge and conduct. *White v. Panic, 783 A.2d 543 (Del. Supr. 2001).*

Derivative suit complaint was properly dismissed for failure to excuse demand where plaintiffs contended directors breached oversight duty but where evidence failed to show that directors faced substantial likelihood of liability. *Stone v. Ritter, 911 A.2d 362 (Del Supr. 2006).*

When a derivative suit was properly instituted, an amendment to the complaint does not have to be the subject of a demand on the board of directors as to those claims already validly in litigation. *Braddock v. Zimmerman, 906 A.2d 776 (Del. Supr. 2006).*

A complaint adequately pled demand futility where all defendant directors were named defendants in a companion federal securities action that had survived a motion to dismiss based in part on that court's finding that the defendants' trades raised a powerful and cogent inference of scienter. Thus it was not possible for the defendants to consider a demand impartially. *Pfeiffer v. Toll, 989 A.2d 683 (Del. Ch. 2010).*

Where stockholder made demand and the defendants failed to respond for two years and allegedly took actions making a meaningful response unlikely the stockholder could pursue the derivative action. *Rich v. Chong, 66 A.3d 963 (Del. Ch. 2013).*

.4 Ownership of shares. — In derivative action, stockholder must allege he was stockholder at time of transaction of which he complains, so that allegation that directors authorized corporation to buy bonds at inflated price two years before he became stockholder bars him from bringing suit, even though he also alleges that

after he became stockholder directors harmed corporation by holding on to such bonds. *Nickson v. Filtrol Corp, 262 A.2d 267 (Del. Ch. 1970)*.

Holders of 5% convertible subordinated debentures could not bring derivative action for payment of improper dividend because they were not "stockholders". *Harff v. Kerkorian, 324 A.2d 215 (Del. Ch. 1974)*.

Stockholder who acquired his shares after parent corporation amended its management contract and tax allocation agreement with subsidiary corporation had no standing to bring derivative action but could sue on allegations of subsequent diversion of corporate opportunity and waste of corporate assets which were non-unanimously ratified by stockholders. *Schreiber v. Bryan, 396 A.2d 522 (Del. Ch. 1978)*.

Stockholder had equitable standing to bring derivative suit challenging propriety of loan from corporation A to corporation B, even though he was not stockholder at time of suit after corporate reorganization, because reorganization was involuntary and had no meaningful effect on stockholder's ownership of the business enterprise. *Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982)*.

.5 Continuing wrongs. — When wrong complained of is continuing one, transferee of stock may sue, even though wrong began before transfer; but when wrong complained of was diversion by corporate officer of opportunity to buy stock in other corporations and last stock purchase took place before suing stockholder acquired his stock, he is barred from suing derivatively. *Newkirk v. W J Rainey, Inc, 76 A.2d 121 (Del. Ch. 1950)*.

Illegal grant of stock options is not continuing wrong; complaining stockholder must have been such on date of grant. *Elster v. American Airlines, Inc, 100 A.2d 219 (Del. Ch. 1953)*.

.6 Settlement of derivative suit. — Court will not approve voluntary settlement of stockholder's derivative suit that would make it dismiss suit without prejudice, when settlement provides only for divestiture of control of corporation, but does not provide for repayment of moneys allegedly fraudulently obtained, when the complaint alleges (1) control of corporation by one stockholder, (2) frauds accomplished through that control, (3) losses to corporation through excessive salaries, bonuses and stock options, and (4) issuance of false prospectuses. *Steigman v. Beery, 203 A.2d 463 (Del. Ch. 1964)*.

Court will approve settlement of derivative action that lets corporation continue to buy all its products from partnership owned by corporation's majority shareholders, when (1) settlement reduced partnership's profits and (2) granted corporation option to purchase partnership at price substantially less than its then market value. *Goodman v. Futrovsky, 213 A.2d 899 (Del. Supr. 1965)*.

Minority stockholders cannot block settlement of derivative suit merely because it does not give corporation money, when (1) stockholders overwhelmingly approve it, (2) corporation gains advantages by ending litigation and improving executive incentive plan, and (3) provable facts would not sustain big money award. *Hoffman v. Dann, 205 A.2d 343 (Del. Supr. 1964)*.

Court rejected shareholder's proposed modification of settlement agreement which provided $2 per share to all shareholders who tender but stopped non-tendering shareholders from including any claim for breach of fiduciary duty in their appraisal actions. Settlement was fair to non-tendering shareholders who exercised

their rights to appraisal because they benefitted by opportunity to tender shares at higher price. *Selfe v. Joseph, 501 A.2d 409 (Del. Supr. 1985)*.

Settlement of consolidated derivative actions challenging bank merger was fair to holders of preferred convertible stock because (1) preferred shareholders' right to vote as separate class on proposed merger was subject to good-faith dispute, so it could be compromised during settlement negotiations and (2) preferred shareholders benefited from merger since, without settlement and merger, outlook for bank's securities would have been bleak and value of shares in new merged corporation was significantly higher than value of pre-merger bank shares. *Cohn v. Zarowitz, 501 A.2d 1235 (Del. Supr. 1985).*

Court approved settlement of shareholders' derivative action challenging corporation's purchase at premium of block of shares because (1) directors lacked self-interest when 10 of 13 were outside directors, (2) directors made reasonable investigation relying on advice by corporation's investment banker and counsel, (3) greenmail is permitted when hostile takeover attempt would have disruptive effect on corporation in light of administrative complexities generated by litigation, and (4) modification of repurchased stock's voting rights was sufficient consideration for settlement. *Polk v. Good, 507 A.2d 531 (Del. Supr. 1986).*

.7 Allowance of counsel fees. — Stockholders bringing derivative action are entitled to fees for their attorneys when institution of suit caused corporation to adopt new employees' incentive plan that enabled it to attract higher quality personnel, even though plan more costly; however, they are not entitled to fees for achieving change in composition of management, when no showing that suit was actual cause of that change. *Dann v. Chrysler Corp, 215 A.2d 709 (Del. Ch. 1965)*.

Attorney for stockholder can recover his fees from corporation when stockholder's suit to enjoin if from buying equipment and giving its key employees stock options and employment contracts is successful. *Richman v. DeVal Aero-Dynamics, Inc, 185 A.2d 884 (Del. Ch. 1962)*.

Stockholder of former subsidiary could recover attorneys' fees in derivative suit from surviving corporation, when suit showed likelihood of success prior to mootness caused by subsequent merger that was largely induced by suit. *McDonnell Douglas Corp v. Palley, 310 A.2d 635 (Del. Supr. 1973)*.

Shareholder who brought derivative suit against directors for wasting corporate assets was not entitled to attorneys' fees after his action was mooted by settlement of other shareholders' derivative suit because, although shareholder's claim was meritorious when filed and directors took action benefitting corporation, actions benefitting corporation were taken in response to second derivative suit, not shareholder's suit. *Maldonado v. Flynn, 413 A.2d 1251 (Del.Ch. 1985).*

Corporation was not liable for attorney's fees incurred in minority shareholder's successful class action suit against corporation when (1) there was class recovery from which attorney's fees could be awarded, (2) although corporation violated its fiduciary duty to minority shareholders, there was no showing of corporation's bad faith or deliberate fraud, and (3) minority shareholders could not claim that corporation should pay attorney's fees because damage award was too low since this amounts to indirect reargument of damage award. *Weinberger v. UOP, Inc, 517 A.2d 653 (Del. Ch. 1986)*.

Motion to dismiss a shareholder's complaint seeking attorney's fees for costs incurred in making demand upon a corporation that resulted in corrective action by the corporation's board of directors was granted by the Court of Chancery where plaintiff's reimbursement claim failed to present a meritorious legal claim. *Goodrich v. E F Hutton Group, Inc, 681 A.2d 1039 (Del. Supr. 1996)*.

A shareholder who launches a proxy contest in conjunction with a derivative action may not recover its expenses and attorneys' fees where a corporate benefit resulted from the proxy contest rather than the litigation. *Waterside Partners v. C. Brewer and Co., Ltd., 739 A.2d 768 (Del. Supr. Del. 1999)*.

.8 Participation in wrong. — Stockholder-director could not bring derivative suit against former president for alleged misuse of lessee corporation's funds paid to partnership-lessor dominated by former president and his father, since stockholder did not originally object to lease's terms or president's acts and stockholder himself benefited from alleged misconduct as member of partnership. *Courtland Manor, Inc v. Leeds, 347 A.2d 144 (Del. Ch. 1975)*.

.9 Standing. — Former shareholder lost standing to bring derivative suit against corporation's officers and directors for waste after corporation merged into surviving corporation because shareholder's claim became exclusive property right of surviving corporation and its sole shareholder. *Lewis v. Anderson, 453 A.2d 474 (Del. Supr. 1984)*.

Where plaintiff brought derivative suit and while the suit was pending the corporation was involved in a reverse triangular merger that resulted in the corporation becoming a wholly owned subsidiary of another corporation, plaintiff no longer had standing to bring a derivative suit. *Lewis v. Ward, 852 A.2d 896 (Del. Supr. 2004).*

Tender offeror lacked standing to bring suit under Sec. 14(e) of Securities Exchange Act of 1934 because (1) offerors do not have standing to bring suit under Sec. 14(e) and (2) offeror, although nominal shareholder of target, may be considered only as offeror for purpose of judging his standing. *Kalmanovitz v. G Heileman Brewing Co, 769 F.2d 152 (3d Cir 1985)*.

Cash-out merger will extinguish former shareholder's ability to sue corporation for mismanagement leading to corporate waste. Mismanagement that depresses stock values is wrong to corporation that must be asserted in derivative action, and former shareholder can challenge merger derivatively only when (1) merger is fraudulent in that it was made merely to deprive shareholders of standing to bring derivative action; or (2) merger is really reorganization that does not affect plaintiff's ownership in business enterprise. *Kramer v. Western Pacific Industries, Inc, 546 A.2d 348 (Del. Supr. 1988)*.

The Delaware Supreme Court found that the Court of Chancery, in dismissing plaintiffs' derivative action for lack of standing, correctly relied on a prospectus issued by a corporation's board of directors in connection with an IPO to determine that plaintiffs were not contemporaneous owners of stock in the corporation at the time that the wrongs alleged by plaintiffs occurred. *7547 Partners v. Beck, 682 A.2d 160 (Del. Supr. 1996)*.

Where plaintiff alleges directors breached their fiduciary duties by approving a merger with lower bidder, a settlement agreement, and an increased severance package, suit was derivative and plaintiff lacked standing to sue directly. *In re First Interstate Bancorp Consolidated Shareholder Lit., 729 A.2d 851 (Del. Ch. 1998)*.

Stockholders filing derivative suit in Delaware after other stockholders had filed identical suit in California federal court were collaterally estopped from maintaining suit in Delaware after federal court dismissed suit for failure to make demand. *Pyottv. Louisiana Municipal Police Employees' Retirement System v., 2013 Del. LEXIS 179.*

.10 Special litigation committee. — Shareholder's derivative action that chairman of board/chief executive officer usurped corporate opportunities and received excessive compensation was dismissed on recommendation of corporation's special litigation committee because (1) committee acted independently of corporation and other influences, (2) it conducted, in good faith, reasonable investigation upon which it based its conclusions, and (3) court, in its discretion, refused to overrule recommendation of committee. *Kaplan v. Wyatt, 499 A.2d 1184 (Del. Supr. 1985)*.

Court refused to accept recommendation of corporation's special litigation committee and dismiss shareholders' derivative suit alleging that directors and officers diverted corporate opportunity to themselves where (1) Committee, consisting of one member, was not independent because member was director when challenged action took place and he had numerous political and financial dealings with corporation's chief executive officer/chairman of board who allegedly controlled board; (2) Committee did not establish reasonable basis for its conclusions that opportunity to purchase stock in another corporation was not corporate opportunity. *Lewis v. Fuqua, 502 A.2d 962 (Del. Ch. 1985)*.

Majority shareholders/directors breached their fiduciary duties of fair dealing owed to minority shareholders when they approved cash-out merger because (1) merger had intended effect of terminating pending derivative litigation seeking recovery from majority shareholders/directors and (2) no independent agency, either board committee, special counsel or investment banker, provided basis to conclude that derivative claims were without value to corporation or that cash-out price was fair. *Merritt v. Colonial Foods, Inc, 505 A.2d 757 (Del. Ch. 1986)*.

A special litigation committee (SLC) could not meet the burden of proving its independence where members of the SLC served with the key defendant director on the board of a football foundation and hall of fame, the resolution delegating authority to the SLC left it litigating to dismiss the suit at the same time it was investigating the suit's merits, and the CEO and SLC chairman publicly stated the director was innocent before the SLC's investigation was complete. *Biondi v. Scrushy, 820 A.2d 1148 (Del. Ch. 2003).*

A 2 person special litigation committee could not be considered independent where both members were professors at a university, and where the defendant directors included that university's professors, alumni, and large contributors. *In re Oracle Corp. Derivative Litigation, 824 A.2d 917 (Del. Ch. 2003).*

.11 Statute of limitations. — Shareholder's derivative action was not time barred because cause of action for money damages from unjustifiable use of proxies begins when injury occurs, not when plaintiff has knowledge of possible wrongdoing. *Baron v. Allied Artists Pictures Corp, 717 F.2d 105 (3d Cir 1983)*.

.12 Declaratory Judgment Act as bar to derivative suit. — Corporation could not use Declaratory Judgment Act, 10 Del C. Sec. 6512, to head off a derivative suit before it was filed, because (1) Purpose of declaratory judgment procedure is to provide a technique for early resolution of disputes when a party is suffering practical consequences from uncertainty arising from assertion by another of a legal

claim. Demand letter filed under Rule 23.1 mentioning a future derivative suit was the only action taken by shareholders at time board filed complaint for declaratory judgment; and (2) Assertions in demand letter did not impose any practical or imminent injury on corporation. *Schick Incorporated v. Amalgamated Clothing and Textile Workers Union, 533 A.2d 1235 (Del. Ch. 1987)*.

.**13 Adequate Representative.** — A shareholder's failure to inspect a corporation's books and records before filing a derivative suit does not create a presumption that the shareholder cannot be an adequate representative. *Pyott v. Louisiana Municipal Police Employees' Retirement System v., 2013 Del. LEXIS 179.*

.**14 Suit by Creditor.** — Creditors may not bring a direct suit for breach of fiduciary duty against the directors of a Delaware corporation that is insolvent or in the zone of insolvency. *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, *930 A.2d 92 (Del Supr. 2007).*

A creditor need only show that the corporation was insolvent when the suit was filed and not continuously after that date, nor must the creditor show that the insolvency was irretrievable. *Quadrant Structured Products Company Ltd. v. Vertin*, *C.A. 6900 (Del. Ch. 2015).*

§328 EFFECT OF LIABILITY OF CORPORATION ON IMPAIRMENT OF CERTAIN TRANSACTIONS

The liability of a corporation of this State, or the stockholders, directors or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with the corporation, shall not in any way be lessened or impaired by the sale of its assets, or by the increase or decrease in the capital stock of the corporation, or by its merger or consolidation with one or more corporations or by any change or amendment in its certificate of incorporation.

§329 DEFECTIVE ORGANIZATION OF CORPORATION AS DEFENSE

(a) No corporation of this State and no person sued by any such corporation shall be permitted to assert the want of legal organization as a defense to any claim.

(b) This section shall not be construed to prevent judicial inquiry into the regularity or validity of the organization of a corporation, or its lawful possession of any corporate power it may assert in any other suit or proceeding where its corporate existence or the power to exercise the corporate rights it asserts is challenged, and evidence tending to sustain the challenge shall be admissible in any such suit or proceeding.

Decisions

.1 Corporate existence attacked. — Corporate existence cannot be attacked collaterally. *McKee v. Standard Minerals Corp, 156 A 193 (Ch. Ct. 1931); St Nicholas Ruthenian Greek Catholic Church v. Bilanski, 162 A 60 (Ch. Ct. 1932); Read v. Tidewater Coal Exchange, Inc, 116 A 898 (Ch. Ct. 1922); Standard Sewing Machine Co v. Frame, 48 A 188 (1900); Mayor of Wilmington v. Addicks, 43 A 297 (Ch. Ct. 1899).*

§330 USURY; PLEADING BY CORPORATION

No corporation shall plead any statute against usury in any court of law or equity in any suit instituted to enforce the payment of any bond, note or other evidence of indebtedness issued or assumed by it.

Subchapter XIV
CLOSE CORPORATIONS; SPECIAL PROVISIONS

§341 LAW APPLICABLE TO CLOSE CORPORATION

(a) This subchapter applies to all close corporations, as defined in Sec. 342 of this title. Unless a corporation elects to become a close corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to the provisions of this chapter, except the provisions of this subchapter.

(b) This chapter shall be applicable to all close corporations, as defined in Sec. 342 of this title, except insofar as this subchapter otherwise provides.

Decisions

.1 Application. — Minority shareholders in a close corporation were not entitled to the special relief provided by Subchapter XIV where the corporation had not elected to become a close corporation as provided in the Subchapter. *Nixon v. Blackwell, 626 A.2d 1366 (Del. Supr. 1993).*

§342 CLOSE CORPORATION DEFINED; CONTENTS OF CERTIFICATE OF INCORPORATION

(a) A close corporation is a corporation organized under this chapter whose certificate of incorporation contains the provisions required by Sec. 102 of this title and, in addition, provides that:

(1) All of the corporation's issued stock of all classes, exclusive of treasury shares, shall be represented by certificates and shall be held of record by not more than a specified number of persons, not exceeding 30; and

(2) All of the issued stock of all classes shall be subject to one or more of the restrictions on transfer permitted by Sec. 202 of this title; and

(3) The corporation shall make no offering of any of its stock of any class which would constitute a "public offering" within the meaning of the United States Securities Act of 1933 15 U.S.C. Sec. 77a et seq. as it may be amended from time to time.

(b) The certificate of incorporation of a close corporation may set forth the qualifications of stockholders, either by specifying classes of persons who shall be entitled to be holders of record of stock of any class, or by specifying classes of persons who shall not be entitled to be holders of stock of any class or both.

(c) For purposes of determining the number of holders of record of the stock of a close corporation, stock which is held in joint or common tenancy or by the entireties shall be treated as held by one stockholder. (Last amended by Ch. 112, L. '83, eff. 7-1-83.)

Decisions

.1 Ownership of shares. — Incorporating attorney for three stockholders in close corporation cannot resolve dispute among them over ownership of the stock by buying the stock of the majority; he must give the minority first chance to buy. *Opdyke v. Kent Liquor Mart, Inc, 181 A.2d 579 (1962)*.

§343 FORMATION OF A CLOSE CORPORATION

A close corporation shall be formed in accordance with Sec. 101, 102 and 103 of this title, except that:

(1) Its certificate of incorporation shall contain a heading stating the name of the corporation and that it is a close corporation; and

(2) Its certificate of incorporation shall contain the provisions required by Sec. 342 of this title.

§344 ELECTION OF EXISTING CORPORATION TO BECOME A CLOSE CORPORATION

Any corporation organized under this chapter may become a close corporation under this subchapter by executing, acknowledging and filing, in accordance with Sec. 103 of this title, a certificate of amendment of its certificate of incorporation which shall contain a statement that it elects to become a close corporation, the provisions required by Sec. 342 of this title to appear in the certificate of incorporation of a close corporation, and a heading stating the name of the corporation and that it is a close corporation. Such amendment shall be adopted in accordance with the requirements of Sec. 241 or 242 of this title, except that it must be approved by a vote of the holders of record of at least two thirds of the shares of each class of stock of the corporation which are outstanding. (Last amended by Ch. 587, L. '96, eff. 11-24-97.)

§345 LIMITATIONS ON CONTINUATION OF CLOSE CORPORATION STATUS

A close corporation continues to be such and to be subject to this subchapter until:

(1) It files with the Secretary of State a certificate of amendment deleting from its certificate of incorporation the provisions required or permitted by Sec. 342 of this title to be stated in the certificate of incorporation to qualify it as a close corporation; or

(2) Any 1 of the provisions or conditions required or permitted by Sec. 342 of this title to be stated in a certificate of incorporation to qualify a corporation as a close corporation has in fact been breached and neither the corporation nor any of its stockholders takes the steps required by Sec. 348 of this title to prevent such loss of status or to remedy such breach.

§346 VOLUNTARY TERMINATION OF CLOSE CORPORATION STATUS BY AMENDMENT OF CERTIFICATE OF INCORPORATION; VOTE REQUIRED

(a) A corporation may voluntarily terminate its status as a close corporation and cease to be subject to this subchapter by amending its certificate of incorporation to delete therefrom the additional provisions required or permitted by Sec. 342 of his title to be stated in the certificate of incorporation of a close corporation. Any such amendment shall be adopted and shall become effective in accordance with Sec. 242 of this title, except that it must be approved by a vote of the holders of record or at least two-thirds of the shares of each class of stock of the corporation which are outstanding.

(b) The certificate of incorporation of a close corporation may provide that on any amendment to terminate its status as a close corporation, a vote greater than two thirds or a vote of all shares of any class shall be required; and if the certificate of incorporation contains such a provision, that provision shall not be amended, repealed or modified by any vote less than that required to terminate the corporation's status as a close corporation.

§347 ISSUANCE OR TRANSFER OF STOCK OF A CLOSE CORPORATION IN BREACH OF QUALIFYING CONDITIONS

(a) If stock of a close corporation is issued or transferred to any person who is not entitled under any provision of the certificate of incorporation permitted by subsection (b) of Sec. 342 of this title to be a holder of record of stock of such corporation, and if the certificate for such stock conspicuously notes the qualifications of the persons entitled to be holders of record thereof, such person is conclusively presumed to have notice of the fact of such person's ineligibility to be a stockholder.

(b) If the certificate of incorporation of a close corporation states the number of persons, not in excess of 30, who are entitled to be holders of record of its stock, and if the certificate for such stock conspicuously states such number, and if the issuance or transfer of stock to any person would cause the stock to be held by more than such number of persons, the person to whom such stock is issued or transferred is conclusively presumed to have notice of this fact.

(c) If a stock certificate of any close corporation conspicuously notes the fact of a restriction on transfer of stock of the corporation, and the restriction is one which is permitted by Sec. 202 of this title, the transferee of the stock is conclusively presumed to have notice of the fact that such person has acquired stock in violation of the restriction, if such acquisition violates the restriction.

(d) Whenever any person to whom stock of a close corporation has been issued or transferred has, or is conclusively presumed under this section to have, notice either (1) that such person is a person not eligible to be a holder of stock of the corporation, or (2) that transfer of stock to such person would cause the stock of the corporation to be held by more than the number of persons permitted by its certificate of incorporation to hold stock of the corporation, or (3) that the transfer of stock is in violation of a restriction on transfer of stock, the corporation may, at its option, refuse to register transfer of the stock into the name of the transferee.

(e) Subsection (d) of this section shall not be applicable if the transfer of stock, even though otherwise contrary to subsections (a), (b) or (c), of this section, has been consented to by all the stockholders of the close corporation, or if the close corporation has amended its certificate of incorporation in accordance with Sec. 346 of this title.

(f) The term "transfer", as used in this section, is not limited to a transfer for value.

(g) The provisions of this section do not in any way impair any rights of a transferee regarding any right to rescind the transaction or to recover under any applicable warranty express or implied. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§348 INVOLUNTARY TERMINATION OF CLOSE CORPORATION STATUS; PROCEEDING TO PREVENT LOSS OF STATUS

(a) If any event occurs as a result of which 1 or more of the provisions or conditions included in a close corporation's certificate of incorporation pursuant to Sec. 342 of this title to qualify it as a close corporation has been breached, the corporation's status as a close corporation under this subchapter shall terminate unless:

(1) Within 30 days after the occurrence of the event, or within 30 days after the event has been discovered, whichever is later, the corporation files with the Secretary of State a certificate, executed and

acknowledged in accordance with Sec. 103 of this title, stating that a specified provision or condition included in its certificate of incorporation pursuant to Sec. 342 of this title to qualify it as a close corporation has ceased to be applicable, and furnishes a copy of such certificate to each stockholder; and

(2) The corporation concurrently with the filing of such certificate takes such steps as are necessary to correct the situation which threatens its status as a close corporation, including, without limitation, the refusal to register the transfer of stock which has been wrongfully transferred as provided by Sec. 347 of this title, or a proceeding under subsection (b) of this section.

(b) The Court of Chancery, upon the suit of the corporation or any stockholder, shall have jurisdiction to issue all orders necessary to prevent the corporation from losing its status as a close corporation, or to restore its status as a close corporation by enjoining or setting aside any act or threatened act on the part of the corporation or a stockholder which would be inconsistent with any of the provisions or conditions required or permitted by Sec. 342 of this title to be stated in the certificate of incorporation of a close corporation, unless it is an act approved in accordance with Sec. 346 of this title. The Court of Chancery may enjoin or set aside any transfer or threatened transfer of stock of a close corporation which is contrary to the terms of its certificate of incorporation or of any transfer restriction permitted by Sec. 202 of this title, and may enjoin any public offering, as defined in Sec. 342 of this title, or threatened public offering of stock of the close corporation.

§349 CORPORATE OPTION WHERE A RESTRICTION ON TRANSFER OF A SECURITY IS HELD INVALID

If a restriction on transfer of a security of a close corporation is held not to be authorized by Sec. 202 of this title, the corporation shall nevertheless have an option, for a period of 30 days after the judgment setting aside the restriction becomes final, to acquire the restricted security at a price which is agreed upon by the parties, or if no agreement is reached as to price, then at the fair value as determined by the Court of Chancery. In order to determine fair value, the Court may appoint an appraiser to receive evidence and report to the Court such appraiser's findings and recommendation as to fair value. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§350 AGREEMENTS RESTRICTING DISCRETION OF DIRECTORS

A written agreement among the stockholders of a close corporation holding a majority of the outstanding stock entitled to vote, whether solely among themselves or with a party not a stockholder, is not invalid, as between the parties to the agreement, on the ground that it so relates to the conduct of the business and affairs of the corporation as to restrict or interfere with the discretion or powers of the board of directors. The effect of any such agreement shall be to relieve the directors and impose upon the stockholders who are parties to the agreement the liability for managerial acts or omissions which is imposed on directors to the extent and so long as the discretion or powers of the board in its management of corporate affairs is controlled by such agreement.

§351 MANAGEMENT BY STOCKHOLDERS

The certificate of incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors. So long as this provision continues in effect:

(1) No meeting of stockholders need be called to elect directors;

(2) Unless the context clearly requires otherwise, the stockholders of the corporation shall be deemed to be directors for purposes of applying provisions of this chapter; and

(3) The stockholders of the corporation shall be subject to all liabilities of directors.

Such a provision may be inserted in the certificate of incorporation by amendment if all incorporators and subscribers or all holders of record of all of the outstanding stock, whether or not having voting power, authorize such a provision. An amendment to the certificate of incorporation to delete such a provision shall be adopted by a vote of the holders of a majority of all outstanding stock of the corporation, whether or not otherwise entitled to vote. If the certificate of incorporation contains a provision authorized by this section, the existence of such provision shall be noted conspicuously on the face or back of every stock certificate issued by such corporation.

Decisions

.1 Effect of unanimous stockholder ratification. — Unanimous ratification of a transaction by a close corporation's stockholders does not bar a later derivative suit attacking the transaction if the ratification was fraudulently obtained. *Brown v. Dolese Bros Co, 154 A.2d 233 (Ch. Ct. 1959)*, *aff'd, 157 A.2d 784 (1960)*.

.2 Corporate opportunity. — Sole stockholders of close corporation did not breach fiduciary duty to later stockholders when they bought with their own funds a partnership that was the corporation's sole produce supplier. *Goodman v. Futrovsky, 213 A.2d 899 (1965)*.

§352 APPOINTMENT OF CUSTODIAN FOR CLOSE CORPORATION

(a) In addition to the provisions of Sec. 226 of this title respecting the appointment of a custodian for any corporation, the Court of Chancery, upon application of any stockholder, may appoint one or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of any close corporation when:

(1) Pursuant to Sec. 351 of this title the business and affairs of the corporation are managed by the stockholders and they are so divided that the business of the corporation is suffering or is threatened with irreparable injury and any remedy with respect to such deadlock provided in the certificate of incorporation or bylaws or in any written agreement of the stockholders has failed; or

(2) The petitioning stockholder has the right to the dissolution of the corporation under a provision of the certificate of incorporation permitted by Sec. 355 of this title.

(b) In lieu of appointing a custodian for a close corporation under this section or Sec. 226 of this title the Court of Chancery may appoint a provisional director, whose powers and status shall be as provided in Sec. 353 of this title if the Court determines that it would be in the best interest of the corporation. Such appointment shall not preclude any subsequent order of the Court appointing a custodian for such corporation.

§353 APPOINTMENT OF A PROVISIONAL DIRECTOR IN CERTAIN CASES

(a) Notwithstanding any contrary provision of the certificate of incorporation or the bylaws or agreement of the stockholders, the Court of

Chancery may appoint a provisional director for a close corporation if the directors are so divided respecting the management of the corporation's business and affairs that the votes required for action by the board of directors cannot be obtained with the consequence that the business and affairs of the corporation can no longer be conducted to the advantage of the stockholders generally.

(b) An application for relief under this section must be filed (1) by at least one half of the number of directors then in office, (2) by the holders of at least one third of all stock then entitled to elect directors, or, (3) if there be more than 1 class of stock then entitled to elect 1 or more directors, by the holders of two thirds of the stock of any such class; but the certificate of incorporation of a close corporation may provide that a lesser proportion of the directors or of the stockholders or of a class of stockholders may apply for relief under this section.

(c) A provisional director shall be an impartial person who is neither a stockholder nor a creditor of the corporation or of any subsidiary or affiliate of the corporation, and whose further qualifications, if any, may be determined by the Court of Chancery. A provisional director is not a receiver of the corporation and does not have the title and powers of a custodian or receiver appointed under Sec. 226 and 291 of this title. A provisional director shall have all the rights and powers of a duly elected director of the corporation, including the right to notice of and to vote at meetings of directors, until such time as such person shall be removed by order of the Court of Chancery or by the holders of a majority of all shares then entitled to vote to elect directors or by the holders of two thirds of the shares of that class of voting shares which filed the application for appointment of a provisional director.

A provisional director's compensation shall be determined by agreement between such person and the corporation subject to approval of the Court of Chancery, which may fix such person's compensation in the absence of agreement or in the event of disagreement between the provisional director and the corporation.

(d) Even though the requirements of subsection (b) of this section relating to the number of directors or stockholders who may petition for appointment of a provisional director are not satisfied, the Court of Chancery may nevertheless appoint a provisional director if permitted by subsection (b) of Sec. 352 of this title. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Non-participating voting stock. — Before the enactment of this section, it was held that a corporation equally owned by two groups of stockholders could create new class of non-participating voting stock, and issue one share to odd numbered new director able to break deadlock; arrangement was approved by unanimous vote of stockholders and effected through charter amendment. *Lehrman v. Cohen, 222 A.2d 800 (1966)*.

§354 OPERATING CORPORATION AS PARTNERSHIP

No written agreement among stockholders of a close corporation, nor any provision of the certificate of incorporation or of the bylaws of the corporation, which agreement or provision relates to any phase of the affairs of such corporation, including but not limited to the management of its business or declaration and payment of dividends or other division of profits or the election of directors or officers or the employment of stockholders by the corporation or the arbitration of disputes, shall be invalid on the ground that it is an attempt by the parties to the agreement or by the stockholders of the corporation to treat the corporation as if it were a partnership or to arrange relations among the stockholders or between the stockholders and the corporation in a manner that would be appropriate only among partners.

Decisions

.1 Voting rights. — Voting trustee can enforce a stockholder's agreement giving one class of stock the right to elect a majority of the board even though the certificate of incorporation is silent, when those voting rights are in bylaw. *In re Farm Industries, Inc, 196 A.2d 582 (Ch. Ct. 1963)*.

.2 Voting agreement. — Prior to the adoption of this section, an agreement between stockholders "to agree" as to how they would vote their stock, providing that they would be bound by the decision of an arbitrator if they were unable to agree, was an enforceable contract and not contrary to public policy as an attempted delegation of irrevocable control over voting rights. *Ringling v. Ringling Bros-Barnum & Bailey Combined Shows, Inc, 49 A.2d 603*, mod, *53 A.2d 441 (Ch. Ct. 1946)*.

§355 STOCKHOLDERS' OPTION TO DISSOLVE CORPORATION

(a) The certificate of incorporation of any close corporation may include a provision granting to any stockholder, or to the holders of any

specified number or percentage of shares of any class of stock, an option to have the corporation dissolved at will or upon the occurrence of any specified event or contingency. Whenever any such option to dissolve is exercised, the stockholders exercising such option shall give written notice thereof to all other stockholders. After the expiration of 30 days following the sending of such notice, the dissolution of the corporation shall proceed as if the required number of stockholders having voting power had consented in writing to dissolution of the corporation as provided by Sec. 228 of this title.

(b) If the certificate of incorporation as originally filed does not contain a provision authorized by subsection (a), of this section, the certificate may be amended to include such provision if adopted by the affirmative vote of the holders of all the outstanding stock, whether or not entitled to vote, unless the certificate of incorporation specifically authorizes such an amendment by a vote which shall be not less than two thirds of all the outstanding stock whether or not entitled to vote.

(c) Each stock certificate in any corporation whose certificate of incorporation authorizes dissolution as permitted by this section shall conspicuously note on the face thereof the existence of the provision. Unless noted conspicuously on the face of the stock certificate, the provision is ineffective. (Last amended by Ch. 186, L. '67, eff. 1-2-68.)

Decisions

.1 Compelling dissolution. — Court will not appoint a liquidating receiver for a solvent, well-managed close corporation on the ground that the directors (1) keep inadequate books and records, if the records meet IRS requirements, (2) deny minority stockholders the right to make an independent audit, and (3) refuse to declare dividends. *Hall v. John S Isaacs & Sons Farms, Inc, 163 A.2d 288 (1960)*.

Court will delay appointing a receiver for an insolvent corporation to give creditors and majority stockholders, who wish to continue corporation, time to show that they could put business on current basis; upon such showing, court will exercise its discretion to dismiss petition. *Foster v. Del Drug Co, 114 A.2d 228 (Ch. Ct. 1955)*.

Court will appoint receiver of solvent corporation which is run by its majority stockholder for his own convenience and in disregard of the rights of the minority as evidenced by the majority stockholder's misuse of the corporation's credit and his ignoring corporate law formalities. *Tansey v. Oil Producing Royalties, Inc, 133 A.2d 141 (Ch. Ct. 1957)*.

§356 EFFECT OF THIS SUBCHAPTER ON OTHER LAWS

This subchapter shall not be deemed to repeal any statute or rule of law which is or would be applicable to any corporation which is organized under this chapter but is not a close corporation.

Subchapter XV
PUBLIC BENEFIT CORPORATIONS
[As Added by Ch. 122, L. '13, eff. 8-1-13.]

§361. LAW APPLICABLE TO PUBLIC BENEFIT CORPORATIONS; HOW FORMED

This subchapter applies to all public benefit corporations, as defined in §362 of this title. If a corporation elects to become a public benefit corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to the provisions of this chapter, except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply.

§362. PUBLIC BENEFIT CORPORATION DEFINED; CONTENTS OF CERTIFICATE OF INCORPORATION

(a) A "public benefit corporation" is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit corporation shall:

(1) Identify within its statement of business or purpose pursuant to §102(a)(3) of this title 1 or more specific public benefits to be promoted by the corporation; and

(2) State within its heading that it is a public benefit corporation.

(b) "Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a certificate of incorporation contemplated by this subchapter.

(c) The name of the public benefit corporation may contain the words "public benefit corporation," or the abbreviation "P.B.C.," or the designation "PBC," which shall be deemed to satisfy the requirements of §102(a)(l)(i) of this title. If the name does not contain such language, the corporation shall, prior to issuing unissued shares of stock or disposing of treasury shares, provide notice to any person to whom such stock is issued or who acquires such treasury shares that it is a public benefit corporation; provided that such notice need not be provided if the issuance or disposal is pursuant to an offering registered under the Securities Act of 1933 [15 U.S.C. §77r et seq.] or if, at the time of issuance or disposal, the corporation has a class of securities that is registered under the Securities Exchange Act of 1934 [15 U.S.C. §78a et seq.]. (Last amended by Ch. 40, L. '15, eff. 8-1-15).

§363. CERTAIN AMENDMENTS AND MERGERS; VOTES REQUIRED; APPRAISAL RIGHTS

(a) Notwithstanding any other provisions of this chapter, a corporation that is not a public benefit corporation, may not, without the approval of 2/3 of the outstanding stock of the corporation entitled to vote thereon:

(1) Amend its certificate of incorporation to include a provision authorized by §362(a)(1) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign public benefit corporation or similar entity.

The restrictions of this section shall not apply prior to the time that the corporation has received payment for any of its capital stock, or in the case of a nonstock corporation, prior to the time that it has members.

(b) Any stockholder of a corporation that is not a public benefit corporation that holds shares of stock of such corporation immediately prior to the effective time of:

(1) An amendment to the corporation's certificate of incorporation to include a provision authorized by §362(a)(1) of this title; or

(2) A merger or consolidation that would result in the conversion of the corporation's stock into or exchange of the corporation's stock for the right to receive shares or other equity interests in a domestic or foreign public benefit corporation or similar entity; and has neither voted in favor of such amendment or such merger or consolidation nor consented thereto in writing pursuant to §228 of this title, shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock; provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of the meeting of stockholders to act upon the agreement of merger or consolidation, or amendment, were either: (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders, unless, in the case of a merger or consolidation, the holders thereof are required by the terms of an agreement of merger or consolidation to accept for such stock anything except (A) shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 holders; (B) cash in lieu of fractional shares or fractional depository receipts described in the foregoing clause (A); or (C) any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing clauses (A) and (B).

(c) Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation may not, without the approval of 2/3 of the outstanding stock of the corporation entitled to vote thereon:

(1) Amend its certificate of incorporation to delete or amend a provision authorized by §362(a)(1) or §366(c) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares

or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits pursuant to §362(a) of this title or imposing requirements pursuant to §366(c) of this title.

(d) Notwithstanding the foregoing, a nonprofit nonstock corporation may not be a constituent corporation to any merger or consolidation governed by this section. (Last amended by Ch. 40, L. '15, effective with respect to mergers and consolidations consummated pursuant to agreements entered into on or after 8-1-15, or in the case of amendments, amendments approved by the board of directors on or after 8-1-15).

§364. STOCK CERTIFICATES; NOTICES REGARDING UNCERTIFICATED STOCK

Any stock certificate issued by a public benefit corporation shall note conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter. Any notice given by a public benefit corporation pursuant to §151(f) of this title shall state conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

§365. DUTIES OF DIRECTORS

(a) The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.

(b) A director of a public benefit corporation shall not, by virtue of the public benefit provisions or §362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's

decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

(c) The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of §102(b)(7) or §145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.

§366. PERIODIC STATEMENTS AND THIRD-PARTY CERTIFICATION

(a) A public benefit corporation shall include in every notice of a meeting of stockholders a statement to the effect that it is a public benefit corporation formed pursuant to this subchapter.

(b) A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct. The statement shall include:

(1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;

(2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;

(3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and

(4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.

(c) The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation:

(1) Provide the statement described in subsection (b) of this section more frequently than biennially;

(2) Make the statement described in subsection (b) of this section available to the public; and/or

(3) Use a third-party standard in connection with and/or attain a periodic third-party certification addressing the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and/or the best interests of those materially affected by the corporation's conduct.

§367. DERIVATIVE SUITS

Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivative suit, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least $2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in §365(a) of this title.

§368. NO EFFECT ON OTHER CORPORATIONS

This subchapter shall not affect a statute or rule of law that is applicable to a corporation that is not a public benefit corporation, except as provided in §363 of this title.

Subchapter XVI
FOREIGN CORPORATIONS

§371 DEFINITION; QUALIFICATION TO DO BUSINESS IN STATE; PROCEDURE

(a) As used in this chapter, the words "foreign corporation" mean a corporation organized under the laws of any jurisdiction other than this State.

(b) No foreign corporation shall do any business in this State, through or by branch offices, agents or representatives located in this State, until it shall have paid to the Secretary of State of this State for the use of this State, $80, and shall have filed in the Office of the Secretary of State:

(1) A certificate, as of a date not earlier than 6 months prior to the filing date, issued by an authorized officer of the jurisdiction of its incorporation evidencing its corporate existence. If such certificate is in a foreign language, a translation thereof, under oath of the translator, shall be attached thereto;

(2) A statement executed by an authorized officer of each corporation setting forth (i) the name and address of its registered agent in this

State, which agent may be any of the foreign corporation itself, an individual resident in this State, a domestic corporation, a domestic partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a domestic limited liability company, a domestic statutory trust, a foreign corporation (other than the foreign corporation itself), a foreign partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a foreign limited liability company or a foreign statutory trust, (ii) a statement, as of a date not earlier than 6 months prior to the filing date, of the assets and liabilities of the corporation, and (iii) the business it proposes to do in this State, and a statement that it is authorized to do that business in the jurisdiction of its incorporation. The statement shall be acknowledged in accordance with Sec. 103 of this title.

(c) The certificate of the Secretary of State, under seal of office, of the filing of the certificates required by subsection (b) of this section, shall be delivered to the registered agent upon the payment to the Secretary of State of the fee prescribed for such certificates, and the certificate shall be prima facie evidence of the right of the corporation to do business in this State; provided, that the Secretary of State shall not issue such certificate unless the name of the corporation is such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names that are reserved on such records and from the names on such records of each other corporation, partnership, limited partnership, limited liability company or statutory trust organized or registered as a domestic or foreign corporation, partnership, limited partnership, limited liability company or statutory trust under the laws of this State, except with the written consent of the person who has reserved such name or such other corporation, partnership, limited partnership, limited liability company or statutory trust, executed, acknowledged and filed with the Secretary of State in accordance with Sec. 103 of this title. If the name of the foreign corporation conflicts with the name of a corporation, partnership, limited partnership, limited liability company or statutory trust organized under the laws of this State, or a name reserved for a corporation, partnership, limited partnership, limited liability company or statutory trust to be organized under the laws of this State, or a name reserved or registered as that of a foreign corporation, partnership, limited partnership, limited liability company or statutory trust under the laws of this State, the foreign corporation may qualify to do business if it adopts an

assumed name which shall be used when doing business in this State as long as the assumed name is authorized for use by this section. (Last amended by Ch. 290, L. '10, eff. 8-2-10.)

Decisions

.1 Power of state over foreign corporations. — Courts of Delaware will not control internal affairs of foreign corporations. *Hanssen v. Pusey & Jones Co, 276 F. 296 (D. Del. 1921)*.

A state is free to choose whether it will hear an in personam suit against an amply notified foreign corporation on a claim arising outside the state and not related to the activities of the corporation in state. *Perkins v. Benguet Cons Min Co, 342 US 437 (1952)*.

Supreme Court will require federal district court to hear diversity suit for money judgment, possibly involving the internal affairs of a foreign corporation. *Williams v. G B & W R Co, 326 US 549 (1946)*.

Federal court has discretionary jurisdiction of minority stockholder's derivative suit against foreign corporation and its directors, whether or not it is bound to follow the law of the state, and it should take jurisdiction where the suit does not involve the internal affairs of the foreign corporation and where, although a similar suit is pending in a court of the foreign corporation's home state, that court could not afford adequate relief because personal service could not be effected on defendant directors within its jurisdiction. *Overfield v. Pennroad Corp, 113 F.2d 6 (3d Cir 1940)*.

When foreign corporation registers to do business in Delaware and appoints agent there to receive service of process, corporation consents to general jurisdiction of Delaware courts. *Sternberg v. O'Neil, 550 A.2d 1105 (1988)*.

.2 Doing business-in general. — To be subject to service of process in Delaware a foreign corporation must (1) be doing business in the state (2) of a nature and to an extent (3) to warrant the inference that by the business done the corporation has subjected itself to the jurisdiction of the state and is present by its officers or agents. *Bell v. Viavi Co, 143 A 255 (1928)*.

Mere solicitation by an agent is not doing business for service of process purpose. *Atlas Mutual Benefit Ass'n v. Portscheller, 46 A.2d 643 (1945)*.

Unqualified corporation that solicits business and performs heating and air conditioning job instate is subject to service of process under state's long-arm statute, even though that job was only its second job instate in 14 years. *Crowell Corp v. TopkisConstr Co, 267 A.2d 613 (1970)*.

Unqualified corporation cannot bring action instate when it (1) advertised in local newspapers; (2) engaged in credit transactions instate; (3) maintained local bank account; and (4) provided transportation to its out-of-state lodge; statute required qualification for transaction of "any business" in state and barred maintenance of "any action" as penalty for failure to qualify. *Farmers Bank of Delaware v. Sinwellan Corp, 367 A.2d 180 (1976)*.

Foreign corporation that fills orders from stock on hand within state and continuously polices its dealers in regard to its Fair Trade contracts is "doing business" for service of process purpose. *Klein v. Sunbeam Corp, 94 A.2d 385 (1952)*.

§372 ADDITIONAL REQUIREMENTS IN CASE OF CHANGE OF NAME, CHANGE OF BUSINESS PURPOSE OR MERGER OR CONSOLIDATION

(a) Every foreign corporation admitted to do business in this State which shall change its corporate name, or enlarge, limit or otherwise change the business which it proposes to do in this State, shall, within 30 days after the time said change becomes effective, file with the Secretary of State a certificate, which shall set forth:

(1) The name of the foreign corporation as it appears on the records of the Secretary of State of this State;

(2) The jurisdiction of its incorporation;

(3) The date it was authorized to do business in this State;

(4) If the name of the foreign corporation has been changed, a statement of the name relinquished, a statement of the new name and a statement that the change of name has been effected under the laws of the jurisdiction of its incorporation and the date the change was effected;

(5) If the business it proposes to do in this State is to be enlarged, limited or otherwise changed, a statement reflecting such change and a statement that it is authorized to do in the jurisdiction of its incorporation the business which it proposes to do in this State.

(b) Whenever a foreign corporation authorized to transact business in this State shall be the survivor of a merger permitted by the laws of the state or country in which it is incorporated, it shall, within 30 days after the merger becomes effective, file a certificate, issued by the proper officer of the state or country of its incorporation, attesting to the occurrence of such event. If the merger has changed the corporate name of such foreign corporation or has enlarged, limited or otherwise changed the business it proposes to do in this State, it shall also comply with subsection (a) of this section.

(c) Whenever a foreign corporation authorized to transact business in this State ceases to exist because of a statutory merger or consolidation, it shall comply with section 381 of this title.

(d) The Secretary of State shall be paid, for the use of the State, $50 for filing and indexing each certificate required by subsection (a) or (b)

of this section, and in the event of a change of name an additional $50 shall be paid for a certificate to be issued as evidence of filing the change of name. (Last amended by Ch. 78, L. '09, eff. 8-1-09.)

§373 EXCEPTIONS TO REQUIREMENTS

(a) No foreign corporation shall be required to comply with Sec. 371 and 372 of this title, under any of the following conditions:

(1) If it is in the mail order or a similar business, merely receiving orders by mail or otherwise in pursuance of letters, circulars, catalogs, or other forms of advertising, or solicitation, accepting the orders outside this State, and filling them with goods shipped into this State;

(2) If it employs salespersons, either resident or traveling, to solicit orders in this State, either by display of samples or otherwise (whether or not maintaining sales offices in this State), all orders being subject to approval at the offices of the corporation without this State, and all goods applicable to the orders being shipped in pursuance thereof from without this State to the vendee or to the seller or such seller's agent for delivery to the vendee, and if any samples kept within this State are for display or advertising purposes only, and no sales, repairs or replacements are made from stock on hand in this State;

(3) If it sells, by contract consummated outside this State, and agrees, by the contract, to deliver into this State, machinery, plants or equipment, the construction, erection or installation of which within this State requires the supervision of technical engineers or skilled employees performing services not generally available, and as a part of the contract of sale agrees to furnish such services, and such services only, to the vendee at the time of construction, erection or installation;

(4) If its business operations within this State, although not falling within the terms of paragraphs (1), (2), and (3) of this subsection or any of them, are nevertheless wholly interstate in character;

(5) If it is an insurance company doing business in this State.

(6) If it creates, as borrower or lender, or acquires, evidences of debt, mortgages or liens on real or personal property;

(7) If it secures or collects debts or enforces any rights in property securing the same.

(b) This section shall have no application to the question of whether any foreign corporation is subject to service of process and suit in this

State under Sec. 382 of this title or any other law of this State. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

Decisions

.1 Bonding activities. — Bonding activities of foreign company were interstate in nature even though local real estate was used as security for loans it arranged for residents, since with one exception, all lenders were nonresidents; thus company could sue to collect commission for procuring loan even though neither company nor its principal operator was licensed to do business locally. *Bond Associates, Inc v. Continental Arms, Inc, 310 A.2d 875 (1973)*.

§374 ANNUAL REPORT

Annually on or before June 30, a foreign corporation doing business in this State shall file a report with the Secretary of State. The report shall be made on a form designated by the Secretary of State and shall be signed by the corporation's president, secretary, treasurer or other proper officer duly authorized so to act, or by any of its directors, or if filing an initial report by any incorporator in the event its board of directors shall not have been elected. The fact that an individual's name is signed on a certification attached to a corporate report shall be prima facie evidence that such individual is authorized to certify the report on behalf of the corporation; however the official title or position of the individual signing the corporate report shall be designated. The report shall contain the following information:

(1) The location of its registered office in this State, which shall include the street, number, city and postal code;

(2) The name of the agent upon whom service of process against the corporation may be served;

(3) The location of the principal place of business of the corporation, which shall include the street, number, city, state or foreign country; and

(4) The names and addresses of all the directors as of the filing date of the report and the name and address of the officer who signs the report.

If any officer or director of a foreign corporation required to file an annual report with the Secretary of State shall knowingly make any false

statement in the report, such officer or director shall be guilty of perjury. (Last amended by Ch. 86, L. '17, eff. 8-1-17.)

§375 FAILURE TO FILE REPORT

Upon the failure, neglect or refusal of any foreign corporation to file an annual report as required by Sec. 374 of this title, the Secretary of State may, in the Secretary of State's discretion, investigate the reasons therefor and shall terminate the right of the foreign corporation to do business within this State upon failure of the corporation to file an annual report within any 2-year period. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§376 SERVICE OF PROCESS UPON QUALIFIED FOREIGN CORPORATIONS

(a) All process issued out of any court of this State, all orders made by any court of this State, all rules and notices of any kind required to be served on any foreign corporation which has qualified to do business in this State may be served on the registered agent of the corporation designated in accordance with Sec. 371 of this title, or if there be no such agent, then on any officer, director or other agent of the corporation then in this State.

(b) In case the officer whose duty it is to serve legal process cannot by due diligence serve the process in any manner provided for by subsection (a) of this section, it shall be lawful to serve the process against the corporation upon the Secretary of State, and such service shall be as effectual for all intents and purposes as if made in any of the ways provided for in subsection (a) of this section. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event that service is effected through the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify the corporation by letter, directed to the corporation at its principal place of business as it appears on the last annual report filed pursuant to §374 of this title or, if no such address appears, at its

last registered office. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served upon the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection, and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as a part of the costs in the proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary of State, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from receipt of such service. (Last amended by Ch. 290, L. '10, eff. 8-2-10.)

Decisions

.1 Effect of designation of agent. — Delaware cannot exercise general jurisdiction over a foreign corporation merely because it registered to do business and appointed a registered agent. *Genuine Parts Company v. Cepec*, *137 A.3d 123 (Del. Supr. 2016).*

§377 CHANGE OF REGISTERED AGENT

(a) Any foreign corporation, which has qualified to do business in this State, may change its registered agent and substitute another registered agent by filing a certificate with the Secretary of State, acknowledged in accordance with §103 of this title, setting forth:

(1) The name and address of its registered agent designated in this State upon whom process directed to said corporation may be served; and

(2) A revocation of all previous appointments of agent for such purposes.

Such registered agent shall comply with §371(b)(2)(i) of this title.

(b) Any individual or entity designated by a foreign corporation as its registered agent for service of process may resign by filing with the Secretary of State a signed statement that the registered agent is unwilling to continue to act as the registered agent of the corporation for service of process, including in the statement the post-office address of the main or headquarters office of the foreign corporation, but such resignation shall not become effective until 30 days after the statement is filed. The statement shall be acknowledged by the registered agent and shall contain a representation that written notice of resignation was given to the corporation at least 30 days prior to the filing of the statement by mailing or delivering such notice to the corporation at its address given in the statement.

(c) If any agent designated and certified as required by §371 of this title shall die or remove from this State, or resign, then the foreign corporation for which the agent had been so designated and certified shall, within 10 days after the death, removal or resignation of its agent, substitute, designate and certify to the Secretary of State, the name of another registered agent for the purposes of this subchapter, and all process, orders, rules and notices mentioned in §376 of this title may be served on or given to the substituted agent with like effect as is prescribed in that section.

(d) A foreign corporation whose qualification to do business in this State has been forfeited pursuant to §132(f)(4) or §136(b) of this title may be reinstated by filing a certificate of reinstatement with the Secretary of State, acknowledged in accordance with §103 of this title, setting forth:

(1) The name of the foreign corporation;

(2) The effective date of the forfeiture; and

(3) The name and address of the foreign corporation's registered agent required to be maintained by §132 of this title.

(e) Upon the filing of a certificate of reinstatement in accordance with subsection (d) of this section, the qualification of the foreign corporation to do business in this State shall be reinstated with the same force and effect as if it had not been forfeited pursuant to this title. (Last amended by Ch. 273, L. '12, eff. 8-1-12.)

§378 PENALTIES FOR NONCOMPLIANCE

Any foreign corporation doing business of any kind in this State without first having complied with any section of this subchapter applicable to it,

shall be fined not less than $200 nor more than $500 for each such offense. Any agent of any foreign corporation that shall do any business in this State for any foreign corporation before the foreign corporation has complied with any section of this subchapter applicable to it, shall be fined not less than $100 nor more than $500 for each such offense.

§379 BANKING POWERS DENIED

(a) No foreign corporation shall, within the limits of this State, by any implication or construction, be deemed to possess the power of discounting bills, notes or other evidence of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt upon loan for circulation as money, anything in its charter or articles of incorporation to the contrary notwithstanding, except as otherwise provided in subchapter VII of Chapter 7 of Title 5 or in Chapter 14 of Title 5.

(b) All certificates issued by the Secretary of State under Sec. 371 of this title shall expressly set forth the limitations and restrictions contained in this section. (Last amended by Ch. 254, L. '98, eff. 3-30-98.)

§380 FOREIGN CORPORATION AS FIDUCIARY IN THIS STATE

A corporation organized and doing business under the laws of the District of Columbia or of any state of the United States other than Delaware, duly authorized by its certificate of incorporation or by-laws so to act, may be appointed by any last will and testament or other testamentary writing, probated within this state, or by a deed of trust, mortgage, or other agreement, as executor, guardian, trustee, or other fiduciary, and may act as such within this state, when and to the extent that the laws of the District of Columbia or of the state in which the foreign corporation is organized confer like powers upon corporations organized and doing business under the laws of this state. (Last amended by Ch. 353, L. '84, eff. 7-17-84.)

§381 WITHDRAWAL OF FOREIGN CORPORATION FROM STATE; PROCEDURE; SERVICE OF PROCESS ON SECRETARY OF STATE

(a) Any foreign corporation which shall have qualified to do business in this State under §371 of this title, may surrender its authority to do business in this State and may withdraw therefrom by filing with the Secretary of State:

(1) A certificate executed in accordance with §103 of this title, stating that it surrenders its authority to transact business in the state and withdraws therefrom; and stating the address to which the Secretary of State may mail any process against the corporation that may be served upon the Secretary of State, or

(2) A copy of an order or decree of dissolution made by any court of competent jurisdiction or other competent authority of the State or other jurisdiction of its incorporation, certified to be a true copy under the hand of the clerk of the court or other official body, and the official seal of the court or official body or clerk thereof, together with a certificate executed in accordance with paragraph (a)(1) of this section, stating the address to which the Secretary of State may mail any process against the corporation that may be served upon the Secretary of State.

(b) The Secretary of State shall, upon payment to the Secretary of State of the fees prescribed in §391 of this title, issue a sufficient number of certificates, under the Secretary of State's hand and official seal, evidencing the surrender of the authority of the corporation to do business in this State and its withdrawal therefrom. One of the certificates shall be furnished to the corporation withdrawing and surrendering its right to do business in this State.

(c) Upon the issuance of the certificates by the Secretary of State, the appointment of the registered agent of the corporation in this State, upon whom process against the corporation may be served, shall be revoked, and the corporation shall be deemed to have consented that service of process in any action, suit or proceeding based upon any cause of action arising in this State, during the time the corporation was authorized to transact business in this State, may thereafter be made by service upon the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate.

(d) In the event of service upon the Secretary of State in accordance with subsection (c) of this section, the Secretary of State shall forthwith notify the corporation by letter, directed to the corporation at the address stated in the certificate which was filed by the corporation with the Secretary of State pursuant to subsection (a) of this section. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served upon the Secretary of State. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being made pursuant to this subsection, and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as part of the cost of the action, suit or proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of such service setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which the process has been served upon the Secretary of State, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from receipt of the service of process. (Last amended by Ch. 273, L. '12, eff. 8-1-12.)

§382 SERVICE OF PROCESS ON NONQUALIFYING FOREIGN CORPORATIONS

(a) Any foreign corporation which shall transact business in this State without having qualified to do business under §371 of this title shall be deemed to have thereby appointed and constituted the Secretary of State of this State its agent for the acceptance of legal process in any civil action, suit or proceeding against it in any state or federal court in this State arising or growing out of any business transacted by it within this State. If any foreign corporation consents in writing to be subject to the jurisdiction of any state or federal court in this State for any civil action, suit or proceeding against it arising or growing out of any business or matter, and if the agreement or instrument setting forth such consent does not otherwise provide a manner of service of legal process in any such civil action, suit or proceeding against it, such foreign corpo-

ration shall be deemed to have thereby appointed and constituted the Secretary of State of this State its agent for the acceptance of legal process in any such civil action, suit or proceeding against it. The transaction of business in this State by such corporation and/or such consent by such corporation to the jurisdiction of any state or federal court in this State without provision for a manner of service of legal process shall be a signification of the agreement of such corporation that any process served upon the Secretary of State when so served shall be of the same legal force and validity as if served upon an authorized officer or agent personally within this State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate.

(b) Section 373 of this title shall not apply in determining whether any foreign corporation is transacting business in this State within the meaning of this section; and "the transaction of business" or "business transacted in this State," by any such foreign corporation, whenever those words are used in this section, shall mean the course or practice of carrying on any business activities in this State, including, without limiting the generality of the foregoing, the solicitation of business or orders in this State. This section shall not apply to any insurance company doing business in this State.

(c) In the event of service upon the Secretary of State in accordance with subsection (a) of this section, the Secretary of State shall forthwith notify the corporation thereof by letter, directed to the corporation at the address furnished to the Secretary of State by the plaintiff in such action, suit or proceeding. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served upon the Secretary of State. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being made pursuant to this subsection, and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as a part of the costs in the proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such process setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which process has been served upon the

Secretary of State, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from receipt of the service of process. (Last amended by Ch. 72, L. '13, eff. 8-1-13.)

Decisions

.1 Solicitation. — Out-of-state heating units manufacturer can be sued under state's long-arm statute, when it solicited orders, sold products through independent manufacturer's agents, and visited customers instate. *County Plumbing and Heating Co v. Strine, 272 A.2d 340 (1970)*.

.2 Not doing business. — Domestic corporation could not sue unqualified corporations instate for breach of agreement to install equipment in different state, when unqualified corporations did not transact business generally instate and breach of agreement did not arise out of particular business done instate. *Delaware Lead Construction Co v. Young Industries, Inc, 360 F.Supp. 1244 (D. Del. 1973)*.

Unqualified parent corporation that guaranteed payment of purchases of its unqualified subsidiary could move to quash service of process on Secretary of State and dismiss complaint for lack of personal jurisdiction, when activities of its subsidiary in telephoning and mailing orders for merchandise to seller's instate office and accepting four F.O.B. deliveries there, were insufficient to constitute transaction of business instate. *General Foods Corp v. Haines and Company, Inc, 458 F.Supp. 1167 (D. Del. 1978)*.

.3 Service of process was improper. — Corporate officers served with substituted process pursuant to statute calling for such service upon corporations only were improperly served; foreign corporation that held several auctions within state was doing sufficient business for suit against it to be maintained within jurisdiction. *Wier v. Fairchild Galleries, 377 A.2d 28 (Ch. Ct. 1977)*.

§383 ACTIONS BY AND AGAINST UNQUALIFIED FOREIGN CORPORATIONS

(a) A foreign corporation which is required to comply with Sec. 371 and 372 of this title and which has done business in this State without authority shall not maintain any action or special proceeding in this State unless and until such corporation has been authorized to do business in this State and has paid to the State all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this State without authority. This prohibition shall not apply to any successor in interest of such foreign corporation.

(b) The failure of a foreign corporation to obtain authority to do business in this State shall not impair the validity of any contract or act of the foreign corporation or the right of any other party to the contract to maintain any action or special proceeding thereon, and shall not prevent the foreign corporation from defending any action or special proceeding in this State.

Decisions

.1 Enforcing contract. — Unqualified corporation can enforce contract of sale against buyer who retained its benefits. *Model Heating Co v. Magarity, 81 A 394 (1911)*.

.2 Suit in federal court. — Foreign corporation, barred from suing in state court, because "doing business" without authority, cannot sue in federal court. *Woods v. Interstate Realty Co, 337 US 535 (1949)*.

.3 Bringing suit while unqualified. — Unqualified corporation cannot bring action instate when it (1) advertised in local newspapers; (2) engaged in credit transactions instate; (3) maintained local bank account; and (4) provided transportation to its out-of-state lodge; statute required qualification to do business instate and barred maintenance of "any action" as penalty for failure to qualify. *Farmers Bank of Delaware v. Sinwellan Corp, 367 A.2d 180 (1976)*.

One transaction does not constitute "doing business"; hence, this section not operate to bar suit on the grounds that the corporation was not qualified. *Coyle v. Peoples, 349 A.2d 870 (1975)*.

§384 FOREIGN CORPORATIONS DOING BUSINESS WITHOUT HAVING QUALIFIED; INJUNCTIONS

The Court of Chancery shall have jurisdiction to enjoin any foreign corporation, or any agent thereof, from transacting any business in this State if such corporation has failed to comply with any section of this subchapter applicable to it or if such corporation has secured a certificate of the Secretary of State under Sec. 371 of this title on the basis of false or misleading representations. The Attorney General shall, upon the Attorney General's own motion or upon the relation of proper parties, proceed for this purpose by complaint in any county in which such corporation is doing business. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§385 FILING OF CERTAIN INSTRUMENTS WITH RECORDER OF DEEDS NOT REQUIRED

No instrument that is required to be filed with the Secretary of State of this State by this subchapter need be filed with the Recorder of Deeds of any county of this State in order to comply with this subchapter. (Added by Ch. 112, L. '83, eff. 7-1-83.)

Subchapter XVII
DOMESTICATION AND TRANSFER

§388 DOMESTICATION OF NON-UNITED STATES ENTITIES

(a) As used in this section, the term:

(1) "Foreign jurisdiction" means any foreign country or other foreign jurisdiction (other than the United States, any state, the District of Columbia, or any possession or territory of the United States); and

(2) "Non-United States entity" means a corporation, a limited liability company, a statutory trust, a business trust or association, a real estate investment trust, a common-law trust, or any other unincorporated business or entity, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), formed, incorporated, created or that otherwise came into being under the laws of any foreign jurisdiction.

(b) Any non-United States entity may become domesticated as a corporation in this State by complying with subsection (h) of this section and filing with the Secretary of State:

(1) A certificate of corporate domestication which shall be executed in accordance with subsection (g) of this section and filed in accordance with §103 of this title; and

(2) A certificate of incorporation, which shall be executed, acknowledged and filed in accordance with §103 of this title.

Each of the certificates required by this subsection (b) shall be filed simultaneously with the Secretary of State and, if such certificates are not to become effective upon their filing as permitted by §103(d) of this title, then each such certificate shall provide for the same effective date or time in accordance with §103(d) of this title.

(c) The certificate of corporate domestication shall certify:

(1) The date on which and jurisdiction where the non-United States entity was first formed, incorporated, created or otherwise came into being;

(2) The name of the non-United States entity immediately prior to the filing of the certificate of corporate domestication;

(3) The name of the corporation as set forth in its certificate of incorporation filed in accordance with subsection (b) of this section; and

(4) The jurisdiction that constituted the seat, siege social, or principal place of business or central administration of the non-United States entity or any other equivalent thereto under applicable law, immediately prior to the filing of the certificate of corporate domestication; and

(5) That the domestication has been approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the non-United States entity and the conduct of its business or by applicable non-Delaware law, as appropriate.

(d) Upon the certificate of corporate domestication and the certificate of incorporation becoming effective in accordance with §103 of this title, the non-United States entity shall be domesticated as a corporation in this State and the corporation shall thereafter be subject to all of the provisions of this title, except that notwithstanding §106 of this title, the existence of the corporation shall be deemed to have commenced on the date the non-United States entity commenced its existence in the jurisdiction in which the non-United States entity was first formed, incorporated, created or otherwise came into being.

(e) The domestication of any non-United States entity as a corporation in this State shall not be deemed to affect any obligations or liabilities of the non-United States entity incurred prior to its domestication as a corporation in this State, or the personal liability of any person therefor.

(f) The filing of a certificate of corporate domestication shall not affect the choice of law applicable to the non-United States entity, except that, from the effective time of the domestication, the law of the State of Delaware, including this title, shall apply to the non-United States entity to the same extent as if the non-United States entity had been incorporated as a corporation of this State on that date.

(g) The certificate of corporate domestication shall be signed by any person who is authorized to sign the certificate of corporate domestication on behalf of the non-United States entity.

(h) Prior to the filing of a certificate of corporate domestication with the Secretary of State, the domestication shall be approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the non-United States entity and the conduct of its business or by applicable non-Delaware law, as appropriate, and the certificate of incorporation shall be approved by the same authorization required to approve the domestication.

(i) When a non-United States entity has become domesticated as a corporation pursuant to this section, for all purposes of the laws of the State of Delaware, the corporation shall be deemed to be the same entity as the domesticating non-United States entity and the domestication shall constitute a continuation of the existence of the domesticating non-United States entity in the form of a corporation of this State. When any domestication shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the non-United States entity that has been domesticated, and all property, real, personal and mixed, and all debts due to such non-United States entity, as well as all other things and causes of action belonging to such non-United States entity, shall remain vested in the corporation to which such non-United States entity has been domesticated (and also in the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication) and shall be the property of such corporation (and also of the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication), and the title to any real property vested by deed or otherwise in such non-United States entity shall not revert or be in any way impaired by reason of this title; but all rights of creditors and all liens upon any property of such non-United States entity shall be preserved unimpaired, and all debts, liabilities and duties of the non-United States entity that has been domesticated shall remain attached to the corporation to which such non-United States entity has been domesticated (and also to the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication), and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as such corporation. The rights, privileges, powers and interests in property of the non-United States entity, as well as the debts, liabilities and duties of the

non-United States entity, shall not be deemed, as a consequence of the domestication, to have been transferred to the corporation to which such non-United States entity has domesticated for any purpose of the laws of the State of Delaware.

(j) Unless otherwise agreed or otherwise required under applicable non-Delaware law, the domesticating non-United States entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the domestication shall not be deemed to constitute a dissolution of such non-United States entity. If, following domestication, a non-United States entity that has become domesticated as a corporation of this State continues its existence in the foreign jurisdiction in which it was existing immediately prior to domestication, the corporation and such non-United States entity shall, for all purposes of the laws of the State of Delaware, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State of Delaware and the laws of such foreign jurisdiction.

(k) In connection with a domestication under this section, shares of stock, rights or securities of, or interests in, the non-United States entity that is to be domesticated as a corporation of this State may be exchanged for or converted into cash, property, or shares of stock, rights or securities of such corporation or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, or shares of stock, rights or securities of, or interests in, another corporation or other entity or may be cancelled. (Last amended by Ch. 96, L. '11, eff. 8-1-11.)

§389 TEMPORARY TRANSFER OF DOMICILE INTO THIS STATE

(a) As used in this section:

(1) The term "foreign jurisdiction" and the term "non-United States entity" shall have the same meanings as set forth in §388(a) of this title.

(2) The terms "officers" and "directors" include, in addition to such persons, trustees, managers, partners and all other persons performing functions equivalent to those of officers and directors, however named or described in any relevant instrument.

(3) The term "emergency condition" shall be deemed to include but not be limited to any of the following:

a. War or other armed conflict;

b. Revolution or insurrection;

c. Invasion or occupation by foreign military forces;

d. Rioting or civil commotion of an extended nature;

e. Domination by a foreign power;

f. Expropriation, nationalization or confiscation of a material part of the assets or property of the non-United States entity;

g. Impairment of the institution of private property (including private property held abroad);

h. The taking of any action under the laws of the United States whereby persons resident in the jurisdiction, the law of which governs the internal affairs of the non-United States entity, might be treated as "enemies" or otherwise restricted under laws of the United States relating to trading with enemies of the United States;

i. The immediate threat of any of the foregoing; and

j. Such other event which, under the law of the jurisdiction governing the internal affairs of the non-United States entity, permits the non-United States entity to transfer its domicile.

(b) Any non-United States entity may, subject to and upon compliance with this section, transfer its domicile (which term, as used in this section, shall be deemed to refer in addition to the seat, siege social or principal place of business or central administration of such entity, or any other equivalent thereto under applicable law) into this State, and may perform the acts described in this section, so long as the law by which the internal affairs of such entity are governed does not expressly prohibit such transfer.

(c) Any non-United States entity that shall propose to transfer its domicile into this State shall submit to the Secretary of State for the Secretary of State's review, at least 30 days prior to the proposed transfer of domicile, the following:

(1) A copy of its certificate of incorporation and bylaws (or the equivalent thereof under applicable law), certified as true and correct by the appropriate director, officer or government official;

(2) A certificate issued by an authorized official of the jurisdiction the law of which governs the internal affairs of the non-United States entity evidencing its existence;

(3) A list indicating the person or persons who, in the event of a transfer pursuant to this section, shall be the authorized officers and directors of the non-United States entity, together with evidence of their authority to act and their respective executed agreements in writing regarding service of process as set out in subsection (j) of this section;

(4) A certificate executed by the appropriate officer or director of the non-United States entity, setting forth:

a. The name and address of its registered agent in this State;

b. A general description of the business in which it is engaged;

c. That the filing of such certificate has been duly authorized by any necessary action and does not violate the certificate of incorporation or bylaws (or equivalent thereof under applicable law) or any material agreement or instrument binding on such entity;

d. A list indicating the person or persons authorized to sign the written communications required by subsection (e) of this section;

e. An affirmance that such transfer is not expressly prohibited under the law by which the internal affairs of the non-United States entity are governed; and

f. An undertaking that any transfer of domicile into this State will take place only in the event of an emergency condition in the jurisdiction the law of which governs the internal affairs of the non-United States entity and that such transfer shall continue only so long as such emergency condition, in the judgment of the non-United States entity's management, so requires; and

(5) The examination fee prescribed under §391 of this title.

If any of the documents referred to in paragraphs (1)-(5) of this subsection are not in English, a translation thereof, under oath of the translator, shall be attached thereto. If such documents satisfy the requirements of this section, and if the name of the non-United States entity meets the requirements of §102(a)(1) of this title, the Secretary of State shall notify the non-United States entity that such documents have been accepted for filing, and the records of the Secretary of State shall reflect such acceptance and such notification. In addition, the Secretary of State shall enter the name of the non-United States entity on the Secretary of State's reserved list to remain there so long as the non-United States entity is in compliance with this section. No document submitted under this subsection shall be available for public inspection pursuant to Chapter 100 of Title 29 until, and unless, such entity effects a transfer of its domicile as provided in this section. The Secretary of State may waive the 30-day period and translation requirement provided for in this subsection upon request by such entity, supported by facts (including, without limitation, the existence of an emergency condition) justifying such waiver.

(d) On or before March 1 in each year, prior to the transfer of its domicile as provided for in subsection (e) of this section, during any such transfer and, in the event that it desires to continue to be subject to a transfer of domicile under this section, after its domicile has ceased to be in this State, the non-United States entity shall file a certificate executed by an

appropriate officer or director of the non-United States entity, certifying that the documents submitted pursuant to this section remain in full force and effect or attaching any amendments or supplements thereto and translated as required in subsection (c) of this section, together with the filing fee prescribed under §391 of this title. In the event that any non-United States entity fails to file the required certificate on or before March 1 in each year, all certificates and filings made pursuant to this section shall become null and void on March 2 in such year, and any proposed transfer thereafter shall be subject to all of the required submissions and the examination fee set forth in subsection (c) of this section.

(e) If the Secretary of State accepts the documents submitted pursuant to subsection (c) of this section for filing, such entity may transfer its domicile to this State at any time by means of a written communication to such effect addressed to the Secretary of State, signed by 1 of the persons named on the list filed pursuant to subparagraph d. of paragraph (4) of subsection (c) of this section, and confirming that the statements made pursuant to paragraph (4) of subsection (c) of this section remain true and correct; provided, that if emergency conditions have affected ordinary means of communication, such notification may be made by telegram, telex, telecopy or other form of writing so long as a duly signed duplicate is received by the Secretary of State within 30 days thereafter. The records of the Secretary of State shall reflect the fact of such transfer. Upon the payment to the Secretary of State of the fee prescribed under §391 of this title, the Secretary of State shall certify that the non-United States entity has filed all documents and paid all fees required by this title. Such certificate of the Secretary of State shall be prima facie evidence of transfer by such non-United States entity of its domicile into this State.

(f) Except to the extent expressly prohibited by the laws of this State, from and after the time that a non-United States entity transfers its domicile to this State pursuant to this section, the non-United States entity shall have all of the powers which it had immediately prior to such transfer under the law of the jurisdiction governing its internal affairs and the directors and officers designated pursuant to paragraph (3) of subsection (c) of this section, and their successors, may manage the business and affairs of the non-United States entity in accordance with the laws of such jurisdiction. Any such activity conducted pursuant to this section shall not be deemed to be doing business within this State for purposes of §371 of this title. Any reference in this section to the law of the jurisdiction go-

verning the internal affairs of a non-United States entity which has transferred its domicile into this State shall be deemed to be a reference to such law as in effect immediately prior to the transfer of domicile.

(g) For purposes of any action in the courts of this State, no non-United States entity which has obtained the certificate of the Secretary of State referred to in subsection (e) of this section shall be deemed to be an "enemy" person or entity for any purpose, including, without limitation, in relation to any claim of title to its assets, wherever located, or to its ability to institute suit in said courts.

(h) The transfer by any non-United States entity of its domicile into this State shall not be deemed to affect any obligations or liabilities of such non-United States entity incurred prior to such transfer.

(i) The directors of any non-United States entity which has transferred its domicile into this State may withhold from any holder of equity interests in such entity any amounts payable to such holder on account of dividends or other distributions, if the directors shall determine that such holder will not have the full benefit of such payment, so long as the directors shall make provision for the retention of such withheld payment in escrow or under some similar arrangement for the benefit of such holder.

(j) All process issued out of any court of this State, all orders made by any court of this State and all rules and notices of any kind required to be served on any non-United States entity which has transferred its domicile into this State may be served on the non-United States entity pursuant to §321 of this title in the same manner as if such entity were a corporation of this State. The directors of a non-United States entity which has transferred its domicile into this State shall agree in writing that they will be amenable to service of process by the same means as, and subject to the jurisdiction of the courts of this State to the same extent as are directors of corporations of this State, and such agreements shall be submitted to the Secretary of State for filing before the respective directors take office.

(k) Any non-United States entity which has transferred its domicile into this State may voluntarily return to the jurisdiction the law of which governs its internal affairs by filing with the Secretary of State an application to withdraw from this State. Such application shall be accompanied by a resolution of the directors of the non-United States entity authorizing such withdrawal and by a certificate of the highest diplomatic or consular official of such jurisdiction accredited to the United States indicating the consent of such jurisdiction to such withdrawal.

The application shall also contain, or be accompanied by, the agreement of the non-United States entity that it may be served with process in this State in any proceeding for enforcement of any obligation of the non-United States entity arising prior to its withdrawal from this State, which agreement shall include the appointment of the Secretary of State as the agent of the non-United States entity to accept service of process in any such proceeding and shall specify the address to which a copy of process served upon the Secretary of State shall be mailed. Upon the payment of any fees and taxes owed to this State, the Secretary of State shall file the application and the non-United States entity's domicile shall, as of the time of filing, cease to be in this State. (Last amended by Ch. 30, L. '05, eff. 8-1-05.)

§390 TRANSFER OR CONTINUANCE OF DOMESTIC CORPORATIONS

(a) Upon compliance with the provisions of this section, any corporation existing under the laws of this State may transfer to or domesticate or continue in any foreign jurisdiction and, in connection therewith, may elect to continue its existence as a corporation of this State. As used in this section, the term:

(1) "Foreign jurisdiction" means any foreign country, or other foreign jurisdiction (other than the United States, any state, the District of Columbia, or any possession or territory of the United States); and

(2) "Resulting entity" means the entity formed, incorporated, created or otherwise coming into being as a consequence of the transfer of the corporation to, or its domestication or continuance in, a foreign jurisdiction pursuant to this section.

(b) The board of directors of the corporation which desires to transfer to or domesticate or continue in a foreign jurisdiction shall adopt a resolution approving such transfer, domestication or continuance specifying the foreign jurisdiction to which the corporation shall be transferred or in which the corporation shall be domesticated or continued and, if applicable, that in connection with such transfer, domestication or continuance the corporation's existence as a corporation of this State is to continue and recommending the approval of such transfer or domestication or continuance by the stockholders of the corporation. Such resolution shall be submitted to the stockholders of the corporation at an annual or special meeting. Due notice of the time, place and purpose of the meeting shall be given to each holder of stock, whether voting or nonvoting, of the

corporation at the address of the stockholder as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. At the meeting, the resolution shall be considered and a vote taken for its adoption or rejection. If all outstanding shares of stock of the corporation, whether voting or nonvoting, shall be voted for the adoption of the resolution, the corporation shall file with the Secretary of State a certificate of transfer if its existence as a corporation of this State is to cease or a certificate of transfer and domestic continuance if its existence as a corporation of this State is to continue, executed in accordance with §103 of this title, which certifies:

(1) The name of the corporation, and if it has been changed, the name under which it was originally incorporated.

(2) The date of filing of its original certificate of incorporation with the Secretary of State.

(3) The foreign jurisdiction to which the corporation shall be transferred or in which it shall be domesticated or continued and the name of the resulting entity.

(4) That the transfer, domestication or continuance of the corporation has been approved in accordance with the provisions of this section.

(5) In the case of a certificate of transfer, (i) that the existence of the corporation as a corporation of this State shall cease when the certificate of transfer becomes effective, and (ii) the agreement of the corporation that it may be served with process in this State in any proceeding for enforcement of any obligation of the corporation arising while it was a corporation of this State which shall also irrevocably appoint the Secretary of State as its agent to accept service of process in any such proceeding and specify the address (which may not be that of the corporation's registered agent without the written consent of the corporation's registered agent, such consent to be filed along with the certificate of transfer) to which a copy of such process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such corporation that has transferred out of the State of Delaware by letter, directed to such corporation that has transferred out of the State of Delaware at the address so specified, unless such corporation shall have designated in

writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $50 for the use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process.

(6) In the case of a certificate of transfer and domestic continuance, that the corporation will continue to exist as a corporation of this State after the certificate of transfer and domestic continuance becomes effective.

(c) Upon the filing of a certificate of transfer in accordance with subsection (b) of this section and payment to the Secretary of State of all fees prescribed under this title, the Secretary of State shall certify that the corporation has filed all documents and paid all fees required by this title, and thereupon the corporation shall cease to exist as a corporation of this State at the time the certificate of transfer becomes effective in accordance with §103 of this title. Such certificate of the Secretary of State shall be prima facie evidence of the transfer, domestication or continuance by such corporation out of this State.

(d) The transfer, domestication or continuance of a corporation out of this State in accordance with this section and the resulting cessation of its existence as a corporation of this State pursuant to a certificate of transfer shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to such transfer, domestication or continuance, the personal liability of any person incurred prior to such transfer, domestication or continuance, or the choice of law applicable to the corporation with respect to matters arising prior to such transfer, domestication or

continuance. Unless otherwise agreed or otherwise provided in the certificate of incorporation, the transfer, domestication or continuance of a corporation out of the State of Delaware in accordance with this section shall not require such corporation to wind up its affairs or pay its liabilities and distribute its assets under this title and shall not be deemed to constitute a dissolution of such corporation.

(e) If a corporation files a certificate of transfer and domestic continuance, after the time the certificate of transfer and domestic continuance becomes effective, the corporation shall continue to exist as a corporation of this State, and the law of the State of Delaware, including this title, shall apply to the corporation to the same extent as prior to such time. So long as a corporation continues to exist as a corporation of the State of Delaware following the filing of a certificate of transfer and domestic continuance, the continuing corporation and the resulting entity shall, for all purposes of the laws of the State of Delaware, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State of Delaware and the laws of the foreign jurisdiction.

(f) When a corporation has transferred, domesticated or continued pursuant to this section, for all purposes of the laws of the State of Delaware, the resulting entity shall be deemed to be the same entity as the transferring, domesticating or continuing corporation and shall constitute a continuation of the existence of such corporation in the form of the resulting entity. When any transfer, domestication or continuance shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the corporation that has transferred, domesticated or continued, and all property, real, personal and mixed, and all debts due to such corporation, as well as all other things and causes of action belonging to such corporation, shall remain vested in the resulting entity (and also in the corporation that has transferred, domesticated or continued, if and for so long as such corporation continues its existence as a corporation of this State) and shall be the property of such resulting entity (and also of the corporation that has transferred, domesticated or continued, if and for so long as such corporation continues its existence as a corporation of this State), and the title to any real property vested by deed or otherwise in such corporation shall not revert or be in any way impaired by reason of this title; but all rights of creditors and all liens upon any property of such corporation shall be preserved unimpaired, and all debts, liabilities and duties of such corporation shall remain attached to the resulting entity (and also to the

corporation that has transferred, domesticated or continued, if and for so long as such corporation continues its existence as a corporation of this State), and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as such resulting entity. The rights, privileges, powers and interests in property of the corporation, as well as the debts, liabilities and duties of the corporation, shall not be deemed, as a consequence of the transfer, domestication or continuance, to have been transferred to the resulting entity for any purpose of the laws of the State of Delaware.

(g) In connection with a transfer, domestication or continuance under this section, shares of stock of the transferring, domesticating or continuing corporation may be exchanged for or converted into cash, property, or shares of stock, rights or securities of, or interests in, the resulting entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, or shares of stock, rights or securities of, or interests in, another corporation or other entity or may be cancelled.

(h) No vote of the stockholders of a corporation shall be necessary to authorize a transfer, domestication or continuance if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the transfer, domestication or continuance.

(i) Whenever it shall be desired to transfer to or domesticate or continue in any foreign jurisdiction any nonstock corporation, the governing body shall perform all the acts necessary to effect a transfer, domestication or continuance which are required by this section to be performed by the board of directors of a corporation having capital stock. If the members of a nonstock corporation are entitled to vote for the election of members of its governing body or are entitled under the certificate of incorporation or the bylaws of such corporation to vote on such transfer, domestication or continuance or on a merger, consolidation, or dissolution of the corporation, they, and any other holder of any membership interest in the corporation, shall perform all the acts necessary to effect a transfer, domestication or continuance which are required by this section to be performed by the stockholders of a corporation having capital stock. If there is no member entitled to vote thereon, nor any other holder of any membership interest in the corporation, the transfer, domestication or continuance of the corporation shall be authorized at a meeting of the governing body, upon the adoption of a resolution to transfer or domesticate or continue by the vote of a majority of members of its governing body then in office. In all other respects, the method and proceedings for

the transfer, domestication or continuance of a nonstock corporation shall conform as nearly as may be to the proceedings prescribed by this section for the transfer, domestication or continuance of corporations having capital stock. In the case of a charitable nonstock corporation, due notice of the corporation's intent to effect a transfer, domestication or continuance shall be mailed to the Attorney General of the State of Delaware 10 days prior to the date of the proposed transfer, domestication or continuance. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Subchapter XVIII
MISCELLANEOUS PROVISIONS

§391 AMOUNTS PAYABLE TO SECRETARY OF STATE UPON FILING CERTIFICATE OR OTHER PAPER

(a) The following fees and penalties shall be collected by and paid to the Secretary of State, for the use of the State:

(1) Upon the receipt for filing of an original certificate of incorporation, the fee shall be computed on the basis of $0.02 for each share of authorized capital stock having par value up to and including 20,000 shares, $0.01 for each share in excess of 20,000 shares up to and including 200,000 shares, and 2/5 of a $0.01 for each share in excess of 200,000 shares; $0.01 for each share of authorized capital stock without par value up to and including 20,000 shares, 1/2 of $0.01 for each share in excess of 20,000 shares up to and including 2,000,000 shares, and 2/5 of $0.01 for each share in excess of 2,000,000 shares. In no case shall the amount paid be less than $15. For the purpose of computing the fee on par value stock each $100 unit of the authorized capital stock shall be counted as 1 assessable share.

(2) Upon the receipt for filing of a certificate of amendment of certificate of incorporation, or a certificate of amendment of certificate of incorporation before payment of capital, or a restated certificate of incorporation, increasing the authorized capital stock of a corporation, the fee shall be an amount equal to the difference between the fee computed at the foregoing rates upon the total authorized capital stock of the corporation including the proposed increase, and the fee com-

puted at the foregoing rates upon the total authorized capital stock excluding the proposed increase. In no case shall the amount paid be less than $30.

(3) Upon the receipt for filing of a certificate of amendment of certificate of incorporation before payment of capital and not involving an increase of authorized capital stock, or an amendment to the certificate of incorporation not involving an increase of authorized capital stock, or a restated certificate of incorporation not involving an increase of authorized capital stock, or a certificate of retirement of stock, the fee to be paid shall be $30. For all other certificates relating to corporations, not otherwise provided for, the fee to be paid shall be $5.00. In the case of exempt corporations no fee shall be paid under this paragraph.

(4) Upon the receipt for filing of a certificate of merger or consolidation of 2 or more corporations, the fee shall be an amount equal to the difference between the fee computed at the foregoing rates upon the total authorized capital stock of the corporation created by the merger or consolidation, and the fee so computed upon the aggregate amount of the total authorized capital stock of the constituent corporations. In no case shall the amount paid be less than $75. The foregoing fee shall be in addition to any tax or fee required under any other law of this State to be paid by any constituent entity that is not a corporation in connection with the filing of the certificate of merger or consolidation.

(5) Upon the receipt for filing of a certificate of dissolution, there shall be paid to and collected by the Secretary of State a fee of:

a. Forty dollars ($40); or

b. Ten dollars ($10) in the case of a certificate of dissolution which certifies that:

1. The corporation has no assets and has ceased transacting business; and

2. The corporation, for each year since its incorporation in this State, has been required to pay only the minimum franchise tax then prescribed by §503 of this title; and

3. The corporation has paid all franchise taxes and fees due to or assessable by this State through the end of the year in which said certificate of dissolution is filed.

(6) Upon the receipt for filing of a certificate of reinstatement of a foreign corporation or a certificate of surrender and withdrawal from the State by a foreign corporation, there shall be collected by and paid to the Secretary of State a fee of $10.

(7) For receiving and filing and/or indexing any certificate, affidavit, agreement or any other paper provided for by this chapter, for which no different fee is specifically prescribed, a fee of $115 in each case shall be paid to the Secretary of State. The fee in the case of a certificate of incorporation filed as required by §102 of this title shall be $25. For entering information from each instrument into the Delaware Corporation Information System in accordance with §103(c)(8) of this title, the fee shall be $5.00.

a. A certificate of dissolution which meets the criteria stated in paragraph (a)(5)b. of this section shall not be subject to such fee; and

b. A certificate of incorporation filed in accordance with §102 of this title shall be subject to a fee of $25.

(8) For receiving and filing and/or indexing the annual report of a foreign corporation doing business in this State, a fee of $125 shall be paid. In the event of neglect, refusal or failure on the part of any foreign corporation to file the annual report with the Secretary of State on or before June 30 each year, the corporation shall pay a penalty of $125.

(9) For recording and indexing articles of association and other papers required by this chapter to be recorded by the Secretary of State, a fee computed on the basis of $0.01 a line shall be paid.

(10) For certifying copies of any paper on file provided by this chapter, a fee of $50 shall be paid for each copy certified. In addition, a fee of $2.00 per page shall be paid in each instance where the Secretary of State provides the copies of the document to be certified.

(11) For issuing any certificate of the Secretary of State other than a certification of a copy under paragraph (a)(10) of this section, or a certificate that recites all of a corporation's filings with the Secretary of State, a fee of $50 shall be paid for each certificate. For issuing any certificate of the Secretary of State that recites all of a corporation's filings with the Secretary of State, a fee of $175 shall be paid for each certificate. For issuing any certificate via the Division's online services, a fee of up to $175 shall be paid for each certificate.

(12) For filing in the office of the Secretary of State any certificate of change of location or change of registered agent, as provided in §133 of this title, there shall be collected by and paid to the Secretary of State a fee of $50, provided that no fee shall be charged pursuant to §103(c)(6) and (c)(7) of this title.

(13) For filing in the office of the Secretary of State any certificate of change of address or change of name of registered agent, as provided in §134 of this title, there shall be collected by and paid to the Secretary of

State a fee of $50, plus the same fees for receiving, filing, indexing, copying and certifying the same as are charged in the case of filing a certificate of incorporation.

(14) For filing in the office of the Secretary of State any certificate of resignation of a registered agent and appointment of a successor, as provided in §135 of this title, there shall be collected by and paid to the Secretary of State a fee of $50.

(15) For filing in the office of the Secretary of State, any certificate of resignation of a registered agent without appointment of a successor, as provided in §§136 and 377 of this title, there shall be collected by and paid to the Secretary of State a fee of $2.00 for each corporation whose registered agent has resigned by such certificate.

(16) For preparing and providing a written report of a record search, a fee of $100 shall be paid.

(17) For preclearance of any document for filing, a fee of $250 shall be paid.

(18) For receiving and filing and/or indexing an annual franchise tax report of a corporation provided for by §502 of this title, a fee of $25 shall be paid by exempt corporations and a fee of $50 shall be paid by all other corporations.

(19) For receiving and filing and/or indexing by the Secretary of State of a certificate of domestication and certificate of incorporation prescribed in §388(d) of this title, a fee of $165, plus the fee payable upon the receipt for filing of an original certificate of incorporation, shall be paid.

(20) For receiving, reviewing and filing and/or indexing by the Secretary of State of the documents prescribed in §389(c) of this title, a fee of $10,000 shall be paid.

(21) For receiving, reviewing and filing and/or indexing by the Secretary of State of the documents prescribed in §389(d) of this title, an annual fee of $2,500 shall be paid.

(22) Except as provided in this section, the fees of the Secretary of State shall be as provided for in §2315 of Title 29.

(23) In the case of exempt corporations, the total fees payable to the Secretary of State upon the filing of a Certificate of Change of Registered Agent and/or Registered Office or a Certificate of Revival shall be $5.00 and such filings shall be exempt from any fees or assessments pursuant to the requirements of §103(c)(6) and (c)(7) of this title.

(24) For accepting a corporate name reservation application, an application for renewal of a corporate name reservation, or a notice of

transfer or cancellation of a corporate name reservation, there shall be collected by and paid to the Secretary of State a fee of up to $75.

(25) For receiving and filing and/or indexing by the Secretary of State of a certificate of transfer or a certificate of continuance prescribed in §390 of this title, a fee of $1,000 shall be paid.

(26) For receiving and filing and/or indexing by the Secretary of State of a certificate of conversion and certificate of incorporation prescribed in §265 of this title, a fee of $115, plus the fee payable upon the receipt for filing of an original certificate of incorporation, shall be paid.

(27) For receiving and filing and/or indexing by the Secretary of State of a certificate of conversion prescribed in §266 of this title, a fee of $165 shall be paid.

(28) For receiving and filing and/or indexing by the Secretary of State of a certificate of validation prescribed in §204 of this title, a fee of $2,500 shall be paid; provided, that if the certificate of validation has the effect of increasing the authorized capital stock of a corporation, an additional fee, calculated in accordance with paragraph (a)(2) of this section, shall also be paid.

(b)(1) For the purpose of computing the fee prescribed in paragraphs (a)(1), (2), (4) and (28) of this section the authorized capital stock of a corporation shall be considered to be the total number of shares which the corporation is authorized to issue, whether or not the total number of shares that may be outstanding at any 1 time be limited to a less number.

(2) For the purpose of computing the fee prescribed in paragraphs (a)(2), (3) and (28) of this section, a certificate of amendment of certificate of incorporation, or an amended certificate of incorporation before payment of capital, or a restated certificate of incorporation, or a certificate of validation, shall be considered as increasing the authorized capital stock of a corporation provided it involves an increase in the number of shares, or an increase in the par value of shares, or a change of shares with par value into shares without par value, or a change of shares without par value into shares with par value, or any combination of 2 or more of the above changes, and provided further that the fee computed at the rates set forth in paragraph (a)(1) of this section upon the total authorized capital stock of the corporation including the proposed change or changes exceeds the fee so computed upon the total authorized stock of the corporation excluding such change or changes.

(c) The Secretary of State may issue photocopies or electronic image copies of instruments on file, as well as instruments, documents and

other papers not on file, and for all such photocopies or electronic image copies which are not certified by the Secretary of State, a fee of $10 shall be paid for the first page and $2.00 for each additional page. Notwithstanding Delaware's Freedom of Information Act (Chapter 100 of Title 29) or any other provision of law granting access to public records, the Secretary of State upon request shall issue only photocopies or electronic image copies of public records in exchange for the fees described in this section, and in no case shall the Secretary of State be required to provide copies (or access to copies) of such public records (including without limitation bulk data, digital copies of instruments, documents and other papers, databases or other information) in an electronic medium or in any form other than photocopies or electronic image copies of such public records in exchange, as applicable, for the fees described in this section or §2318 of Title 29 for each such record associated with a file number.

(d) No fees for the use of the State shall be charged or collected from any corporation incorporated for the drainage and reclamation of lowlands or for the amendment or renewal of the charter of such corporation.

(e) The Secretary of State may in the Secretary of State's discretion permit the extension of credit for the fees required by this section upon such terms as the Secretary of State shall deem to be appropriate.

(f) The Secretary of State shall retain from the revenue collected from the fees required by this section a sum sufficient to provide at all times a fund of at least $500, but not more than $1,500, from which the Secretary of State may refund any payment made pursuant to this section to the extent that it exceeds the fees required by this section. The fund shall be deposited in the financial institution which is the legal depository of state moneys to the credit of the Secretary of State and shall be disbursable on order of the Secretary of State.

g) The Secretary of State may in the Secretary of State's discretion charge a fee of $60 for each check received for payment of any fee or tax under Chapter 1 or Chapter 6 of this title that is returned due to insufficient funds or as the result of a stop payment order.

(h) In addition to those fees charged under subsections (a) and (c) of this section, there shall be collected by and paid to the Secretary of State the following:

(1) For all services described in subsection (a) of this section that are requested to be completed within 30 minutes on the same day as the day of the request, an additional sum of up to $7,500 and for all services

described in subsections (a) and (c) of this section that are requested to be completed within 1 hour on the same day as the day of the request, an additional sum of up to $1,000 and for all services described in subsections (a) and (c) of this section that are requested to be completed within 2 hours on the same day as the day of the request, an additional sum of up to $500; and

(2) For all services described in subsections (a) and (c) of this section that are requested to be completed within the same day as the day of the request, an additional sum of up to $300; and

(3) For all services described in subsections (a) and (c) of this section that are requested to be completed within a 24-hour period from the time of the request, an additional sum of up to $150.

The Secretary of State shall establish (and may from time to time alter or amend) a schedule of specific fees payable pursuant to this subsection.

(i) A domestic corporation or a foreign corporation registered to do business in this State that files with the Secretary of State any instrument or certificate, and in connection therewith, neglects, refuses or fails to pay any fee or tax under Chapter 1 or Chapter 6 of this title shall, after written demand therefor by the Secretary of State by mail addressed to such domestic corporation or foreign corporation in care of its registered agent in this State, cease to be in good standing as a domestic corporation or registered as a foreign corporation in this State on the ninetieth day following the date of mailing of such demand, unless such fee or tax and, if applicable, the fee provided for in subsection (g) of this section are paid in full prior to the ninetieth day following the date of mailing of such demand. A domestic corporation that has ceased to be in good standing or a foreign corporation that has ceased to be registered by reason of the neglect, refusal or failure to pay any such fee or tax shall be restored to and have the status of a domestic corporation in good standing or a foreign corporation that is registered in this State upon the payment of the fee or tax which such domestic corporation or foreign corporation neglected, refused or failed to pay together with the fee provided for in subsection (g) of this section, if applicable. The Secretary of State shall not accept for filing any instrument authorized to be filed with the Secretary of State under this title in respect of any domestic corporation that is not in good standing or any foreign corporation that has ceased to be registered by reason of the neglect, refusal or failure to pay any such fee or tax, and shall not issue any certificate of good standing with respect to such domestic corporation or foreign corpora-

tion, unless and until such domestic corporation or foreign corporation shall have been restored to and have the status of a domestic corporation in good standing or a foreign corporation duly registered in this State.

(j) As used in this section, the term "exempt corporation" shall have the meaning given to it in §501(b) of this title. (Last amended by Ch. 45, L. '19, eff. 8-1-19.)

Decisions

.1 Redesignation. — Corporation that adopted single resolution to amend charter to (1) increase number of authorized shares of common stock and (2) redesignate all common stock as no par shares and then filed two separate certificates of amendment covering each aspect was obligated to pay tax of $10 rather than $318,050 upon second filing because redesignation was separate transaction that did not increase authorized capital stock. *Chrysler Corp v. State of Delaware, 457 A.2d 345 (1983)*.

§393 RIGHTS, LIABILITIES AND DUTIES UNDER PRIOR STATUTES

All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this chapter, all suits pending, all rights of action conferred, and all duties, restrictions, liabilities and penalties imposed or required by and under laws enacted prior to the adoption or amendment of this chapter, shall not be impaired, diminished or affected by this chapter.

§394 RESERVED POWER OF STATE TO AMEND OR REPEAL CHAPTER; CHAPTER PART OF CORPORATION'S CHARTER OR CERTIFICATEOF INCORPORATION

This chapter may be amended or repealed, at the pleasure of the General Assembly, but any amendment or repeal shall not take away or impair any remedy under this chapter against any corporation or its officers for any liability which shall have been previously incurred. This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation.

Decisions

.1 Legislative powers. — Stock is held subject to power of legislature to amend law so as to enlarge power of amending provisions of certificate of incorporation relating to classification and relative rights of stock. *Davis v. Louisville Gas & Elec Co, 142 A 654 (Ch. Ct. 1928)*.

Charter amendment could not wipe out past dividend preferences that had accrued. *Keller v. Wilson & Co, 190 A 115 (1936)*.

GCL amendments govern all corporations including those created before them. *Gow v. Consolidated Coppermines Corp, 165 A 136 (Ch. Ct. 1933)*.

.2 Amendatory powers. — A corporate charter may be amended to increase an authorized capital stock issue by appropriate vote of stockholders. Validity of amendment depends on construction of charter, including GCL provisions that are impliedly written into it. *Hartford Acc & Ind Co v. W S Dickey Clay Mfg Co, 24 A.2d 315 (1942)*.

§395 CORPORATIONS USING "TRUST" IN NAME, ADVERTISEMENTS AND OTHERWISE; RESTRICTIONS; VIOLATIONS AND PENALTIES; EXCEPTIONS

(a) Except as provided below in subsection (d) of this section, every corporation of this State using the word "trust" as part of its name, except a corporation regulated under the Bank Holding Company Act of 1956, 12 U.S.C. §1841 et seq., or 10 of the Home Owners' Loan Act, 12 U.S.C. §1467a et seq., as those statutes shall from time to time be amended, shall be under the supervision of the State Bank Commissioner of this State and shall make not less than 2 reports during each year to the Commissioner, according to the form which shall be prescribed by the Commissioner, verified by the oaths or affirmations of the president or vice-president, and the treasurer or secretary of the corporation, and attested by the signatures of at least 3 directors.

(b) Except as provided below in subsection (d) of this section, no corporation of this State shall use the word "trust" as part of its name, except a corporation reporting to and under the supervision of the State Bank Commissioner of this State or a corporation regulated under the Bank Holding Company Act of 1956, 12 U.S.C. §1841 et seq., or §10 of the Home Owners' Loan Act, 12 U.S.C. §1467a et seq., as those statutes shall from time to time be amended. Except as provided below in subsection (d) of this section, the name of any such corporation shall not be amended so as to include the word "trust" unless such corporation shall report to and be under the supervision of the Commissioner, or unless it

is regulated under the Bank Holding Company Act of 1956 or the Savings and Loan Holding Company Act.

(c) No corporation of this State, except corporations reporting to and under the supervision of the State Bank Commissioner of this State or corporations regulated under the Bank Holding Company Act of 1956, 12 U.S.C. §1841 et seq., or §10 of the Home Owners' Loan Act, 12 U.S.C. §1467a et seq., as those statutes shall from time to time be amended, shall advertise or put forth any sign as a trust company, or in any way solicit or receive deposits or transact business as a trust company.

(d) The requirements and restrictions set forth above in subsections (a) and (b) of this section shall not apply to, and shall not be construed to prevent the use of the word "trust" as part of the name of, a corporation that is not subject to the supervision of the State Bank Commissioner of this State and that is not regulated under the Bank Holding Company Act of 1956, 12 U.S.C. §1841 et seq., or §10 of the Home Owners' Loan Act, 12 U.S.C. §1467a et seq., where use of the word "trust" as part of such corporation's name clearly:

(1) Does not refer to a trust business;

(2) Is not likely to mislead the public into believing that the nature of the business of the corporation includes activities that fall under the supervision of the State Bank Commissioner of this State or that are regulated under the Bank Holding Company Act of 1956, 12 U.S.C. §1841 et seq., or §10 of the Home Owners' Loan Act, 12 U.S.C. §1467a et seq.; and

(3) Will not otherwise lead to a pattern and practice of abuse that might cause harm to the interests of the public or the State, as determined by the Director of the Division of Corporations and the State Bank Commissioner. (Last amended by Ch. 96, L. '11, eff. 8-1-11.)

§396 PUBLICATION OF CHAPTER BY SECRETARY OF STATE; DISTRIBUTION

The Secretary of State may have printed, from time to time as the Secretary of State deems necessary, pamphlet copies of this chapter, and the Secretary of State shall dispose of the copies to persons and corporations desiring the same for a sum not exceeding the cost of printing. The money received from the sale of the copies shall be disposed of as are other fees of the office of the Secretary of State. Nothing in this section shall prevent the free distribution of single pamphlet copies of this chapter by the Secretary of State, for the printing of which

provision is made from time to time by joint resolution of the General Assembly. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§397 PENALTY FOR UNAUTHORIZED PUBLICATION OF CHAPTER

Whoever prints or publishes the provisions of this chapter without the authority of the Secretary of State of this State, shall be fined not more than $500 or imprisoned not more than 3 months, or both.

§398 SHORT TITLE

This chapter shall be known and may be identified and referred to as the "General Corporation Law of the State of Delaware."

Title 8. Corporations
Chapter 5. Corporation Franchise Tax

Subchapter 1

§501 CORPORATIONS SUBJECT TO AND EXEMPT FROM FRANCHISE TAX

(a) Every telegraph, telephone or cable company, every electric company organized for the production and/or distribution of light, heat or power, every company organized for the purpose of producing and/or distributing steam, heat or power, every company organized for the purpose of the production and/or distribution and/or sale of gas, every parlor, palace or sleeping car company, every express company, every pipeline company, every life insurance company, every other insurance company of whatever kind (other than a captive insurance company licensed under Chapter 69 of Title 18), and every corporation now existing or hereafter to be incorporated under the laws of this State, shall pay an annual tax, for the use of the State, by way of license for the corporate franchise as prescribed in this chapter. No such tax shall be paid by any exempt corporation, any banking corporation, savings bank, building and loan association or any captive insurance company licensed under Chapter 69 of Title 18, or any corporation for drainage and reclamation of lowlands.

(b) As used in this chapter, the term "exempt corporation" shall be defined as any corporation organized under Chapter 1 of this title that:

(1) Is exempt from taxation under §501(c) of the United States Internal Revenue Code (26 U.S.C. §501(c)) or any similar provisions of the Internal Revenue Code, or any successor provisions;

(2) Qualifies as a civic organization under §8110(a)(1) of Title 9 or §6840(4) of Title 16;

(3) Qualifies as a charitable/fraternal organization under §2593(1) of Title 6;

(4) Is listed in §8106(a) of Title 9;

(5) Is organized primarily or exclusively for religious or charitable purposes, or is a religious corporation or purely charitable or educational association, or is a company, association or society, which, by its certificate of incorporation, has for its object the assistance of sick, needy or disabled members, or the defraying of funeral expenses of deceased members, or to provide for the wants of the widows or widowers and families after death of its members; or

(6)a. Is organized not for profit; and

b. No part of its net earnings inures to the benefit of any member or individual. (Last amended by Ch. 96, L. '11, eff. 8-1-11.)

§502 ANNUAL FRANCHISE TAX REPORT; CONTENTS; FAILURE TO FILE AND PAY TAX; DUTIES OF SECRETARY OF STATE

(a) Annually on or before March 1, every corporation now existing or hereafter incorporated under Chapter 1 of this title or which has accepted the Constitution of this State, shall make an annual franchise tax report to the Secretary of State. The report shall be made on a form designated by the Secretary of State and shall be signed by the corporation's president, secretary, treasurer or other proper officer duly authorized so to act, or by any of its directors, or if filing an initial report by any incorporator in the event its board of directors shall not have been elected. The fact that an individual's name is signed on the report shall be prima facie evidence that such individual is authorized to certify the report on behalf of the corporation; however, the official title or position of the individual signing the corporate report shall be designated. The report shall contain the following information:

(1) The location of its registered office in this State, which shall include the street, number, city and postal code;

(2) The name of the agent upon whom service of process against the corporation may be served;

(3) The location of the principal place of business of the corporation, which shall include the street, number, city, state or foreign country;

(4) The names and addresses of all the directors as of the filing date of the report and the name and address of the officer who signs the report; provided, that other than an initial report, all reports shall list a director or directors excepting any report filed in conjunction with a certificate of dissolution filed by an incorporator pursuant to §274 of this title or a certificate of dissolution filed pursuant to §275(c) of this title;

(5) The number of shares and the par value per share of each class of capital stock having a par value and the number of shares of each class of stock without par value which the corporation is authorized to issue; and

(6) Such additional information, schedules and attachments as the Secretary shall require to ascertain the franchise tax due to the State.

(b) If any officer or director of a corporation required to make an annual franchise tax report to the Secretary of State shall knowingly make any false statement in the report, such officer or director shall be guilty of perjury.

(c) If the annual franchise tax report and the franchise tax due are not filed or paid by the corporation as required by this chapter, the Secretary of State shall ascertain and fix the amount of the franchise tax as determined in the manner prescribed by §503(a) of this title and the amount so fixed by the Secretary of State shall stand as the basis of taxation under the provisions of this chapter unless the corporation shall thereafter elect to compute the franchise tax in the manner prescribed by §503(a)(2) of this title by filing the annual franchise tax report and complying with the provisions of §503(b) of this title. In the event of neglect, refusal or failure on the part of any corporation to file a complete annual franchise tax report with the Secretary of State on or before March 1, the corporation shall pay the sum of $200 to be recovered by adding that amount to the franchise tax as herein determined and fixed, and such additional sum shall become a part of the franchise tax as so determined and fixed, and shall be collected in the same manner and subject to the same penalties.

(d) In case any corporation shall fail to file its annual franchise tax report and the franchise tax due within the time required by this chapter, and in case the agent in charge of the registered office of any corporation upon whom process against the corporation may be served shall die, resign, refuse to act as such, remove from this State or cannot with due diligence be found, it shall be lawful while default continues to serve process against the corporation upon the Secretary of State. Such service upon the Secretary of State shall be made in the manner and shall have the effect stated in subsection (b) of Sec. 321 of this title and shall be governed in all respects by said subsection.

(e) The Secretary of State shall safely keep all reports returned in such manner as they may be open to the inspection of all persons pursuant to the provisions set forth in Chapter 100 of Title 29. Any tax information provided pursuant to paragraph (a)(7) of this section, contained

on annual franchise tax reports filed after tax year 2006 shall not be deemed public.

(f) The Secretary of State shall not issue certificates of good standing that pertain to any corporation that has an unpaid franchise tax balance due to the State or does not have on file a completed annual franchise tax report for the relevant time period. (Last amended by Ch. 354, L. '18, eff. 8-1-18.)

§503 RATES AND COMPUTATION OF FRANCHISE TAX

(a) All corporations accepting the provisions of the Constitution of this State and coming under Chapter 1 of this title, and all corporations which have heretofore filed or may hereafter file a certificate of incorporation under said chapter, shall pay to the Secretary of State as an annual franchise tax whichever of the applicable amounts prescribed by paragraphs (a)(1) and (a)(2) of this section is the lesser:

(1) Where a corporation that is not authorized to issue capital stock is not an exempt corporation under §501(b) of this title, $175; where the authorized capital stock does not exceed 5,000 shares, $175; where the authorized capital stock exceeds 5,000 shares, but is not more than 10,000 shares, $250; and the further sum of $85 on each 10,000 shares or part thereof.

(2) One hundred and seventy-five dollars where the assumed no-par capital of the corporation, found in the manner provided in this paragraph, does not exceed $500,000; $250 where the assumed no-par capital exceeds $500,000 but is not more than $1,000,000; and the further sum of $85 for each $1,000,000 or part thereof of such additional assumed no-par capital.

For the purpose of computing the tax in accordance with paragraph (a)(2) of this section, the corporation's assumed no-par capital, whenever the phrase "assumed no-par capital" is used in paragraph (a)(2) of this section, shall be found by multiplying the number of authorized shares of capital stock without par value by $100. To the amount of tax attributable to the corporation's assumed no-par capital, computed as above prescribed, add $400 for each $1,000,000 or fraction thereof in excess of $1,000,000 of an assumed par value capital, found by multiplying the number of authorized shares of capital stock having par value by the quotient resulting from dividing the amount of the total assets of the corporation, as shown in the manner hereinafter provided, by the

total number of issued shares of all denominations and classes. If the quotient shall be less than the par value of any denomination or class of authorized shares having par value, the number of the shares of each class shall be multiplied by their par value for the purpose of ascertaining the assumed par value capital in respect of the shares and the number of authorized shares having a par value to be multiplied by the quotient, as aforesaid, shall be reduced by the number of the shares whose par value exceeds the quotient; and where, to determine the assumed par value capital, it is necessary to multiply a class or classes of shares by the quotient and also to multiply a class or classes of shares by the par value of the shares, the assumed par value capital of the corporation shall be the sum of the products of the multiplications. Whenever the amount of the assumed par value capital, computed as above prescribed, is less than $1,000,000, the amount of the tax attributable thereto shall be the amount that bears the same relation to $400 that the amount of the assumed par value capital bears to $1,000,000.

(b) Unless a corporation shall submit to the Secretary of State, at the time of filing its annual franchise tax report, a statement setting forth the number of shares of each class of stock actually issued, if any, and the amount of the total gross assets of the corporation, as of the nearest date on which the amount is obtainable, including in the statement its goodwill valued at the same amount at which it is valued in the books of account of the corporation, it shall pay a franchise tax for such year computed in the manner prescribed by paragraph (1) of subsection (a) of this section.

(c) Except as provided in this subsection, in no case shall the tax on any corporation for a full taxable year, computed by paragraph (a)(1) of this section be more than $200,000 nor less than $175; or computed by paragraph (a)(2) of this section be more than $200,000 nor less than $400. In each calendar year, the Secretary of State shall compile a list of each corporation that as of December 1:

(1) Had a class or series of stock listed on a national securities exchange; and

(2) Reported in its financial statements prepared in accordance with United States generally accepted accounting principles (GAAP) or International Financial Reporting Standards (IFRS) and included in its most recent annual report filed with the United States Securities and Exchange Commission or any similar agency outside the United States with responsibility for enforcing securities laws or serving as a public repository for the corporation’s financial disclosures, both of the following:

a. Consolidated annual gross revenues equal to or greater than $750,000,000 or consolidated assets equal to or greater than $750,000,000; and

b. Consolidated annual gross revenues not less than $250,000,000 and consolidated assets not less than $250,000,000; provided that if the corporation's financial statements are reported in a currency other than United States dollars, then, for purposes of measuring the amount of revenues and assets set forth therein, such amounts shall be converted into United States dollars using the applicable spot exchange rate for value established by Bloomberg as of the last day of the corporation's most recently completed fiscal year.

Notwithstanding subsection (a) of this section and the first sentence of this subsection, for each corporation satisfying the requirements of paragraphs (c)(1) and (2) of this section for a fiscal year for which its annual franchise tax would otherwise be $200,000 as computed under paragraph (a)(1) or (2) of this section (each, a "large corporate filer"), the Secretary of State shall fix the annual franchise tax for such taxable year at $250,000. In the event that a corporation would otherwise qualify as a large corporate filer but has no filed annual report with the United States Securities and Exchange Commission (or any similar foreign agency), and became listed on a national securities exchange in connection with a succession within the taxable year, then reference shall be made to the most recent annual report of the predecessor of such corporation for purposes of determining whether such corporation has satisfied the requirements of paragraphs (c)(2)a. and b. of this section.

(3) As used in this subsection:

a. "Predecessor" means, with respect to any corporation, any other corporation or other entity whose consolidated assets and liabilities, immediately prior to a succession, are substantially the same as the consolidated assets and liabilities of such corporation immediately following such succession; and

b. "Succession" means the direct acquisition of assets and liabilities comprising a going business from a predecessor, whether by merger, consolidation, purchase or other direct transfer.

(d) In case the corporation has not been in existence during the whole year, the amount of tax due, at the foregoing rates and as above provided, shall be prorated for the portion of the year during which the corporation was in existence.

(e) In case a corporation shall have changed during the taxable year the amount of its authorized capital stock, the total annual franchise tax

payable at the foregoing rates shall be arrived at by adding together the franchise taxes calculated as above set forth as prorated for the several periods of the year during which each distinct authorized amount of capital stock was in effect. The filing of a certificate of validation pursuant to §204 of this title shall not reduce the annual franchise tax due for any period prior to the filing of such certificate of validation and any calculation of additional annual franchise tax due for any period prior to the filing of such certificate of validation shall be calculated at the current rates in effect pursuant to this section.

(f) Every corporation which shall show on its annual franchise tax report that it has not been engaged in any of the business activities for which it was granted a certificate of incorporation, shall pay only at the rate of one half of the amount of taxes scheduled above for the portion of the year as it shall not have been so engaged and at the full rate for the remainder of the year. The Secretary of State may require the filling of a supplemental affidavit stating fully the pertinent facts upon which the claim for one-half rate is based.

(g) For the purpose of computing the taxes imposed by this section, the authorized capital stock of a corporation shall be considered to be the total number of shares which the corporation is authorized to issue, whether or not the number of shares that may be outstanding at any one time be limited to a less number.

(h) All corporations as defined in this section which are regulated investment companies as defined by Sec. 851 of the Federal Internal Revenue Code 26 U.S.C. Sec. 851, shall pay to the Secretary of State as an annual franchise tax, a tax computed either under paragraph (1) or paragraph (2) of subsection (a) of this section, or a tax at the rate of $400 per annum for each $1,000,000, or fraction thereof in excess of $1,000,000, of the average gross assets thereof during the taxable year, whichever be the least, provided that in no case shall the tax on any corporation for a full taxable year under this subsection (h) be more than $100,000. The average assets for the purposes of this section shall be taken to be the mean of the gross assets on January 1 and December 31 of the taxable year. Any corporation electing to pay a tax under this subsection shall show on its annual franchise tax report that the corporation is a regulated investment company as above defined, and the amount of its assets on January 1 and December 31 of the taxable year, and the mean thereof. The Secretary of State may investigate the facts set forth in the report and if it should be found that the corporation so electing to pay under this subsection shall not be a regulated invest-

ment company, as above defined, shall assess upon the corporation a tax under paragraphs (1) and (2) of subsection (a) of this section, whichever be the lesser.

(i) As used in subsections (a) and (b) of this section, the term "total assets" and the term "total gross assets" are identical terms and mean all assets of the corporation, net only of allowances for bad debts, accumulated depreciation, accumulated depletion, accumulated amortization of land and accumulated amortization of intangible assets.

Such total assets and total gross assets shall be those "total assets" reported to the United States on U.S. Form 1120 Schedule L, relative to the company's fiscal year ending in the calendar year prior to filing with the Secretary of State pursuant to this section. If such schedule is no longer in use, the Secretary of State shall designate a replacement. The Secretary of State may at any time require a true and correct copy of such schedule to be filed with the Secretary of State's office.

No corporation shall consolidate with its assets the assets of another entity for purposes of this section. If such schedule or its replacement reports on a consolidated basis, the reporting corporation shall submit to the Secretary of State a reconciliation of its reported total assets or total gross assets to the consolidated total assets reported on the schedule. Interests in entities which are consolidated with the reporting company shall be included within "total assets" and "total gross assets" at a value determined in accordance with generally accepted accounting principles. (Last amended by Ch. 53, L. '17, eff. as noted within.)

§504 COLLECTION AND DISPOSITION OF TAX; TENTATIVE RETURN AND TAX; PENALTY INTEREST; INVESTIGATION OF ANNUAL FRANCHISE TAX REPORT; NOTICE OF ADDITIONAL TAX DUE

(a) The franchise tax shall be due and payable on March 1 following the close of the calendar year, except that with respect to a corporation whose franchise tax liability for the current calendar year is estimated to be $5,000 or more, a tentative return and tax shall be due and payable as follows:

(1) Forty percent of the estimated tax on June 1 of the current year;

(2) Twenty percent of the estimated tax on September 1 of the current year;

(3) Twenty percent of the estimated tax on December 1 of the current year; and

(4) The remainder of the tax as finally determined together with the annual franchise tax report on March 1 following the close of the calendar year.

(b) The Department of State shall receive the franchise tax and pay over all taxes collected to the Department of Finance, except as provided in Sec. 506 of this title.

(c) If the tax of any corporation remains unpaid after the due dates established by this section, the tax shall bear interest at the rate of 1 and one half percent for each month or portion thereof until fully paid.

(d) The Secretary of State has power to inquire into the truth or falsity or accuracy of every report required to be filed to carry out this chapter.

The Secretary of State may require the production of the books of any corporation referred to in this chapter and may swear or affirm and examine witnesses in relation thereto. Where the Secretary of State shall determine the amount of franchise tax which has been paid is less than the franchise tax due, the Secretary of State shall notify the taxpayer of the additional tax and any interest thereon which is due. Such additional tax and interest thereon shall be paid, or a petition for review thereof shall be filed, within 60 days after the notification to the taxpayer.

(e) The tentative return and tax paid thereon under subsection (a) of this section shall be based on the annual franchise tax of the preceding year.

(f) The penalties for nonpayment of the tentative franchise tax as set forth in subsection (a) of this section shall be the same as those applied for any nonpayment of franchise tax in this title.

(g) The Secretary of State may in the Secretary of State's discretion charge a fee of $60 for each check received for payment of franchise taxes, penalties or interest thereon that is returned due to insufficient funds or as the result of a stop payment order to be recovered by adding the amount of that fee to the franchise tax, and such sum shall become a part of the franchise tax and shall be collected in the same manner and subject to the same penalties. (Last amended by Ch. 51, L. '03, eff. 8-1-03.)

§505 REVIEW AND REFUND; JURISDICTION AND POWER OF THE SECRETARY OF STATE; APPEAL

(a) If any corporation claims that the annual franchise tax or any penalties or interest were erroneously or illegally fixed or paid with re-

spect to a calendar year, the corporation may, not later than the 1st day of March of the second calendar year following the close of such calendar year, petition the Secretary of State for a reduction or refund of such tax, penalties or interest. The petition shall set forth the facts upon which the petitioner relies.

(b) Prior to the filing of a certificate required by subsection (c) of Sec. 312 of this title, a corporation may petition the Secretary of State for a reduction of taxes, penalties or interest which the State claims are due it pursuant to subsection (g) of Sec. 312 of this title and which the corporation claims have been erroneously or illegally fixed.

(c) If the Secretary of State determines the tax, interest and/or penalties fixed by the Secretary or taxes paid are excessive or incorrect, in whole or in part, the Secretary shall resettle the same and adjust the assessment of tax, interest or penalties accordingly and shall refund to the corporation any amount paid in excess of the proper amount of tax, interest and/or penalties so determined to be due. In the case of any corporation which is not required to pay an annual tax under Sec. 501(a) of this title, the Secretary of State may remit all or part of the penalties and interest provided in this chapter. Any refund due to a corporation which has merged into another Delaware domestic corporation shall be credited to the surviving Delaware corporation.

(d) Any corporation, within a period of 60 days after the determination by the Secretary of State on a petition filed pursuant to subsections (a) and (b) of this section, may petition the Court of Chancery, in and for the county where the registered office or place of business of the corporation is located, for a review de novo of the determination of the Secretary of State. The petition shall set forth the facts upon which the petitioner relies. The Secretary of State shall be named as respondent in any such petition and be served therewith in the same manner as if the Secretary of State were a defendant in a civil suit.

(e) If the Court of Chancery determines that the tax, interest and/or penalties determined by the Secretary of State pursuant to subsections (a) and (b) of this section are excessive or incorrect, in whole or in part, it shall resettle the same and adjust the assessment of tax, interest or penalties accordingly, and notify the corporation and the Secretary of State of its determination and direct the Secretary of State to refund to the corporation any amount paid in excess of the proper amount of tax, interest and/or penalties so determined to be due. The Court of Chancery may remit all or part of the penalties and interest provided in Sec. 502 of this title. (Last amended by Ch. 253, L. ‘10, eff. 8-1-10.)

§506 FUND FOR PAYMENT OF REFUNDS

The Secretary of State shall retain in the Secretary of State's hands out of the revenue collected from the taxes imposed by this chapter a sum sufficient to provide at all times a fund of at least $5,000, but not more than $70,000, out of which the Secretary of State shall pay any refunds to which corporations shall become entitled under this chapter. The fund shall be deposited in the financial institution which is legal depository of state moneys to the credit of the Secretary of State and shall be disbursable on order of the Secretary of State. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§507 COLLECTION OF TAX; PREFERRED DEBT

The franchise tax shall be a debt due from the corporation to the State, for which an action at law may be maintained after the same shall have been in arrears for a period of 1 month. The tax shall also be a preferred debt in case of insolvency. (Last amended by Ch. 450, L. '71, eff. 1-1-73.)

§508 INJUNCTION AGAINST EXERCISE OF FRANCHISE OR TRANSACTING BUSINESS

The Attorney General, either of the Attorney General's own motion or upon request of the Secretary of State, whenever any franchise tax due under this chapter from any corporation shall have remained in arrears for a period of 3 months after the tax shall have become payable, may apply to the Court of Chancery, by petition in the name of the State, on 5 days' notice to the corporation, which notice may be served in such manner as the Court may direct, for an injunction to restrain the corporation from the exercise of any franchise or the transaction of any business within the State, until the payment of the tax, interest due thereon and the cost of the application, which shall be fixed by the Court. The Court of Chancery may grant the injunction, if a proper case appears, and upon granting and service of the injunction, the corporation thereafter shall not exercise any franchise or transact any business within this State until the injunction shall be dissolved. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

§509 FURTHER REMEDY IN COURT OF CHANCERY; APPOINTMENT OF RECEIVER OR TRUSTEE; SALE OF PROPERTY

(a) After any corporation, now existing or hereafter incorporated under Chapter 1 of this title, has failed or neglected for the period of 1 year to pay the franchise taxes imposed by law, and the Secretary of State shall have reported such corporation to the Governor of the State, as provided in Sec. 511 of this title, then the Attorney General of this State may proceed against the corporation in the Court of Chancery of this State for the appointment of a receiver, or otherwise.

(b) The Court of Chancery in the proceeding shall ascertain the amount of the taxes remaining due and unpaid by the corporation to this State, and shall enter a final decree for the amount so ascertained. Thereupon a fierifacias or other process shall issue for the collection of the same as other debts are collected. If no property which may be seized and sold on fierifacias shall be found within this State sufficient to pay the decree, the Court shall further order and decree that the corporation, within 10 days from and after the service of notice of the decree upon any officer of the corporation upon whom service of process may be lawfully made, or such notice as the Court shall direct, shall assign and transfer to the trustee or receiver appointed by the Court, any chose in action, or any patent or patents, or any assignments of or license under any patented invention or inventions owned by, leased or licensed to or controlled in whole or in part by the corporation, to be sold by the receiver or trustee for the satisfaction of the decree. No injunction theretofore issued nor any forfeiture of the charter of any corporation shall be held to exempt the corporation from compliance with the order of the Court.

(c) If the corporation neglects or refuses within 10 days from and after the service of the notice of the decree to assign and transfer the same to the receiver or trustee for sale as aforesaid, the Court shall appoint a trustee to make the assignment of the same, in the name and on behalf of the corporation, to the receiver or trustee appointed to make the sale. The receiver or trustee shall thereupon, after such notice and in such manner as required for the sale under fierifacias of personal property, sell the same to the highest bidder. The receiver or trustee, upon the payment of the purchase money, shall execute and deliver to the purchaser an assignment and transfer of all the patents and interests of the corporation so sold, which assignment or transfer shall vest in the purchaser a valid title to all right, title and interest whatsoever of

the corporation therein, and the proceeds of the sale shall be applied to the payment of the unpaid taxes, together with the costs of the proceedings. (Last amended by Ch. 712, L. '69, eff. 7-15-70.)

§510 FAILURE TO PAY TAXOR FILE A COMPLETE ANNUAL REPORT FOR 1 YEAR; CHARTER VOID; EXTENSION OF TIME

If any corporation, accepting the Constitution of this State and coming under Chapter 1 of this title, or any corporation which has heretofore filed or may hereafter file a certificate of incorporation under said chapter, neglects or refuses for 1 year to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which it is required to pay under this chapter, or shall neglect or refuse to file a complete annual franchise tax report, the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, unless the Secretary of State, for good cause shown, shall have given further time for payment of the tax or taxes or the completion of an annual franchise tax report, in which case a certificate thereof shall be filed in the office of the Secretary of State stating the reason therefor. On or before November 30 in each year, the Secretary of State shall notify each corporation which has neglected or refused to pay the franchise tax or taxes assessed against it or becoming due during the year or has refused or neglected to file a complete annual franchise tax report, that the charter of the corporation shall become void unless such taxes are paid and such complete annual franchise tax report is filed on or before March 1 of the following year. (Last amended by Ch. 306, L. '06, eff. 1-1-08.)

§511 REPEAL OF CHARTERS OF DELINQUENT CORPORATIONS; REPORT TO GOVERNOR AND PROCLAMATION

On or before June 30 in each year, the Secretary of State shall report to the Governor a list of all the corporations, which for 1 year next preceding such report, have failed, neglected or refused to pay the franchise taxes assessed against them or due by them, or to file a complete annual franchise tax report, under the laws of this State, and the Governor shall forthwith issue a proclamation declaring that the charters of these corporations are repealed. (Last amended by Ch. 306, L. '06, eff. 1-1-08.)

§512 FILING AND PUBLICATION OF PROCLAMATION; NOTING REPEAL IN RECORDER'S OFFICE

A list of those corporations whose charters were repealed by gubernatorial proclamation pursuant to Section 511 of this chapter shall be filed in the office of the Secretary of State. On or before October 31 of each calendar year, the Secretary of State shall publish such proclamation on the Internet or on a similar medium for a period of 1 week and shall advertise the website or other address where such proclamation can be accessed in at least 1 newspaper of general circulation in the State of Delaware. (Last amended by Ch. 298, L. '02, eff. 7-1-02.)

§513 ACTING UNDER PROCLAIMED CHARTER; PENALTY

Whoever exercises or attempts to exercise any powers under the certificate of incorporation of any corporation which has been proclaimed by the Governor, after the issuance of the proclamation, shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

§514 MISTAKES IN PROCLAMATION; CORRECTION

On or before June 30 in each year, the Secretary of State shall report to the Governor a list of all the corporations, which for 1 year next preceding such report, have failed, neglected or refused to pay the franchise taxes assessed against them or due by them, or to file a complete annual franchise tax report, under the laws of this State, and the Governor shall forthwith issue a proclamation declaring that the charters of these corporations are repealed. (Last amended by Ch. 306, L. '06, eff. 1-1-08.)

§515 ANNUAL REPORT OF SECRETARY OF STATE

The Secretary of State shall prepare and publish an annual report containing such statistics as may be available with respect to the operation of this chapter, including the amounts collected and amounts unpaid for each year for which the tax is assessed, and such other facts as are pertinent and desirable.

§516 RETALIATORY TAXATION AND REGULATION; IMPOSITION

When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees, or other obligations or requirements are imposed upon corporations chartered under Chapter 1 of this title, doing business in the other state or nation, or upon their agents therein, than the law of this State imposes upon their corporations or agents doing business in this State, so long as the laws continue in force in the other state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of the other state or nations doing business within this State or upon their agents here. Nothing in this section shall be held to repeal any duty, condition or requirement now imposed by law upon the corporations of other states or nations transacting business in this State.

§517 DUTIES OF ATTORNEY GENERAL

The Attorney General shall have all the powers and authorities in conjunction with the Secretary of State to collect franchise taxes and penalties due from proclaimed corporations and corporations whose charter has become void by operation of law. (Last amended by Ch. 306, L. '06, eff. 1-1-08.)

§518 RELIEF FOR CORPORATIONS WITH ASSETS IN CERTAIN UNFRIENDLY NATIONS

All corporations incorporated and existing under the laws of this State, all of whose assets are located in any country from which it is impossible to remove such assets or withdraw income, or whose assets are located at any place where it is made unlawful by any law of the United States of America now or hereafter enacted or by any rule, regulation or proclamation or executive order issued under any such law, to send any communications, may, in the discretion of the Secretary of State, be relieved and freed from any and all assessment of franchise taxes provided for by this chapter and such corporations may further be relieved by the Secretary of State of the necessity of filing any state reports due or required.

The Secretary of State shall administer this section and may require such evidence, submitted by any officer or agent, as in the Secretary of State's judgment may be necessary or desirable to determine whether or not a corporation deserves such relief from taxes and the filing of reports, and may make such regulations in relation thereto as the Secretary of State may deem desirable or necessary. (Last amended by Ch. 339, L. '98, eff. 7-1-98.)

DELAWARE LIMITED LIABILITY COMPANY ACT

Title 6, Chapter 18

(Added by Ch. 434, L. '92, eff. 10-1-92.)

Subchapter I
GENERAL PROVISIONS

§18-101 DEFINITIONS

As used in this chapter unless the context otherwise requires:

(1) "Bankruptcy" means an event that causes a person to cease to be a member as provided in Sec. 18-304 of this chapter.

(2) "Certificate of formation" means the certificate referred to in Sec. 18-201 of this chapter, and the certificate as amended.

(3) "Contribution" means any cash, property, services rendered or a promissory note or other obligation to contribute cash or property or to perform services, which a person contributes to a limited liability company in his capacity as a member.

(4) "Document" means

(i) any tangible medium on which information is inscribed, and includes handwritten, typed, printed or similar instruments, and copies of such instruments; and

(ii) an electronic transmission.

(5) "Electronic transmission" means any form of communication not directly involving the physical transmission of paper, including the use of, or participation in, 1 or more electronic networks or databases (including 1 or more distributed electronic networks or databases), that creates a record that may be retained, retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form by such a recipient through an automated process.

(6) “Foreign limited liability company” means a limited liability company formed under the laws of any state or under the laws of any foreign country or other foreign jurisdiction. When used in this title in reference to a foreign limited liability company, the terms “limited liability company agreement,”“limited liability company interest,”“manager” or “member” shall mean a limited liability company agreement, limited liability company interest, manager or member, respectively, under the laws of the state or foreign country or other foreign jurisdiction under which the foreign limited liability company is formed.

(7) “Knowledge” means a person’s actual knowledge of a fact, rather than the person’s constructive knowledge of the fact.

(8) “Limited liability company” and “domestic limited liability company” means a limited liability company formed under the laws of the State of Delaware and having 1 or more members.

(9) “Limited liability company agreement” means any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written, oral or implied, of the member or members as to the affairs of a limited liability company and the conduct of its business. A member or manager of a limited liability company or an assignee of a limited liability company interest is bound by the limited liability company agreement whether or not the member or manager or assignee executes the limited liability company agreement. A limited liability company is not required to execute its limited liability company agreement. A limited liability company is bound by its limited liability company agreement whether or not the limited liability company executes the limited liability company agreement. A limited liability company agreement of a limited liability company having only 1 member shall not be unenforceable by reason of there being only 1 person who is a party to the limited liability company agreement. A limited liability company agreement is not subject to any statute of frauds (including §2714 of this title). A limited liability company agreement may provide rights to any person, including a person who is not a party to the limited liability company agreement, to the extent set forth therein. A written limited liability company agreement or another written agreement or writing:

a. May provide that a person shall be admitted as a member of a limited liability company, or shall become an assignee of a limited liability company interest or other rights or powers of a member to the extent assigned:

1. If such person (or a representative authorized by such person orally, in writing or by other action such as payment for a limited liability company interest) executes the limited liability company agreement or any other writing evidencing the intent of such person to become a member or assignee; or

2. Without such execution, if such person (or a representative authorized by such person orally, in writing or by other action such as payment for a limited liability company interest) complies with the conditions for becoming a member or assignee as set forth in the limited liability company agreement or any other writing; and

b. Shall not be unenforceable by reason of its not having been signed by a person being admitted as a member or becoming an assignee as provided in subparagraph a. of this paragraph, or by reason of its having been signed by a representative as provided in this chapter.

(10) "Limited liability company interest" means a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets.

(11) "Liquidating trustee" means a person carrying out the winding up of a limited liability company.

(12) "Manager" means a person who is named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement or similar instrument under which the limited liability company is formed, and includes a manager of the limited liability company generally and a manager associated with a series of the limited liability company. Unless the context otherwise requires, references in this chapter to a manager (including references in this chapter to a manager of a limited liability company) shall be deemed to be references to a manager of the limited liability company generally and to a manager associated with a series with respect to such series.

(13) "Member" means a person who is admitted to a limited liability company as a member as provided in §18-301 of this title, and includes a member of the limited liability company generally and a member associated with a series of the limited liability company. Unless the context otherwise requires, references in this chapter to a member (including references in this chapter to a member of a limited liability company) shall be deemed to be references to a member of the limited liability company generally and to a member associated with a series with respect to such series.

(14) “Person” means a natural person, partnership (whether general or limited), limited liability company, trust (including a common law trust, business trust, statutory trust, voting trust or any other form of trust), estate, association (including any group, organization, co-tenancy, plan, board, council or committee), corporation, government (including a country, state, county or any other governmental subdivision, agency or instrumentality), custodian, nominee or any other individual or entity (or series thereof) in its own or any representative capacity, in each case, whether domestic or foreign.

(15) “Personal representative” means, as to a natural person, the executor, administrator, guardian, conservator or other legal representative thereof and, as to a person other than a natural person, the legal representative or successor thereof.

(16) “Protected series” means a designated series of members, managers, limited liability company interests or assets that is established in accordance with §18-215(b) of this title.

(17) “Registered series” means a designated series of members, managers, limited liability company interests or assets that is formed in accordance with §18-218 of this title.

(18) “Series” means a designated series of members, managers, limited liability company interests or assets that is a protected series or a registered series, or that is neither a protected series nor a registered series.

(19) “State” means the District of Columbia or the Commonwealth of Puerto Rico or any state, territory, possession or other jurisdiction of the United States other than the State of Delaware. (Last amended by Ch. 357, L. ‘18, eff. 8-1-19 and Ch. 48, L.’19, eff. 8-1-19.)

§18-102 NAME SET FORTH IN CERTIFICATE

The name of each limited liability company as set forth in its certificate of formation:

(1) Shall contain the words “Limited Liability Company” or the abbreviation “L.L.C.” or the designation “LLC”;

(2) May contain the name of a member or manager;

(3) Must be such as to distinguish it upon the records in the office of the Secretary of State from the name on such records of any corporation, partnership, limited partnership, statutory trust, limited liability company, registered series of a limited liability company or registered

series of a limited partnership reserved, registered, formed or organized under the laws of the State of Delaware or qualified to do business or registered as a foreign corporation, foreign limited partnership, foreign statutory trust, foreign partnership, or foreign limited liability company in the State of Delaware; provided however, that a limited liability company may register under any name which is not such as to distinguish it upon the records in the office of the Secretary of State from the name on such records of any domestic or foreign corporation, partnership, limited partnership, statutory trust, registered series of a limited liability company, registered series of a limited partnership or foreign limited liability company reserved, registered, formed or organized under the laws of the State of Delaware with the written consent of the other corporation, partnership, limited partnership, statutory trust, registered series of a limited liability company, registered series of a limited partnership or foreign limited liability company, which written consent shall be filed with the Secretary of State; provided further, that, if on July 31, 2011, a limited liability company is registered (with the consent of another limited liability company) under a name which is not such as to distinguish it upon the records in the office of the Secretary of State from the name on such records of such other domestic limited liability company, it shall not be necessary for any such limited liability company to amend its certificate of formation to comply with this subsection;

(4) May contain the following words: "Company", "Association", "Club", "Foundation", "Fund", "Institute", "Society", "Union", "Syndicate", "Limited", "Public Benefit" or "Trust" (or abbreviations of like import); and

(5) Shall not contain the word "bank," or any variation thereof, except for the name of a bank reporting to and under the supervision of the State Bank Commissioner of this State or a subsidiary of a bank or savings association (as those terms are defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. §1813), or a limited liability company regulated under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841 et seq., or the Home Owners' Loan Act, as amended, 12 U.S.C. §1461 et seq.; provided, however, that this section shall not be construed to prevent the use of the word "bank," or any variation thereof, in a context clearly not purporting to refer to a banking business or otherwise likely to mislead the public about the nature of the business of the limited liability company or to lead to a pattern and practice of abuse that might cause harm to the interests of the public or this State as determined by the Division of Corporations in the De-

partment of State. (Last amended by Ch. 357, L. '18, eff. 8-1-19 and Ch. 48, L.'19, eff. 8-1-19.)

§18-103 RESERVATION OF NAME

(a) The exclusive right to the use of a name may be reserved by:

(1) Any person intending to organize a limited liability company under this chapter and to adopt that name;

(2) Any person intending to form a registered series of a limited liability company under this chapter and to adopt that name in accordance with §18-218(e) of this title;

(3)Any domestic limited liability company or any foreign limited liability company registered in the State of Delaware which, in either case, proposes to change its name;

(4) Any foreign limited liability company intending to register in the State of Delaware and adopt that name; and

(5) Any person intending to organize a foreign limited liability company and intending to have it register in the State of Delaware and adopt that name.

(b) The reservation of a specified name shall be made by filing with the Secretary of State an application, executed by the applicant, specifying the name to be reserved and the name and address of the applicant. If the Secretary of State finds that the name is available for use by a domestic or foreign limited liability company, the Secretary shall reserve the name for the exclusive use of the applicant for a period of 120 days. Once having so reserved a name, the same applicant may again reserve the same name for successive 120-day periods. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the Secretary of State a notice of the transfer, executed by the applicant for whom the name was reserved, specifying the name to be transferred and the name and address of the transferee. The reservation of a specified name may be cancelled by filing with the Secretary of State a notice of cancellation, executed by the applicant or transferee, specifying the name reservation to be cancelled and the name and address of the applicant or transferee. Unless the Secretary of State finds that any application, notice of transfer, or notice of cancellation filed with the Secretary of State as required by this subsection does not conform to law, upon receipt of all filing fees required by law the Secretary shall prepare and return to the person who filed such instrument a

copy of the filed instrument with a notation thereon of the action taken by the Secretary of State.

(c) A fee as set forth in Sec. 18-1105(a)(1) of this chapter shall be paid at the time of the initial reservation of any name, at the time of the renewal of any such reservation and at the time of the filing of a notice of the transfer or cancellation of any such reservation. (Last amended by Ch. 457, L. '18, eff. 8-1-19.)

§18-104 REGISTERED OFFICE; REGISTERED AGENT

(a) Each limited liability company shall have and maintain in the State of Delaware:

(1) A registered office, which may but need not be a place of its business in the State of Delaware; and

(2) A registered agent for service of process on the limited liability company, having a business office identical with such registered office, which agent may be any of:

a. The limited liability company itself,

b. An individual resident in the State of Delaware,

c. A domestic limited liability company (other than the limited liability company itself), a domestic corporation, a domestic partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), or a domestic statutory trust, or

d. A foreign corporation, a foreign partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a foreign limited liability company, or a foreign statutory trust.

(b) A registered agent may change the address of the registered office of the limited liability company(ies) for which it is registered agent to another address in the State of Delaware by paying a fee as set forth in Sec. 18-1105(a)(2) of this title and filing with the Secretary of State a certificate, executed by such registered agent, setting forth the address at which such registered agent has maintained the registered office for each of the limited liability companies for which it is a registered agent, and further certifying to the new address to which each such registered office will be changed on a given day, and at which new address such registered agent will thereafter maintain the registered office for each of the limited liability companies for which it is a registered agent. Upon

the filing of such certificate, the Secretary of State shall furnish to the registered agent a certified copy of the same under the Secretary's hand and seal of office, and thereafter, or until further change of address, as authorized by law, the registered office in the State of Delaware of each of the limited liability companies for which the agent is a registered agent shall be located at the new address of the registered agent thereof as given in the certificate. In the event of a change of name of any person acting as a registered agent of a limited liability company, such registered agent shall file with the Secretary of State a certificate executed by such registered agent setting forth the new name of such registered agent, the name of such registered agent before it was changed, and the address at which such registered agent has maintained the registered office for each of the limited liability companies for which it is a registered agent, and shall pay a fee as set forth in Sec. 18-1105(a)(2) of this title. Upon the filing of such certificate, the Secretary of State shall furnish to the registered agent a certified copy of the certificate under the Secretary of State's own hand and seal of office. A change of name of any person acting as a registered agent of a limited liability company as a result of a merger or consolidation of the registered agent with or into anotherperson which succeeds to its assets and liabilities by operation of law shall be deemed a change of name for purposes of this section. Filing a certificate under this section shall be deemed to be an amendment of the certificate of formation of each limited liability company affected thereby, and each such limited liability company shall not be required to take any further action with respect thereto to amend its certificate of formation under Sec. 18-202 of this title. Any registered agent filing a certificate under this section shall promptly, upon such filing, deliver a copy of any such certificate to each limited liability company affected thereby.

(c) The registered agent of 1 or more limited liability companies may resign and appoint a successor registered agent by paying a fee as set forth in Sec. 18-1105(a)(2) of this title and filing a certificate with the Secretary of State stating that it resigns and the name and address of the successor registered agent. There shall be attached to such certificate a statement of each affected limited liability company ratifying and approving such change of registered agent. Upon such filing, the successor registered agent shall become the registered agent of such limited liability companies as have ratified and approved such substitution, and the successor registered agent's address, as stated in such certificate, shall become the address of each such limited liability company's regis-

tered office in the State of Delaware. The Secretary of State shall then issue a certificate that the successor registered agent has become the registered agent of the limited liability companies so ratifying and approving such change and setting out the names of such limited liability companies. Filing of such certificate of resignation shall be deemed to be an amendment of the certificate of formation of each limited liability company affected thereby, and each such limited liability company shall not be required to take any further action with respect thereto to amend its certificate of formation under Sec. 18-202 of this title.

(d) The registered agent of a limited liability company, including a limited liability company whose certificate of formation has been cancelled pursuant to §18-1108 of this title, may resign without appointing a successor registered agent by paying a fee as set forth in §18-1105(a)(2) of this title and filing a certificate of resignation with the Secretary of State, but such resignation shall not become effective until 30 days after the certificate is filed. The certificate shall contain a statement that written notice of resignation was given to the limited liability company at least 30 days prior to the filing of the certificate by mailing or delivering such notice to the limited liability company at its address last known to the registered agent and shall set forth the date of such notice. The certificate shall include such information last provided to the registered agent pursuant to subsection (g) of this section of this title for a communications contact for the limited liability company. Such information regarding the communications contact shall not be deemed public. A certificate filed pursuant to this subsection must be on the form prescribed by the Secretary of State. After receipt of the notice of the resignation of its registered agent, the limited liability company for which such registered agent was acting shall obtain and designate a new registered agent, to take the place of the registered agent so resigning. If such limited liability company fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the certificate of formation of such limited liability company shall be canceled. After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against each limited liability company (and each protected series and each registered series thereof) for which the resigned registered agent had been acting shall thereafter be upon the Secretary of State in accordance with §18-105 of this title.

(e) Every registered agent shall:

(1) If an entity, maintain a business office in the State of Delaware which is generally open, or if an individual, be generally present at a designated location in the State of Delaware, at sufficiently frequent times to accept service of process and otherwise perform the functions of a registered agent;

(2) If a foreign entity, be authorized to transact business in the State of Delaware;

(3) Accept service of process and other communications directed to the limited liability companies (and any protected series or registered series thereof) and foreign limited liability companies for which it serves as registered agent and forward same to the limited liability company or foreign limited liability company to which the service or communication is directed;

(4) Forward to the limited liability companies and foreign limited liability companies for which it serves as registered agent the statement for the annual tax for such limited liability company (and each registered series thereof) or such foreign limited liability company, as applicable, as described in §18-1107 of this title or an electronic notification of same in a form satisfactory to the Secretary of State. and

(5) Satisfy and adhere to regulations established by the Secretary regarding the verification of both the identity of the entity's contacts and individuals for which the registered agent maintains a record for the reduction of risk of unlawful business purposes.

(f) Any registered agent who at any time serves as registered agent for more than 50 entities (a “commercial registered agent”), whether domestic or foreign, shall satisfy and comply with the following qualifications:

(1) A natural person serving as a commercial registered agent shall:

a. Maintain a principal residence or a principal place of business in the State of Delaware;

b. Maintain a Delaware business license;

c. Be generally present at a designated location within the State of Delaware during normal business hours to accept service of process and otherwise perform the functions of a registered agent as specified in subsection (e) of this section;

d. Provide the Secretary of State upon request with such information identifying and enabling communication with such commercial registered agent as the Secretary of State shall require; and

e. Satisfy and adhere to regulations established by the Secretary regarding the verification of both the identity of the entity's contacts and individuals for which the natural person maintains a record for the reduction of risk of unlawful business purposes.

(2) A domestic or foreign corporation, a domestic or foreign partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a domestic or foreign limited liability company, or a domestic or foreign statutory trust serving as a commercial registered agent shall:

a. Have a business office within the State of Delaware which is generally open during normal business hours to accept service of process and otherwise perform the functions of a registered agent as specified in subsection (e) of this section;

b. Maintain a Delaware business license;

c. Have generally present at such office during normal business hours an officer, director or managing agent who is a natural person;

d. Provide the Secretary of State upon request with such information identifying and enabling communication with such commercial registered agent as the Secretary of State shall require; and

e Satisfy and adhere to regulations established by the Secretary regarding the verification of both the identity of the entity's contacts and individuals for which it maintains a record for the reduction of risk of unlawful business purposes.

(3) For purposes of this subsection and paragraph (i)(2)a. of this section, a commercial registered agent shall also include any registered agent which has an officer, director or managing agent in common with any other registered agent or agents if such registered agents at any time during such common service as officer, director or managing agent collectively served as registered agents for more than 50 entities, whether domestic or foreign.

(g) Every domestic limited liability company and every foreign limited liability company qualified to do business in the State of Delaware shall provide to its registered agent and update from time to time as necessary the name, business address and business telephone number of a natural person who is a member, manager, officer, employee or designated agent of the domestic or foreign limited liability company who is then authorized to receive communications from the registered agent. Such person shall be deemed the communications contact for the domestic or foreign limited liability company. A domestic limited liability company, upon receipt of a request by the communications contact

delivered in writing or by electronic transmission, shall provide the communications contact with the name, business address and business telephone number of a natural person who has access to the record required to be maintained pursuant to §18-305(h) of this title. Every registered agent shall retain (in paper or electronic form) the above information concerning the current communications contact for each domestic limited liability company and each foreign limited liability company for which that registered agent serves as registered agent. If the domestic or foreign limited liability company fails to provide the registered agent with a current communications contact, the registered agent may resign as the registered agent for such domestic or foreign limited liability company pursuant to this section.

(h) The Secretary of State is fully authorized to issue such regulations, as may be necessary or appropriate to carry out the enforcement of subsections (e), (f) and (g) of this section, and to take actions reasonable and necessary to assure registered agents' compliance with subsections (e), (f) and (g) of this section. Such actions may include refusal to file documents submitted by a registered agent, including the refusal to file any documents regarding an entity's formation.

(i) Upon application of the Secretary of State, the Court of Chancery may enjoin any person or entity from serving as a registered agent or as an officer, director or managing agent of a registered agent.

(1) Upon the filing of a complaint by the Secretary of State pursuant to this section, the court may make such orders respecting such proceeding as it deems appropriate, and may enter such orders granting interim or final relief as it deems proper under the circumstances.

(2) Any 1 or more of the following grounds shall be a sufficient basis to grant an injunction pursuant to this section:

a. With respect to any registered agent who at any time within 1 year immediately prior to the filing of the Secretary of State's complaint is a commercial registered agent, failure after notice and warning to comply with the qualifications set forth in subsection (e) of this section and/or the requirements of subsections (f) or (g) of this section above;

b. The person serving as a registered agent, or any person who is an officer, director or managing agent of an entity registered agent, has been convicted of a felony or any crime which includes an element of dishonesty or fraud or involves moral turpitude; or

c. The registered agent has engaged in conduct in connection with acting as a registered agent that is intended to or likely to deceive or defraud the public.

(3) With respect to any order the court enters pursuant to this section with respect to an entity that has acted as a registered agent, the court may also direct such order to any person who has served as an officer, director or managing agent of such registered agent. Any person who, on or after January 1, 2007, serves as an officer, director or managing agent of an entity acting as a registered agent in the State of Delaware shall be deemed thereby to have consented to the appointment of such registered agent as agent upon whom service of process may be made in any action brought pursuant to this section, and service as an officer, director or managing agent of an entity acting as a registered agent in the State of Delaware shall be a signification of the consent of such person that any process when so served shall be of the same legal force and validity as if served upon such person within the State of Delaware, and such appointment of the registered agent shall be irrevocable.

(4) Upon the entry of an order by the Court enjoining any person or entity from acting as a registered agent, the Secretary of State shall mail or deliver notice of such order to each affected domestic or foreign limited liability company:

a. That has specified the address of a place of business in a record of the Secretary of State, to the address specified, or

b. An address of which the Secretary of State has obtained from the domestic or foreign limited liability company's former registered agent, to the address obtained.

If such a domestic limited liability company fails to obtain and designate a new registered agent within 30 days after such notice is given, the certificate of formation of such limited liability company shall be canceled. If such a foreign limited liability company fails to obtain and designate a new registered agent within 30 days after such notice is given, such foreign limited liability company shall not be permitted to do business in the State of Delaware and its registration shall be canceled. If any other affected domestic limited liability company fails to obtain and designate a new registered agent within 60 days after entry of an order by the Court enjoining such limited liability company's registered agent from acting as a registered agent, the certificate of formation of such limited liability company shall be canceled. If any other affected foreign limited liability company fails to obtain and designate a new registered agent within 60 days after entry of an order by the Court enjoining such foreign limited liability company's registered agent from acting as a registered agent, such foreign limited liability company shall not be permitted to do business in the State of Delaware and its registration

shall be canceled. If the Court enjoins a person or entity from acting as a registered agent as provided in this section and no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the domestic or foreign limited liability company for which the registered agent had been acting shall thereafter be upon the Secretary of State in accordance with §18-105 or §18-911 of this title. The Court of Chancery may, upon application of the Secretary of State on notice to the former registered agent, enter such orders as it deems appropriate to give the Secretary of State access to information in the former registered agent's possession in order to facilitate communication with the domestic and foreign limited liability companies the former registered agent served.

(j) The Secretary of State is authorized to make a list of registered agents available to the public, and to establish such qualifications and issue such rules and regulations with respect to such listing as the Secretary of State deems necessary or appropriate.

(k) As contained in any certificate of formation, application for registration as a foreign limited liability company, or other document filed in the office of the Secretary of State under this chapter, the address of a registered agent or registered office shall include the street, number, city and postal code. (Last amended by Ch. 357, L. '19, eff. 8-1-19 and Ch. 48, L. '19, eff. 8-1-19.)

§18-105 SERVICE OF PROCESS ON DOMESTIC LIMITED LIABILITY COMPANIES AND PROTECTED SERIES OR REGISTERED SERIES THEREOF

(a) Service of legal process upon any domestic limited liability company or any protected series or registered series thereof shall be made by delivering a copy personally to any manager of the limited liability company in the State of Delaware, or the registered agent of the limited liability company in the State of Delaware, or by leaving it at the dwelling house or usual place of abode in the State of Delaware of any such manager or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the limited liability company in the State of Delaware. If service of legal process is made upon the registered agent of the limited liability company in the State of Delaware on behalf of any such protected series or registered series,

such process shall include the name of the limited liability company and the name of such protected series or registered series. If the registered agent be a corporation, service of process upon it as such may be made by serving, in the State of Delaware, a copy thereof on the president, vice-president, secretary, assistant secretary or any director of the corporate registered agent. Service by copy left at the dwelling house or usual place of abode of a manager or registered agent, or at the registered office or other place of business of the limited liability company in the State of Delaware, to be effective, must be delivered thereat at least 6 days before the return date of the process, and in the presence of an adult person, and the officer serving the process shall distinctly state the manner of service in the officer's return thereto. Process returnable forthwith must be delivered personally to the manager or registered agent.

(b) In case the officer whose duty it is to serve legal process cannot by due diligence serve the process in any manner provided for by subsection (a) of this section, it shall be lawful to serve the process against the limited liability company or any protected series or registered series thereof upon the Secretary of State, and such service shall be as effectual for all intents and purposes as if made in any of the ways provided for in subsection (a) of this section. If service of legal process is made upon the Secretary of State on behalf of any such protected series or registered series, such process shall include the name of the limited liability company and the name of such protected series or registered series. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event that service is effected through the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify the limited liability company by letter, directed to the limited liability company at its address as it appears on the records relating to such limited liability company on file with the Secretary of State or, if no such address appears, at its last registered office. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any

other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection, and to pay the Secretary of State the sum of $50 for the use of the State of Delaware, which sum shall be taxed as part of the costs in the proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from the Secretary's receipt of the service of process. (Last amended by Ch. 357, L. '18, eff. 8-1-19.)

§18-106 NATURE OF BUSINESS PERMITTED; POWERS

(a) A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in Sec. 126 of Title 8.

(b) A limited liability company shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its limited liability company agreement, together with any powers incidental thereto, including such powers and privileges as are necessary or convenient to the conduct, promotion or attainment of the business, purposes or activities of the limited liability company.

(c) Notwithstanding any provision of this chapter to the contrary, without limiting the general powers enumerated in subsection (b) above, a limited liability company shall, subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, have the power and authority to make contracts of guaranty and suretyship, and enter into interest rate, basis, currency, hedge or other swap agreements, or cap, floor, put, call, option, exchange or collar agreements, derivative agreements or other agreements similar to any of the foregoing.

(d) Unless otherwise provided in a limited liability company agreement, a limited liability company has the power and authority to grant, hold or exercise a power of attorney, including an irrevocable power of attorney. (Last amended by Ch. 287, L. '10, eff. 8-2-10.)

§18-107 BUSINESS TRANSACTIONS OF MEMBER OR MANAGER WITH THE LIMITED LIABILITY COMPANY

Except as provided in a limited liability company agreement, a member or manager may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume 1 or more obligations of, provide collateral for, and transact other business with, a limited liability company and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a member or manager. (Last amended by Ch. 260, L. '94, eff. 8-1-94.)

§18-108 INDEMNIFICATION

Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.

Decisions

.1 Advancement of expenses. — Sec. 18-108 authorizes LLCs to obligate themselves to advance legal fees. Therefore, when the operating agreement stated that "to the fullest extent permitted by application of law" expenses, including, legal fees, incurred by a covered person shall be advanced by the LLC, the LLC was obligated to advance legal fees. *Morgan v. Grace, 2003 Del. Ch. LEXIS 13.*

Sec. 18-108 gives members broad authority to set terms for indemnification and advancement of expenses. Persons forming LLCs clearly have authority to require a written undertaking as a condition to advancement. Where the parties failed to do so, the court will not read this requirement into the contract. or is this requirement implied in the statute. *Senior Tour Players 207 Management Co. LLC v. Golftown 207 Holding Co. LLC, 853 A.2d 124 (Del. Ch. 2004).*

Plaintiff was not entitled to advancement of his legal expenses pursuant to a provision of the LLC agreement stating that the LLC "shall indemnify and hold harmless" certain persons as indemnification is separate from advancement. *Majkowski v. American Imaging Management Services, LLC, 913 A.2d 572 (Del. Ch. 2006).*

Former managing member who brought suit challenging his removal was not entitled to advancement of expenses under provision of LLC agreement that only

covered suits initiated by person seeking advancement if made as a response to a threatened action. *Donohue v. Corning*, *949 A.2d 574 (Del. Ch. 2008).*

.2 Right to indemnification. — Where former officers had reason to believe they would be sued, fees paid for an investigation of the potential claims against them were included in the indemnification rights granted in the operating agreement. *Meyers v. Quiz-Dia LLC,C.A. No. 9870 (Ch. Ct. 6-6-17).*

§18-109 SERVICE OF PROCESS ON MANAGERS AND LIQUIDATING TRUSTEES

(a) A manager or a liquidating trustee of a limited liability company may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager or the liquidating trustee of a duty to the limited liability company, or any member of the limited liability company, whether or not the manager or the liquidating trustee is a manager or a liquidating trustee at the time suit is commenced. A manager's or a liquidating trustee's serving as such constitutes such person's consent to the appointment of the registered agent of the limited liability company (or, if there is none, the Secretary of State) as such person's agent upon whom service of process may be made as provided in this section. Such service as a manager or a liquidating trustee shall signify the consent of such manager or liquidating trustee that any process when so served shall be of the same legal force and validity as if served upon such manager or liquidating trustee within the State of Delaware and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable. As used in this subsection (a) and in subsections (b), (c) and (d) of this Sec. 18-109, the term "manager" refers (i) to a person who is a manager as defined in Sec. 18-101(10) of this chapter and (ii) to a person, whether or not a member of a limited liability company, who although not a manager as defined in Sec. 18-101(10) of this chapter, participates materially in the management of the limited liability company, provided, however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in Sec. 18-101(10) of this chapter shall not, by itself, constitute participation in the management of the limited liability company.

(b) Service of process shall be effected by serving the registered agent (or, if there is none, the Secretary of State) with 1 copy of such process in the manner provided by law for service of writs of summons. In the

event service is made under this subsection upon the Secretary of State, the plaintiff shall pay to the Secretary of State the sum of $50 for the use of the State of Delaware, which sum shall be taxed as part of the costs of the proceeding if the plaintiff shall prevail therein. In addition, the Prothonotary or the Register in Chancery of the court in which the civil action or proceeding is pending shall, within 7 days of such service, deposit in the United States mails, by registered mail, postage prepaid, true and attested copies of the process, together with a statement that service is being made pursuant to this section, addressed to such manager or liquidating trustee at the registered office of the limited liability company and at his address last known to the party desiring to make such service.

(c) In any action in which any such manager or liquidating trustee has been served with process as hereinabove provided, the time in which a defendant shall be required to appear and file a responsive pleading shall be computed from the date of mailing by the Prothonotary or the Register in Chancery as provided in subsection (b) of this section; however, the court in which such action has been commenced may order such continuance or continuances as may be necessary to afford such manager or liquidating trustee reasonable opportunity to defend the action.

(d) In a written limited liability company agreement or other writing, a manager or member may consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the State of Delaware, or the exclusivity of arbitration in a specified jurisdiction or the State of Delaware, and to be served with legal process in the manner prescribed in such limited liability company agreement or other writing.

Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State of Delaware, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company.

(e) Nothing herein contained limits or affects the right to serve process in any other manner now or hereafter provided by law. This section is an extension of and not a limitation upon the right otherwise existing of service of legal process upon nonresidents.

(f) The Court of Chancery and the Superior Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof and such other rules which may be necessary to imple-

ment this section and are not inconsistent with this section. (Last amended by Ch. 389, L. '00, eff. 8-1-00.)

Decisions

.1 Nonresident manager's consent to jurisdiction. — When a nonresident agrees to serve as manager of a Delaware LLC it is reasonable that he anticipate being subject to personal jurisdiction in a dispute that hinges entirely on the rights and obligations allotted to managers of the LLC. *Assist Stock Management, L.L.C. v. Rosheim, 753 A.2d 974 (Ch. Ch. 2001).*

.2 Copy of process sent to defendant. — Where plaintiff failed to have notice sent to defendant's last known address as required by Sec. 109(b), service of process was technically defective and plaintiff had to re-serve defendant. *Assist Stock Management, L.L.C. v. Rosheim, 753 A.2d 974 (Ch. Ch. 2001).*

.3 Jurisdiction over contract claim. —Personal jurisdiction was proper over breach of contract claims under Sec. 18-109 where the defendant participated materially in the management of the LLCs, where the claims were intertwined with his management, his involvement in the action was useful and Delaware had an interest in the adjudication of this type of dispute.*PT China LLC v. pt Korea LLC, C.A. No. 4456 (Del. Ch. 2010).*

§18-110 CONTESTED MATTERS RELATING TO MANAGERS; CONTESTED VOTES

(a) Upon application of any member or manager, the Court of Chancery may hear and determine the validity of any admission, election, appointment, removal; or resignation of a manager of a limited liability company, and the right of any person to become or continue to be a manager of a limited liability company, and, in case the right to serve as a manager is claimed by more than 1 person, may determine the person or persons entitled to serve as managers; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the limited liability company relating to the issue. In any such application, the limited liability company shall be named as a party and service of copies of the application upon the registered agent of the limited liability company shall be deemed to be service upon the limited liability company and upon the person or persons whose right to serve as a manager is contested and

upon the person or persons, if any, claiming to be a manager or claiming the right to be a manager; and the registered agent shall forward immediately a copy of the application to the limited liability company and to the person or persons whose right to serve as a manager is contested and to the person or persons, if any, claiming to be a manager or the right to be a manager, in a postpaid, sealed, registered letter addressed to such limited liability company and such person or persons at their post-office addresses last known to the registered agent or furnished to the registered agent by the applicant member or manager. The Court may make such order respecting further or other notice of such application as it deems proper under these circumstances.

(b) Upon application of any member or manager, the Court of Chancery may hear and determine the result of any vote of members or managers upon matters as to which the members or managers of the limited liability company, or any class or group of members or managers, have the right to vote pursuant to the limited liability company agreement or other agreement or this chapter (other than the admission, election, appointment, removal or resignation of managers).

In any such application, the limited liability company shall be named as a party and service of the application upon the registered agent of the limited liability company shall be deemed to be service upon the limited liability company, and no other party need be joined in order for the Court to adjudicate the result of the vote. The Court may make such order respecting further or other notice of such application as it deems proper under these circumstances.

(c) As used in this section, the term ‘manager’ refers (i) to a person who is a manager as defined in §18-101(10) of this Title, and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in §18-101(10) of this Title, participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in §18-101(10) of this Title shall not, by itself, constitute participation in the management of the limited liability company.

(d)Nothing herein contained limits or affects the right to serve process in any other manner now or hereafter provided by law. This section is an extension of and not a limitation upon the right otherwise existing of service of legal process upon nonresidents. (Last amended by Ch. 387, L. ‘08, eff. 8-1-08.)

§18-111 INTERPRETATION AND ENFORCEMENT OF LIMITED LIABILITY COMPANY AGREEMENT

Any action to interpret, apply or enforce the provisions of a limited liability company agreement, or the duties, obligations or liabilities of a limited liability company to the members or managers of the limited liability company, or the duties, obligations or liabilities among members or managers and of members or managers to the limited liability company, or the rights or powers of, or restrictions on, the limited liability company, members or managers, or any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of this chapter, may be brought in the Court of Chancery.

As used in this section, the term "manager" refers (i) to a person who is a manager as defined in §18-101(10) of this Title, and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in §18-101(10) of this Title, participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in §18-101(10) of this Title shall not, by itself, constitute participation in the management of the limited liability company. (Last amended by Ch. 58, L. '09, eff. 8-1-09.)

Decisions

.1 Chancery Court's jurisdiction. — A breach of fiduciary duty claim brought by LLCs and their owners against the LLC's managing partner had to be brought in the Chancery Court even though only money damages were sought. The focus of the jurisdictional inquiry regarding a fiduciary duty claim is whether a special relationship of trust existed between the parties. Here, the plaintiff, as a member of the LLC, placed a very particular and special trust in the defendant. However, the Chancery Court did not have jurisdiction over claims for unjust enrichment and specific performance of a contract as they entailed no special trust relationship and the plaintiff only sought money damages. *Grace v. Morgan, 2004 Del. Super. LEXIS 2.*

.2 Affect of arbitration clause. — Court, and not arbitrator would determine arbitrability of claims where LLC agreement permitted members to obtain injunctive relief and specific performance in the court as there was no clear or unmistakable evidence of intent to have an arbitrator determine arbitrability. *James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 75 (Del. Supr. 2006).*

Where LLC agreement had provision requiring arbitration of any dispute under or related to the LLC agreement, and where several provisions of the LLC agreement

would have to be considered and interpreted in order to adjudicate the plaintiff's claims, arbitration of plaintiff's suit for breach of fiduciary duty was required. *Douzinas v. American Bureau of Shipping, 888 A.2d 1146 (Del. Ch. 2006).*

A third party that was granted inspection rights in an LLC agreement was not subject to the arbitration clause in the LLC agreement as it was not a party to the LLC agreement and the inspection rights clause did not compel arbitration. *NAMA Holdings, LLC v. Related World Market Center, LLC, 922 A.2d 417 (Del. Ch. 2007).*

§18-112 JUDICIAL CANCELLATION OF CERTIFICATE OF FORMATION; PROCEEDINGS

(a) Upon motion by the Attorney General, the Court of Chancery shall have jurisdiction to cancel the certificate of formation of any domestic limited liability company for abuse or misuse of its limited liability company powers, privileges or existence. The Attorney General shall proceed for this purpose in the Court of Chancery.

(b) The Court of Chancery shall have power, by appointment of trustees, receivers or otherwise, to administer and wind up the affairs of any domestic limited liability company whose certificate of formation shall be canceled by the Court of Chancery under this section, and to make such orders and decrees with respect thereto as shall be just and equitable respecting its affairs and assets and the rights of its members and creditors. (As added by Ch. 357, L. '18, effective 8-1-18.)

§18-113 DOCUMENT FORM, SIGNATURE AND DELIVERY

(a) Except as provided in subsection (b) of this section, without limiting the manner in which any act or transaction may be documented, or the manner in which a document may be signed or delivered:

(1) Any act or transaction contemplated or governed by this chapter or the limited liability company agreement may be provided for in a document, and an electronic transmission is the equivalent of a written document.

(2) Whenever this chapter or the limited liability company agreement requires or permits a signature, the signature may be a manual, facsimile, conformed or electronic signature. "Electronic signature" means an electronic symbol or process that is attached to, or logically associated with, a document and executed or adopted by a person with an intent to authenticate or adopt the document.

(3) Unless otherwise provided in the limited liability company agreement or agreed between the sender and recipient, an electronic transmission is delivered to a person for purposes of this chapter and the limited liability company agreement when it enters an information processing system that the person has designated for the purpose of receiving electronic transmissions of the type delivered, so long as the electronic transmission is in a form capable of being processed by that system and such person is able to retrieve the electronic transmission. Whether a person has so designated an information processing system is determined by the limited liability company agreement or from the context and surrounding circumstances, including the parties' conduct. An electronic transmission is delivered under this section even if no person is aware of its receipt. Receipt of an electronic acknowledgement from an information processing system establishes that an electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

This chapter shall not prohibit one or more persons from conducting a transaction in accordance with chapter 12A of this title so long as the part or parts of the transaction that are governed by this chapter are documented, signed and delivered in accordance with this subsection (a) or otherwise in accordance with this chapter. This subsection (a) shall apply solely for purposes of determining whether an act or transaction has been documented, and the document has been signed and delivered, in accordance with this chapter and the limited liability company agreement.

(b) Subsection (a) of this section shall not apply to: (1) a document filed with or submitted to the Secretary of State, the Register in Chancery, or a court or other judicial or governmental body of this State, (2) a certificate of limited liability company interest, and (3) an act or transaction effected pursuant to Section 18-104, 18-105, or 18-109 or subchapter IX or X of this chapter. The foregoing shall not create any presumption about the lawful means to document a matter addressed by this subsection (b), or the lawful means to sign or deliver a document addressed by this subsection (b). A provision of the limited liability company agreement shall not limit the application of subsection (a) of this section unless the provision expressly restricts one or more of the means of documenting an act or transaction, or of signing or delivering a document, permitted by subsection (a).

(c) In the event that any provision of this chapter is deemed to modify, limit or supersede the Electronic Signatures in Global and National

Commerce Act, 15 U.S.C. §7001 et. seq., the provisions of this chapter shall control to the fullest extent permitted by section 7002(a)(2) of such act. (As added by Ch. 48, L. '19, effective 8-1-19.)

Subchapter II
FORMATION; CERTIFICATE OF FORMATION

§18-201 CERTIFICATE OF FORMATION

(a) In order to form a limited liability company, 1 or more authorized persons must execute a certificate of formation. The certificate of formation shall be filed in the office of the Secretary of State and set forth:

(1) The name of the limited liability company;

(2) The address of the registered office and the name and address of the registered agent for service of process required to be maintained by Sec. 18-104 of this chapter; and

(3) Any other matters the members determine to include therein.

(b) A limited liability company is formed at the time of the filing of the initial certificate of formation in the Office of the Secretary of State or at any later date or time specified in the certificate of formation if, in either case, there has been substantial compliance with the requirements of this section. A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.

(c) The filing of the certificate of formation in the Office of the Secretary of State shall make it unnecessary to file any other documents under Chapter 31 of this title.

(d) A limited liability company agreement shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation and, whether entered into or otherwise existing before, after or at the time of such filing, may be made effective as of the effective time of such filing or at such other time or date as provided in or reflected by the limited liability company agreement.

(e) A certificate of formation substantially complies with §18-201(a)(2) of this title if it contains the name of the registered agent and

the address of the registered office even if the certificate of formation does not expressly designate such person as the registered agent or such address as the registered office or the address of the registered agent. (Last amended by Ch. 89, L. '17, eff. 8-1-17.)

Decisions

.1 De facto LLC. — An LLC may exist as a de facto entity based on the fact that the Delaware LLC Act provides a law under which the LLC may exist, a bona fide attempt to organize the LLC was made and there was an exercise of corporate powers. *IOENGINE, LLC v. Interactive Media Corp., 2017 U.S. Dist. LEXIS 758.*

§18-202 AMENDMENT TO CERTIFICATE OF FORMATION

(a) A certificate of formation is amended by filing a certificate of amendment thereto in the Office of the Secretary of State. The certificate of amendment shall set forth:

(1) The name of the limited liability company; and

(2) The amendment to the certificate of formation.

(b) A manager or, if there is no manager, then any member who becomes aware that any statement in a certificate of formation was false when made, or that any matter described has changed making the certificate of formation false in any material respect, shall promptly amend the certificate of formation.

(c) A certificate of formation may be amended at any time for any other proper purpose.

(d) Unless otherwise provided in this chapter or unless a later effective date or time (which shall be a date or time certain) is provided for in the certificate of amendment, a certificate of amendment shall be effective at the time of its filing with the Secretary of State.

§18-203 CANCELLATION OF CERTIFICATE

(a) A certificate of formation shall be canceled upon the dissolution and the completion of winding up of a limited liability company, or as provided in §18-104(d), §18-104 (i)(4), §18-112 or §18-1108 of this title,

or upon the filing of a certificate of merger or consolidation or a certificate of ownership and merger if the limited liability company is not the surviving or resulting entity in a merger or consolidation or upon the future effective date or time of a certificate of merger or consolidation or a certificate of ownership and merger if the limited liability company is not the surviving or resulting entity in a merger or consolidation, or upon the filing of a certificate of transfer or upon the future effective date or time of a certificate of transfer, or upon the filing of a certificate of conversion to non-Delaware entity or upon the future effective date or time of a certificate of conversion to non-Delaware entity or upon the filing of a certificate of division if the limited liability company is a dividing company that is not a surviving company or upon the future effective date or time of a certificate of division if the limited liability company is a dividing company that is not a surviving company. A certificate of cancellation shall be filed in the office of the Secretary of State to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up of a limited liability company and shall set forth:

(1) The name of the limited liability company;

(2) The date of filing of its certificate of formation;

(3) If the limited liability company has formed 1 or more registered series whose certificate of registered series has not been canceled prior to the filing of the certificate of cancellation, the name of each such registered series;

(4) The future effective date or time (which shall be a date or time certain) of cancellation if it is not to be effective upon the filing of the certificate; and

(5) Any other information the person filing the certificate of cancellation determines.

(b) A certificate of cancellation that is filed in the office of the Secretary of State prior to the dissolution or the completion of winding up of a limited liability company may be corrected as an erroneously executed certificate of cancellation by filing with the office of the Secretary of State a certificate of correction of such certificate of cancellation in accordance with §18-211 of this title.

(c) The Secretary of State shall not issue a certificate of good standing with respect to a limited liability company (or any registered series thereof) if its certificate of formation is canceled. (Last amended by Ch. 357, L. ‘18, eff. 8-1-19.)

Decisions

.1 Nullification of certificate of cancellation. — A claim for nullification of a Certificate of Cancellation due to pending unresolved liabilities and a failure to provide for adequate reserves for known liabilities, may proceed because Section 18-804 requires a dissolving LLC to make reasonable provision for the payment of unmatured contractual claims before filing its Certificate of Cancellation. *Thor Merritt Square, LLC v. Bayview Malls, LLC, C.A. No. 4480 (Del. Ch. 2010).*

§18-204 EXECUTION

(a) Each certificate required by this subchapter to be filed in the office of the Secretary of State shall be executed by one or more authorized persons or, in the case of a certificate of conversion to limited liability company or certificate of limited liability company domestication, by any person authorized to execute such certificate on behalf of the other entity or non-United States entity, respectively, except that a certificate of merger or consolidation filed by a surviving or resulting other business entity shall be executed by any person authorized to execute such certificate on behalf of such other business entity.

(b) Unless otherwise provided in a limited liability company agreement, any person may sign any certificate or amendment thereof or enter into a limited liability company agreement or amendment thereof by an agent, including an attorney-in-fact. An authorization, including a power of attorney, to sign any certificate or amendment thereof or to enter into a limited liability company agreement or amendment thereof need not be in writing, need not be sworn to, verified or acknowledged, and need not be filed in the Office of the Secretary of State, but if in writing, must be retained by the limited liability company.

(c) For all purposes of the laws of the State of Delaware, unless otherwise provided in a limited liability company agreement, a power of attorney or proxy with respect to a limited liability company granted to any person shall be irrevocable if it states that it is irrevocable and it is coupled with an interest sufficient in law to support an irrevocable power or proxy. Such irrevocable power of attorney or proxy, unless otherwise provided therein or in a limited liability company agreement, shall not be affected by subsequent death, disability, incapacity, dissolution, termination of existence or bankruptcy of, or any other event

concerning, the principal. A power of attorney or proxy with respect to matters relating to the organization, internal affairs or termination of a limited liability company or granted by a person as a member or an assignee of a limited liability company interest or by a person seeking to become a member or an assignee of a limited liability company interest and, in either case, granted to the limited liability company, a manager or member thereof, or any of their respective officers, directors, managers, members, partners, trustees, employees or agents shall be deemed coupled with an interest sufficient in law to support an irrevocable power or proxy. The provisions of this subsection shall not be construed to limit the enforceability of a power of attorney or proxy that is part of a limited liability company agreement.

(d) The execution of a certificate by a person who is authorized by this chapter to execute such certificate constitutes an oath or affirmation, under the penalties of perjury in the third degree, that, to the best of such person's knowledge and belief, the facts stated therein are true. (Last amended by Ch. 45, L. '15, eff. 8-1-15.)

§18-205 EXECUTION, AMENDMENT OR CANCELLATION BY JUDICIAL ORDER

(a) If a person required to execute a certificate required by this subchapter fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the Court of Chancery to direct the execution of the certificate. If the Court finds that the execution of the certificate is proper and that any person so designated has failed or refused to execute the certificate, it shall order the Secretary of State to record an appropriate certificate.

(b) If a person required to execute a limited liability company agreement or amendment thereof fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the Court of Chancery to direct the execution of the limited liability company agreement or amendment thereof. If the Court finds that the limited liability company agreement or amendment thereof should be executed and that any person required to execute the limited liability company agreement or amendment thereof has failed or refused to do so, it shall enter an order granting appropriate relief.

§18-206 FILING

(a) The signed copy of any certificate authorized to be filed under this chapter shall be delivered to the Secretary of State. A person who executes a certificate as an agent or fiduciary need not exhibit evidence of that person's authority as a prerequisite to filing. Any signature on any certificate authorized to be filed with the Secretary of State under any provision of this chapter may be a facsimile, a conformed signature or an electronically transmitted signature. Upon delivery of any certificate, the Secretary of State shall record the date and time of its delivery. Unless the Secretary of State finds that any certificate does not conform to law, upon receipt of all filing fees required by law the Secretary of State shall:

(1) Certify that any certificate authorized to be filed under this chapter has been filed in the Secretary of State's office by endorsing upon the signed certificate the word "Filed," and the date and time of the filing. This endorsement is conclusive of the date and time of its filing in the absence of actual fraud. Except as provided in paragraph (a)(5) or (a)(6) of this section, such date and time of filing of a certificate shall be the date and time of delivery of the certificate;

(2) File and index the endorsed certificate;

(3) Prepare and return to the person who filed it or that person's representative a copy of the signed certificate, similarly endorsed, and shall certify such copy as a true copy of the signed certificate; and

(4) Enter Cause to be entered such information from the certificate as the Secretary of State deems appropriate into the Delaware Corporation Information System or any system which is a successor thereto in the office of the Secretary of State, and such information and a copy of such certificate shall be permanently maintained as a public record on a suitable medium. The Secretary of State is authorized to grant direct access to such system to registered agents subject to the execution of an operating agreement between the Secretary of State and such registered agent. Any registered agent granted such access shall demonstrate the existence of policies to ensure that information entered into the system accurately reflects the content of certificates in the possession of the registered agent at the time of entry.

(5) Upon request made upon or prior to delivery, the Secretary of State may, to the extent deemed practicable, establish as the date and time of filing of a certificate a date and time after its delivery. If the Secretary of State refuses to file any certificate due to an error, omission or

other imperfection, the Secretary of State may hold such certificate in suspension, and in such event, upon delivery of a replacement certificate in proper form for filing and tender of the required fees within 5 business days after notice of such suspension is given to the filer, the Secretary of State shall establish as the date and time of filing of such certificate the date and time that would have been the date and time of filing of the rejected certificate had it been accepted for filing. The Secretary of State shall not issue a certificate of good standing with respect to any limited liability company or registered series with a certificate held in suspension pursuant to this subsection. The Secretary of State may establish as the date and time of filing of a certificate the date and time at which information from such certificate is entered pursuant to subdivision (a)(4) of this section if such certificate is delivered on the same date and within 4 hours after such information is entered.

(6) If:

(A) Together with the actual delivery of a certificate and tender of the required fees, there is delivered to the Secretary of State a separate affidavit (which in its heading shall be designated as an affidavit of extraordinary condition) attesting, on the basis of personal knowledge of the affiant or a reliable source of knowledge identified in the affidavit, that an earlier effort to deliver such certificate and tender such fees was made in good faith, specifying the nature, date and time of such good faith effort and requesting that the Secretary of State establish such date and time as the date and time of filing of such certificate; or

(B) Upon the actual delivery of a certificate and tender of the required fees, the Secretary of State in his or her discretion provides a written waiver of the requirement for such an affidavit stating that it appears to the Secretary of State that an earlier effort to deliver such certificate and tender such fees was made in good faith and specifying the date and time of such effort; and

(C) The Secretary of State determines that an extraordinary condition existed at such date and time, that such earlier effort was unsuccessful as a result of the existence of such extraordinary condition, and that such actual delivery and tender were made within a reasonable period (not to exceed 2 business days) after the cessation of such extraordinary condition, then the Secretary of State may establish such date and time as the date and time of filing of such certificate. No fee shall be paid to the Secretary of State for receiving an affidavit of extraordinary condition. For purposes of this subsection, an extraordinary condition means: any emergency resulting from an attack on, invasion or occupation by

foreign military forces of, or disaster, catastrophe, war or other armed conflict, revolution or insurrection or rioting or civil commotion in, the United States or a locality in which the Secretary of State conducts its business or in which the good faith effort to deliver the certificate and tender the required fees is made, or the immediate threat of any of the foregoing; or any malfunction or outage of the electrical or telephone service to the Secretary of State's office, or weather or other condition in or about a locality in which the Secretary of State conducts its business, as a result of which the Secretary of State's office is not open for the purpose of the filing of certificates under this chapter or such filing cannot be effected without extraordinary effort. The Secretary of State may require such proof as it deems necessary to make the determination required under clause (C) of this subsection, and any such determination shall be conclusive in the absence of actual fraud. If the Secretary of State establishes the date and time of filing of a certificate pursuant to this subsection, the date and time of delivery of the affidavit of extraordinary condition or the date and time of the Secretary of State's written waiver of such affidavit shall be endorsed on such affidavit or waiver and such affidavit or waiver, so endorsed, shall be attached to the filed certificate to which it relates. Such filed certificate shall be effective as of the date and time established as the date and time of filing by the Secretary of State pursuant to this subsection, except as to those persons who are substantially and adversely affected by such establishment and, as to those persons, the certificate shall be effective from the date and time endorsed on the affidavit of extraordinary condition or written waiver attached thereto.

(b) Notwithstanding any other provision of this chapter, any certificate filed under this chapter shall be effective at the time of its filing with the Secretary of State or at any later date or time (not later than a time on the one hundred and eightieth day after the date of its filing if such date of filing is on or after January 1, 2012) specified in the certificate. Upon the filing of a certificate of amendment (or judicial decree of amendment), certificate of correction, corrected certificate or restated certificate in the office of the Secretary of State, or upon the future effective date or time of a certificate of amendment (or judicial decree thereof) or restated certificate, as provided for therein, the certificate of formation or certificate of registered series, as applicable, shall be amended, corrected or restated as set forth therein. Upon the filing of a certificate of cancellation (or a judicial decree thereof), a certificate of merger or consolidation or a certificate of ownership and merger or a

certificate of division which acts as a certificate of cancellation, a certificate of transfer, a certificate of conversion to a non-Delaware entity, or a certificate of conversion of registered series to protected series, or upon the future effective date or time of a certificate of cancellation (or a judicial decree thereof), a certificate of merger or consolidation or a certificate of ownership and merger or a certificate of division which acts as a certificate of cancellation, a certificate of transfer, a certificate of conversion to a non-Delaware entity, or a certificate of conversion of registered series to protected series, as provided for therein, or as specified in §18-104(d), §18-104(i)(4), §18-112 or §18-1108 of this title, the certificate of formation or certificate of registered series, as applicable, is canceled. Upon the filing of a certificate of limited liability company domestication or upon the future effective date or time of a certificate of limited liability company domestication, the entity filing the certificate of limited liability company domestication is domesticated as a limited liability company with the effect provided in §18-212 of this title. Upon the filing of a certificate of conversion to limited liability company or upon the future effective date or time of a certificate of conversion to limited liability company, the entity filing the certificate of conversion to limited liability company is converted to a limited liability company with the effect provided in §18-214 of this title. Upon the filing of a certificate of conversion of protected series to registered series, or upon the future effective date or time of a certificate of conversion of protected series to registered series, the protected series with respect to which such filing is made is converted to a registered series with the effect provided in §18-219 of this title. Upon the filing of a certificate of conversion of registered series to protected series, or upon the future effective date or time of a certificate of conversion of registered series to protected series, the registered series filing such certificate is converted to a protected series with the effect provided in §18-220 of this title. Upon the filing of a certificate of revival, a limited liability company or a registered series is revived with the effect provided in §18-1109 or §18-1110 of this title. Upon the filing of a certificate of transfer and domestic continuance, or upon the future effective date or time of a certificate of transfer and domestic continuance, as provided for therein, the limited liability company filing the certificate of transfer and domestic continuance shall continue to exist as a limited liability company of the State of Delaware with the effect provided in §18-213 of this title.

(c) If any certificate filed in accordance with this chapter provides for a future effective date or time and if, prior to such future effective date

or time set forth in such certificate, the transaction is terminated or its terms are amended to change the future effective date or time or any other matter described in such certificate so as to make such certificate false or inaccurate in any respect, such certificate shall, prior to the future effective date or time set forth in such certificate, be terminated or amended by the filing of a certificate of termination or certificate of amendment of such certificate, executed in accordance with Sec. 18-204 of this chapter, which shall identify the certificate which has been terminated or amended and shall state that the certificate has been terminated or the manner in which it has been amended. Upon the filing of a certificate of amendment of a certificate with a future effective date or time, the certificate identified in such certificate of amendment is amended. Upon the filing of a certificate of termination of a certificate with a future effective date or time, the certificate identified in such certificate of termination is terminated.

(d) A fee as set forth in §18-1105(a)(3) of this title shall be paid at the time of the filing of a certificate of formation, a certificate of registered series, a certificate of amendment, a certificate of correction, a certificate of amendment of a certificate with a future effective date or time, a certificate of termination of a certificate with a future effective date or time, a certificate of cancellation, a certificate of merger or consolidation, a certificate of ownership and merger, a restated certificate, a corrected certificate, a certificate of conversion to limited liability company, a certificate of conversion to a non-Delaware entity, a certificate of conversion of protected series to registered series, a certificate of conversion of registered series to protected series, a certificate of transfer, a certificate of transfer and domestic continuance, a certificate of limited liability company domestication, a certificate of division or a certificate of revival.

(e) The Secretary of State, acting as agent, shall collect and deposit in a separate account established exclusively for that purpose, a courthouse municipality fee with respect to each filed instrument and shall thereafter monthly remit funds from such account to the treasuries of the municipalities designated in Title 10, §301. Said fees shall be for the purposes of defraying certain costs incurred by such municipalities in hosting the primary locations for the Delaware Courts. The fee to such municipalities shall be $20 for each instrument filed with the Secretary of State in accordance with this section. The municipality to receive the fee shall be the municipality designated in Title 10, §301 in the county in which the limited liability company's registered office in this State is, or

is to be, located, except that a fee shall not be charged for a document filed in accordance with Subchapter IX of this chapter.

(f) A fee as set forth in Sec. 18-1105(a)(4) of this title shall be paid for a certified copy of any paper on file as provided for by this chapter, and a fee as set forth in Sec. 18-1105(a)(5) of this title shall be paid for each page copied.

(g) Notwithstanding any other provision of this chapter, it shall not be necessary for any limited liability company or foreign limited liability company to amend its certificate of formation, its application for registration as a foreign limited liability company, or any other document that has been filed in the office of the Secretary of State prior to August 1, 2011, to comply with §§18-104(k) of this title; notwithstanding the foregoing, any certificate or other document filed under this chapter on or after August 1, 2011, and changing the address of a registered agent or registered office shall comply with §18-104(k) of this title. (Last amended by Ch. 357, L. '18, eff. 8-1-19 and Ch. 48, L. '19, eff. 8-1-19.)

§18-207 NOTICE

The fact that a certificate of formation is on file in the office of the Secretary of State is notice that the entity formed in connection with the filing of the certificate of formation is a limited liability company formed under the laws of the State of Delaware and is notice of all other facts set forth therein which are required to be set forth in a certificate of formation by §18-201(a)(1) and (2) or §18-1202 of this title and which are permitted to be set forth in a certificate of formation by §18-215(b) or §18-218(b) of this title. The fact that a certificate of registered series is on file in the office of the Secretary of State is notice that the registered series named in such certificate of registered series has been formed pursuant to §18-218 of this title and is notice of all other facts set forth therein which are required to be set forth in a certificate of registered series by §18-218(d) of this title. (Last amended by Ch. 357, L. '18, eff. 8-1-19.)

§18-208 RESTATED CERTIFICATE

(a) Restated certificate of formation

(1)A limited liability company may, whenever desired, integrate into a single instrument all of the provisions of its certificate of formation

which are then in effect and operative as a result of there having theretofore been filed with the Secretary of State 1 or more certificates or other instruments pursuant to any of the sections referred to in this subchapter and it may at the same time also further amend its certificate of formation by adopting a restated certificate of formation.

(2) If a restated certificate of formation merely restates and integrates but does not further amend the initial certificate of formation, as theretofore amended or supplemented by any instrument that was executed and filed pursuant to any of the sections in this subchapter, it shall be specifically designated in its heading as a "Restated Certificate of Formation" together with such other words as the limited liability company may deem appropriate and shall be executed by an authorized person and filed as provided in Sec. 18-206 of this chapter in the Office of the Secretary of State. If a restated certificate restates and integrates and also further amends in any respect the certificate of formation, as theretofore amended or supplemented, it shall be specifically designated in its heading as an "Amended and Restated Certificate of Formation" together with such other words as the limited liability company may deem appropriate and shall be executed by at least 1 authorized person, and filed as provided in Sec. 18-206 of this chapter in the Office of the Secretary of State.

(3) A restated certificate of formation shall state, either in its heading or in an introductory paragraph, the limited liability company's present name, and, if it has been changed, the name under which it was originally filed, and the date of filing of its original certificate of formation with the Secretary of State, and the future effective date or time (which shall be a date or time certain) of the restated certificate if it is not to be effective upon the filing of the restated certificate. A restated certificate shall also state that it was duly executed and is being filed in accordance with this section. If a restated certificate only restates and integrates and does not further amend a limited liability company's certificate of formation as theretofore amended or supplemented and there is no discrepancy between those provisions and the restated certificate, it shall state that fact as well.

(4) Upon the filing of a restated certificate of formation with the Secretary of State, or upon the future effective date or time of a restated certificate of formation as provided for therein, the initial certificate of formation, as theretofore amended or supplemented, shall be superseded; thenceforth, the restated certificate of formation, including any further amendment or changes made thereby, shall be the certificate of

formation of the limited liability company, but the original effective date of formation shall remain unchanged.

(5) Any amendment or change effected in connection with the restatement and integration of the certificate of formation shall be subject to any other provision of this chapter, not inconsistent with this section, which would apply if a separate certificate of amendment were filed to effect such amendment or change.

(b) Restated certificate of registered series.

(1) A registered series of a limited liability company may, whenever desired, integrate into a single instrument all of the provisions of its certificate of registered series which are then in effect and operative as a result of there having theretofore been filed with the Secretary of State 1 or more certificates or other instruments pursuant to any of the sections referred to in this subchapter, and it may at the same time also further amend its certificate of registered series by adopting a restated certificate of registered series.

(2) If a restated certificate of registered series merely restates and integrates but does not further amend the initial certificate of registered series, as theretofore amended or supplemented by any instrument that was executed and filed pursuant to any of the sections in this subchapter, it shall be specifically designated in its heading as a "Restated Certificate of Registered Series" together with such other words as the registered series may deem appropriate and shall be executed by an authorized person and filed as provided in §18-206 of this title in the office of the Secretary of State. If a restated certificate restates and integrates and also further amends in any respect the certificate of registered series as theretofore amended or supplemented, it shall be specifically designated in its heading as an "Amended and Restated Certificate of Registered Series" together with such other words as the registered series may deem appropriate and shall be executed by at least 1 authorized person, and filed as provided in §18-206 of this title in the office of the Secretary of State.

(3) A restated certificate of registered series shall state, either in its heading or in an introductory paragraph, the name of the limited liability company, the present name of the registered series, and, if the name of the registered series has been changed, the name under which it was originally filed, and the date of filing of its original certificate of registered series with the Secretary of State, and the future effective date or time (which shall be a date or time certain) of the restated certificate of registered series if it is not to be effective upon the filing of the restated

certificate of registered series. A restated certificate shall also state that it was duly executed and is being filed in accordance with this section. If a restated certificate only restates and integrates and does not further amend a certificate of registered series, as theretofore amended or supplemented and there is no discrepancy between those provisions and the restated certificate, it shall state that fact as well.

(4) Upon the filing of a restated certificate of registered series with the Secretary of State, or upon the future effective date or time of a restated certificate of registered series as provided for therein, the initial certificate of registered series, as theretofore amended or supplemented, shall be superseded; thenceforth, the restated certificate of registered series, including any further amendment or changes made thereby, shall be the certificate of registered series of such registered series, but the original effective date of formation of the registered series, as applicable, shall remain unchanged.

(5) Any amendment or change effected in connection with the restatement and integration of a certificate of registered series shall be subject to any other provision of this chapter, not inconsistent with this section, which would apply if a separate certificate of amendment were filed to effect such amendment or change. (Last amended by Ch. 357, L. '18, eff. 8-1-19.)

§18-209 MERGER AND CONSOLIDATION

(a) As used in this section and in §§18-204, 18-217, 18-219, 18-220 and 18-221 of this title, "other business entity" means a corporation, a statutory trust, a business trust, an association, a real estate investment trust, a common-law trust, or any other incorporated or unincorporated business or entity, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), and a foreign limited liability company, but excluding a domestic limited liability company. As used in this section and in §§18-210 and 18-301 of this title, "plan of merger" means a writing approved by a domestic limited liability company, in the form of resolutions or otherwise, that states the terms and conditions of a merger under subsection (i) of this section.

(b) Pursuant to an agreement of merger or consolidation, 1 or more domestic limited liability companies may merge or consolidate with or

into 1 or more domestic limited liability companies or 1 or more other business entities formed or organized under the laws of the State of Delaware or any other state or the United States or any foreign country or other foreign jurisdiction, or any combination thereof, with such domestic limited liability company or other business entity as the agreement shall provide being the surviving or resulting domestic limited liability company or other business entity. Unless otherwise provided in the limited liability company agreement, an agreement of merger or consolidation or a plan of merger shall be approved by each domestic limited liability company which is to merge or consolidate by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a domestic limited liability company or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting domestic limited liability company or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a domestic limited liability company or other business entity which is not the surviving or resulting limited liability company or other business entity in the merger or consolidation, may remain outstanding or may be canceled. Notwithstanding prior approval, an agreement of merger or consolidation or a plan of merger may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation or plan of merger. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the second sentence of this subsection as in effect on July 31, 2015.

(c) Except in the case of a merger under subsection (i) of this section, if a domestic limited liability company is merging or consolidating under this section, the domestic limited liability company or other business entity surviving or resulting in or from the merger or consolidation shall file a certificate of merger or consolidation executed by 1 or more authorized persons on behalf of the domestic limited liability company when it is the surviving or resulting entity in the office of the Secretary of State. The certificate of merger or consolidation shall state:

(1) The name, jurisdiction of formation or organization and type of entity of each of the domestic limited liability companies and other business entities which is to merge or consolidate;

(2) That an agreement of merger or consolidation has been approved and executed by each of the domestic limited liability companies and other business entities which is to merge or consolidate;

(3) The name of the surviving or resulting domestic limited liability company or other business entity;

(4) In the case of a merger in which a domestic limited liability company is the surviving entity, such amendments, if any, to the certificate of formation of the surviving domestic limited liability company to change its name, registered office or registered agent as are desired to be effected by the merger;

(5) The future effective date or time (which shall be a date or time certain) of the merger or consolidation if it is not to be effective upon the filing of the certificate of merger or consolidation;

(6) That the agreement of merger or consolidation is on file at a place of business of the surviving or resulting domestic limited liability company or other business entity, and shall state the address thereof;

(7) That a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting domestic limited liability company or other business entity, on request and without cost, to any member of any domestic limited liability company or any person holding an interest in any other business entity which is to merge or consolidate; and

(8) If the surviving or resulting entity is not a domestic limited liability company, or a corporation, partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or statutory trust organized under the laws of the State of Delaware, a statement that such surviving or resulting other business entity agrees that it may be served with process in the State of Delaware in any action, suit or proceeding for the enforcement of any obligation of any domestic limited liability company which is to merge or consolidate, irrevocably appointing the Secretary of State as its agent to accept service of process in any such action, suit or proceeding and specifying the address to which a copy of such process shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the

event of service hereunder upon the Secretary of State, the procedures set forth in §18-911(c) of this title shall be applicable, except that the plaintiff in any such action, suit or proceeding shall furnish the Secretary of State with the address specified in the certificate of merger or consolidation provided for in this section and any other address which the plaintiff may elect to furnish, together with copies of such process as required by the Secretary of State, and the Secretary of State shall notify such surviving or resulting other business entity at all such addresses furnished by the plaintiff in accordance with the procedures set forth in §18-911(c) of this title.

(d) Unless a future effective date or time is provided in a certificate of merger or consolidation, or in the case of a merger under subsection (i) of this section in a certificate of ownership and merger, in which event a merger or consolidation shall be effective at any such future effective date or time, a merger or consolidation shall be effective upon the filing in the office of the Secretary of State of a certificate of merger or consolidation or a certificate of ownership and merger.

(e) A certificate of merger or consolidation or a certificate of ownership and merger shall act as a certificate of cancellation for a domestic limited liability company which is not the surviving or resulting entity in the merger or consolidation. A certificate of merger that sets forth any amendment in accordance with subsection (c)(4) of this section shall be deemed to be an amendment to the certificate of formation of the limited liability company, and the limited liability company shall not be required to take any further action to amend its certificate of formation under §18-202 of this title with respect to such amendments set forth in the certificate of merger. Whenever this section requires the filing of a certificate of merger or consolidation, such requirement shall be deemed satisfied by the filing of an agreement of merger or consolidation containing the information required by this section to be set forth in the certificate of merger or consolidation.

(f) An agreement of merger or consolidation or a plan of merger approved in accordance with subsection (b) of this section may:

(1) Effect any amendment to the limited liability company agreement; or

(2) Effect the adoption of a new limited liability company agreement, for a limited liability company if it is the surviving or resulting limited liability company in the merger or consolidation.

Any amendment to a limited liability company agreement or adoption of a new limited liability company agreement made pursuant to the

foregoing sentence shall be effective at the effective time or date of the merger or consolidation and shall be effective notwithstanding any provision of the limited liability company agreement relating to amendment or adoption of a new limited liability company agreement, other than a provision that by its terms applies to an amendment to the limited liability company agreement or the adoption of a new limited liability company agreement, in either case, in connection with a merger or consolidation. The provisions of this subsection shall not be construed to limit the accomplishment of a merger or of any of the matters referred to herein by any other means provided for in a limited liability company agreement or other agreement or as otherwise permitted by law, including that the limited liability company agreement of any constituent limited liability company to the merger or consolidation (including a limited liability company formed for the purpose of consummating a merger or consolidation) shall be the limited liability company agreement of the surviving or resulting limited liability company.

(g) When any merger or consolidation shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of each of the domestic limited liability companies and other business entities that have merged or consolidated, and all property, real, personal and mixed, and all debts due to any of said domestic limited liability companies and other business entities, as well as all other things and causes of action belonging to each of such domestic limited liability companies and other business entities, shall be vested in the surviving or resulting domestic limited liability company or other business entity, and shall thereafter be the property of the surviving or resulting domestic limited liability company or other business entity as they were of each of the domestic limited liability companies and other business entities that have merged or consolidated, and the title to any real property vested by deed or otherwise, under the laws of the State of Delaware, in any of such domestic limited liability companies and other business entities, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said domestic limited liability companies and other business entities shall be preserved unimpaired, and all debts, liabilities and duties of each of the said domestic limited liability companies and other business entities that have merged or consolidated shall thenceforth attach to the surviving or resulting domestic limited liability company or other business entity, and may be enforced against it to the same extent as if said debts, liabilities and du-

ties had been incurred or contracted by it. Unless otherwise agreed, a merger or consolidation of a domestic limited liability company, including a domestic limited liability company which is not the surviving or resulting entity in the merger or consolidation, shall not require such domestic limited liability company to wind up its affairs under §18-803 of this title or pay its liabilities and distribute its assets under §18-804 of this title, and the merger or consolidation shall not constitute a dissolution of such limited liability company.

(h) A limited liability company agreement may provide that a domestic limited liability company shall not have the power to merge or consolidate as set forth in this section.

(i) In any case in which (i) at least 90% of the outstanding shares of each class of the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision required by §251(g)(7)(i) of Title 8), of which class there are outstanding shares that, absent §267(a) of Title 8, would be entitled to vote on such merger, is owned by a domestic limited liability company, (ii) 1 or more of such corporations is a corporation of the State of Delaware, and (iii) any corporation that is not a corporation of the State of Delaware is a corporation of any other state or the District of Columbia or another jurisdiction, the laws of which do not forbid such merger, the domestic limited liability company having such stock ownership may either merge the corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such corporations, into 1 of the other corporations, pursuant to a plan of merger. If a domestic limited liability company is causing a merger under this subsection, the domestic limited liability company shall file a certificate of ownership and merger executed by 1 or more authorized persons on behalf of the domestic limited liability company in the office of the Secretary of State. The certificate of ownership and merger shall certify that such merger was authorized in accordance with the domestic limited liability company's limited liability company agreement and this chapter, and if the domestic limited liability company shall not own all the outstanding stock of all the corporations that are parties to the merger, shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving domestic limited liability company or corporation upon surrender of each share of the corporation or corporations not owned by the domestic limited liability company, or the cancellation of some or all of such shares. If a corporation surviving a merger under this subsec-

tion is not a corporation organized under the laws of the State of Delaware, then the terms and conditions of the merger shall obligate such corporation to agree that it may be served with process in the State of Delaware in any proceeding for enforcement of any obligation of the domestic limited liability company or any obligation of any constituent corporation of the State of Delaware, as well as for enforcement of any obligation of the surviving corporation, including any suit or other proceeding to enforce the right of any stockholders as determined in appraisal proceedings pursuant to §262 of Title 8, and to irrevocably appoint the Secretary of State as its agent to accept service of process in any such suit or other proceedings, and to specify the address to which a copy of such process shall be mailed by the Secretary of State. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such surviving corporation thereof by letter, directed to such surviving corporation at its address so specified, unless such surviving corporation shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $50 for the use of the State of Delaware, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process. (Last amended by Ch. 357, L. ‘18, eff. 8-1-19.)

Decisions

.1 Manager's fiduciary duty of loyalty. — Even where LLC agreement permitted managers to consent to a merger without notifying other managers, the act of 2 of 3 managers to merge the LLC without notifying the 3rd manager in order to convert the 3rd manager's majority interest into a minority interest and prevent him from using his right to remove managers, constituted a breach of fiduciary duty and the merger was declared invalid. *VSG, Inc. v. Castiel*, *2000 Del. Ch. LEXIS 122.*

.2 Entire fairness. — A merger was not the product of fair dealing where the plaintiff member did not receive notice until 4 days before closing and where its voting equity would decrease from 50% to 5%. The price was not fair where it was based on a valuation of the LLC of $32 million, where more complete valuations indicated a value of between $72 and $103 million. *Solar Cells, Inc. v. True North Partners, LLC, 2002 Del. Ch. LEXIS 38 (2002).*

§18-210 CONTRACTUAL APPRAISAL RIGHTS

A limited liability company agreement or an agreement of merger or consolidation or a plan of merger or a plan of division may provide that contractual appraisal rights with respect to a limited liability company interest or another interest in a limited liability company shall be available for any class or group or series of members or limited liability company interests in connection with any amendment of a limited liability company agreement, any merger or consolidation in which the limited liability company or a registered series of the limited liability company is a constituent party to the merger or consolidation, any division of the limited liability company, any conversion of the limited liability company to another business form, any conversion of a protected series of the limited liability company to a registered series of such limited liability company, any conversion of a registered series of the limited liability company to a protected series of such limited liability company, any transfer to or domestication or continuance in any jurisdiction by the limited liability company, or the sale of all or substantially all of the limited liability company's assets. The Court of Chancery shall have jurisdiction to hear and determine any matter relating to any such appraisal rights. (Last amended by Ch. 48, L. '19, eff. 8-1-19.)

§18-211 CERTIFICATE OF CORRECTION

(a) Whenever any certificate authorized to be filed with the office of the Secretary of State under any provision of this chapter has been so

filed and is an inaccurate record of the action therein referred to, or was defectively or erroneously executed, such certificate may be corrected by filing with the office of the Secretary of State a certificate of correction of such certificate. The certificate of correction shall specify the inaccuracy or defect to be corrected, shall set forth the portion of the certificate in corrected form, and shall be executed and filed as required by this chapter. The certificate of correction shall be effective as of the date the original certificate was filed, except as to those persons who are substantially and adversely affected by the correction, and as to those persons the certificate of correction shall be effective from the filing date.

(b) In lieu of filing a certificate of correction, a certificate may be corrected by filing with the Secretary of State a corrected certificate which shall be executed and filed as if the corrected certificate were the certificate being corrected, and a fee equal to the fee payable to the Secretary of State for a certificate of correction as prescribed by §18-1105 of this title shall be paid and collected by the Secretary of State for the use of the State of Delaware in connection with the filing of the corrected certificate. The corrected certificate shall be specifically designated as such in its heading, shall specify the inaccuracy or defect to be corrected and shall set forth the entire certificate in corrected form. A certificate corrected in accordance with this section shall be effective as of the date the original certificate was filed, except as to those persons who are substantially and adversely affected by the correction and as to those persons the certificate as corrected shall be effective from the filing date. (Last amended by Ch. 357, L. '18, eff. 8-1-18.)

§18-212 DOMESTICATION OF NON-UNITED STATES ENTITIES

(a) As used in this section and in Sec. 18-204, "non-United States entity" means a foreign limited liability company (other than 1 formed under the laws of a state) or a corporation, a statutory trust, a business trust, an association, a real estate investment trust, a common-law trust or any other incorporated or unincorporated business or entity, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) formed, incorporated, created or that otherwise came into being under the laws of any foreign country or other foreign jurisdiction (other than any state).

(b) Any non-United States entity may become domesticated as a limited liability company in the State of Delaware by complying with subsection (g) of this section and filing in the office of the Secretary of State in accordance with Sec. 18-206 of this title:

(1) A certificate of limited liability company domestication that has been executed in accordance with Sec. 18-204 of this title; and

(2) A certificate of formation that complies with Sec. 18-201 of this title and has been executed by 1 or more authorized persons in accordance with Sec. 18-204 of this title.

Each of the certificates required by this subsection (b) shall be filed simultaneously in the office of the Secretary of State and, if such certificates are not to become effective upon their filing as permitted by §18-206(b) of this title, then each such certificate shall provide for the same effective date or time in accordance with §18-206(b) of this title.

(c) The certificate of limited liability company domestication shall state:

(1) The date on which and jurisdiction where the non-United States entity was first formed, incorporated, created or otherwise came into being;

(2) The name of the non-United States entity immediately prior to the filing of the certificate of limited liability company domestication;

(3) The name of the limited liability company as set forth in the certificate of formation filed in accordance with subsection (b) of this section;

(4) The future effective date or time (which shall be a date or time certain) of the domestication as a limited liability company if it is not to be effective upon the filing of the certificate of limited liability company domestication and the certificate of formation;

(5) The jurisdiction that constituted the seat, siege social, or principal place of business or central administration of the non-United States entity, or any other equivalent thereto under applicable law, immediately prior to the filing of the certificate of limited liability company domestication; and

(6) That the domestication has been approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the non-United States entity and the conduct of its business or by applicable non-Delaware law, as appropriate.

(d) Upon the filing in the office of the Secretary of State of the certificate of limited liability company domestication and the certificate of formation or upon the future effective date or time of the certificate of

limited liability company domestication and the certificate of formation, the non-United States entity shall be domesticated as a limited liability company in the State of Delaware and the limited liability company shall thereafter be subject to all of the provisions of this chapter, except that notwithstanding Sec. 18-201 of this chapter, the existence of the limited liability company shall be deemed to have commenced on the date the non-United States entity commenced its existence in the jurisdiction in which the non-United States entity was first formed, incorporated, created or otherwise came into being.

(e) The domestication of any non-United States entity as a limited liability company in the State of Delaware shall not be deemed to affect any obligations or liabilities of the non-United States entity incurred prior to its domestication as a limited liability company in the State of Delaware, or the personal liability of any person therefor.

(f) The filing of a certificate of limited liability company domestication shall not affect the choice of law applicable to the non-United States entity, except that from the effective date or time of the domestication, the law of the State of Delaware, including the provisions of this chapter, shall apply to the non-United States entity to the same extent as if the non-United States entity had been formed as a limited liability company on that date.

(g) Prior to the filing of a certificate of limited liability company domestication with the Office of the Secretary of State, the domestication shall be approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the non-United States entity and the conduct of its business or by applicable non-Delaware law, as appropriate, and a limited liability company agreement shall be approved by the same authorization required to approve the domestication.

(h) When any domestication shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the non-United States entity that has been domesticated, and all property, real, personal and mixed, and all debts due to such non-United States entity, as well as all other things and causes of action belonging to such non-United States entity, shall remain vested in the domestic limited liability company to which such non-United States entity has been domesticated (and also in the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication) and shall be the property of

such domestic limited liability company (and also of the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication), and the title to any real property vested by deed or otherwise in such non-United States entity shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such non-United States entity shall be preserved unimpaired, and all debts, liabilities and duties of the non-United States entity that has been domesticated shall remain attached to the domestic limited liability company to which such non-United States entity has been domesticated (and also to the non-United States entity, if and for so long as the non-United States entity continues its existence in the foreign jurisdiction in which it was existing immediately prior to the domestication), and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a domestic limited liability company. The rights, privileges, powers and interests in property of the non-United States entity, as well as the debts, liabilities and duties of the non-United States entity, shall not be deemed, as a consequence of the domestication, to have been transferred to the domestic limited liability company to which such non-United States entity has domesticated for any purpose of the laws of the State of Delaware.

(i) When a non-United States entity has become domesticated as a limited liability company pursuant to this section, for all purposes of the laws of the State of Delaware, the limited liability company shall be deemed to be the same entity as the domesticating non-United States entity and the domestication shall constitute a continuation of the existence of the domesticating non-United States entity in the form of a domestic limited liability company. Unless otherwise agreed, for all purposes of the laws of the State of Delaware, the domesticating non-United States entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the domestication shall not be deemed to constitute a dissolution of such non-United States entity. If, following domestication, a non-United States entity that has become domesticated as a limited liability company continues its existence in the foreign country or other foreign jurisdiction in which it was existing immediately prior to domestication, the limited liability company and such non-United States entity shall, for all purposes of the laws of the State of Delaware, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing

under the laws of the State of Delaware and the laws of such foreign country or other foreign jurisdiction.

(j) In connection with a domestication hereunder, rights or securities of, or interests in, the non-United States entity that is to be domesticated as a domestic limited liability company may be exchanged for or converted into cash, property, rights or securities of, or interests in, such domestic limited liability company or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another domestic limited liability company or other entity, may remain outstanding or may be cancelled. (Last amended by Ch. 89, L. '17, eff. 8-1-17.)

§18-213 TRANSFER OR CONTINUANCE OF DOMESTIC LIMITED LIABILITY COMPANIES

(a) Upon compliance with this section, any limited liability company may transfer to or domesticate or continue in any jurisdiction, other than any state, and, in connection therewith, may elect to continue its existence as a limited liability company in the State of Delaware.

(b) If the limited liability company agreement specifies the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section, the transfer or domestication or continuance shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section and does not prohibit such a transfer or domestication or continuance, the transfer or domestication or continuance shall be authorized in the same manner as is specified in the limited liability company agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the limited liability company agreement does not specify the manner of authorizing a transfer or domestication or continuance described in subsection (a) of this section or a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit such a transfer or domestication or continuance, the transfer or domestication or continuance shall be authorized by the approval by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members. If a

transfer or domestication or continuance described in subsection (a) of this section shall be authorized as provided in this subsection (b), a certificate of transfer if the limited liability company's existence as a limited liability company of the State of Delaware is to cease, or a certificate of transfer and domestic continuance if the limited liability company's existence as a limited liability company in the State of Delaware is to continue, executed in accordance with §18-204 of this title, shall be filed in the office of the Secretary of State in accordance with 18-206 of this title. The certificate of transfer or the certificate of transfer and domestic continuance shall state:

(1) The name of the limited liability company and, if it has been changed, the name under which its certificate of formation was originally filed;

(2) The date of the filing of its original certificate of formation with the Secretary of State;

(3) The jurisdiction to which the limited liability company shall be transferred or in which it shall be domesticated or continued and the name of the entity or business form formed, incorporated, created or that otherwise comes into being as a consequence of the transfer of the limited liability company to, or its domestication or continuance in, such foreign jurisdiction;

(4) The future effective date or time (which shall be a date or time certain) of the transfer to or domestication or continuance in the jurisdiction specified in paragraph (b)(3) of this section if it is not to be effective upon the filing of the certificate of transfer or the certificate of transfer and domestic continuance;

(5) That the transfer or domestication or continuance of the limited liability company has been approved in accordance with this section;

(6) In the case of a certificate of transfer, (i) that the existence of the limited liability company as a limited liability company of the State of Delaware shall cease when the certificate of transfer becomes effective, and (ii) the agreement of the limited liability company that it may be served with process in the State of Delaware in any action, suit or proceeding for enforcement of any obligation of the limited liability company arising while it was a limited liability company of the State of Delaware, and that it irrevocably appoints the Secretary of State as its agent to accept service of process in any such action, suit or proceeding;

(7) The address (which may not be that of the limited liability company's registered agent without the written consent of the limited liability company's registered agent, such consent to be filed with the

certificate of transfer) to which a copy of the process referred to in paragraph (b)(6) of this section shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State under paragraph (b)(6) of this section by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of service hereunder upon the Secretary of State, the procedures set forth in §18-911(c) of this title shall be applicable, except that the plaintiff in any such action, suit or proceeding shall furnish the Secretary of State with the address specified in this subsection and any other address that the plaintiff may elect to furnish, together with copies of such process as required by the Secretary of State, and the Secretary of State shall notify the limited liability company that has transferred or domesticated or continued out of the State of Delaware at all such addresses furnished by the plaintiff in accordance with the procedures set forth in §18-911(c) of this title; and

(8) In the case of a certificate of transfer and domestic continuance, that the limited liability company will continue to exist as a limited liability company of the State of Delaware after the certificate of transfer and domestic continuance becomes effective.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the third sentence of this subsection as in effect on July 31, 2015.

(c) Upon the filing in the office of the Secretary of State of the certificate of transfer or upon the future effective date or time of the certificate of transfer and payment to the Secretary of State of all fees prescribed in this chapter, the Secretary of State shall certify that the limited liability company has filed all documents and paid all fees required by this chapter, and thereupon the limited liability company shall cease to exist as a limited liability company of the State of Delaware. Such certificate of the Secretary of State shall be prima facie evidence of the transfer or domestication or continuance by such limited liability company out of the State of Delaware.

(d) The transfer or domestication or continuance of a limited liability company out of the State of Delaware in accordance with this section and the resulting cessation of its existence as a limited liability company of the State of Delaware pursuant to a certificate of transfer shall not be

deemed to affect any obligations or liabilities of the limited liability company incurred prior to such transfer or domestication or continuance or the personal liability of any person incurred prior to such transfer or domestication or continuance, nor shall it be deemed to affect the choice of law applicable to the limited liability company with respect to matters arising prior to such transfer or domestication or continuance. Unless otherwise agreed, the transfer or domestication or continuance of a limited liability company out of the State of Delaware in accordance with this section shall not require such limited liability company to wind up its affairs under Sec. 18-803 of this title or pay its liabilities and distribute its assets under Sec. 18-804 of this title and shall not be deemed to constitute a dissolution of such limited liability company.

(e) If a limited liability company files a certificate of transfer and domestic continuance, after the time the certificate of transfer and domestic continuance becomes effective, the limited liability company shall continue to exist as a limited liability company of the State of Delaware, and the laws of the State of Delaware, including this chapter, shall apply to the limited liability company to the same extent as prior to such time. So long as a limited liability company continues to exist as a limited liability company of the State of Delaware following the filing of a certificate of transfer and domestic continuance, the continuing domestic limited liability company and the entity or business form formed, incorporated, created or that otherwise came into being as a consequence of the transfer of the limited liability company to, or its domestication or continuance in, a foreign country or other foreign jurisdiction shall, for all purposes of the laws of the State of Delaware, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State and the laws of such foreign country or other foreign jurisdiction.

(f) In connection with a transfer or domestication or continuance of a domestic limited liability company to or in another jurisdiction pursuant to subsection (a) of this section, rights or securities of, or interests in, such limited liability company may be exchanged for or converted into cash, property, rights or securities of, or interests in, the entity or business form in which the limited liability company will exist in such other jurisdiction as a consequence of the transfer or domestication or continuance or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another entity or business form, may remain outstanding or may be cancelled.

(g) When a limited liability company has transferred or domesticated or continued out of the State of Delaware pursuant to this section, the transferred or domesticated or continued entity or business form shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the limited liability company and shall constitute a continuation of the existence of such limited liability company in the form of the transferred or domesticated or continued entity or business form. When any transfer or domestication or continuance of a limited liability company out of the State of Delaware shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the limited liability company that has transferred or domesticated or continued, and all property, real, personal and mixed, and all debts due to such limited liability company, as well as all other things and causes of action belonging to such limited liability company, shall remain vested in the transferred or domesticated or continued entity or business form (and also in the limited liability company that has transferred, domesticated or continued, if and for so long as such limited liability company continues its existence as a domestic limited liability company) and shall be the property of such transferred or domesticated or continued entity or business form (and also of the limited liability company that has transferred, domesticated or continued, if and for so long as such limited liability company continues its existence as a domestic limited liability company), and the title to any real property vested by deed or otherwise in such limited liability company shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such limited liability company shall be preserved unimpaired, and all debts, liabilities and duties of the limited liability company that has transferred or domesticated or continued shall remain attached to the transferred or domesticated or continued entity or business form (and also to the limited liability company that has transferred, domesticated or continued, if and for so long as such limited liability company continues its existence as a domestic limited liability company), and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as the transferred or domesticated or continued entity or business form. The rights, privileges, powers and interests in property of the limited liability company that has transferred or domesticated or continued, as well as the debts, liabilities and duties of such limited liability company, shall not be deemed, as a consequence of the transfer

or domestication or continuance out of the State of Delaware, to have been transferred to the transferred or domesticated or continued entity or business form for any purpose of the laws of the State of Delaware.

(h) A limited liability company agreement may provide that a domestic limited liability company shall not have the power to transfer, domesticate or continue as set forth in this section. (Last amended by Ch. 45, L. '15, eff. 8-1-15.)

§18-214 CONVERSION OF CERTAIN ENTITIES TO A LIMITED LIABILITY COMPANY

(a) As used in this section and in Sec. 18-204, the term "other entity" means a corporation, a statutory trust, a business trust, an association, a real estate investment trust, a common-law trust or any other incorporated or unincorporated business or entity, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or a foreign limited liability company.

(b) Any other entity may convert to a domestic limited liability company by complying with subsection (h) of this section and filing in the office of the Secretary of State in accordance with Sec. 18-206 of this title:

(1) A certificate of conversion to limited liability company that has been executed in accordance with Sec. 18-204 of this title; and

(2) A certificate of formation that complies with Sec. 18-201 of this title and has been executed by 1 or more authorized persons in accordance with Sec. 18-204 of this title.

Each of the certificates required by this subsection (b) shall be filed simultaneously in the office of the Secretary of State and, if such certificates are not to become effective upon their filing as permitted by §18-206(b) of this title, then each such certificate shall provide for the same effective date or time in accordance with §18-206(b) of this title.

(c) The certificate of conversion to limited liability company shall state:

(1) The date on which and jurisdiction where the other entity was first created, incorporated, formed or otherwise came into being and, if it has changed, its jurisdiction immediately prior to its conversion to a domestic limited liability company;

(2) The name and type of entity of the other entity immediately prior to the filing of the certificate of conversion to limited liability company;

(3) The name of the limited liability company as set forth in its certificate of formation filed in accordance with subsection (b) of this section; and

(4) The future effective date or time (which shall be a date or time certain) of the conversion to a limited liability company if it is not to be effective upon the filing of the certificate of conversion to limited liability company and the certificate of formation.

(d) Upon the filing in the office of the Secretary of State of the certificate of conversion to limited liability company and the certificate of formation or upon the future effective date or time of the certificate of conversion to limited liability company and the certificate of formation, the other entity shall be converted into a domestic limited liability company and the limited liability company shall thereafter be subject to all of the provisions of this title, except that notwithstanding Sec. 18-201 of this title, the existence of the limited liability company shall be deemed to have commenced on the date the other entity commenced its existence in the jurisdiction in which the other entity was first created, formed, incorporated or otherwise came into being.

(e) The conversion of any other entity into a domestic limited liability company shall not be deemed to affect any obligations or liabilities of the other entity incurred prior to its conversion to a domestic limited liability company or the personal liability of any person incurred prior to such conversion.

(f) When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the other entity that has converted, and all property, real, personal and mixed, and all debts due to such other entity, as well as all other things and causes of action belonging to such other entity, shall remain vested in the domestic limited liability company to which such other entity has converted and shall be the property of such domestic limited liability company, and the title to any real property vested by deed or otherwise in such other entity shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such other entity shall be preserved unimpaired, and all debts, liabilities and duties of the other entity that has converted shall remain attached to the domestic limited liability company to which such other entity has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties

had originally been incurred or contracted by it in its capacity as a domestic limited liability company. The rights, privileges, powers and interests in property of the other entity, as well as the debts, liabilities and duties of the other entity, shall not be deemed, as a consequence of the conversion, to have been transferred to the domestic limited liability company to which such other entity has converted for any purpose of the laws of the State of Delaware.

(g) Unless otherwise agreed, for all purposes of the laws of the State of Delaware, the converting other entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not be deemed to constitute a dissolution of such other entity. When an other entity has been converted to a limited liability company pursuant to this section, for all purposes of the laws of the State of Delaware, the limited liability company shall be deemed to be the same entity as the converting other entity and the conversion shall constitute a continuation of the existence of the converting other entity in the form of a domestic limited liability company.

(h) Prior to filing a certificate of conversion to limited liability company with the office of the Secretary of State, the conversion shall be approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the other entity and the conduct of its business or by applicable law, as appropriate and a limited liability company agreement shall be approved by the same authorization required to approve the conversion.

(i) In connection with a conversion hereunder, rights or securities of or interests in the other entity which is to be converted to a domestic limited liability company may be exchanged for or converted into cash, property, or rights or securities of or interests in such domestic limited liability company or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, or rights or securities of or interests in another domestic limited liability company or other entity, may remain outstanding or may be cancelled.

(j) The provisions of this section shall not be construed to limit the accomplishment of a change in the law governing, or the domicile of, an other entity to the State of Delaware by any other means provided for in a limited liability company agreement or other agreement or as otherwise permitted by law, including by the amendment of a limited liability company agreement or other agreement. (Last amended by Ch. 89, L. ‘17, eff. 8-1-17.)

§18-215 SERIES OF MEMBERS, MANAGERS OR LIMITED LIABILITY COMPANY INTERESTS OR ASSETS

(a) A limited liability company agreement may establish or provide for the establishment of 1 or more designated series of members, managers, limited liability company interests or assets. Any such series may have separate rights, powers or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations, and any such series may have a separate business purpose or investment objective. No provision of subsection (b) of this section or §18-218 of this title shall be construed to limit the application of the principle of freedom of contract to a series that is not a protected series or a registered series. Other than pursuant to §§18-219, 18-220 and 18-221, a series may not merge, convert or consolidate pursuant to any section of this title or any other statute of this State.

(b) A series established in accordance with the following sentence is a protected series. Notwithstanding anything to the contrary set forth in this chapter or under other applicable law, in the event that a limited liability company agreement establishes or provides for the establishment of 1 or more series, and to the extent the records maintained for any such series account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof, and if the limited liability company agreement so provides, and if notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of formation of the limited liability company, then the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to such series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, and, unless otherwise provided in the limited liability company agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series. Neither the preceding sentence nor any provision pursuant thereto in a limited liability company agreement or certificate of formation shall (i) restrict a protected series or limited liability company on behalf of a protected series from agreeing in the limited liability company agreement or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or oth-

erwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such protected series or (ii) restrict a limited liability company from agreeing in the limited liability company agreement or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a protected series shall be enforceable against the assets of the limited liability company generally. Assets associated with a protected series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise. Records maintained for a protected series that reasonably identify its assets, including by specific listing, category, type, quantity, computational or allocational formula or procedure (including a percentage or share of any asset or assets) or by any other method where the identity of such assets is objectively determinable, will be deemed to account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof. Notice in a certificate of formation of the limitation on liabilities of a protected series as referenced in this subsection shall be sufficient for all purposes of this subsection whether or not the limited liability company has established any protected series when such notice is included in the certificate of formation, and there shall be no requirement that any specific protected series of the limited liability company be referenced in such notice. The fact that a certificate of formation that contains the foregoing notice of the limitation on liabilities of a protected series is on file in the office of the Secretary of State shall constitute notice of such limitation on liabilities of a protected series. As used in this chapter, a reference to assets of a protected series includes assets associated with such series, a reference to assets associated with a protected series includes assets of such series, a reference to members or managers of a protected series includes members or managers associated with such series, and a reference to members or managers associated with a protected series includes members or managers of such series. The following shall apply to a protected series:

(1) A protected series may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in §126 of Title 8. Unless otherwise provided in a limited liability company agreement, a protected series shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.

(2) Except as otherwise provided by this chapter, no member or manager of a protected series shall be obligated personally for any debt, obligation or liability of such series, whether arising in contract, tort or otherwise, solely by reason of being a member or acting as manager of such series. Notwithstanding the preceding sentence, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of 1 or more protected series.

(3) A limited liability company agreement may provide for classes or groups of members or managers associated with a protected series having such relative rights, powers and duties as the limited liability company agreement may provide, and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of members or managers associated with such series having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of members or managers associated with such series. A limited liability company agreement may provide for the taking of an action, including the amendment of the limited liability company agreement, without the vote or approval of any member or manager or class or group of members or managers, including an action to create under the provisions of the limited liability company agreement a class or group of a protected series of limited liability company interests that was not previously outstanding. A limited liability company agreement may provide that any member or class or group of members associated with a protected series shall have no voting rights.

(4) A limited liability company agreement may grant to all or certain identified members or managers or a specified class or group of the members or managers associated with a protected series the right to vote separately or with all or any class or group of the members or managers associated with such series, on any matter. Voting by members or managers associated with a protected series may be on a per capita, number, financial interest, class, group or any other basis.

(5) Unless otherwise provided in a limited liability company agreement, the management of a protected series shall be vested in the members associated with such series in proportion to the then current percentage or other interest of members in the profits of such series owned by all of the members associated with such series, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling; provided, however, that if a limited lia-

bility company agreement provides for the management of a protected series, in whole or in part, by a manager, the management of such series, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement. The manager of a protected series shall also hold the offices and have the responsibilities accorded to the manager as set forth in a limited liability company agreement. A protected series may have more than 1 manager. Subject to §18-602 of this title, a manager shall cease to be a manager with respect to a protected series as provided in a limited liability company agreement. Except as otherwise provided in a limited liability company agreement, any event under this chapter or in a limited liability company agreement that causes a manager to cease to be a manager with respect to a protected series shall not, in itself, cause such manager to cease to be a manager of the limited liability company or with respect to any other series thereof.

(6) Notwithstanding §18-606 of this title, but subject to subsections (b)(7) and (b)(10) of this section, and unless otherwise provided in a limited liability company agreement, at the time a member of a protected series becomes entitled to receive a distribution with respect to such series, the member has the status of, and is entitled to all remedies available to, a creditor of such series, with respect to the distribution. A limited liability company agreement may provide for the establishment of a record date with respect to allocations and distributions with respect to a protected series.

(7) Notwithstanding §18-607(a) of this title, a limited liability company may make a distribution with respect to a protected series. A limited liability company shall not make a distribution with respect to a protected series to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of such series, other than liabilities to members on account of their limited liability company interests with respect to such series and liabilities for which the recourse of creditors is limited to specified property of such series, exceed the fair value of the assets associated with such series, except that the fair value of property of such series that is subject to a liability for which the recourse of creditors is limited shall be included in the assets associated with such series only to the extent that the fair value of that property exceeds that liability. For purposes of the immediately preceding sentence, the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan

or other benefits program. A member who receives a distribution in violation of this paragraph (b)(7), and who knew at the time of the distribution that the distribution violated this paragraph (b)(7), shall be liable to the protected series for the amount of the distribution. A member who receives a distribution in violation of this paragraph (b)(7), and who did not know at the time of the distribution that the distribution violated this paragraph (b)(7), shall not be liable for the amount of the distribution. Subject to §18-607(c) of this title, which shall apply to any distribution made with respect to a protected series under this paragraph (b)(7), this paragraph (b)(7) shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

(8) Unless otherwise provided in the limited liability company agreement, a member shall cease to be associated with a protected series and to have the power to exercise any rights or powers of a member with respect to such series upon the assignment of all of the member's limited liability company interest with respect to such series. Except as otherwise provided in a limited liability company agreement, any event under this chapter or a limited liability company agreement that causes a member to cease to be associated with a protected series shall not, in itself, cause such member to cease to be associated with any other series or terminate the continued membership of a member in the limited liability company or cause the termination of the protected series, regardless of whether such member was the last remaining member associated with such series.

(9) Subject to §18-801 of this title, except to the extent otherwise provided in the limited liability company agreement, a protected series may be terminated and its affairs wound up without causing the dissolution of the limited liability company. The termination of a protected series shall not affect the limitation on liabilities of such series provided by this subsection (b). A protected series is terminated and its affairs shall be wound up upon the dissolution of the limited liability company under §18-801 of this title or otherwise upon the first to occur of the following:

a. At the time specified in the limited liability company agreement;

b. Upon the happening of events specified in the limited liability company agreement;

c. Unless otherwise provided in the limited liability company agreement, upon the vote or consent of members associated with such series who own more than 2/3 of the then-current percentage or other interest in the profits of such series of the limited liability company owned by all of the members associated with such series; or

d. The termination of such series under subsection (b)(11) of this section.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by paragraph (k)(3) of this section as in effect on July 31, 2015 (except that "affirmative" and "written" shall be deleted from such paragraph (k)(3) of this section).

(10) Notwithstanding §18-803(a) of this title, unless otherwise provided in the limited liability company agreement, a manager associated with a protected series who has not wrongfully terminated such series or, if none, the members associated with such series or a person approved by the members associated with such series, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of such series owned by all of the members associated with such series, may wind up the affairs of such series; but the Court of Chancery, upon cause shown, may wind up the affairs of a protected series upon application of any member or manager associated with such series, or the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee. The persons winding up the affairs of a protected series may, in the name of the limited liability company and for and on behalf of the limited liability company and such series, take all actions with respect to such series as are permitted under §18-803(b) of this title. The persons winding up the affairs of a protected series shall provide for the claims and obligations of such series and distribute the assets of such series as provided in §18-804 of this title, which section shall apply to the winding up and distribution of assets of a protected series. Actions taken in accordance with this paragraph (b)(10) shall not affect the liability of members and shall not impose liability on a liquidating trustee. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the first sentence of this paragraph (b)(10) as in effect on July 31, 2015.

(11) On application by or for a member or manager associated with a protected series, the Court of Chancery may decree termination of such series whenever it is not reasonably practicable to carry on the business of such series in conformity with a limited liability company agreement.

(12) For all purposes of the laws of the State of Delaware, a protected series is an association, regardless of the number of members or managers, if any, of such series.

(c) A series established in accordance with subsection (b) of this section may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in Sec. 126 of Title 8. Unless otherwise provided in a limited liability company agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.

(d) Notwithstanding Sec. 18-303(a) of this title, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of one or more series.

(e) A limited liability company agreement may provide for classes or groups of members or managers associated with a series having such relative rights, powers and duties as the limited liability company agreement may provide, and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of members or managers associated with the series having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of members or managers associated with the series. A limited liability company agreement may provide for the taking of an action, including the amendment of the limited liability company agreement, without the vote or approval of any member or manager or class or group of members or managers, including an action to create under the provisions of the limited liability company agreement a class or group of the series of limited liability company interests that was not previously outstanding. A limited liability company agreement may provide that any member or class or group of members associated with a series shall have no voting rights.

(f) A limited liability company agreement may grant to all or certain identified members or managers or a specified class or group of the members or managers associated with a series the right to vote separately or with all or any class or group of the members or managers associated with the series, on any matter. Voting by members or managers associated with a series may be on a per capita, number, financial interest, class, group or any other basis.

(g) Unless otherwise provided in a limited liability company agreement, the management of a series shall be vested in the members associated with such series in proportion to the then current percentage or other interest of members in the profits of the series owned by all of the members associated with such series, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling; provided, however, that if a limited liability company agreement provides for the management of the series, in whole or in part, by a manager, the management of the series, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement. The manager of the series shall also hold the offices and have the responsibilities accorded to the manager as set forth in a limited liability company agreement. A series may have more than 1 manager. Subject to Sec. 18-602 of this title, a manager shall cease to be a manager with respect to a series as provided in a limited liability company agreement. Except as otherwise provided in a limited liability company agreement, any event under this chapter or in a limited liability company agreement that causes a manager to cease to be a manager with respect to a series shall not, in itself, cause such manager to cease to be a manager of the limited liability company or with respect to any other series thereof.

(h) Notwithstanding Sec. 18-606 of this title, but subject to subsections (i) and (l) of this section, and unless otherwise provided in a limited liability company agreement, at the time a member associated with a series that has been established in accordance with subsection (b) of this section becomes entitled to receive a distribution with respect to such series, the member has the status of, and is entitled to all remedies available to, a creditor of the series, with respect to the distribution. A limited liability company agreement may provide for the establishment of a record date with respect to allocations and distributions with respect to a series.

(i) Notwithstanding Sec. 18-607(a) of this title, a limited liability company may make a distribution with respect to a series that has been established in accordance with subsection (b) of this section. A limited liability company shall not make a distribution with respect to a series that has been established in accordance with subsection (b) of this section to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of such series, other than liabilities to members on account of their limited liability company interests with respect to such series and liabilities for which the recourse

of creditors is limited to specified property of such series, exceed the fair value of the assets associated with such series, except that the fair value of property of the series that is subject to a liability for which the recourse of creditors is limited shall be included in the assets associated with such series only to the extent that the fair value of that property exceeds that liability. For purposes of the immediately preceding sentence, the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program. A member who receives a distribution in violation of this subsection, and who knew at the time of the distribution that the distribution violated this subsection, shall be liable to a series for the amount of the distribution. A member who receives a distribution in violation of this subsection, and who did not know at the time of the distribution that the distribution violated this subsection, shall not be liable for the amount of the distribution. Subject to Sec. 18-607(c) of this title, which shall apply to any distribution made with respect to a series under this subsection, this subsection shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

(j) Unless otherwise provided in the limited liability company agreement, a member shall cease to be associated with a series and to have the power to exercise any rights or powers of a member with respect to such series upon the assignment of all of the member's limited liability company interest with respect to such series. Except as otherwise provided in a limited liability company agreement, any event under this chapter or a limited liability company agreement that causes a member to cease to be associated with a series shall not, in itself, cause such member to cease to be associated with any other series or terminate the continued membership of a member in the limited liability company or cause the termination of the series, regardless of whether such member was the last remaining member associated with such series.

(k) Subject to §18-801 of this title, except to the extent otherwise provided in the limited liability company agreement, a series may be terminated and its affairs wound up without causing the dissolution of the limited liability company. The termination of a series established in accordance with subsection (b) of this section shall not affect the limitation on liabilities of such series provided by subsection (b) of this section. A series is terminated and its affairs shall be wound up upon the

dissolution of the limited liability company under §18-801 of this title or otherwise upon the first to occur of the following:

(1) At the time specified in the limited liability company agreement;

(2) Upon the happening of events specified in the limited liability company agreement;

(3) Unless otherwise provided in the limited liability company agreement, upon the vote or consent of members associated with such series who own more than 2/3 of the then-current percentage or other interest in the profits of the series of the limited liability company owned by all of the members associated with such series; or

(4) The termination of such series under subsection (m) of this section.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by paragraph (k)(3) of this section as in effect on July 31, 2015 (except that "affirmative" and "written" shall be deleted from such paragraph (k)(3) of this section).

(l) Notwithstanding §18-803(a) of this title, unless otherwise provided in the limited liability company agreement, a manager associated with a series who has not wrongfully terminated the series or, if none, the members associated with the series or a person approved by the members associated with the series, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the series owned by all of the members associated with the series, may wind up the affairs of the series; but, if the series has been established in accordance with subsection (b) of this section, the Court of Chancery, upon cause shown, may wind up the affairs of the series upon application of any member or manager associated with the series, or the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee. The persons winding up the affairs of a series may, in the name of the limited liability company and for and on behalf of the limited liability company and such series, take all actions with respect to the series as are permitted under 18-803(b) of this title. The persons winding up the affairs of a series shall provide for the claims and obligations of the series and distribute the assets of the series as provided in 18-804 of this title, which section shall apply to the winding up and distribution of assets of a series. Actions taken in accordance with this subsection shall not affect the liability of members and shall not impose liability on a

liquidating trustee. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the first sentence of this subsection as in effect on July 31, 2015.

(m) On application by or for a member or manager associated with a series established in accordance with subsection (b) of this section, the Court of Chancery may decree termination of such series whenever it is not reasonably practicable to carry on the business of the series in conformity with a limited liability company agreement.

(n) If a foreign limited liability company that is registering to do business in the State of Delaware in accordance with Sec. 18-902 of this title is governed by a limited liability company agreement that establishes or provides for the establishment of designated series of members, managers, limited liability company interests or assets having separate rights, powers or duties with respect to specified property or obligations of the foreign limited liability company or profits and losses associated with specified property or obligations, that fact shall be so stated on the application for registration as a foreign limited liability company. In addition, the foreign limited liability company shall state on such application whether the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series, if any, shall be enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally or any other series thereof, and whether any of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the foreign limited liability company generally or any other series thereof shall be enforceable against the assets of such series. (Last amended by Ch. 345, L. ‘18, eff. 8-1-19 and Ch. 48, L. ‘19, eff. 8-1-19.)

§18-216 APPROVAL OF CONVERSION OF A LIMITED LIABILITY COMPANY

(a) Upon compliance with this section, a domestic limited liability company may convert to a corporation, a statutory trust, a business trust, an association, a real estate investment trust, a common-law trust or any other incorporated or unincorporated business or entity, including a partnership (whether general (including a limited liability partner-

ship) or limited (including a limited liability limited partnership)) or a foreign limited liability company.

(b) If the limited liability company agreement specifies the manner of authorizing a conversion of the limited liability company, the conversion shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company and does not prohibit a conversion of the limited liability company, the conversion shall be authorized in the same manner as is specified in the limited liability company agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company or a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit a conversion of the limited liability company, the conversion shall be authorized by the approval by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by the third sentence of this subsection as in effect on July 31, 2015.

(c) Unless otherwise agreed, the conversion of a domestic limited liability company to another entity or business form pursuant to this section shall not require such limited liability company to wind up its affairs under Sec. 18-803 of this title or pay its liabilities and distribute its assets under Sec. 18-804 of this title, and the conversion shall not constitute a dissolution of such limited liability company. When a limited liability company has converted to another entity or business form pursuant to this section, for all purposes of the laws of the State of Delaware, the other entity or business form shall be deemed to be the same entity as the converting limited liability company and the conversion shall constitute a continuation of the existence of the limited liability company in the form of such other entity or business form.

(d) In connection with a conversion of a domestic limited liability company to another entity or business form pursuant to this section, rights or securities of or interests in the domestic limited liability company which is to be converted may be exchanged for or converted into

cash, property, rights or securities of or interests in the entity or business form into which the domestic limited liability company is being converted or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of or interests in another entity or business form, may remain outstanding or may be cancelled.

(e) If a limited liability company shall convert in accordance with this section to another entity or business form organized, formed or created under the laws of a jurisdiction other than the State of Delaware, a certificate of conversion to non-Delaware entity executed in accordance with Sec. 18-204 of this title, shall be filed in the office of the Secretary of State in accordance with Sec. 18-206 of this title. The certificate of conversion to non-Delaware entity shall state:

(1) The name of the limited liability company and, if it has been changed, the name under which its certificate of formation was originally filed;

(2) The date of filing of its original certificate of formation with the Secretary of State;

(3) The jurisdiction in which the entity or business form, to which the limited liability company shall be converted, is organized, formed or created, and the name of such entity or business form;

(4) The future effective date or time (which shall be a date or time certain) of the conversion if it is not to be effective upon the filing of the certificate of conversion to non-Delaware entity;

(5) That the conversion has been approved in accordance with this section;

(6) The agreement of the limited liability company that it may be served with process in the State of Delaware in any action, suit or proceeding for enforcement of any obligation of the limited liability company arising while it was a limited liability company of the State of Delaware, and that it irrevocably appoints the Secretary of State as its agent to accept service of process in any such action, suit or proceeding;

(7) The address to which a copy of the process referred to in paragraph (6) of this subsection shall be mailed to it by the Secretary of State. Process may be served upon the Secretary of State under paragraph (e)(6) of this section by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event of service hereunder upon the Secretary of State, the procedures set forth in §18-911(c) of this title shall be applicable, except that the plaintiff in

any such action, suit or proceeding shall furnish the Secretary of State with the address specified in this subdivision and any other address that the plaintiff may elect to furnish, together with copies of such process as required by the Secretary of State, and the Secretary of State shall notify the limited liability company that has converted out of the State of Delaware at all such addresses furnished by the plaintiff in accordance with the procedures set forth in §18-911(c) of this title.

(f) Upon the filing in the office of the Secretary of State of the certificate of conversion to non-Delaware entity or upon the future effective date or time of the certificate of conversion to non-Delaware entity and payment to the Secretary of State of all fees prescribed in this chapter, the Secretary of State shall certify that the limited liability company has filed all documents and paid all fees required by this chapter, and thereupon the limited liability company shall cease to exist as a limited liability company of the State of Delaware. Such certificate of the Secretary of State shall be prima facie evidence of the conversion by such limited liability company out of the State of Delaware.

(g) The conversion of a limited liability company out of the State of Delaware in accordance with this section and the resulting cessation of its existence as a limited liability company of the State of Delaware pursuant to a certificate of conversion to non-Delaware entity shall not be deemed to affect any obligations or liabilities of the limited liability company incurred prior to such conversion or the personal liability of any person incurred prior to such conversion, nor shall it be deemed to affect the choice of law applicable to the limited liability company with respect to matters arising prior to such conversion.

(h) When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the limited liability company that has converted, and all property, real, personal and mixed, and all debts due to such limited liability company, as well as all other things and causes of action belonging to such limited liability company, shall remain vested in the other entity or business form to which such limited liability company has converted and shall be the property of such other entity or business form, and the title to any real property vested by deed or otherwise in such limited liability company shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such limited liability company shall be preserved unimpaired, and all debts, liabilities and duties of the limited liability company that has converted shall remain attached to the other entity or

business form to which such limited liability company has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as such other entity or business form. The rights, privileges, powers and interests in property of the limited liability company that has converted, as well as the debts, liabilities and duties of such limited liability company, shall not be deemed, as a consequence of the conversion, to have been transferred to the other entity or business form to which such limited liability company has converted for any purpose of the laws of the State of Delaware.

(i) A limited liability company agreement may provide that a domestic limited liability company shall not have the power to convert as set forth in this section. (Last amended by Ch. 89, L. '17, eff. 8-1-17.)

§18-217 DIVISION OF A LIMITED LIABILITY COMPANY

(a) As used in this section and §§18-203, 18-301 and 18-1203:

(1) "Dividing company" means the domestic limited liability company that is effecting a division in the manner provided in this section.

(2) "Division" means the division of a dividing company into 2 or more domestic limited liability companies in accordance with this section.

(3) "Division company" means a surviving company, if any, and each resulting company.

(4) "Division contact" means, in connection with any division, a natural person who is a Delaware resident, any division company in such division or any other domestic limited liability company or other business entity as defined in §18-209 of this title formed or organized under the laws of the State of Delaware, which division contact shall maintain a copy of the plan of division for a period of 6 years from the effective date of the division and shall comply with paragraph (g)(3) of this section.

(5) "Organizational documents" means the certificate of formation and limited liability company agreement of a domestic limited liability company.

(6) "Resulting company" means a domestic limited liability company formed as a consequence of a division.

(7) "Surviving company" means a dividing company that survives the division.

(b) Pursuant to a plan of division, any domestic limited liability company may, in the manner provided in this section, be divided into 2 or more domestic limited liability companies. The division of a domestic limited liability company in accordance with this section and, if applicable, the resulting cessation of the existence of the dividing company pursuant to a certificate of division shall not be deemed to affect the personal liability of any person incurred prior to such division with respect to matters arising prior to such division, nor shall it be deemed to affect the validity or enforceability of any obligations or liabilities of the dividing company incurred prior to such division; provided, that the obligations and liabilities of the dividing company shall be allocated to and vested in, and valid and enforceable obligations of, such division company or companies to which such obligations and liabilities have been allocated pursuant to the plan of division, as provided in subsection (l) of this section. Each resulting company in a division shall be formed in compliance with the requirements of this chapter and subsection (i) of this section.

(c) If the limited liability company agreement of the dividing company specifies the manner of adopting a plan of division, the plan of division shall be adopted as specified in the limited liability company agreement. If the limited liability company agreement of the dividing company does not specify the manner of adopting a plan of division and does not prohibit a division of the limited liability company, the plan of division shall be adopted in the same manner as is specified in the limited liability company agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the limited liability company agreement of the dividing company does not specify the manner of adopting a plan of division or authorizing a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit a division of the limited liability company, the adoption of a plan of division shall be authorized by the approval by members who own more than 50 percent of the then current percentage or other interest in the profits of the dividing company owned by all of the members. Notwithstanding prior approval, a plan of division may be terminated or amended pursuant to a provision for such termination or amendment contained in the plan of division.

(d) Unless otherwise provided in a plan of division, the division of a domestic limited liability company pursuant to this section shall not require such limited liability company to wind up its affairs under §18-803

of this title or pay its liabilities and distribute its assets under §18-804 of this title, and the division shall not constitute a dissolution of such limited liability company.

(e) In connection with a division under this section, rights or securities of, or interests in, the dividing company may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving company or any resulting company or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a domestic limited liability company or any other business entity which is not a division company or may be canceled or remain outstanding (if the dividing company is a surviving company).

(f) A plan of division adopted in accordance with subsection (c) of this section:

(1) May effect any amendment to the limited liability company agreement of the dividing company if it is a surviving company in the division; or

(2) May effect the adoption of a new limited liability company agreement for the dividing company if it is a surviving company in the division; and

(3) Shall effect the adoption of a limited liability company agreement for each resulting company.

(f) Any amendment to a limited liability company agreement or adoption of a new limited liability company agreement for the dividing company, if it is a surviving company in the division, or adoption of a new limited liability company agreement for each resulting company made pursuant to the foregoing sentence shall be effective at the effective time or date of the division. Any amendment to a limited liability company agreement or adoption of a limited liability company agreement for the dividing company, if it is a surviving company in the division, shall be effective notwithstanding any provision in the limited liability company agreement of the dividing company relating to amendment or adoption of a new limited liability company agreement, other than a provision that by its terms applies to an amendment to the limited liability company agreement or the adoption of a new limited liability company agreement, in either case, in connection with a division, merger or consolidation.

(g) If a domestic limited liability company is dividing under this section, the dividing company shall adopt a plan of division which shall set forth:

(1) The terms and conditions of the division, including:

a. Any conversion or exchange of the limited liability company interests of the dividing company into or for limited liability company interests or other securities or obligations of any division company or cash, property or rights or securities or obligations of or interests in any other business entity or domestic limited liability company which is not a division company, or that the limited liability company interests of the dividing company shall remain outstanding or be canceled, or any combination of the foregoing; and

b. The allocation of assets, property, rights, series, debts, liabilities and duties of the dividing company among the division companies;

(2) The name of each resulting company and, if the dividing company will survive the division, the name of the surviving company;

(3) The name and business address of a division contact which shall have custody of a copy of the plan of division. The division contact, or any successor division contact, shall serve for a period of 6 years following the effective date of the division. During such 6 year period the division contact shall provide, without cost, to any creditor of the dividing company, within 30 days following the division contact's receipt of a written request from any creditor of the dividing company, the name and business address of the division company to which the claim of such creditor was allocated pursuant to the plan of division; and

(4) Any other matters that the dividing company determines to include therein.

(h) If a domestic limited liability company divides under this section, the dividing company shall file a certificate of division executed by 1 or more authorized persons on behalf of such dividing company in the office of the Secretary of State in accordance with §18-204 of this title and a certificate of formation that complies with §18-201 of this title for each resulting company executed by one or more authorized persons in accordance with §18-204 of this title. The certificate of division shall state:

(1) The name of the dividing company and, if it has been changed, the name under which its certificate of formation was originally filed and whether the dividing company is a surviving company;

(2) The date of filing of the dividing company's original certificate of formation with the Secretary of State;

(3) The name of each division company;

(4) The name and business address of the division contact required by paragraph (g)(3) of this section;

(5) The future effective date or time (which shall be a date or time certain) of the division if it is not to be effective upon the filing of the certificate of division;

(6) That the division has been approved in accordance with this section;

(7) That the plan of division is on file at a place of business of such division company as is specified therein, and shall state the address thereof; and

(8) That a copy of the plan of division will be furnished by such division company as is specified therein, on request and without cost, to any member of the dividing company.

(i) The certificate of division and each certificate of formation for each resulting company required by subsection (h) of this section shall be filed simultaneously in the office of the Secretary of State and, if such certificates are not to become effective upon their filing as permitted by §18-206(b) of this title, then each such certificate shall provide for the same effective date or time in accordance with §18-206(b) of this title. Concurrently with the effective date or time of a division, the limited liability company agreement of each resulting company shall become effective.

(j) A certificate of division shall act as a certificate of cancellation for a dividing company which is not a surviving company.

(k) A limited liability company agreement may provide that a domestic limited liability company shall not have the power to divide as set forth in this section.

(l) Upon the division of a domestic limited liability company becoming effective:

(1) The dividing company shall be divided into the distinct and independent resulting companies named in the plan of division, and, if the dividing company is not a surviving company, the existence of the dividing company shall cease.

(2) For all purposes of the laws of the State of Delaware, all of the rights, privileges and powers, and all the property, real, personal and mixed, of the dividing company and all debts due on whatever account to it, as well as all other things and other causes of action belonging to it, shall without further action be allocated to and vested in the applicable division company in such a manner and basis and with such effect as is specified in the plan of division, and the title to any real property or interest therein allocated to and vested in any division company shall not revert or be in any way impaired by reason of the division.

(3) Each division company shall, from and after effectiveness of the certificate of division, be liable as a separate and distinct domestic limited liability company for such debts, liabilities and duties of the dividing company as are allocated to such division company pursuant to the plan of division in the manner and on the basis provided in paragraph (g)(1)b. of this section.

(4) Each of the debts, liabilities and duties of the dividing company shall without further action be allocated to and be the debts, liabilities and duties of such division company as is specified in the plan of division as having such debts, liabilities and duties allocated to it, in such a manner and basis and with such effect as is specified in the plan of division, and no other division company shall be liable therefor, so long as the plan of division does not constitute a fraudulent transfer under applicable law, and all liens upon any property of the dividing company shall be preserved unimpaired, and all debts, liabilities and duties of the dividing company shall remain attached to the division company to which such debts, liabilities and duties have been allocated in the plan of division, and may be enforced against such division company to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a domestic limited liability company.

(5) In the event that any allocation of assets, debts, liabilities and duties to division companies in accordance with a plan of division is determined by a court of competent jurisdiction to constitute a fraudulent transfer, each division company shall be jointly and severally liable on account of such fraudulent transfer notwithstanding the allocations made in the plan of division; provided, however, the validity and effectiveness of the division are not otherwise affected thereby.

(6) Debts and liabilities of the dividing company that are not allocated by the plan of division shall be the joint and several debts and liabilities of all of the division companies.

(7) It shall not be necessary for a plan of division to list each individual asset, property, right, series, debt, liability or duty of the dividing company to be allocated to a division company so long as the assets, property, rights, series, debts, liabilities or duties so allocated are reasonably identified by any method where the identity of such assets, property, rights, series, debts, liabilities or duties is objectively determinable.

(8) The rights, privileges, powers and interests in property of the dividing company that have been allocated to a division company, as well as the debts, liabilities and duties of the dividing company that have

been allocated to such division company pursuant to a plan of division, shall remain vested in each such division company and shall not be deemed, as a result of the division, to have been assigned or transferred to such division company for any purpose of the laws of the State of Delaware.

(9) Any action or proceeding pending against a dividing company may be continued against the surviving company as if the division did not occur, but subject to subsection (l)(4) of this section, and against any resulting company to which the asset, property, right, series, debt, liability or duty associated with such action or proceeding was allocated pursuant to the plan of division by adding or substituting such resulting company as a party in the action or proceeding.

(m) In applying the provisions of this chapter on distributions, a direct or indirect allocation of property or liabilities in a division is not deemed a distribution for purposes of this chapter.

(n) The provisions of this section shall not be construed to limit the means of accomplishing a division by any other means provided for in a limited liability company agreement or other agreement or as otherwise permitted by this chapter or as otherwise permitted by law.

(o) All limited liability companies formed on or after August 1, 2018, shall be governed by this section. All limited liability companies formed prior to August 1, 2018, shall be governed by this section; provided, that if the dividing company is a party to any written contract, indenture or other agreement entered into prior to August 1, 2018, that, by its terms, restricts, conditions or prohibits the consummation of a merger or consolidation by the dividing company with or into another party, or the transfer of assets by the dividing company to another party, then such restriction, condition or prohibition shall be deemed to apply to a division as if it were a merger, consolidation or transfer of assets, as applicable. (Last amended by 48, L. '19, eff. 8-1-19.)

§18-218 REGISTERED SERIES OF MEMBERS, MANAGERS, LIMITED LIABILITY COMPANY INTERESTS OR ASSETS

(a) If a limited liability company agreement provides for the establishment or formation of 1 or more series, then a registered series may be formed by complying with this §18-218. A limited liability company agreement does not need to use the term registered when referencing series or refer to this §18-218, and a reference in a limited liability com-

pany agreement for a registered series, including a registered series resulting from the conversion of a protected series to a registered series, may continue to refer to §18-215 of this title, which reference shall be deemed a reference to this §18-218 with respect to such registered series. A registered series is formed by the filing of a certificate of registered series in the office of the Secretary of State.

(b) Notice of the limitation on liabilities of a registered series as referenced in §18-218(c) shall be set forth in the certificate of formation of the limited liability company. Notice in a certificate of formation of the limitation on liabilities of a registered series as referenced in §18-218(c) shall be sufficient for all purposes of this subsection whether or not the limited liability company has formed any registered series when such notice is included in the certificate of formation, and there shall be no requirement that (i) any specific registered series of the limited liability company be referenced in such notice, (ii) such notice use the term registered when referencing series or include a reference to this §18-218, or (iii) the certificate of formation be amended if it includes a reference to §18-215 of this title. Any reference to §18-215 of this title in a certificate of formation of a limited liability company that has one or more registered series shall be deemed a reference to this §18-218 with respect to such registered series. The fact that a certificate of formation that contains the foregoing notice of the limitation on liabilities of a series is on file in the office of the Secretary of State shall constitute notice of such limitation on liabilities of a registered series.

(c) Notwithstanding anything to the contrary set forth in this chapter or under other applicable law, to the extent the records maintained for a registered series account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof, then the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to such series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, and, unless otherwise provided in the limited liability company agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series. Neither the preceding sentences nor any provision pursuant thereto in a limited liability company agreement, certificate of formation or certificate of registered series shall (i) restrict a registered series or limited liability company on behalf

of a registered series from agreeing in the limited liability company agreement or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such registered series or (ii) restrict a limited liability company from agreeing in the limited liability company agreement or otherwise that any or all of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a registered series shall be enforceable against the assets of the limited liability company generally. Assets associated with a registered series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise. Records maintained for a registered series that reasonably identify its assets, including by specific listing, category, type, quantity, computational or allocational formula or procedure (including a percentage or share of any asset or assets) or by any other method where the identity of such assets is objectively determinable, will be deemed to account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof. As used in this chapter, a reference to assets of a registered series includes assets associated with such series, a reference to assets associated with a registered series includes assets of such series, a reference to members or managers of a registered series includes members or managers associated with such series, and a reference to members or managers associated with a registered series includes members or managers of such series. The following shall apply to a registered series:

(1) A registered series may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in §126 of Title 8. Unless otherwise provided in a limited liability company agreement, a registered series shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.

(2) Except as otherwise provided by this chapter, no member or manager of a registered series shall be obligated personally for any debt, obligation or liability of such series, whether arising in contract, tort or otherwise, solely by reason of being a member or acting as manager of such series. Notwithstanding the preceding sentence, under a limited liability company agreement or under another agreement, a

member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of 1 or more registered series.

(3) A limited liability company agreement may provide for classes or groups of members or managers associated with a registered series having such relative rights, powers and duties as the limited liability company agreement may provide, and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of members or managers associated with such series having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of members or managers associated with such series. A limited liability company agreement may provide for the taking of an action, including the amendment of the limited liability company agreement, without the vote or approval of any member or manager or class or group of members or managers, including an action to create under the provisions of the limited liability company agreement a class or group of a registered series of limited liability company interests that was not previously outstanding. A limited liability company agreement may provide that any member or class or group of members associated with a registered series shall have no voting rights.

(4) A limited liability company agreement may grant to all or certain identified members or managers or a specified class or group of the members or managers associated with a registered series the right to vote separately or with all or any class or group of the members or managers associated with such series, on any matter. Voting by members or managers associated with a registered series may be on a per capita, number, financial interest, class, group or any other basis.

(5) Unless otherwise provided in a limited liability company agreement, the management of a registered series shall be vested in the members associated with such series in proportion to the then current percentage or other interest of members in the profits of such series owned by all of the members associated with such series, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling; provided, however, that if a limited liability company agreement provides for the management of a registered series, in whole or in part, by a manager, the management of such series, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement. The manager of a registered series shall also hold the

offices and have the responsibilities accorded to the manager as set forth in a limited liability company agreement. A registered series may have more than 1 manager. Subject to §18-602 of this title, a manager shall cease to be a manager with respect to a registered series as provided in a limited liability company agreement. Except as otherwise provided in a limited liability company agreement, any event under this chapter or in a limited liability company agreement that causes a manager to cease to be a manager with respect to a registered series shall not, in itself, cause such manager to cease to be a manager of the limited liability company or with respect to any other series thereof.

(6) Notwithstanding §18-606 of this title, but subject to subsections (c)(7) and (c)(10) of this section, and unless otherwise provided in a limited liability company agreement, at the time a member of a registered series becomes entitled to receive a distribution with respect to such series, the member has the status of, and is entitled to all remedies available to, a creditor of such series, with respect to the distribution. A limited liability company agreement may provide for the establishment of a record date with respect to allocations and distributions with respect to a registered series.

(7) Notwithstanding §18-607(a) of this title, a limited liability company may make a distribution with respect to a registered series. A limited liability company shall not make a distribution with respect to a registered series to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of such series, other than liabilities to members on account of their limited liability company interests with respect to such series and liabilities for which the recourse of creditors is limited to specified property of such series, exceed the fair value of the assets associated with such series, except that the fair value of property of such series that is subject to a liability for which the recourse of creditors is limited shall be included in the assets associated with such series only to the extent that the fair value of that property exceeds that liability. For purposes of the immediately preceding sentence, the term “distribution” shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program. A member who receives a distribution in violation of this subsection, and who knew at the time of the distribution that the distribution violated this subsection, shall be liable to the registered series for the amount of the distribution. A member who receives a distribution in violation of this

subsection, and who did not know at the time of the distribution that the distribution violated this subsection, shall not be liable for the amount of the distribution. Subject to §18-607(c) of this title, which shall apply to any distribution made with respect to a registered series under this subsection, this subsection shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

(8) Unless otherwise provided in the limited liability company agreement, a member shall cease to be associated with a registered series and to have the power to exercise any rights or powers of a member with respect to such series upon the assignment of all of the member's limited liability company interest with respect to such series. Except as otherwise provided in a limited liability company agreement, any event under this chapter or a limited liability company agreement that causes a member to cease to be associated with a registered series shall not, in itself, cause such member to cease to be associated with any other series or terminate the continued membership of a member in the limited liability company or cause the dissolution of the registered series, regardless of whether such member was the last remaining member associated with such series.

(9) Subject to §18-801 of this title, except to the extent otherwise provided in the limited liability company agreement, a registered series may be dissolved and its affairs wound up without causing the dissolution of the limited liability company. The dissolution of a registered series shall not affect the limitation on liabilities of such series provided by this subsection (c). A registered series is dissolved and its affairs shall be wound up upon the dissolution of the limited liability company under §18-801 of this title or otherwise upon the first to occur of the following:

a. At the time specified in the limited liability company agreement;

b. Upon the happening of events specified in the limited liability company agreement;

c. Unless otherwise provided in the limited liability company agreement, upon the vote or consent of members associated with such series who own more than 2/3 of the then-current percentage or other interest in the profits of such series of the limited liability company owned by all of the members associated with such series; or

d. The dissolution of such series under paragraph (c)(11) of this section.

(10) Notwithstanding §18-803(a) of this title, unless otherwise provided in the limited liability company agreement, a manager associated

with a registered series who has not wrongfully dissolved such series or, if none, the members associated with such series or a person approved by the members associated with such series, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of such series owned by all of the members associated with such series, may wind up the affairs of such series; but the Court of Chancery, upon cause shown, may wind up the affairs of a registered series upon application of any member or manager associated with such series, or the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee. The persons winding up the affairs of a registered series may, in the name of the limited liability company and for and on behalf of the limited liability company and such series, take all actions with respect to such series as are permitted under §18-803(b) of this title. The persons winding up the affairs of a registered series shall provide for the claims and obligations of such series and distribute the assets of such series as provided in §18-804 of this title, which section shall apply to the winding up and distribution of assets of a registered series. Actions taken in accordance with this subsection shall not affect the liability of members and shall not impose liability on a liquidating trustee.

(11) On application by or for a member or manager associated with a registered series, the Court of Chancery may decree dissolution of such series whenever it is not reasonably practicable to carry on the business of such series in conformity with a limited liability company agreement.

(12) For all purposes of the laws of the State of Delaware, a registered series is an association, regardless of the number of members or managers, if any, of such series.

(d) In order to form a registered series of a limited liability company, a certificate of registered series must be filed in accordance with this subsection.

(1) A certificate of registered series:

a. Shall set forth:

(i). The name of the limited liability company; and

(ii). The name of the registered series.

b. May include any other matter that the members of such registered series determine to include therein.

(2) A certificate of registered series shall be executed in accordance with §18-204 of this title and shall be filed in the office of the Secretary of State in accordance with §18-206 of this title. A certificate of registered series shall be effective as of the effective time of such filing un-

less a later effective date or time (which shall be a date or time certain) is provided for in the certificate of registered series. A certificate of registered series is not an amendment to the certificate of formation of the limited liability company. The filing of a certificate of registered series in the office of the Secretary of State shall make it unnecessary to file any other documents under Chapter 31 of this title.

(3) A certificate of registered series is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate of amendment of certificate of registered series shall set forth:

a. The name of the limited liability company;

b. The name of the registered series; and

c. The amendment to the certificate of registered series.

(4) A manager of a registered series or, if there is no manager, then any member of a registered series who becomes aware that any statement in a certificate of registered series filed with respect to such registered series was false when made, or that any matter described therein has changed making the certificate of registered series false in any material respect, shall promptly amend the certificate of registered series.

(5) A certificate of registered series may be amended at any time for any other proper purpose.

(6) Unless otherwise provided in this chapter or unless a later effective date or time (which shall be a date or time certain) is provided for in the certificate of amendment of certificate of registered series, a certificate of amendment of certificate of registered series shall be effective at the time of its filing with the Secretary of State.

(7) A certificate of registered series shall be canceled upon the cancellation of the certificate of formation of the limited liability company named in the certificate of registered series, or upon the filing of a certificate of cancellation of the certificate of registered series or upon the future effective date or time of a certificate of cancellation of the certificate of registered series, or as provided in §18-1108(b) of this title, or upon the filing of a certificate of merger or consolidation of registered series if the registered series is not the surviving or resulting registered series in a merger or consolidation or upon the future effective date or time of a certificate of merger or consolidation of registered series if the registered series is not the surviving or resulting registered series in a merger or consolidation, or upon the filing of a certificate of conversion of registered series to protected series or upon the future effective date or time of a certificate of conversion of registered series to a protected series. A certificate of cancellation of the certificate of registered series

may be filed at any time, and shall be filed, in the office of the Secretary of State to accomplish the cancellation of a certificate of registered series upon the dissolution of a registered series for which a certificate of registered series was filed and completion of the winding up of such registered series. A certificate of cancellation of the certificate of registered series shall set forth:

a. The name of the limited liability company;

b. The name of the registered series;

c. The date of filing of the certificate of registered series;

d. The future effective date or time (which shall be a date or time certain) of cancellation if it is not to be effective upon the filing of the certificate of cancellation; and

e. Any other information the person filing the certificate of cancellation of the certificate of registered series determines.

(8) A certificate of cancellation of the certificate of registered series that is filed in the office of the Secretary of State prior to the dissolution or the completion of winding up of a registered series may be corrected as an erroneously executed certificate of cancellation of the certificate of registered series by filing with the office of the Secretary of State a certificate of correction of such certificate of cancellation of the certificate of registered series in accordance with §18-211 of this title.

(9) The Secretary of State shall not issue a certificate of good standing with respect to a registered series if its certificate of registered series is canceled or the limited liability company has ceased to be in good standing.

(e) The name of each registered series as set forth in its certificate of registered series:

(1) Shall begin with the name of the limited liability company, including any word, abbreviation or designation required by §18-102 of this title;

(2) May contain the name of a member or manager;

(3) Must be such as to distinguish it upon the records in the office of the Secretary of State from the name on such records of any corporation, partnership, limited partnership, statutory trust, limited liability company or registered series reserved, registered, formed or organized under the laws of the State of Delaware or qualified to do business or registered as a foreign corporation, foreign limited partnership, foreign statutory trust, foreign partnership or foreign limited liability company in the State of Delaware; provided, however, that a registered series may register under any name which is not such as to distinguish it upon

the records in the office of the Secretary of State from the name on such records of any domestic or foreign corporation, partnership, limited partnership, statutory trust, registered series or foreign limited liability company reserved, registered, formed or organized under the laws of the State of Delaware with the written consent of the other corporation, partnership, limited partnership, statutory trust, registered series or foreign limited liability company, which written consent shall be filed with the Secretary of State;

(4) May contain the following words: "Company," "Association," "Club," "Foundation," "Fund," "Institute," "Society," "Union," "Syndicate," "Limited," "Public Benefit" or "Trust" (or abbreviations of like import); and

(5) Shall not contain the word "bank," or any variation thereof, except for the name of a bank reporting to and under the supervision of the State Bank Commissioner of this State or a subsidiary of a bank or savings association (as those terms are defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. §1813), or a limited liability company regulated under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §1841 et seq., or the Home Owners' Loan Act, as amended, 12 U.S.C. §1461 et seq.; provided, however, that this section shall not be construed to prevent the use of the word "bank," or any variation thereof, in a context clearly not purporting to refer to a banking business or otherwise likely to mislead the public about the nature of the business of the limited liability company or the registered series, or to lead to a pattern and practice of abuse that might cause harm to the interests of the public or this State as determined by the Division of Corporations in the Department of State. (Last amended by 48, L. '19, eff. 8-1-19.)

§18-219 APPROVAL OF CONVERSION OF A PROTECTED SERIES OF A DOMESTIC LIMITED LIABILITY COMPANY TO A REGISTERED SERIES OF SUCH DOMESTIC LIMITED LIABILITY COMPANY

(a) A protected series of a domestic limited liability company may convert to a registered series of such domestic limited liability company by complying with this section and filing in the office of the Secretary of State in accordance with §18-206 of this title:

(1) A certificate of conversion of protected series to registered series that has been executed in accordance with §18-204 of this title; and

(2) A certificate of registered series that complies with §18-218(d) of this title and has been executed by 1 or more authorized persons in accordance with §18-204 of this title.

Each of the certificates required by this subsection (a) shall be filed simultaneously in the office of the Secretary of State and, if such certificates are not to become effective upon their filing as permitted by §18-206(b) of this title, then each such certificate shall provide for the same effective date or time in accordance with §18-206(b) of this title.

An existing series may not become a registered series other than pursuant to this section.

(b) If the limited liability company agreement specifies the manner of authorizing a conversion of a protected series of such limited liability company to a registered series of such limited liability company, the conversion of a protected series to a registered series shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a conversion of a protected series of such limited liability company to a registered series of such limited liability company and does not prohibit a conversion of a protected series to a registered series, the conversion shall be authorized by members of such protected series who own more than 50 percent of the then current percentage or other interest in the profits of such protected series owned by all of the members of such protected series.

(c) Unless otherwise agreed, the conversion of a protected series of a limited liability company to a registered series of such limited liability company pursuant to this section shall not require such limited liability company or such protected series of such limited liability company to wind up its affairs under §18-803 or §18-215 of this title or pay its liabilities and distribute its assets under §18-804 or §18-215 of this title, and the conversion of a protected series of a limited liability company to a registered series of such limited liability company shall not constitute a dissolution of such limited liability company or a termination of such protected series. When a protected series of a limited liability company has converted to a registered series of such limited liability company pursuant to this section, for all purposes of the laws of the State of Delaware, the registered series shall be deemed to be the same series as the converting protected series and the conversion shall constitute a continuation of the existence of the protected series in the form of such registered series.

(d) In connection with a conversion of a protected series of a limited liability company to a registered series of such limited liability company pursuant to this section, rights or securities of or interests in the protected series which is to be converted may be exchanged for or converted into cash, property, rights or securities of or interests in the registered series into which the protected series is being converted or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of or interests in any other business entity, may remain outstanding or may be canceled.

(e) If a protected series shall convert to a registered series in accordance with this section, a certificate of conversion of protected series to registered series executed in accordance with §18-204 of this title shall be filed in the office of the Secretary of State in accordance with §18-206 of this title. The certificate of conversion of protected series to a registered series shall state:

(1) The name of the limited liability company and, if it has been changed, the name under which its certificate of formation was originally filed;

(2) The name of the protected series and, if it has been changed, the name of the protected series as originally established;

(3) The name of the registered series as set forth in its certificate of registered series filed in accordance with subsection (a) of this section;

(4) The date of filing of the original certificate of formation of the limited liability company with the Secretary of State;

(5) The date on which the protected series was established;

(6) The future effective date or time (which shall be a date or time certain) of the conversion if it is not to be effective upon the filing of the certificate of conversion of protected series to a registered series; and

(7) That the conversion has been approved in accordance with this section.

(f) A copy of the certificate of conversion of protected series to a registered series certified by the Secretary of State shall be prima facie evidence of the conversion by such protected series to a registered series of such limited liability company.

(g) When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the protected series that has converted, and all property, real, personal and mixed, and all debts due to such protected series, as well as all other things and causes of action belonging to such protected series, shall remain vested in the registered series

to which such protected series has converted and shall be the property of such registered series, and the title to any real property vested by deed or otherwise in such protected series shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such protected series shall be preserved unimpaired, and all debts, liabilities and duties of the protected series that has converted shall remain attached to the registered series to which such protected series has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as such registered series. The rights, privileges, powers and interests in property of the protected series that has converted, as well as the debts, liabilities and duties of such protected series, shall not be deemed, as a consequence of the conversion, to have been transferred to the registered series to which such protected series of such limited liability company has converted for any purpose of the laws of the State of Delaware.

(h) A limited liability company agreement may provide that a protected series of a limited liability company shall not have the power to convert to a registered series of such limited liability company as set forth in this section. (Last amended by 48, L. '19, eff. 8-1-19.)

§18-220 APPROVAL OF CONVERSION OF A REGISTERED SERIES OF A DOMESTIC LIMITED LIABILITY COMPANY TO A PROTECTED SERIES OF SUCH DOMESTIC LIMITED LIABILITY COMPANY

(a) Upon compliance with this section, a registered series of a domestic limited liability company may convert to a protected series of such domestic limited liability company. An existing registered series may not become a protected series other than pursuant to this §18-220.

(b) If the limited liability company agreement specifies the manner of authorizing a conversion of a registered series of such limited liability company to a protected series of such limited liability company, the conversion of a registered series to a protected series shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a conversion of a registered series of such limited liability company to a protected series of such limited liability company and does not prohibit a conversion of a registered series to a protected series, the conversion shall be authorized by members of such registered

series who own more than 50 percent of the then current percentage or other interest in the profits of such registered series owned by all of the members of such registered series.

(c) Unless otherwise agreed, the conversion of a registered series of a limited liability company to a protected series of such limited liability company pursuant to this section shall not require such limited liability company or such registered series of such limited liability company to wind up its affairs under §18-803 or §18-218 of this title or pay its liabilities and distribute its assets under §18-804 or §18-218 of this title, and the conversion of a registered series of a limited liability company to a protected series of such limited liability company shall not constitute a dissolution of such limited liability company or of such registered series. When a registered series of a limited liability company has converted to a protected series of such limited liability company pursuant to this section, for all purposes of the laws of the State of Delaware, the protected series shall be deemed to be the same series as the converting registered series and the conversion shall constitute a continuation of the existence of the registered series in the form of such protected series.

(d) In connection with a conversion of a registered series of a limited liability company to protected series of such limited liability company pursuant to this section, rights or securities of or interests in the registered series which is to be converted may be exchanged for or converted into cash, property, rights or securities of or interests in the protected series into which the registered series is being converted or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of or interests in any other business entity, may remain outstanding or may be canceled.

(e) If a registered series shall convert to a protected series in accordance with this section, a certificate of conversion of registered series to protected series executed in accordance with §18-204 of this title shall be filed in the office of the Secretary of State in accordance with §18-206 of this title. The certificate of conversion of registered series to a protected series shall state:

(1) The name of the limited liability company and, if it has been changed, the name under which its certificate of formation was originally filed;

(2) The date of filing of the original certificate of formation of the limited liability company with the Secretary of State;

(3) The name of the registered series and, if it has been changed, the name under which its certificate of registered series was originally filed;

(4) The date of filing of its original certificate of registered series with the Secretary of State;

(5) The future effective date or time (which shall be a date or time certain) of the conversion if it is not to be effective upon the filing of the certificate of conversion of registered series to a protected series; and

(6) That the conversion has been approved in accordance with this section.

(f) Upon the filing in the office of the Secretary of State of the certificate of conversion of registered series to protected series or upon the future effective date or time of the certificate of conversion of registered series to protected series and payment to the Secretary of State of all fees prescribed in this chapter, the Secretary of State shall certify that the registered series has filed all documents and paid all fees required by this chapter. Such certificate of the Secretary of State shall be prima facie evidence of the conversion by such registered series to a protected series of such limited liability company.

(g) When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the registered series that has converted, and all property, real, personal and mixed, and all debts due to such registered series, as well as all other things and causes of action belonging to such registered series, shall remain vested in the protected series to which such registered series has converted and shall be the property of such protected series, and the title to any real property vested by deed or otherwise in such registered series shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such registered series shall be preserved unimpaired, and all debts, liabilities and duties of the registered series that has converted shall remain attached to the protected series to which such registered series has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as such protected series. The rights, privileges, powers and interests in property of the registered series that has converted, as well as the debts, liabilities and duties of such registered series, shall not be deemed, as a consequence of the conversion, to have been transferred to the protected series to which such registered series of such limited liability company has converted for any purpose of the laws of the State of Delaware.

(h) A limited liability company agreement may provide that a registered series of a limited liability company shall not have the power to

convert to a protected series of such limited liability company as set forth in this section. (Last amended by 48, L. '19, eff. 8-1-19.)

§18-221 MERGER AND CONSOLIDATION OF REGISTERED SERIES

(a) Pursuant to an agreement of merger or consolidation, 1 or more registered series may merge or consolidate with or into 1 or more other registered series of the same limited liability company with such registered series as the agreement shall provide being the surviving or resulting registered series. Unless otherwise provided in the limited liability company agreement, an agreement of merger or consolidation shall be approved by each registered series which is to merge or consolidate by members of such registered series who own more than 50 percent of the then current percentage or other interest in the profits of such registered series owned by all of the members of such registered series. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a registered series which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting registered series or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a domestic limited liability company or other business entity which is not the surviving or resulting registered series in the merger or consolidation, may remain outstanding or may be canceled. Notwithstanding prior approval, an agreement of merger or consolidation may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation.

(b) If a registered series is merging or consolidating under this section, the registered series surviving or resulting in or from the merger or consolidation shall file a certificate of merger or consolidation of registered series executed by 1 or more authorized persons on behalf of the registered series when it is the surviving or resulting registered series in the office of the Secretary of State. The certificate of merger or consolidation of registered series shall state:

(1) The name of each registered series which is to merge or consolidate and the name of the limited liability company that formed such registered series;

(2) That an agreement of merger or consolidation has been approved and executed by or on behalf of each registered series which is to merge or consolidate;

(3) The name of the surviving or resulting registered series;

(4) Such amendment, if any, to the certificate of registered series of the registered series that is the surviving registered series to change the name of the surviving registered series, as is desired to be effected by the merger;

(5) The future effective date or time (which shall be a date or time certain) of the merger or consolidation if it is not to be effective upon the filing of the certificate of merger or consolidation of registered series;

(6) That the agreement of merger or consolidation is on file at a place of business of the surviving or resulting registered series or the limited liability company that formed such registered series, and shall state the address thereof; and

(7) That a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting registered series, on request and without cost, to any member of any registered series which is to merge or consolidate.

(c) Unless a future effective date or time is provided in a certificate of merger or consolidation of registered series, a merger or consolidation pursuant to this section shall be effective upon the filing in the office of the Secretary of State of a certificate of merger or consolidation.

(d) A certificate of merger or consolidation of registered series shall act as a certificate of cancellation of the certificate of registered series of the registered series which is not the surviving or resulting registered series in the merger or consolidation. A certificate of merger or consolidation of registered series that sets forth any amendment in accordance with paragraph (b)(4) of this section shall be deemed to be an amendment to the certificate of registered series of the surviving registered series, and no further action shall be required to amend the certificate of registered series of the surviving or resulting registered series under §18-218 of this title with respect to such amendments set forth in such certificate of merger or consolidation. Whenever this section requires the filing of a certificate of merger or consolidation, such requirement shall be deemed satisfied by the filing of an agreement of merger or consolidation containing the information required by this section to be set forth in the certificate of merger or consolidation.

(e) An agreement of merger or consolidation approved in accordance with subsection (a) of this section may effect any amendment to the limited liability company agreement relating solely to the registered series that are constituent parties to the merger or consolidation.

Any amendment to a limited liability company agreement relating solely to the registered series that are constituent parties to the merger or consolidation made pursuant to the foregoing sentence shall be effective at the effective time or date of the merger or consolidation and shall be effective notwithstanding any provision of the limited liability company agreement relating to amendment of the limited liability company agreement, other than a provision that by its terms applies to an amendment to the limited liability company agreement in connection with a merger or consolidation. The provisions of this subsection shall not be construed to limit the accomplishment of a merger or of any of the matters referred to herein by any other means provided for in a limited liability company agreement or other agreement or as otherwise permitted by law, including that the limited liability company agreement relating to any constituent registered series to the merger or consolidation (including a registered series formed for the purpose of consummating a merger or consolidation) shall be the limited liability company agreement of the surviving or resulting registered series.

(f) When any merger or consolidation shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of each of the registered series that have merged or consolidated, and all property, real, personal and mixed, and all debts due to any of said registered series, as well as all other things and causes of action belonging to each of such registered series, shall be vested in the surviving or resulting registered series, and shall thereafter be the property of the surviving or resulting registered series as they were of each of the registered series that have merged or consolidated, and the title to any real property vested by deed or otherwise, under the laws of the State of Delaware, in any of such registered series, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said registered series shall be preserved unimpaired, and all debts, liabilities and duties of each of the said registered series that have merged or consolidated shall thenceforth attach to the surviving or resulting registered series, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. Unless otherwise agreed, a merger or consolidation of a

registered series of a limited liability company, including a registered series which is not the surviving or resulting registered series in the merger or consolidation, shall not require such registered series to wind up its affairs under §18-218 of this title, or pay its liabilities and distribute its assets under §18-218 of this title and the merger or consolidation shall not constitute a dissolution of such registered series.

(g) A limited liability company agreement may provide that a registered series of such limited liability company shall not have the power to merge or consolidate as set forth in this section. (Last amended by 48, L. '19, eff. 8-1-19.)

Subchapter III
MEMBERS

§18-301 ADMISSION OF MEMBERS

(a) In connection with the formation of a limited liability company, a person is admitted as a member of the limited liability company upon the later to occur of:

(1) The formation of the limited liability company; or

(2) The time provided in and upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, when the person's admission is reflected in the records of the limited liability company.

(b) After the formation of a limited liability company, a person is admitted as a member of the limited liability company:

(1) In the case of a person who is not an assignee of a limited liability company interest, including a person acquiring a limited liability company interest directly from the limited liability company and a person to be admitted as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company at the time provided in and upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company;

(2) In the case of an assignee of a limited liability company interest, as provided in Sec. 18-704(a) of this title and at the time provided in and

upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, when any such person's permitted admission is reflected in the records of the limited liability company;

(3) In the case of a person being admitted as a member of a surviving or resulting limited liability company pursuant to a merger or consolidation approved in accordance with Sec. 18-209(b) of this title, as provided in the limited liability company agreement of the surviving or resulting limited liability company or in the agreement of merger or consolidation or plan of merger, and in the event of any inconsistency, the terms of the agreement of merger or consolidation or plan of merger shall control; and in the case of a person being admitted as a member of a limited liability company pursuant to a merger or consolidation in which such limited liability company is not the surviving or resulting limited liability company in the merger or consolidation, as provided in the limited liability company agreement of such limited liability company, or

(4) In the case of a person being admitted as a member of a division company pursuant to a division approved in accordance with §18-217(c) of this title, as provided in the limited liability company agreement of such division company or in the plan of division, and in the event of any inconsistency, the terms of the plan of division shall control; and in the case of a person being admitted as a member of a limited liability company pursuant to a division in which such limited liability company is not a division company in the division, as provided in the limited liability company agreement of such limited liability company.

(c) In connection with the domestication of a non-United States entity (as defined in Sec. 18-212 of this title) as a limited liability company in the State of Delaware in accordance with Sec. 18-212 of this title or the conversion of another entity (as defined in Sec. 18-214 of this title) to a domestic limited liability company in accordance with Sec. 18-214 of this title, a person is admitted as a member of the limited liability company as provided in the limited liability company agreement.

(d) A person may be admitted to a limited liability company as a member of the limited liability company and may receive a limited liability company interest in the limited liability company without making a contribution or being obligated to make a contribution to the limited liability company. Unless otherwise provided in a limited liability company agreement, a person may be admitted to a limited liability company as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company. Unless otherwise

provided in a limited liability company agreement, a person may be admitted as the sole member of a limited liability company without making a contribution or being obligated to make a contribution to the limited liability company or without acquiring a limited liability company interest in the limited liability company.

(e) Unless otherwise provided in a limited liability company agreement or another agreement, a member shall have no preemptive right to subscribe to any additional issue of limited liability company interests or another interest in a limited liability company. (Last amended by Ch. 48, L. '19, eff. 8-1-19.)

Decisions

.1 Member fiduciary duty. — Minority members do not owe fiduciary duties by default. *Beach To Bay Real Estate Center LLC v. Beach To Bay Realtors, Inc.,C.A. No. 10007 (Ch. Ct. 7-10-17).*

§18-302 CLASSES AND VOTING

(a) A limited liability company agreement may provide for classes or groups of members having such relative rights, powers and duties as the limited liability company agreement may provide, and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of members having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of members. A limited liability company agreement may provide for the taking of an action, including the amendment of the limited liability company agreement, without the vote or approval of any member or class or group of members, including an action to create under the provisions of the limited liability company agreement a class or group of limited liability company interests that was not previously outstanding. A limited liability company agreement may provide that any member or class or group of members shall have no voting rights.

(b) A limited liability company agreement may grant to all or certain identified members or a specified class or group of the members the right to vote separately or with all or any class or group of the members

or managers, on any matter. Voting by members may be on a per capita, number, financial interest, class, group or any other basis.

(c) A limited liability company agreement may set forth provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any members, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.

(d) Unless otherwise provided in a limited liability company agreement, meetings of members may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting. Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on, consented to or approved by members, the members may take such action without a meeting, without prior notice and without a vote if consented to or approved, in writing, by electronic transmission or by any other means permitted by law, by members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members entitled to vote thereon were present and voted. Unless otherwise provided in a limited liability company agreement, if a person (whether or not then a member) consenting as a member to any matter provides that such consent will be effective at a future time (including a time determined upon the happening of an event), then such person shall be deemed to have consented as a member at such future time so long as such person is then a member. Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on by members, the members may vote in person or by proxy, and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. Unless otherwise provided in a limited liability company agreement, a consent transmitted by electronic transmission by a member or by a person or persons authorized to act for a member shall be deemed to be written and signed for purposes of this subsection.

(e) If a limited liability company agreement provides for the manner in which it may be amended, including by requiring the approval of a person who is not a party to the limited liability company agreement or the satisfaction of conditions, it may be amended only in that manner or as otherwise permitted by law, including as permitted by §18-209(f)

of this title (provided that the approval of any person may be waived by such person and that any such conditions may be waived by all persons for whose benefit such conditions were intended). Unless otherwise provided in a limited liability company agreement, a supermajority amendment provision shall only apply to provisions of the limited liability company agreement that are expressly included in the limited liability company agreement. As used in this section, "supermajority amendment provision" means any amendment provision set forth in a limited liability company agreement requiring that an amendment to a provision of the limited liability company agreement be adopted by no less than the vote or consent required to take action under such latter provision.

(f) If a limited liability company agreement does not provide for the manner in which it may be amended, the limited liability company agreement may be amended with the approval of all of the members or as otherwise permitted by law, including as permitted by §18-209(f) of this title. This subsection shall only apply to a limited liability company whose original certificate of formation was filed with the Secretary of State on or after January 1, 2012. (Last amended by Ch. 48, L. '19, eff. 8-1-19.)

§18-303 LIABILITY TO THIRD PARTIES

(a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

(b) Notwithstanding the provisions of Sec. 18-303(a) of this chapter, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company. (Last amended by Ch. 260, L. '94, eff. 8-1-94.)

Decisions

.1 Requirement of legal representation. — For a limited liability company to appear or conduct business in a Delaware court, it must be represented by a mem-

ber of the Delaware bar. A member or manager of the limited liability company cannot represent the limited liability company. The court reasoned that a limited liability company more closely resembles a corporation, which requires legal representation, than a partnership, which does not. *Poor v. Fox Hollow Enterprises, No. 93A-09-005 (Super Ct 3-29-94)*.

.2 Piercing the corporate veil. — Defendant members or managers of a limited liability company are not shielded by its corporate veil where liability arises from defendants' participation in acts or events not engaged in solely by reason of being, or acting as, LLC members or managers. *The Pepsi-Cola Bottling Company of Salisbury, Maryland v. Handy, C.A. No. 1973-S (Ch. Ct. 3-15-00)*.

§18-304 EVENTS OF BANKRUPTCY

A person ceases to be a member of a limited liability company upon the happening of any of the following events:

(1) Unless otherwise provided in a limited liability company agreement, or with the consent of all members, a member:

a. Makes an assignment for the benefit of creditors;

b. Files a voluntary petition in bankruptcy;

c. Is adjudged a bankrupt or insolvent, or has entered against the member an order for relief, in any bankruptcy or insolvency proceeding;

d. Files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation;

e. Files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding of this nature;

f. Seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the member or of all or any substantial part of the member's properties; or

(2) Unless otherwise provided in a limited liability company agreement, or with the consent of all members, 120 days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, if the proceeding has not been dismissed, or if within 90 days after the appointment without the member's consent or acquiescence of a trustee, receiver or liquidator of the member or of all or any substantial part of the member's properties, the appointment is not vacated or stayed, or within 90 days

after the expiration of any such stay, the appointment is not vacated. (Last amended by Ch. 271, L. '16, eff. 8-1-16.)

§18-305 ACCESS TO AND CONFIDENTIALITY OF INFORMATION; RECORDS

(a) Each member of a limited liability company, in person or by attorney or other agent, has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at whose expense) as may be set forth in a limited liability company agreement or otherwise established by the manager or, if there is no manager, then by the members, to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company:

(1) True and full information regarding the status of the business and financial condition of the limited liability company;

(2) Promptly after becoming available, a copy of the limited liability company's federal, state and local income tax returns for each year;

(3) A current list of the name and last known business, residence or mailing address of each member and manager;

(4) A copy of any written limited liability company agreement and certificate of formation and all amendments thereto, together with executed copies of any written powers of attorney pursuant to which the limited liability company agreement and any certificate and all amendments thereto have been executed;

(5) True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and which each member has agreed to contribute in the future, and the date on which each became a member; and

(6) Other information regarding the affairs of the limited liability company as is just and reasonable.

(b) Each manager shall have the right to examine all of the information described in subsection (a) of this section for a purpose reasonably related to the position of manager.

(c) The manager of a limited liability company shall have the right to keep confidential from the members, for such period of time as the manager deems reasonable, any information which the manager rea-

sonably believes to be in the nature of trade secrets or other information the disclosure of which the manager in good faith believes is not in the best interest of the limited liability company or could damage the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential.

(d) A limited liability company may maintain its records in other than a written form, including on, by means of, or in the form of any information storage device, method, or 1 or more electronic networks or databases (including 1 or more distributed electronic networks or databases), if such form is capable of conversion into written form within a reasonable time.

(e) Any demand under this section shall be in writing and shall state the purpose of such demand. In every instance where an attorney or other agent shall be the person who seeks the right to obtain the information described in subsection (a) of this section, the demand shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the member.

(f) Any action to enforce any right arising under this section shall be brought in the Court of Chancery. If the limited liability company refuses to permit a member, or attorney or other agent acting for the member, to obtain or a manager to examine the information described in subsection (a) of this section or does not reply to the demand that has been made within 5 business days (or such shorter or longer period of time as is provided for in a limited liability company agreement but not longer than 30 business days) after the demand has been made, the demanding member or manager may apply to the Court of Chancery for an order to compel such disclosure. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought. The Court of Chancery may summarily order the limited liability company to permit the demanding member to obtain or manager to examine the information described in subsection (a) of this section and to make copies or abstracts therefrom, or the Court of Chancery may summarily order the limited liability company to furnish to the demanding member or manager the information described in subsection (a) of this section on the condition that the demanding member or manager first pay to the limited liability company the reasonable cost of obtaining and furnishing such information and on such other conditions as the Court of Chancery deems appropriate. When a demanding member seeks to obtain or a

manager seeks to examine the information described in subsection (a) of this section, the demanding member or manager shall first establish:

(1) That the demanding member or manager has complied with the provisions of this section respecting the form and manner of making demand for obtaining or examining of such information, and

(2) That the information the demanding member or manager seeks is reasonably related to the member's interest as a member or the manager's position as a manager, as the case may be.

The Court of Chancery may, in its discretion, prescribe any limitations or conditions with reference to the obtaining or examining of information, or award such other or further relief as the Court of Chancery may deem just and proper. The Court of Chancery may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within the State of Delaware and kept in the State of Delaware upon such terms and conditions as the order may prescribe.

(g) The rights of a member or manager to obtain information as provided in this section may be restricted in an original limited liability company agreement or in any subsequent amendment approved or adopted by all of the members or in compliance with any applicable requirements of the limited liability company agreement. The provisions of this subsection shall not be construed to limit the ability to impose restrictions on the rights of a member or manager to obtain information by any other means permitted under this chapter.

(h) A limited liability company shall maintain a current record that identifies the name and last known business, residence or mailing address of each member and manager. (Last amended by Ch. 302, L. '14, eff. 8-1-14.)

Decisions

.1 Entitlement to inspection. — A member of an LLC seeking to inspect books and records for the purpose of investigating possible wrongdoing need only show evidence that the wrongdoing may have occurred, and not, as the defendant argued, show that the member's specific interest was adversely affected. The member was also entitled to inspect financial records in order to value its interest where there was a dispute over the number and price of the member's shares. *Somerville Trust v. USV Partners, LLC, 2002 Del. Ch. LEXIS 103 (2002).*

Member of Delaware LLC was entitled to inspect the member list pursuant to a provision of the LLC agreement permitting inspection of books and records, as

member list is considered a record. However, member was not entitled to inspect documents of funds which LLC invested in, as funds were separate entities from LLC. *Arbor Place, L.P. v. Encore Opportunity, L.L.C., 2002 Del. Ch. LEXIS 102 (2002*).

Under the LLC Act, a member who has a proper purpose for inspecting books and records is entitled to inspect those books and records that are necessary for him to fulfill his purpose, regardless of whether they pre-date when he formally acquired member status. *Sanders v. Ohmite Holding, LLC, 17 A.3d 1186 (Del. Ch. 2011).*

LLC's manager was entitled to inspect financial records of the holding company's subsidiaries as he wanted to understand the LLC's cash position so he could discharge his fiduciary duties as a manager. He had a proper purpose and the documents were reasonably related to that purpose. *RED Capital Investment LP v. RED Parent LLC.*, *2016 Del. Ch. LEXIS 25 (2016*).

Member was denied access to the operating agreement and general ledger as there was an insufficient explanation as to why they were needed for the stated purpose of valuing the member's interest and to books and records related to internal affairs as the member failed to present a credible basis to infer mismanagement or misconduct. *Aloha Power Co. v. Regenesis Power, LLC,* 2017 Del. Ch. LEXIS 859

An assignee of a membership interest had no right to inspect books and records where the LLC agreement only authorized members to inspect books and records. *Absalom Absalom Trust v. Saint Gervais LLC, 2019 Del. Ch. LEXIS 239.*

§18-306 REMEDIES FOR BREACH OF LIMITED LIABILITY COMPANY AGREEMENT BY MEMBER

A limited liability company agreement may provide that (1) a member who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement shall be subject to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in the limited liability company agreement, a member shall be subject to specified penalties or specified consequences. Such specified penalties or specified consequences may include and take the form of any penalty or consequence set forth in Section 18-502(c) of this chapter. (Last amended by Ch. 83, L. '01, eff. 8-1-01.)

Decisions

.1 Remedy for breach of transfer restrictions. —Where the transfer restrictions found in the LLC agreement made it clear that the plaintiff member did not intend to have co-members not of its choosing, the remedy for breach of the transfer restrictions would be to remove the defendant as member and leave it with only the

economic interest that an assignee would receive. *Eureka VIII LLC v. Niagara Falls Holdings LLC, 889 A.2d 95 (Del. Ch. 2006), affirmed by Niagara Falls Holdings LLC v. Eureka VIII LLC, No. 413, 2006 (Del. Supr. 2007).*

.2 Penalty Not Specified.—Where LLC agreement provided that each member was to contribute $10,000 but did not include penalty for failure to contribute member failing to contribute was not divested of membership interest. *Grove v. Brown, CA No. 6793 (Del. Ch. 2013).*

Subchapter IV
MANAGERS

§18-401 ADMISSION OF MANAGERS

A person may be named or designated as a manager of the limited liability company as provided in Sec. 18-101(10) of this title. (Last amended by Ch. 260, L. '94, eff. 8-1-94.)

§18-402 MANAGEMENT OF LIMITED LIABILITY COMPANY

Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling; provided however, that if a limited liability company agreement provides for the management, in whole or in part, of a limited liability company by a manager, the management of the limited liability company, to the extent so provided, shall be vested in the manager who shall be chosen in the manner provided in the limited liability company agreement.

The manager shall also hold the offices and have the responsibilities accorded to the manager by or in the manner provided in a limited liability company agreement.

A limited liability company may have more than 1 manager. Unless otherwise provided in a limited liability company agreement, each member and manager has the authority to bind the limited liability company. (Last amended by Ch. 129, L. '99, eff. 8-1-99.)

Decisions

.1 Manager's fiduciary duty of loyalty. — Where 2 of 3 managers acted by consent, without notice to the 3rd manager, to merge the LLC for the purpose of eliminating the 3rd manager's control and where notice was not given because the 3rd manager could have removed the other 2, the 2 managers breached their fiduciary duty of loyalty to the 3rd manager. *VSG, Inc. v. Castiel*, 2000 *Del. Ch. LEXIS 122 (2000).*

Allegations that the managers entered into a merger to profit from a premeditated scheme to squeeze the plaintiff out and seize control of an FCC license held by the LLC, if true, supported a claim for breach of the duty of loyalty. *Kelly v. Blum, LLC, C.A. No. 4516 (Del. Ch. 2010).*

Manager breached fiduciary duties when selling major LLC asset for more than appraised value because manager manipulated the sales process and entire fairness consists of both fair price and fair dealing. *William Penn Partnership v. Saliba, 13 A.3d 749 (Del. Supr. 2011)*.

.2 Fiduciary duties. —Default equitable fiduciary duties exist on the part of a manager to the extent such duties have not been altered or eliminated in the LLC agreement. *Auriga Capital Corp. v. Gatz Properties LLC, 40 A.3d 839 (Del. Ch. 839).*

.3 Removal of Manager. —Where the LLC agreements did not provide the plaintiff manager with a right to pre-removal notice or to be heard, and as it is important not to embrace analogies to other entities or legal structures too broadly, drawing from corporate common law to interpret the for-cause removal provisions in the agreements would be tantamount to rewriting the agreements without the parties' consent. *A&J Capital, Inc. v. Law Office of Krug*, 2018 Del. Ch. LEXIS 235.

.4 Advancement of expenses. —Where the underlying case was about the member's failure to carry out its official duties the member was entitled to advancement. *Freeman Family LLC v. Park Avenue Landing LLC, 2019 Del. Ch. LEXIS 149.*

§18-403 CONTRIBUTIONS BY A MANAGER

A manager of a limited liability company may make contributions to the limited liability company and share in the profits and losses of, and in distributions from, the limited liability company as a member. A person who is both a manager and a member has the rights and powers, and is subject to the restrictions and liabilities, of a manager and, except as provided in a limited liability company agreement, also has the rights and powers, and is subject to the restrictions and liabilities, of a member to the extent of his participation in the limited liability company as a member.

§18-404 CLASSES AND VOTING

(a) A limited liability company agreement may provide for classes or groups of managers having such relative rights, powers and duties as

the limited liability company agreement may provide, and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of managers having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of managers. A limited liability company agreement may provide for the taking of an action, including the amendment of the limited liability company agreement, without the vote or approval of any manager or class or group of managers, including an action to create under the provisions of the limited liability company agreement a class or group of limited liability company interests that was not previously outstanding.

(b) A limited liability company agreement may grant to all or certain identified managers or a specified class or group of the managers the right to vote, separately or with all or any class or group of managers or members, on any matter. Voting by managers may be on a per capita, number, financial interest, class, group or any other basis.

(c) A limited liability company agreement may set forth provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any manager or class or group of managers, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.

(d) Unless otherwise provided in a limited liability company agreement, meetings of managers may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting. Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on, consented to or approved by managers, the managers may take such action without a meeting, without prior notice and without a vote if consented to or approved, in writing, by electronic transmission or by any other means permitted by law, by managers having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all managers entitled to vote thereon were present and voted. Unless otherwise provided in a limited liability company agreement, if a person (whether or not then a manager) consenting as a manager to any matter provides that such consent will be effective at a

future time (including a time determined upon the happening of an event), then such person shall be deemed to have consented as a manager at such future time so long as such person is then a manager. Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on by managers, the managers may vote in person or by proxy, and such proxy may be granted in writing, by means of electronic transmission or as otherwise permitted by applicable law. Unless otherwise provided in a limited liability company agreement, a consent transmitted by electronic transmission by a manager or by a person or persons authorized to act for a manager shall be deemed to be written and signed for purposes of this subsection. (Last amended by Ch. 48, L. '19, eff. 8-1-19.)

Decisions

.1 Required vote. — Where neither the Act nor LLC agreement specifies whether a majority or unanimous vote is required for managers to act, a complete reading of the agreement shows that a majority vote is required where the agreement discusses expansion of the board of managers, specifically states that one of the managers has a right to vote on certain matters, and gives members holding two-thirds of the units the right to dissolve. None of these provisions would make sense unless a majority vote of managers was contemplated. *VSG, Inc. v. Castiel, 2000 Del. Ch. LEXIS 122 (2000).*

.2 Acting upon consent. — Even though LLC agreement permitted managers to act without a meeting upon consent without notifying other managers, such a failure to give notice may still be a breach of fiduciary duty if done to convert the other manager's majority interest into a minority interest and prevent him from using his right to remove managers and thereby prevent the conversion. *VSG, Inc. v. Casteil*, *2000 Del. Ch. LEXIS 122 (2000).*

§18-405 REMEDIES FOR BREACH OF LIMITED LIABILITY COMPANY AGREEMENT BY MANAGER

A limited liability company agreement may provide that (1) a manager who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement shall be subject to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in the limited liability company agreement, a manager shall be subject to specified penalties or specified consequences.

§18-406 RELIANCE ON REPORTS AND INFORMATION BY MEMBER OR MANAGER

A member, manager or liquidating trustee of a limited liability company shall be fully protected in relying in good faith upon the records of the limited liability company and upon information, opinions, reports or statements presented by another manager, member or liquidating trustee, an officer or employee of the limited liability company, or committees of the limited liability company, members or managers, or by any other person as to matters the member, manager or liquidating trustees reasonably believes are within such other person's professional or expert competence, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits or losses of the limited liability company, or the value and amount of assets or reserves or contracts, agreements or other undertakings that would be sufficient to pay claims and obligations of the limited liability company or to make reasonable provision to pay such claims and obligations, or any other facts pertinent to the existence and amount of assets from which distributions to members or creditors might properly be paid. (Last amended by Ch. 51, L. '05, eff. 8-1-05.)

§18-407 DELEGATION OF RIGHTS AND POWERS TO MANAGE

Unless otherwise provided in the limited liability company agreement, a member or manager of a limited liability company has the power and authority to delegate to 1 or more other persons any or all of the member's or manager's, as the case may be, rights, powers and duties to manage and control the business and affairs of the limited liability company. Any such delegation may be to agents, officers and employees of a member or manager or the limited liability company, and by a management agreement or another agreement with, or otherwise to, other persons. Unless otherwise provided in the limited liability company agreement, such delegation by a member or manager shall be irrevocable if it states that it is irrevocable. Unless otherwise provided in the limited liability company agreement, such delegation by a member or manager of a limited liability company shall not cause the member or manager to cease to be a member or manager, as the case may be, of the limited liability company or cause the person to whom any such

rights, powers and duties have been delegated to be a member or manager, as the case may be, of the limited liability company. No other provision of this chapter shall be construed to restrict a member's or manager's power and authority to delegate any or all of its rights, powers and duties to manage and control the business and affairs of the limited liability company. (Last amended by Ch. 89, L. '17, eff. 8-1-17.)

Subchapter V
FINANCE

§18-501 FORM OF CONTRIBUTION

The contribution of a member to a limited liability company may be in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

§18-502 LIABILITY FOR CONTRIBUTION

(a) Except as provided in a limited liability company agreement, a member is obligated to a limited liability company to perform any promise to contribute cash or property or to perform services, even if he is unable to perform because of death, disability or any other reason. If a member does not make the required contribution of property or services, he is obligated at the option of the limited liability company to contribute cash equal to that portion of the agreed value (as stated in the records of the limited liability company) of the contribution that has not been made. The foregoing option shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the limited liability company may have against such member under the limited liability company agreement or applicable law.

(b) Unless otherwise provided in a limited liability company agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all the members. Notwithstanding the compromise, a creditor of a limited liability company who extends credit, after the entering into of a limited liability company agreement or an amendment thereto which, in either case, reflects the

obligation, and before the amendment thereof to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a member to make a contribution or return. A conditional obligation of a member to make a contribution or return money or other property to a limited liability company may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by such member. Conditional obligations include contributions payable upon a discretionary call of a limited liability company prior to the time the call occurs.

(c) A limited liability company agreement may provide that the interest of any member who fails to make any contribution that he is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating his limited liability company interest to that of non-defaulting members, a forced sale of his limited liability company interest, forfeiture of his limited liability company interest, the lending by other members of the amount necessary to meet his commitment, a fixing of the value of his limited liability company interest by appraisal or by formula and redemption or sale of his limited liability company interest at such value, or other penalty or consequence.

§18-503 ALLOCATION OF PROFITS AND LOSSES

The profits and losses of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in a limited liability company agreement. If the limited liability company agreement does not so provide, profits and losses shall be allocated on the basis of the agreed value (as stated in the records of the limited liability company) of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned.

§18-504 ALLOCATION OF DISTRIBUTIONS

Distributions of cash or other assets of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in a limited liability company agree-

ment. If the limited liability company agreement does not so provide, distributions shall be made on the basis of the agreed value (as stated in the records of the limited liability company) of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned.

§18-505 DEFENSE OF USURY NOT AVAILABLE

No obligation of a member or manager of a limited liability company to the limited liability company, or to a member or manager of the limited liability company, arising under the limited liability company agreement or a separate agreement or writing, and no note, instrument or other writing evidencing any such obligation of a member or manager, shall be subject to the defense of usury, and no member or manager shall interpose the defense of usury with respect to any such obligation in any action. (As amended by Ch. 270, L. '12, eff. 8-1-12.)

Subchapter VI
DISTRIBUTIONS AND RESIGNATION

§18-601 INTERIM DISTRIBUTION

Except as provided in this subchapter, to the extent and at the times or upon the happening of the events specified in a limited liability company agreement, a member is entitled to receive from a limited liability company distributions before his resignation from the limited liability company and before the dissolution and winding up thereof.

§18-602 RESIGNATION OF MANAGER

A manager may resign as a manager of a limited liability company at the time or upon the happening of events specified in a limited liability company agreement and in accordance with the limited liability company agreement. A limited liability company agreement may provide that a manager shall not have the right to resign as a manager of a limited liability company. Notwithstanding that a limited liability company agreement provides that a manager does not have the right to resign as a

manager of a limited liability company, a manager may resign as a manager of a limited liability company at any time by giving written notice to the members and other managers. If the resignation of a manager violates a limited liability company agreement, in addition to any remedies otherwise available under applicable law, a limited liability company may recover from the resigning manager damages for breach of the limited liability company agreement and offset the damages against the amount otherwise distributable to the resigning manager.

§18-603 RESIGNATION OF MEMBER

A member may resign from a limited liability company only at the time or upon the happening of events specified in a limited liability company agreement and in accordance with the limited liability company agreement.

Notwithstanding anything to the contrary under applicable law, unless a limited liability company agreement provides otherwise, a member may not resign from a limited liability company prior to the dissolution and winding up of the limited liability company. Notwithstanding anything to the contrary under applicable law, a limited liability company agreement may provide that a limited liability company interest may not be assigned prior to the dissolution and winding up of the limited liability company.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 1996, shall continue to be governed by this section as in effect on July 31, 1996. (Last amended by Ch. 45, L. '96, eff. 8-1-15.)

§18-604 DISTRIBUTION UPON RESIGNATION

Except as provided in this subchapter, upon resignation any resigning member is entitled to receive any distribution to which such member is entitled under a limited liability company agreement and, if not otherwise provided in a limited liability company agreement, such member is entitled to receive, within a reasonable time after resignation, the fair value of such member's limited liability company interest as of the date of resignation based upon such member's right to share in distributions

from the limited liability company. (Last amended by Ch. 129, L. '99, eff. 8-1-99.)

§18-605 DISTRIBUTION IN KIND

Except as provided in a limited liability company agreement, a member, regardless of the nature of the member's contribution, has no right to demand and receive any distribution from a limited liability company in any form other than cash. Except as provided in a limited liability company agreement, a member may not be compelled to accept a distribution of any asset in kind from a limited liability company to the extent that the percentage of the asset distributed exceeds a percentage of that asset which is equal to the percentage in which the member shares in distributions from the limited liability company. Except as provided in the limited liability company agreement, a member may be compelled to accept a distribution of any asset in kind from a limited liability company to the extent that the percentage of the asset distributed is equal to a percentage of that asset which is equal to the percentage in which the member shares in distributions from the limited liability company. (Last amended by Ch. 186, L. '96, eff. 7-10-95.)

§18-606 RIGHT TO DISTRIBUTION

Subject to Secs. 18-607 and 18-804 of this chapter, and unless otherwise provided in a limited liability company agreement, at the time a member becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of a limited liability company with respect to the distribution. A limited liability company agreement may provide for the establishment of a record date with respect to allocations and distributions by a limited liability company.

§18-607 LIMITATIONS ON DISTRIBUTION

(a) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their limited liability company interests and liabilities for which the recourse of creditors is limited to specified property of the limited liability company, exceed the

fair value of the assets of the limited liability company, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability.

For purposes of this subsection (a), the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

(b) A member who receives a distribution in violation of subsection (a) of this section, and who knew at the time of the distribution that the distribution violated subsection (a) of this section, shall be liable to a limited liability company for the amount of the distribution. A member who receives a distribution in violation of subsection (a) of this section, and who did not know at the time of the distribution that the distribution violated subsection (a) of this section, shall not be liable for the amount of the distribution. Subject to subsection (c) of this section, this subsection shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

(c) Unless otherwise agreed, a member who receives a distribution from a limited liability company shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said three year period and an adjudication of liability against such member is made in the said action. (Last amended by Ch. 389, L. '00, eff. 8-1-00.)

Subchapter VII
ASSIGNMENT OF LIMITED LIABILITY COMPANY INTERESTS

§18-701 NATURE OF LIMITED LIABILITY COMPANY INTEREST

A limited liability company interest is personal property. A member has no interest in specific limited liability company property.

§18-702 ASSIGNMENT OF LIMITED LIABILITY COMPANY INTEREST

(a) A limited liability company interest is assignable in whole or in part except as provided in a limited liability company agreement. The assignee of a member's limited liability company interest shall have no right to participate in the management of the business and affairs of a limited liability company except as provided in a limited liability company agreement or, unless otherwise provided in the limited liability company agreement, upon the vote or consent of all of the members of the limited liability company.

(b) Unless otherwise provided in a limited liability company agreement:

(1) An assignment of a limited liability company interest does not entitle the assignee to become or to exercise any rights or powers of a member;

(2) An assignment of a limited liability company interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned; and

(3) A member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of the member's limited liability company interest. Unless otherwise provided in a limited liability company agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the limited liability company interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.

(c) Unless otherwise provided in a limited liability company agreement, a member's interest in a limited liability company may be evidenced by a certificate of limited liability company interest issued by the limited liability company. A limited liability company agreement may provide for the assignment or transfer of any limited liability company interest represented by such a certificate and make other provisions with respect to such certificates. A limited liability company shall not have the power to issue a certificate of limited liability company interest in bearer form.

(d) Unless otherwise provided in a limited liability company agreement and except to the extent assumed by agreement, until an assignee

of a limited liability company interest becomes a member, the assignee shall have no liability as a member solely as result of the assignment.

(e) Unless otherwise provided in the limited liability company agreement, a limited liability company may acquire, by purchase, redemption or otherwise, any limited liability company interest or other interest of a member or manager in the limited liability company. Unless otherwise provided in the limited liability company agreement, any such interest so acquired by the limited liability company shall be deemed canceled. (Last amended by Ch. 271, L. '16, eff. 8-1-16.)

§18-703 MEMBER'S LIMITED LIABILITY COMPANY INTEREST SUBJECT TO CHARGING ORDER

(a) On application by a judgment creditor of a member or of a member's assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment. To the extent so charged, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled in respect of such limited liability company interest.

(b) A charging order constitutes a lien on the judgment debtor's limited liability company interest.

(c) This chapter does not deprive a member or member's assignee of a right under exemption laws with respect to the judgment debtor's limited liability company interest.

(d) The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interest and attachment, garnishment, foreclosure or other legal or equitable remedies are not available to the judgment creditor, whether the limited liability company has 1 member or more than 1 member.

(e) No creditor of a member or of a member's assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.

(f) The Court of Chancery shall have jurisdiction to hear and determine any matter relating to any such charging order. (Last amended byCh. 74, L. '13, eff. 8-1-13.)

Decisions

.1 Jurisdiction. — An amendment to Sec. 18-703 stating that the Chancery Court has jurisdiction to hear matters relating to charging orders clarified that the Chancery Court and Superior Court had concurrent jurisdiction. *Bridev v. One, LLC v. Regency Centers, LP,* 2018 De. Super. LEXIS 134.

§18-704 RIGHT OF ASSIGNEE TO BECOME MEMBER

(a) An assignee of a limited liability company interest becomes a member:

(1) As provided in the limited liability company agreement;

(2) Unless otherwise provided in the limited liability company agreement, upon the vote or consent of all of the members of the limited liability company; or

(3) Unless otherwise provided in the limited liability company agreement by a specific reference to this subsection or otherwise provided in connection with the assignment, upon the voluntary assignment by the sole member of the limited liability company of all of the limited liability company interests in the limited liability company to a single assignee. An assignment will be voluntary for purposes of this subsection if it is consented to by the member at the time of the assignment and is not effected by foreclosure or other similar legal process.

(b) An assignee who has become a member has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a member under a limited liability company agreement and this chapter. Notwithstanding the foregoing, unless otherwise provided in a limited liability company agreement, an assignee who becomes a member is liable for the obligations of his assignor to make contributions as provided in Sec. 18-502 of this chapter, but shall not be liable for the obligations of his assignor under subchapter VI of this chapter. However, the assignee is not obligated for liabilities, including the obligations of his assignor to make contributions as provided in Sec. 18-502 of this chapter, unknown to the assignee at the time he became a member and which could not be ascertained from a limited liability company agreement.

(c) Whether or not an assignee of a limited liability company interest becomes a member, the assignor is not released from his liability to a limited liability company under subchapters V and VI of this chapter. (Last amended by Ch. 271, L. ‘16, eff. 8-1-16.)

Decisions

.1 Validity of assignment. — Trust settlor's assignment of her LLC interest had no effect because dispositions without prior written unanimous consent of the LLC managers were null and void, meaning that the trust held no interest in the LLC. The contractual language that such acts were "void" trumped the common law, rendering the settlor's assignment ineffective and invulnerable to equitable defenses. Absalom *Absalom Trust v. Saint Gervais LLC, 2019 Del. Ch. LEXIS 239*.

§18-705 POWERS OF ESTATE OF DECEASED OR INCOMPETENT MEMBER

If a member who is an individual dies or a court of competent jurisdiction adjudges the member to be incompetent to manage the member's person or property, the member's personal representative may exercise all of the member's rights for the purpose of settling the member's estate or administering the member's property, including any power under a limited liability company agreement of an assignee to become a member. If a member is a corporation, trust or other entity and is dissolved or terminated, the powers of that member may be exercised by its personal representative. (Last amended by Ch. 77, L. '97, eff. 8-1-97.)

Subchapter VIII
DISSOLUTION

§18-801 DISSOLUTION

(a) A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:

(1) At the time specified in a limited liability company agreement, but if no such time is set forth in the limited liability company agreement, then the limited liability company shall have a perpetual existence;

(2) Upon the happening of events specified in a limited liability company agreement;

(3) Unless otherwise provided in a limited liability company agreement, upon the vote or consent of members who own more than 2/3 of the then-current percentage or other interest in the profits of the limited liability company owned by all of the members;

(4) At any time there are no members; provided, that the limited liability company is not dissolved and is not required to be wound up if:

a. Unless otherwise provided in a limited liability company agreement, within 90 days or such other period as is provided for in the limited liability company agreement after the occurrence of the event that terminated the continued membership of the last remaining member, the personal representative of the last remaining member agrees to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member; provided, that a limited liability company agreement may provide that the personal representative of the last remaining member shall be obligated to agree in writing to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member, or

b. A member is admitted to the limited liability company in the manner provided for in the limited liability company agreement, effective as of the occurrence of the event that terminated the continued membership of the last remaining member, within 90 days or such other period as is provided for in the limited liability company agreement after the occurrence of the event that terminated the continued membership of the last remaining member, pursuant to a provision of the limited liability company agreement that specifically provides for the admission of a member to the limited liability company after there is no longer a remaining member of the limited liability company.

(5) The entry of a decree of judicial dissolution under §18-802 of this title.

Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by paragraph (a)(3) of this section as in effect on July 31, 2015 (except that “affirmative” and “written” shall be deleted from such paragraph (a)(3) of this section).

(b) Unless otherwise provided in a limited liability company agreement, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited liability company shall be continued without dissolution. (Last amended by Ch. 271, L. '16, eff. 8-1-16.)

§18-802 JUDICIAL DISSOLUTION

On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement. (Last amended by Ch. 75, L. '95, eff. 8-1-95.)

Decisions

.1 Application of section. — Where it was not reasonably practicable for LLC with two 50% members to carry on business in conformity with the LLC agreement and where exit mechanism in the LLC agreement failed as an adequate remedy because it did not equitably effect separation of the parties, the court ordered dissolution pursuant to Sec. 18-802 was appropriate. *Haley v. Talcott, 864 A.2d 86 (Del. Ch. 2004).*

A petition for dissolution based on the LLC having abandoned its business had to be denied where the petitioner basically alleged that the LLC was a passive holding company and where the LLC was pursuing legal claims — both of which are lawful and common functions. *In re Seneca Investments LLC,970 A.2d 259 (Del. Ch. 2008).*

Member was not entitled to judicial dissolution under Sec. 18-82 where the operating agreement contained a deadlock procedure by which the parties could work around their difficulties and which likely provided a path for plaintiff to exit the business if it chose. *Lola Cars Intern. Ltd. v. Krohn Racing, LLC, C.A. No. 4479, C.A. No. 4886 (Del. Ch. 2010).*

Although a subsidiary lacked standing under Sec. 18-802 because it was not a member, it had standing to seek dissolution in equity. Sec. 18-802 does not provide the exclusive method of LLC dissolution and does not contain language overriding the court's equitable authority. The court also held that this was the type of case where equity would intervene because if the LLC continued, the situation would be contrary to the bargain the parties struck. *In re Carlisle Etcetera, LLC, 114 A.3d 592.*

.2 Standing to Sue. — An LLC's creditors did not have standing to request judicial dissolution. *Trusa v. Nepo*, *C.A. No. 12071 (Ch. Ct. 4-13-17).*

§18-803 WINDING UP

(a) Unless otherwise provided in a limited liability company agreement, a manager who has not wrongfully dissolved a limited liability company or, if none, the members or a person approved by the members, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the limited liability company owned by all of the members, may wind up the limited liability company's affairs; but the Court of Chancery, upon cause shown, may wind up the limited liability company's affairs upon application of any member or manager, or the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee. Unless otherwise provided in a limited liability company agreement, a limited liability company whose original certificate of formation was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by this subsection as in effect on July 31, 2015.

(b) Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in Sec. 18-203 of this chapter, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company, all without affecting the liability of members and managers and without imposing liability on a liquidating trustee. (Last amended by Ch. 45, L. '15, eff. 8-1-15.)

§18-804 DISTRIBUTION OF ASSETS

(a) Upon the winding up of a limited liability company, the assets shall be distributed as follows:

(1) To creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of

the limited liability company (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members and former members under Sec. 18-601 or Sec. 18-604 of this title;

(2) Unless otherwise provided in a limited liability company agreement, to members and former members in satisfaction of liabilities for distributions under Sec. 18-601 or Sec. 18-604 of this title; and

(3) Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.

(b) A limited liability company which has dissolved:

(1) Shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited liability company;

(2) Shall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the limited liability company which is the subject of a pending action, suit or proceeding to which the limited liability company is a party; and

(3) Shall make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the limited liability company or that have not arisen but that, based on facts known to the limited liability company, are likely to arise or to become known to the limited liability company within 10 years after the date of dissolution.

If there are sufficient assets, such claims and obligations shall be paid in full and any such provision for payment made shall be made in full. If there are insufficient assets, such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of assets available therefor. Unless otherwise provided in the limited liability company agreement, any remaining assets shall be distributed as provided in this chapter. Any liquidating trustee winding up a limited liability company's affairs who has complied with this section shall not be personally liable to the claimants of the dissolved limited liability company by reason of such person's actions in winding up the limited liability company.

(c) A member who receives a distribution in violation of subsection (a) of this section, and who knew at the time of the distribution that the distribution violated subsection (a) of this section, shall be liable to the

limited liability company for the amount of the distribution. For purposes of the immediately preceding sentence, the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program. A member who receives a distribution in violation of subsection (a) of this section, and who did not know at the time of the distribution that the distribution violated subsection (a) of this section, shall not be liable for the amount of the distribution. Subject to subsection (d) of this section, this subsection shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

(d) Unless otherwise agreed, a member who receives a distribution from a limited liability company to which this section applies shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of 3 years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said 3-year period and an adjudication of liability against such member is made in the said action.

(e) Section 18-607 of this title shall not apply to a distribution to which this section applies. (Last amended by Ch. 389, L. '00, eff. 8-1-00.)

Decisions

.1 Reserves covering claims. — Court could revive cancelled LLCs so plaintiffs could pursue their claims against them where defendants did not set aside a reserve to cover the plaintiffs' claims in violation of Sec. 18-804. *Capone v. LDH Mgmt. Holdings LLC,* 2018 Del. Ch. LEXIS 131.

§18-805 TRUSTEES OR RECEIVERS FOR LIMITED LIABILITY COMPANIES; APPOINTMENT; POWERS; DUTIES

When the certificate of formation of any limited liability company formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to Section 18-203 of this chapter, the Court of Chancery, on application of any creditor, member or manager of the limited liability company, or any other person who shows good cause therefor, at any time, may either appoint one or more of the managers

of the limited liability company to be trustees, or appoint one or more persons to be receivers, of and for the limited liability company, to take charge of the limited liability company's property, and to collect the debts and property due and belonging to the limited liability company, with the power to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the limited liability company, if in being, that may be necessary for the final settlement of the unfinished business of the limited liability company. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid. (Added by Ch. 83, L. '03, eff. 8-1-03.)

§18-806 REVOCATION OF DISSOLUTION

If a limited liability company agreement provides the manner in which a dissolution may be revoked, it may be revoked in that manner and, unless a limited liability company agreement prohibits revocation of dissolution, then notwithstanding the occurrence of an event set forth in §18-801(a)(1), (2), (3) or (4) of this title, the limited liability company shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation in the office of the Secretary of State, the limited liability company is continued, effective as of the occurrence of such event:

(1) In the case of dissolution effected by the vote or consent of the members or other persons, pursuant to such vote or consent (and the approval of any members or other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this clause);

(2) In the case of dissolution under §18-801(a)(1) or (2) of this title (other than a dissolution effected by the vote or consent of the members or other persons or the occurrence of an event that causes the last remaining member to cease to be a member), pursuant to such vote or consent that, pursuant to the terms of the limited liability company agreement, is required to amend the provision of the limited liability company agreement effecting such dissolution (and the approval of any members or other persons whose approval is required under the limited

liability company agreement to revoke a dissolution contemplated by this clause); and

(3) In the case of dissolution effected by the occurrence of an event that causes the last remaining member to cease to be a member, pursuant to the vote or consent of the personal representative of the last remaining member of the limited liability company or the assignee of all of the limited liability company interests in the limited liability company (and the approval of any other persons whose approval is required under the limited liability company agreement to revoke a dissolution contemplated by this clause).

If there is no remaining member of the limited liability company and the personal representative of the last remaining member or the assignee of all of the limited liability company interests in the limited liability company votes in favor of or consents to the continuation of the limited liability company, such personal representative or such assignee, as applicable, shall be required to agree to the admission of a nominee or designee as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member. The provisions of this section shall not be construed to limit the accomplishment of a revocation of dissolution by other means permitted by law. (Last amended by Ch. 271, L. '16, eff. 8-1-16.)

Subchapter IX
FOREIGN LIMITED LIABILITY COMPANIES

§18-901 LAW GOVERNING

(a) Subject to the Constitution of the State of Delaware:

(1) The laws of the State, territory, possession, or other jurisdiction or country under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members and managers; and

(2) A foreign limited liability company may not be denied registration by reason of any difference between those laws and the laws of the State of Delaware.

(b) A foreign limited liability company shall be subject to Sec. 18-106 of this chapter.

§18-902 REGISTRATION REQUIRED; APPLICATION

Before doing business in the State of Delaware, a foreign limited liability company shall register with the Secretary of State. In order to register, a foreign limited liability company shall submit to the Secretary of State:

(1) A copy executed by an authorized person of an application for registration as a foreign limited liability company, setting forth:

a. The name of the foreign limited liability company and, if different, the name under which it proposes to register and do business in the State of Delaware;

b. The state, territory, possession or other jurisdiction or country where formed, the date of its formation and a statement from an authorized person that, as of the date of filing, the foreign limited liability company validly exists as a limited liability company under the laws of the jurisdiction of its formation;

c. The nature of the business or purposes to be conducted or promoted in the State of Delaware;

d. The address of the registered office and the name and address of the registered agent for service of process required to be maintained by Sec. 18-904(b) of this chapter;

e. A statement that the Secretary of State is appointed the agent of the foreign limited liability company for service of process under the circumstances set forth in Sec. 18-910(b) of this chapter; and

f. The date on which the foreign limited liability company first did, or intends to do, business in the State of Delaware.

(2)A certificate, as of a date not earlier than 6 months prior to the filing date, issued by an authorized officer of the jurisdiction of its formation evidencing its existence. If such certificate is in a foreign language, a translation thereof, under oath of the translator, shall be attached thereto.

(3) A fee as set forth in Sec. 18-1105(a)(6) of this chapter shall be paid. (Last amended by Ch. 287, L. ‘10, eff. 8-2-10.)

§18-903 ISSUANCE OF REGISTRATION

(a) If the Secretary of State finds that an application for registration conforms to law and all requisite fees have been paid, he shall:

(1) Certify that the application has been filed in his office by endorsing upon the original application the word "Filed", and the date and hour of the filing. This endorsement is conclusive of the date and time of its filing in the absence of actual fraud;

(2) File and index the endorsed application.

(b) The Secretary of State shall prepare and return to the person who filed the application or the person's representative a copy of the original signed application, similarly endorsed, and shall certify such copy as a true copy of the original signed application.

(c) The filing of the application with the Secretary of State shall make it unnecessary to file any other documents under Chapter 31 of this title. (Last amended by Ch. 186, L. '95, eff. 7-10-95.)

§18-904 NAME; REGISTERED OFFICE; REGISTERED AGENT

(a) A foreign limited liability company may register with the Secretary of State under any name (whether or not it is the name under which it is registered in the jurisdiction of its formation) that includes the words "Limited Liability Company" or the abbreviation "L.L.C." or the designation "LLC" and that could be registered by a domestic limited liability company; provided however, that a foreign limited liability company may register under any name which is not such as to distinguish it upon the records in the office of the Secretary of State from the name on such records of any domestic or foreign corporation, partnership, statutory trust, limited liability company or limited partnership reserved, registered, formed or organized under the laws of the State of Delaware with the written consent of the other corporation, partnership, statutory trust, limited liability company or limited partnership, which written consent shall be filed with the Secretary of State.

(b) Each foreign limited liability company shall have and maintain in the State of Delaware:

(1) A registered office which may but need not be a place of its business in the State of Delaware; and

(2) A registered agent for service of process on the foreign limited liability company, having a business office identical with such registered office, which agent may be any of:

a. An individual resident in the State of Delaware,

b. A domestic limited liability company, a domestic corporation, a domestic partnership (whether general (including a limited liability part-

nership) or limited (including a limited liability limited partnership)), or a domestic statutory trust, or

c. A foreign corporation, a foreign partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), a foreign limited liability company (other than the foreign limited liability company itself), or a foreign statutory trust. (c) A registered agent may change the address of the registered office of the foreign limited liability companies for which the agent is registered agent to another address in the State of Delaware by paying a fee as set forth in Sec. 18-1105(a)(7) of this chapter and filing with the Secretary of State a certificate, executed by such registered agent, setting forth the address at which such registered agent has maintained the registered office for each of the foreign limited liability companies for which it is a registered agent, and further certifying to the new address to which each such registered office will be changed on a given day, and at which new address such registered agent will thereafter maintain the registered office for each of the foreign limited liability companies for which it is registered agent. Upon the filing of such certificate, the Secretary of State shall furnish to the registered agent a certified copy of the same under the Secretary's hand and seal of office, and thereafter, or until further change of address, as authorized by law, the registered office in the State of Delaware of each of the foreign limited liability companies for which the agent is a registered agent shall be located at the new address of the registered agent thereof as given in the certificate. In the event of a change of name of any person acting as a registered agent of a foreign limited liability company, such registered agent shall file with the Secretary of State a certificate, executed by such registered agent, setting forth the new name of such registered agent, the name of such registered agent before it was changed, and the address at which such registered agent has maintained the registered office for each of the foreign limited liability companies for which it is registered agent, and shall pay a fee as set forth in Sec. 18-1105(a)(7) of this chapter. Upon the filing of such certificate, the Secretary of State shall furnish to the registered agent a certified copy of the same under his or her hand and seal of office. A change of name of any person acting as a registered agent of a foreign limited liability company as a result of the merger or consolidation of the registered agent, with or into another person which succeeds to its assets and liabilities by operation of law, shall be deemed a change of name for purposes of this section. Filing a certificate under this section shall be deemed to be an

amendment of the application of each such foreign limited liability company affected thereby and each foreign limited liability company shall not be required to take any further action with respect thereto, to amend its application under Sec. 18-905 of this chapter. Any registered agent filing a certificate under this section shall promptly, upon such filing, deliver a copy of any such certificate to each foreign limited liability company affected thereby.

(d) The registered agent of 1 or more foreign limited liability companies may resign and appoint a successor registered agent by paying a fee as set forth in Sec. 18-1105(a)(7) of this chapter and filing a certificate with the Secretary of State, stating that it resigns and the name and address of the successor registered agent. There shall be attached to such certificate a statement of each affected foreign limited liability company ratifying and approving such change of registered agent. Upon such filing, the successor registered agent shall become the registered agent of such foreign limited liability companies as have ratified and approved such substitution and the successor registered agent's address, as stated in such certificate, shall become the address of each such foreign limited liability company's registered office in the State of Delaware. The Secretary of State shall then issue a certificate that the successor registered agent has become the registered agent of the foreign limited liability companies so ratifying and approving such change and setting out the names of such foreign limited liability companies. Filing of such certificate of resignation shall be deemed to be an amendment of the application of each foreign limited liability company affected thereby and each such foreign limited liability company shall not be required to take any further action with respect thereto, to amend its application under Sec. 18-905 of this chapter.

(e) The registered agent of one or more foreign limited liability companies may resign without appointing a successor registered agent by paying a fee as set forth in Sec. 18-1105(a)(7) of this chapter and filing a certificate of resignation with the Secretary of State but such resignation shall not become effective until 30 days after the certificate is filed. The certificate shall contain a statement that written notice of resignation was given to each affected foreign limited liability company at least 30 days prior to the filing of the certificate by mailing or delivering such notice to the foreign limited liability company at its address last known to the registered agent and shall set forth the date of such notice. After receipt of the notice of the resignation of its registered agent, the foreign limited liability company for which such registered agent was acting

shall obtain and designate a new registered agent, to take the place of the registered agent so resigning. If such foreign limited liability company fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, such foreign limited liability company shall not be permitted to do business in the State of Delaware and its registration shall be cancelled. After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the foreign limited liability company for which the resigned registered agent had been acting shall thereafter be upon the Secretary of State in accordance with Sec. 18-911 of this chapter. (Last amended by Ch. 105, L. '07, eff. 8-1-07.)

§18-905 AMENDMENTS TO APPLICATION

If any statement in the application for registration of a foreign limited liability company was false when made or any arrangements or other facts described have changed, making the application false in any respect, the foreign limited liability company shall promptly file in the Office of the Secretary of State a certificate, executed by an authorized person, correcting such statement, together with a fee as set forth in Sec. 18-1105(a)(6) of this chapter.

§18-906 CANCELLATION OF REGISTRATION

A foreign limited liability company may cancel its registration by filing with the Secretary of State a certificate of cancellation, executed by an authorized person, together with a fee as set forth in Sec. 18-1105(a)(6) of this title. The registration of a foreign limited liability company shall be cancelled as provided in Sec. 18-104(i)(4), 18-904(e) and 18-1107(h) of this title. A cancellation does not terminate the authority of the Secretary of State to accept service of process on the foreign limited liability company with respect to causes of action arising out of the doing of business in the State of Delaware. (Last amended by Ch. 105, L. '07, eff. 8-1-07.)

§18-907 DOING BUSINESS WITHOUT REGISTRATION

(a) A foreign limited liability company doing business in the State of Delaware may not maintain any action, suit or proceeding in the State of Delaware until it has registered in the State of Delaware, and has paid to the State of Delaware all fees and penalties for the years or parts thereof, during which it did business in the State of Delaware without having registered.

(b) The failure of a foreign limited liability company to register in the State of Delaware does not impair:

(1) The validity of any contract or act of the foreign limited liability company;

(2) The right of any other party to the contract to maintain any action, suit or proceeding on the contract; or

(3) Prevent the foreign limited liability company from defending any action, suit or proceeding in any court of the State of Delaware.

(c) A member or a manager of a foreign limited liability company is not liable for the obligations of the foreign limited liability company solely by reason of the limited liability company's having done business in the State of Delaware without registration.

(d) Any foreign limited liability company doing business in the State of Delaware without first having registered shall be fined and shall pay to the Secretary of State $200 for each year or part thereof during which the foreign limited liability company failed to register in the State of Delaware.

§18-908 FOREIGN LIMITED LIABILITY COMPANIES DOING BUSINESS WITHOUT HAVING QUALIFIED; INJUNCTIONS

The Court of Chancery shall have jurisdiction to enjoin any foreign limited liability company, or any agent thereof, from doing any business in the State of Delaware if such foreign limited liability company has failed to register under this subchapter or if such foreign limited liability company has secured a certificate of the Secretary of State under Sec. 18-903 of this chapter on the basis of false or misleading representations. The Attorney General shall, upon his own motion or upon the relation of proper parties, proceed for this purpose by complaint in any county in which such foreign limited liability company is doing or has done business.

§18-909 EXECUTION; LIABILITY

Section 18-204(c) of this chapter shall be applicable to foreign limited liability companies as if they were domestic limited liability companies.

§18-910 SERVICE OF PROCESS ON REGISTERED FOREIGN LIMITED LIABILITY COMPANIES

(a) Service of legal process upon any foreign limited liability company shall be made by delivering a copy personally to any managing or general agent or manager of the foreign limited liability company in the State of Delaware or the registered agent of the foreign limited liability company in the State of Delaware, or by leaving it at the dwelling house or usual place of abode in the State of Delaware of any such managing or general agent, manager or registered agent (if the registered agent be an individual), or at the registered office or other place of business of the foreign limited liability company in the State of Delaware. If the registered agent be a corporation, service of process upon it as such may be made by serving, in the State of Delaware, a copy thereof on the president, vice-president, secretary, assistant secretary or any director of the corporate registered agent. Service by copy left at the dwelling house or usual place of abode of any managing or general agent, manager or registered agent, or at the registered office or other place of business of the foreign limited liability company in the State of Delaware, to be effective must be delivered thereat at least 6 days before the return date of the process, and in the presence of an adult person, and the officer serving the process shall distinctly state the manner of service in his return thereto. Process returnable forthwith must be delivered personally to the managing or general agent, manager or registered agent.

(b) In case the officer whose duty it is to serve legal process cannot by due diligence serve the process in any manner provided for by subsection (a) of this section, it shall be lawful to serve the process against the foreign limited liability company upon the Secretary of State, and such service shall be as effectual for all intents and purposes as if made in any of the ways provided for in subsection (a) of this section. Process may be served upon the Secretary of State under this subsection by

means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate. In the event that service is effected through the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify the foreign limited liability company by letter, directed to the foreign limited liability company at its last registered office. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection, and to pay to the Secretary of State the sum of $50 for the use of the State of Delaware, which sum shall be taxed as a part of the costs in the proceeding if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary, the fact that service has been effected pursuant to this subsection, the return date thereof and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from the Secretary's receipt of the service of process. (Last amended by Ch. 287, L. '10, eff. 8-2-10.)

§18-911 SERVICE OF PROCESS ON UNREGISTERED FOREIGN LIMITED LIABILITY COMPANIES

(a) Any foreign limited liability company which shall do business in the State of Delaware without having registered under Sec. 18-902 of this chapter shall be deemed to have thereby appointed and constituted the Secretary of State of the State of Delaware its agent for the acceptance of legal process in any civil action, suit or proceeding against it in any State or Federal Court in the State of Delaware arising or growing out of any

business done by it within the State of Delaware. The doing of business in the State of Delaware by such foreign limited liability company shall be a signification of the agreement of such foreign limited liability company that any such process when so served shall be of the same legal force and validity as if served upon an authorized manager or agent personally within the State of Delaware. Process may be served upon the Secretary of State under this subsection by means of electronic transmission but only as prescribed by the Secretary of State. The Secretary of State is authorized to issue such rules and regulations with respect to such service as the Secretary of State deems necessary or appropriate.

(b) Whenever the words “doing business”, “the doing of business” or “business done in this State”, by any such foreign limited liability company are used in this section, they shall mean the course or practice of carrying on any business activities in the State of Delaware, including, without limiting the generality of the foregoing, the solicitation of business or orders in the State of Delaware.

(c) In the event of service upon the Secretary of State in accordance with subsection (a) of this section, the Secretary of State shall forthwith notify the foreign limited liability company thereof by letter, directed to the foreign limited liability company at the address furnished to the Secretary of State by the plaintiff in such action, suit or proceeding. Such letter shall be sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient. Such letter shall enclose a copy of the process and any other papers served upon the Secretary of State. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being made pursuant to this subsection, and to pay to the Secretary of State the sum of $50 for the use of the State of Delaware, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such process setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceeding in which process has been served upon the Secretary, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from the receipt of the service of process (Last amended by Ch. 287, L. ‘10, eff. 8-2-10.)

§18-912 ACTIVITIES NOT CONSTITUTING DOING BUSINESS

(a) Activities of a foreign limited liability company in the State of Delaware that do not constitute doing business for the purpose of this subchapter include:

(1) Maintaining, defending or settling an action or proceeding;

(2) Holding meetings of its members or managers or carrying on any other activity concerning its internal affairs;

(3) Maintaining bank accounts;

(4) Maintaining offices or agencies for the transfer, exchange or registration of the limited liability company's own securities or maintaining trustees or depositories with respect to those securities;

(5) Selling through independent contractors;

(6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside the State of Delaware before they become contracts;

(7) Selling, by contract consummated outside the State of Delaware, and agreeing, by the contract, to deliver into the State of Delaware, machinery, plants or equipment, the construction, erection or installation of which within the State of Delaware requires the supervision of technical engineers or skilled employees performing services not generally available, and as part of the contract of sale agreeing to furnish such services, and such services only, to the vendee at the time of construction, erection or installation;

(8) Creating, as borrower or lender, or acquiring indebtedness with or without a mortgage or other security interest in property;

(9) Collecting debts or foreclosing mortgages or other security interests in property securing the debts, and holding, protecting and maintaining property so acquired;

(10) Conducting an isolated transaction that is not 1 in the course of similar transactions;

(11) Doing business in interstate commerce; and

(12) Doing business in the State of Delaware as an insurance company.

(b) A person shall not be deemed to be doing business in the State of Delaware solely by reason of being a member or manager of a domestic limited liability company or a foreign limited liability company.

(c) This section does not apply in determining whether a foreign limited liability company is subject to service of process, taxation or regulation under any other law of the State of Delaware. (Added by Ch. 51, L. '05, eff. 8-1-05.)

Subchapter X
DERIVATIVE ACTIONS

§18-1001 RIGHT TO BRING ACTION

A member or an assignee of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed. (Last amended by Ch. 341, L. '98, eff. 8-1-98.)

Decisions

.1 Derivative suit based on LLC agreement. — LLC was bound by arbitration and forum selection clauses in LLC agreement and therefore clauses apply to derivative claims brought on its behalf. *Elf Atochem North America, Inc. v. Jarrari, 727 A.2d 286 (Del. Supr. 1999)*.

Where a member alleged another member breached his fiduciary duties by misappropriating the proceeds of an asset sale, the claim was derivative and the suit was dismissed for failure to make a demand or plead futility. *Dietrichson v. Knott*, *C.A. No. 11965 (Ch. Ct. 4-19-17).*

§18-1002 PROPER PLAINTIFF

In a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action and:

(1) At the time of the transaction of which he complains; or

(2) His status as a member or an assignee of a limited liability company interest had devolved upon him by operation of law or pursuant to the terms of a limited liability company agreement from a person who was a member or an assignee of a limited liability company interest at the time of the transaction. (Last amended by Ch. 341, L. '98, eff. 8-1-98.)

Decisions

.1 Derivative suit by creditor. — Creditors of LLCs lack standing under Sec. 18-1002 to bring a derivative suit,*CML v. v. Bax, No. 735, 2010 (Del. Supr. 2011).*

An LLC's creditors did not have standing to bring a derivative suit for breach of fiduciary duties. *Trusa v. Nepo*, *C.A. No. 12071 (Ch. Ct. 4-13-17).*

.2 Standing to sue. — Where plaintiff bringing derivative suit abandoned his lawsuit and sold his LLC units, thereby depriving him of standing to continue as a derivative plaintiff, he rendered any ruling he had obtained incapable of being turned into an appealable final judgment and thus did not obtain an authoritative ruling that can create a corporate benefit and his counsel was not entitled to a fee award. *Crothall v. Zimmerman, 265 94 A.3d 733 (Del. Supr. 2014).*

§18-1003 COMPLAINT

In a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a manager or member or the reasons for not making the effort.

§18-1004 EXPENSES

If a derivative action is successful, in whole or in part, as a result of a judgment, compromise or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, from any recovery in any such action or from a limited liability company.

Subchapter XI
MISCELLANEOUS

§18-1101 CONSTRUCTION AND APPLICATION OF CHAPTER AND LIMITED LIABILITY COMPANY AGREEMENT

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(b) It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.

(c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be ex-

panded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

(d) Unless otherwise provided in a limited liability company agreement, a member or manager or other person shall not be liable to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement for breach of fiduciary duty for the member's or manager's or other person's good faith reliance on the provisions of the limited liability company agreement.

(e) A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

(f) Unless the context otherwise requires, as used herein, the singular shall include the plural and the plural may refer to only the singular. The use of any gender shall be applicable to all genders. The captions contained herein are for purposes of convenience only and shall not control or affect the construction of this chapter.

(g) Sections 9-406 and 9-408 of this title do not apply to any interest in a limited liability company, including all rights, powers and interests arising under a limited liability company agreement or this chapter. This provision prevails over §§9-406 and 9-408 of this title.

(h) Action validly taken pursuant to one provision of this chapter shall not be deemed invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to some other provision of this chapter but fails to satisfy one or more requirements prescribed by such other provision.

(i) A limited liability company agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms.

(j) The provisions of this chapter shall apply whether a limited liability company has 1 member or more than 1 member. (Last amended by Ch. 74, L. '13, eff. 8-1-13.)

Decisions

.1 LLC agreement binds LLC and members. — LLC agreement is an agreement of the members as to how they will conduct their business and the LLC's affairs. The members are the real parties in interest and the LLC is their vehicle. Thus the LLC and members were all bound by arbitration and forum selection clauses in LLC agreement. *Elf Atochem North America, Inc. v. Jarrari, 727 A.2d 286 (Del. Supr. 1999)*.

Where the operating agreement did not include a provision that could be read to give members the right to remove another member and deprive him of his ownership interest, the defendant member breached the operating agreement by extinguishing the plaintiff former member's interest. *Walker v. Resource Dev. Co. Ltd., L.L.C., 791 A.2d 799 (Del Ch. 2000)*.

.2 Liability limitation clause. — A clause in an LLC agreement limiting manager liability for conflicts of interest does not limit a member's ability to seek an injunction of a merger. *Solar Cells, Inc. v. True North Partners, LLC, 2002 Del. Ch. LEXIS 38 (2002).*

Where directors are exculpated from liability in the operating agreement except for claims based on fraudulent, illegal or bad faith conduct, a plaintiff must plead facts demonstrating the directors acted with scienter. *Wood v. Baum, 953 A.2d 136 (Del. Supr. 2008).*

.3 Fiduciary duties. — The Chancery Court's holding that managers owe default fiduciary duties had no precedential value. Because the issue of fiduciary duties could be resolved by reference to the LLC agreement, and because no litigant asked the court to resolve the issue, it was unnecessary to decide whether default fiduciary duties exist. *Gatz Properties, LLC v. Auriga Capital Corporation*, *59 A.3d 1206 (Del. Supr. 2012).*

.4 Reformation of LLC Agreement. — A mistaken party's fault in failing to know or discover the facts before signing an LLC agreement does not bar a reformation claim unless the fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund, 68 A.3d 665 (Del. Supr. 2013).*

§18-1102 SHORT TITLE

This chapter may be cited as the "Delaware Limited Liability Company Act".

§18-1103 SEVERABILITY

If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the

invalid provision or application, and to this end, the provisions of this chapter are severable.

§18-1104 CASES NOT PROVIDED FOR IN THIS CHAPTER

In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern. (Last amended by Ch. 74, L. '13, eff. 8-1-13.)

Decisions

.1 Default fiduciary duties. — It is for the legislature to decide whether fiduciary duties exist by default in the absence of a provision in the LLC agreement. *Gatz Properties, LLC v. Auriga Capital Corporation*, *59 A.3d 1206 (Del. 2012).*

§18-1105 FEES

(a) No document required to be filed under this chapter shall be effective until the applicable fee required by this section is paid. The following fees shall be paid to and collected by the Secretary of State for the use of the State of Delaware:

(1) Upon the receipt for filing of an application for reservation of name, an application for renewal of reservation or a notice of transfer or cancellation of reservation pursuant to §18-103(b) of this title, a fee in the amount of $75.

(2) Upon the receipt for filing of a certificate under §18-104(b) of this title, a fee in the amount of $200, upon the receipt for filing of a certificate under §18-104(c) of this title, a fee in the amount of $200, and upon the receipt for filing of a certificate under §18-104(d) of this title, a fee in the amount of $2.00 for each limited liability company whose registered agent has resigned by such certificate.

(3) Upon the receipt for filing of a certificate of formation under §18-201 of this title or a certificate of registered series under §18-218 of this title, a fee in the amount of $70 and upon the receipt for filing of a certificate of limited liability company domestication under §18-212 of this title, a certificate of transfer or a certificate of transfer and domestic continuance under §18-213 of this title, a certificate of conversion to

limited liability company under §18-214 of this title, a certificate of conversion to a non-Delaware entity under §18-216 of this title, a certificate of amendment under §18-202 or §18-218(d)(3) of this title (except as otherwise provided in paragraph (a)(11) of this section), a certificate of cancellation under §18-203 or §18-218(d)(7) of this title, a certificate of merger or consolidation or a certificate of ownership and merger under §18-209 of this title, a restated certificate of formation or a restated certificate of registered series under §18-208 of this title, a certificate of amendment of a certificate with a future effective date or time under §18-206(c) of this title, a certificate of termination of a certificate with a future effective date or time under §18-206(c) of this title, a certificate of correction under §18-211 of this title, a certificate of division under §18-217 of this title, a certificate of conversion of protected series to registered series under §18-219 of this title, a certificate of conversion of registered series to protected series under §18-220 of this title, a certificate of merger or consolidation of registered series under §18-221 of this title or a certificate of revival under §18-1109 or §18-1110 of this title, a fee in the amount of $180, plus, in the case of a certificate of cancellation under §18-203 of this title, a fee in the amount of $50 for each registered series of the limited liability company named in the certificate of cancellation.

(4) For certifying copies of any paper on file as provided for by this chapter, a fee in the amount of $50 for each copy certified. In addition, a fee of $2.00 per page shall be paid in each instance where the Secretary of State provides the copies of the document to be certified.

(5) The Secretary of State may issue photocopies or electronic image copies of instruments on file, as well as instruments, documents and other papers not on file, and for all such photocopies or electronic image copies which are not certified by the Secretary of State, a fee of $10 shall be paid for the first page and $2.00 for each additional page. Notwithstanding Delaware's Freedom of Information Act (Chapter 100 of Title 29) or other provision of law granting access to public records, the Secretary of State upon request shall issue only photocopies or electronic image copies of public records in exchange for the fees described in this section, and in no case shall the Secretary of State be required to provide copies (or access to copies) of such public records (including without limitation bulk data, digital copies of instruments, documents and other papers, databases or other information) in an electronic medium or in any form other than photocopies or electronic image copies of such public records in exchange, as applicable, for the fees described

in this section or §2318 of Title 29 for each such record associated with a file number.

(6) Upon the receipt for filing of an application for registration as a foreign limited liability company under §18-902 of this title, a certificate under §18-905 of this title or a certificate of cancellation under §18-906 of this title, a fee in the amount of $200.

(7) Upon the receipt for filing of a certificate under §18-904(c) of this title, a fee in the amount of $200, upon the receipt for filing of a certificate under §18-904(d) of this title, a fee in the amount of $200, and upon the receipt for filing of a certificate under §18-904(e) of this title, a fee in the amount of $2.00 for each foreign limited liability company whose registered agent has resigned by such certificate.

(8) For preclearance of any document for filing, a fee in the amount of $250.

(9) For preparing and providing a written report of a record search, a fee of up to $100.

(10)For issuing any certificate of the Secretary of State, including but not limited to a certificate of good standing with respect to a limited liability company or a registered series thereof, other than a certification of a copy under paragraph (a)(4) of this section, a fee in the amount of $50, except that for issuing any certificate of the Secretary of State that recites all of the filings with the Secretary of State of a limited liability company or all of the filings of any registered series or that lists all of the registered series formed by a limited liability company, a fee of $175 shall be paid for each such certificate. For issuing any certificate via the Secretary of State's online services, a fee of up to $175 shall be paid for each certificate.

(11) For receiving and filing and/or indexing any certificate, affidavit, agreement or any other paper provided for by this chapter, for which no different fee is specifically prescribed, a fee in the amount of $200. For filing any instrument submitted by a limited liability company or foreign limited liability company that only changes the registered office or registered agent and is specifically captioned as a certificate of amendment changing only the registered office or registered agent, a fee in the amount of $50 provided that no fee shall be charged pursuant to §18-206(e) of this title.

(12) The Secretary of State may in the Secretary of State's own discretion charge a fee of $60 for each check received for payment of any fee that is returned due to insufficient funds or the result of a stop payment order.

(b) In addition to those fees charged under subsection (a) of this section, there shall be collected by and paid to the Secretary of State the following:

(1) For all services described in subsection (a) of this section that are requested to be completed within 30 minutes on the same day as the day of the request, an additional sum of up to $7,500 and for all services described in subsection (a) of this section that are requested to be completed within 1 hour on the same day as the day of the request, an additional sum of up to $1,000 and for all services described in subsection (a) of this section that are requested to be completed within 2 hours on the same day of the request, an additional sum of up to $500;

(2) For all services described in subsection (a) of this section that are requested to be completed within the same day as the day of the request, an additional sum of up to $300; and

(3) For all services described in subsection (a) of this section that are requested to be completed within a 24-hour period from the time of the request, an additional sum of up to $150.

The Secretary of State shall establish (and may from time to time amend) a schedule of specific fees payable pursuant to this subsection.

(c) The Secretary of State may in his or her discretion permit the extension of credit for the fees required by this section upon such terms as the secretary shall deem to be appropriate.

(d) The Secretary of State shall retain from the revenue collected from the fees required by this section a sum sufficient to provide at all times a fund of at least $500, but not more than $1,500, from which the secretary may refund any payment made pursuant to this section to the extent that it exceeds the fees required by this section. The funds shall be deposited in a financial institution which is a legal depository of State of Delaware moneys to the credit of the Secretary of State and shall be disbursable on order of the Secretary of State.

(e) Except as provided in this section, the fees of the Secretary of State shall be as provided in §2315 of Title 29. (Last amended by Ch. 357, L. ‘18, eff. 8-1-19 and Ch. 48, L.’19, eff. 8-1-19.)

§18-1106 RESERVED POWER OF STATE OF DELAWARE TO ALTER OR REPEAL CHAPTER

All provisions of this chapter may be altered from time to time or repealed and all rights of members and managers are subject to this reservation.

Unless expressly stated to the contrary in this chapter, all amendments of this chapter shall apply to limited liability companies and members and managers whether or not existing as such at the time of the enactment of any such amendment. (Last amended by Ch. 129, L. '99, eff. 8-1-99.)

§18-1107 TAXATION OF LIMITED LIABILITY COMPANIES

(a) For purposes of any tax imposed by the State of Delaware or any instrumentality, agency or political subdivision of the State of Delaware, a domestic limited liability company or a foreign limited liability company qualified to do business in the State of Delaware shall be classified as a partnership unless classified otherwise for federal income tax purposes, in which case the domestic or foreign limited liability company shall be classified in the same manner as it is classified for federal income tax purposes. For purposes of any tax imposed by the State of Delaware or any instrumentality, agency or political subdivision of the State of Delaware, a member or an assignee of a member of a domestic limited liability company or a foreign limited liability company qualified to do business in the State of Delaware shall be treated as either a resident or nonresident partner unless classified otherwise for federal income tax purposes, in which case the member or assignee of a member shall have the same status as such member or assignee of a member has for federal income tax purposes.

(b) Every domestic limited liability company and every foreign limited liability company registered to do business in the State of Delaware shall pay an annual tax, for the use of the State of Delaware, in the amount of $300. There shall be paid by or on behalf of each registered series of a domestic limited liability company an annual tax, for use of the State of Delaware, in the amount of $75 per registered series.

(c) The annual tax for a domestic limited liability company shall be due and payable on the first day of June following the close of the calendar year or upon the cancellation of a certificate of formation. The annual tax for a registered series shall be due and payable on the first day of June following the close of the calendar year or upon the cancellation of a certificate of registered series. The annual tax for a foreign limited liability company shall be due and payable on the first day of June following the close of the calendar year or upon the cancellation of

the certificate of registration. The Secretary of State shall receive the annual tax and pay over all taxes collected to the Department of Finance of the State of Delaware. If the annual tax remains unpaid after the due date, the tax shall bear interest at the rate of one and one-half percent for each month or portion thereof until fully paid.

(d) The Secretary of State shall, at least 60 days prior to the first day of June of each year, cause to be mailed to each domestic limited liability company and each registered series thereof and each foreign limited liability company required to comply with the provisions of this section in care of its registered agent in the State of Delaware an annual statement for the tax to be paid hereunder.

(e) In the event of neglect, refusal or failure on the part of any domestic limited liability company, registered series or foreign limited liability company to pay the annual tax to be paid hereunder on or before the 1st day of June in any year, such domestic limited liability company or foreign limited liability company shall pay the sum of $200 and such registered series shall pay the sum of $50, to be recovered by adding that amount to the annual tax and such additional sum shall become a part of the tax and shall be collected in the same manner and subject to the same penalties.

(f) In case any domestic limited liability company, registered series or foreign limited liability company shall fail to pay the annual tax due within the time required by this section, and in case the agent in charge of the registered office of any domestic limited liability company or foreign limited liability company upon whom process against such domestic limited liability company or any protected series or registered series thereof or foreign limited liability company may be served shall die, resign, refuse to act as such, remove from the State of Delaware or cannot with due diligence be found, it shall be lawful while default continues to serve process against such domestic limited liability company or any protected series or registered series thereof or foreign limited liability company upon the Secretary of State. Such service upon the Secretary of State shall be made in the manner and shall have the effect stated in Sec. 18-105 of this title in the case of a domestic limited liability company or any protected series or registered series thereof and Sec. 18-910 of this title in the case of a foreign limited liability company and shall be governed in all respects by said sections.

(g) The annual tax shall be a debt due from a domestic limited liability company, registered series or foreign limited liability company to the State of Delaware, for which an action at law may be maintained after

the same shall have been in arrears for a period of 1 month. The tax shall also be a preferred debt in the case of insolvency.

(h) A domestic limited liability company that neglects, refuses or fails to pay the annual tax when due shall cease to be in good standing as a domestic limited liability company and all registered series thereof shall also cease to be in good standing. A registered series that neglects, refuses or fails to pay the annual tax when due shall cease to be in good standing as a registered series. A foreign limited liability company that neglects, refuses or fails to pay the annual tax when due shall cease to be registered as a foreign limited liability company in the State of Delaware.

(i) A domestic limited liability company or registered series that has ceased to be in good standing or a foreign limited liability company that has ceased to be registered by reason of the failure by the limited liability company, registered series or foreign limited liability company to pay an annual tax shall be restored to and have the status of a domestic limited liability company or registered series in good standing or a foreign limited liability company that is registered in the State of Delaware upon the payment of the annual tax and all penalties and interest thereon for each year for which such domestic limited liability company, registered series or foreign limited liability company neglected, refused or failed to pay an annual tax.

(j) The Attorney General, either on his own motion or upon request of the Secretary of State, whenever any annual tax due under this chapter from any domestic limited liability company, registered series or foreign limited liability company shall have remained in arrears for a period of 3 months after the tax shall have become payable, may apply to the Court of Chancery, by petition in the name of the State of Delaware, on 5 days' notice to such domestic limited liability company, registered series or foreign limited liability company, which notice may be served in such manner as the Court may direct, for an injunction to restrain such domestic limited liability company, registered series or foreign limited liability company from the transaction of any business within the State of Delaware or elsewhere, until the payment of the annual tax, and all penalties and interest due thereon and the cost of the application which shall be fixed by the Court. The Court of Chancery may grant the injunction, if a proper case appears, and upon granting and service of the injunction, such domestic limited liability company, registered series or foreign limited liability company thereafter shall not transact any business until the injunction shall be dissolved.

(k) A domestic limited liability company that has ceased to be in good standing by reason of the domestic limited liability company's neglect, refusal or failure to pay an annual tax shall remain a domestic limited liability company formed under this chapter, and each registered series thereof shall remain a registered series formed under this chapter, and each protected series thereof shall remain a protected series established under this chapter. A registered series that has ceased to be in good standing by reason of the registered series' neglect, refusal or failure to pay an annual tax shall remain a registered series formed under this chapter. The Secretary of State shall not accept for filing any certificate (except a certificate of resignation of a registered agent when a successor registered agent is not being appointed) required or permitted by this chapter to be filed in respect of any domestic limited liability company, registered series or foreign limited liability company if such domestic limited liability company, registered series or foreign limited liability company has neglected, refused or failed to pay an annual tax, and shall not issue any certificate of good standing with respect to such domestic limited liability company, registered series or foreign limited liability company, unless or until such domestic limited liability company, registered series or foreign limited liability company shall have been restored to and have the status of a domestic limited liability company or registered series in good standing or a foreign limited liability company duly registered in the State of Delaware.

(l) A domestic limited liability company that has ceased to be in good standing (and each protected series and registered series thereof), a registered series that has ceased to be in good standing, or a foreign limited liability company that has ceased to be registered in the State of Delaware by reason of the domestic limited liability company’s, registered series’ or foreign limited liability company's neglect, refusal or failure to pay an annual tax may not maintain any action, suit or proceeding in any court of the State of Delaware until such domestic limited liability company, registered series or foreign limited liability company has been restored to and has the status of a domestic limited liability company, registered series or foreign limited liability company in good standing or duly registered in the State of Delaware. An action, suit or proceeding may not be maintained in any court of the State of Delaware by any successor or assignee of such domestic limited liability company (or any protected series or registered series thereof), registered series, or foreign limited liability company on any right, claim or demand arising out the transaction of business by such domestic limited

liability company (or any protected series or registered series thereof) or registered series after the domestic limited liability company or registered series has ceased to be in good standing or a foreign limited liability company that has ceased to be registered in the State of Delaware until such domestic limited liability company, registered series or foreign limited liability company, or any person that has acquired all or substantially all of its assets, has paid any annual tax then due and payable, together with penalties and interest thereon.

(m) The neglect, refusal or failure of a domestic limited liability company, registered series or foreign limited liability company to pay an annual tax shall not impair the validity of any contract, deed, mortgage, security interest, lien or act of such domestic limited liability company or any protected series or registered series thereof or foreign limited liability company or prevent such domestic limited liability company or any protected series or registered series thereof or foreign limited liability company from defending any action, suit or proceeding with any court of the State of Delaware.

(n) member or manager of a domestic limited liability company, registered series or foreign limited liability company is not liable for the debts, obligations or liabilities of such domestic limited liability company, registered series or foreign limited liability company solely by reason of the neglect, refusal or failure of such domestic limited liability company, registered series or foreign limited liability company to pay an annual tax or by reason of such domestic limited liability company, registered series or foreign limited liability company ceasing to be in good standing or duly registered. A protected series or registered series of a domestic limited liability company is not liable for the debts, obligations or liabilities of such domestic limited liability company or any other series thereof solely by reason of the neglect, refusal or failure of such domestic limited liability company or other series to pay an annual tax or by reason of such domestic limited liability company or other series ceasing to be in good standing. (Last amended by Ch. 357, L. ‘18, eff. 8-1-19 and Ch. 48, L. ‘19, eff. 8-1-19.)

§18-1108 CANCELLATION OF CERTIFICATE OF FORMATION OR CERTIFICATE OF REGISTERED SERIES FOR FAILURE TO PAY TAXES

(a) The certificate of formation of a domestic limited liability company shall be canceled if the annual tax due under §18-1107 of this title for

the domestic limited liability company is not paid for a period of 3 years from the date it is due, such cancellation to be effective on the third anniversary of such due date.

(b) The certificate of registered series shall be canceled if the annual tax due under §18-1107 of this title is not paid for a period of 3 years from the date it is due, such cancellation to be effective on the third anniversary of such due date.

(c) A list of those domestic limited liability companies and registered series whose certificates of formation or certificates of registered series were canceled on June 1 of such calendar year pursuant to §18-1108(a) or §18-1108(b) of this title shall be filed in the office of the Secretary of State. On or before October 31 of each calendar year, the Secretary of State shall publish such list on the Internet or on a similar medium for a period of 1 week and shall advertise the website or other address where such list can be accessed in at least 1 newspaper of general circulation in the State of Delaware. (Last amended by Ch. 357, L. '18, eff. 8-1-19.)

§18-1109 REVIVAL OF DOMESTIC LIMITED LIABILITY COMPANY

(a) A domestic limited liability company whose certificate of formation has been canceled pursuant to §18-104(d) or §18-104(i)(4) or §18-1108(a) of this title may be revived by filing in the office of the Secretary of State a certificate of revival accompanied by the payment of the fee required by §18-1105(a)(3) of this title and payment of the annual tax due under §18-1107 of this title and all penalties and interest thereon due at the time of the cancellation of its certificate of formation. The certificate of revival shall set forth:

(1) The name of the limited liability company at the time its certificate of formation was canceled and, if such name is not available at the time of revival, the name under which the limited liability company is to be revived;

(2) The date of filing of the original certificate of formation of the limited liability company;

(3) The address of the limited liability company's registered office in the State of Delaware and the name and address of the limited liability company's registered agent in the State of Delaware;

(4) A statement that the certificate of revival is filed by 1 or more persons authorized to execute and file the certificate of revival to revive the limited liability company; and

(5) Any other matters the persons executing the certificate of revival determine to include therein.

(b) The certificate of revival shall be deemed to be an amendment to the certificate of formation of the limited liability company, and the limited liability company shall not be required to take any further action to amend its certificate of formation under Sec. 18-202 of this title with respect to the matters set forth in the certificate of revival.

(c) Upon the filing of a certificate of revival, a limited liability company and all registered series thereof that have been formed and whose certificate of registered series has not been canceled prior to the cancellation of the certificate of formation shall be revived with the same force and effect as if its certificate of formation had not been canceled pursuant to §18-104(d), §18-104(i)(4) or §18-1108(a) of this title. Such revival shall validate all contracts, acts, matters and things made, done and performed by the limited liability company, its members, managers, employees and agents during the time when its certificate of formation was canceled pursuant to §18-104(d), §18-104(i)(4) or §18-1108(a) of this title, with the same force and effect and to all intents and purposes as if the certificate of formation had remained in full force and effect. All real and personal property, and all rights and interests, which belonged to the limited liability company at the time its certificate of formation was canceled pursuant to §18-104(d), §18-104(i)(4) or §18-1108(a) of this title or which were acquired by the limited liability company following the cancellation of its certificate of formation pursuant to §18-104(d), §18-104(i)(4) or §18-1108(a) of this title, and which were not disposed of prior to the time of its revival, shall be vested in the limited liability company after its revival as fully as they were held by the limited liability company at, and after, as the case may be, the time its certificate of formation was canceled pursuant to §18-104(d), §18-104(i)(4) or §18-1108(a) of this title. After its revival, the limited liability company shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its members, managers, employees and agents prior to its revival as if its certificate of formation had at all times remained in full force and effect. (Last amended by Ch. 357, L. ‘18, eff. 8-1-19.)

§18-1110 REVIVAL OF REGISTERED SERIES

(a) A registered series whose certificate of registered series has been canceled pursuant to §18-1108(b) of this title may be revived by filing in the office of the Secretary of State a certificate of revival of registered series accompanied by the payment of the fee required by §18-1105(a)(3) of this title and payment of the annual tax due under §18-1107 of this title and all penalties and interest thereon due at the time of the cancellation of its certificate of registered series. The certificate of revival of registered series shall set forth:

(1) The name of the limited liability company at the time the certificate of registered series was canceled and, if such name has changed, the name of the limited liability company at the time of revival of the registered series;

(2) The name of the registered series at the time the certificate of registered series was canceled and, if such name is not available at the time of revival, the name under which the registered series is to be revived;

(3) The date of filing of the original certificate of registered series;

(4) A statement that the certificate of revival of registered series is filed by 1 or more persons authorized to execute and file such certificate of revival to revive the registered series; and

(5) Any other matters the persons executing the certificate of revival of registered series determine to include therein.

(b) The certificate of revival of registered series shall be deemed to be an amendment to the certificate of registered series, and no further actions shall be required to amend its certificate of registered series under §18-218(d)(3) of this title with respect to the matters set forth in such certificate of revival.

(c) Upon the filing of a certificate of revival of registered series, a registered series shall be revived with the same force and effect as if its certificate of registered series had not been canceled pursuant to §18-1108(b) of this title. Such revival shall validate all contracts, acts, matters and things made, done and performed by the registered series, its members, managers, employees and agents during the time when its certificate of registered series was canceled pursuant to §18-1108(b) of this title, with the same force and effect and to all intents and purposes as if the certificate of registered series had remained in full force and effect. All real and personal property, and all rights and interests, which

belonged to the registered series at the time its certificate of registered series was canceled pursuant to §18-1108(b) of this title or which were acquired by the registered series following the cancellation of its certificate of registered series pursuant to §18-1108(b) of this title, and which were not disposed of prior to the time of its revival, shall be vested in the registered series after its revival as fully as they were held by the registered series at, and after, as the case may be, the time its certificate of registered series was canceled pursuant to §18-1108(b) of this title. After its revival, the registered series shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its members, managers, employees and agents prior to its revival as if its certificate of registered series had at all times remained in full force and effect. (Last amended by Ch. 48, L. '19, eff. 8-1-19.)

Subchapter XII

Statutory Public Benefit Limited Liability Companies
[As added by Ch. 357, L. '18, eff. 8-1-18]

§18-1201 LAW APPLICABLE TO STATUTORY PUBLIC BENEFIT LIMITED LIABILITY COMPANIES; HOW FORMED

This subchapter applies to all statutory public benefit limited liability companies, as defined in §18-1202 of this title. If a limited liability company elects to become a statutory public benefit limited liability company under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to the provisions of this chapter, except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply, and notwithstanding §18-1101 or any other provision of this title, such requirements imposed by this subchapter may not be altered in the limited liability company agreement.

§18-1202 STATUTORY PUBLIC BENEFIT LIMITED LIABILITY COMPANY DEFINED; CONTENTS OF CERTIFICATE OF FORMATION AND LIMITED LIABILITY COMPANY AGREEMENT

(a) A "statutory public benefit limited liability company" is a for-profit limited liability company formed under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a statutory public benefit limited liability company shall be managed in a manner that balances the members' pecuniary interests, the best interests of those materially affected by the limited liability company's conduct, and the public benefit or public benefits set forth in its certificate of formation. A statutory public benefit limited liability company shall state in the heading of its certificate of formation that it is a statutory public benefit limited liability company and shall set forth 1 or more specific public benefits to be promoted by the limited liability company in its certificate of formation. The limited liability company agreement of a statutory public benefit limited liability company may not contain any provision inconsistent with this subchapter.

(b) "Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than members in their capacities as members) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a limited liability company agreement contemplated by this subchapter.

§18-1203 CERTAIN AMENDMENTS AND MERGERS; VOTES REQUIRED

Notwithstanding any other provision of this chapter, a statutory public benefit limited liability company may not, without the approval of members who own at least 2/3 of the then-current percentage or other interest in the profits of the limited liability company owned by all members:

(1) Amend its certificate of formation to delete or amend a provision required by §18-1202(a) of this title;

(2) Merge or consolidate with or into another entity or divide into 2 or more domestic limited liability companies if, as a result of such merger, consolidation or division, the limited liability company interests in such limited liability company would become, or be converted into or exchanged for the right to receive, limited liability company interests or other equity interests in a domestic or foreign limited liability company or other entity that is not a statutory public benefit limited liability company or similar entity, the certificate of formation or limited liability company agreement (or similar governing document) of which does not contain provisions identifying a public benefit or public benefits comparable in all material respects to those set forth in the certificate of formation of such limited liability company as contemplated by §18-1202(a) of this title; or

(3) Cease to be a statutory public benefit limited liability company under the provisions of this subchapter.

§18-1204 DUTIES OF MEMBERS OR MANAGERS

(a) The members or managers or other persons with authority to manage or direct the business and affairs of a statutory public benefit limited liability company shall manage or direct the business and affairs of the statutory public benefit limited liability company in a manner that balances the pecuniary interests of the members, the best interests of those materially affected by the limited liability company's conduct, and the specific public benefit or public benefits set forth in its certificate of formation. Unless otherwise provided in a limited liability company agreement, no member, manager or other person with authority to manage or direct the business and affairs of the statutory public benefit limited liability company shall have any liability for monetary damages for the failure to manage or direct the business and affairs of the statutory public benefit limited liability company as provided in this subsection.

(b) A member or manager of a statutory public benefit limited liability company or any other person with authority to manage or direct the business and affairs of the statutory public benefit limited liability company shall not, by virtue of the public benefit provisions or §18-1202(a) of this title, have any duty to any person on account of any interest of

such person in the public benefit or public benefits set forth in its certificate of formation or on account of any interest materially affected by the limited liability company's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such person's fiduciary duties to members and the limited liability company if such person's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

§18-1205 PERIODIC STATEMENTS AND THIRD-PARTY CERTIFICATION

A statutory public benefit limited liability company shall no less than biennially provide its members with a statement as to the limited liability company's promotion of the public benefit or public benefits set forth in its certificate of formation and as to the best interests of those materially affected by the limited liability company's conduct. The statement shall include:

(1) The objectives that have been established to promote such public benefit or public benefits and interests;

(2) The standards that have been adopted to measure the limited liability company's progress in promoting such public benefit or public benefits and interests;

(3) Objective factual information based on those standards regarding the limited liability company's success in meeting the objectives for promoting such public benefit or public benefits and interests; and

(4) An assessment of the limited liability company's success in meeting the objectives and promoting such public benefit or public benefits and interests.

§18-1206 DERIVATIVE SUITS

Members of a statutory public benefit limited liability company or assignees of limited liability company interests in a statutory public benefit limited liability company owning individually or collectively, as of the date of instituting such derivative suit, at least 2% of the then-current percentage or other interest in the profits of the limited liability company or, in the case of a limited liability company with limited liabili-

ty company interests listed on a national securities exchange, the lesser of such percentage or limited liability company interests of at least $2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in §18-1204(a) of this title.

§18-1207 NO EFFECT ON OTHER LIMITED LIABILITY COMPANIES

This subchapter shall not affect a statute or rule of law that is applicable to a limited liability company that is not a statutory public benefit limited liability company.

§18-1208 ACCOMPLISHMENT BY OTHER MEANS

The provisions of this subchapter shall not be construed to limit the accomplishment by any other means permitted by law of the formation or operation of a limited liability company that is formed or operated for a public benefit (including a limited liability company that is designated as a public benefit limited liability company) that is not a statutory public benefit limited liability company.

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