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ASSEMBLY COMMITTEE ON JUDICIARY



WORK SESSION DOCUMENT

MAY 14, 2003

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ASSEMBLY JUDICIARY

DATE: 5/14/03 ROOM: 3138 EXHIBIT P

SUBMITTED BY: ALLISON COMBS

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WORK SESSION

ASSEMBLY COMMITTEE ON JUDICIARY

May 14, 2003

(Please note the list of speakers and summary of the discussion on each measure contained within this document do not represent an official record of the referenced meetings. For an official record, please see the minutes from the meetings of the Assembly Committee on Judiciary, which are available through the Legislative Counsel Bureau.)

The following measures may be considered during the Committee's work session:

- SENATE BILL 122** (BDR 57-265 was requested by Senator Dina Titus and Senator Valerie Wiener). The bill was heard in Committee on May 12, 2003, and no action was taken.

Senate Bill 122 makes various changes regarding malpractice insurance and actions.

Proponents/those testifying in support of the bill: Senator Titus; Lynn Fulstone, Physicians Insurance Company of Wisconsin; Larry Matheis, Nevada State Medical Association; Bill Bradley, Nevada Trial Lawyers Association; Bobbie Gang, Nevada Women's Lobby and National Association of Social Workers.

Opponents/those testifying in opposition of the bill: None

Those who signed in as "neutral" on the bill: Alice A. Molasky-Arman, Nevada Commissioner of Insurance.

Discussion: Testimony in support of the measure indicated the bill's provisions were designed to address factors contributing to the State's medical malpractice crisis. Commissioner Molasky-Arman raised concerns regarding the potential impact of the bill.

Proposed Amendments: None

- SENATE BILL 264** (BDR 16-1182 was requested by Senator Sandra Tiffany, Senator Terry Care, Senator Joseph Neal, and Senator Dennis Nolan). The bill was heard in Committee on May 12, 2003, and no action was taken.

Senate Bill 264 makes various changes to provisions pertaining to the Department of Corrections.

Proponents/those testifying in support of the bill: Dorothy Nash Holmes, Nevada's Department of Corrections.

Opponents/those testifying in opposition of the bill: Laurel Stadler, MADD

Discussion: Testimony provided an overview of the reentry program authorized under the legislation and the "compassionate release" provisions for inmates in ill health or who are pregnant upon imprisonment.

Proposed Amendments: None

- SENATE BILL 436, FIRST REPRINT** (BDR 7-982 was introduced by the Senate Committee on Judiciary). The bill was heard in Committee on May 5, 2003, and no action was taken.

Senate Bill 436 makes various changes to the provisions pertaining to business.

Proponents/those testifying in support of the bill: John Fowler, Business Law Section of the State Bar of Nevada; Scott Anderson, Office of the Secretary of State.

Opponents/those testifying in opposition of the bill: None.

Discussion: Testimony indicated this measure is the omnibus measure presented each session by the Business Law Section to update Nevada's business statutes. A copy of the overview of the bill submitted by Mr. Fowler is provided on blue paper. Testimony also indicated that the concerns of the Office of the Secretary of State were addressed through amendment in the Senate Committee on Judiciary.

Proposed Amendments: The following amendments have been raised:

1. **Changes to Fictitious Firm Name Statutes.** Concerns were raised in a document submitted to Chairman Bernie Anderson (a copy of which is attached on green paper regarding Sections 263 and 265 of the bill).
 - a. *Deletion of requirement to provide a street address*—Section 263 deletes the requirement to provide a street address on a certificate or a renewal certificate. (See page 148.)
 - b. *Deletion of notarization requirements*—Objections were also raised to the proposed deletion of the notarization requirements from Sections 263 and 265. (See pages 148 and 149.)
2. **Provide notice directly to the individual of the impending expiration of certificate filed by the person doing business under assumed or fictitious name,** proposed by Assemblyman John Carpenter. Currently, under NRS 602.010 (amended by Section 262 of the bill on pages 147 and 148), these certificates expire

5 years after filing, if the board of county commissioners adopts an ordinance providing for the expiration. The board has the authority to adopt the ordinance under NRS 602.035, which also provides for notice of the expiration through publication in a newspaper of general circulation.

3. The following amendments are submitted for discussion by Assemblywoman Barbara Buckley:

a. **Section 2 (page 2)—Authorization for a corporation to maintain any records by means of, or in the form of, any information processing system or other information storage device or medium.**

Ensure the application of this section is not overly broad. An amendment is suggested to address this concern by adding a phrase such as "*Except as otherwise required by federal or state law*" to the beginning of Section 2.

b. **Section 23 (pages 11 and 12)—Director and officer liability protections: creditors added and alternative standards permitted.**

i. Delete the addition of "creditors" (page 12, line 41); *and*

ii. Change "and" to "or" (page 12, line 45).

c. **Sections 141, 142, 175 and 176 (pages 75-77 and 91-93)—Statutes setting forth activities that do not require qualification in Nevada.**

The referenced sections allow foreign limited liability companies under Chapter 86 of NRS (Sections 141 and 142) and limited partnerships under Chapter 88 of NRS (Sections 175 and 176) the same list of activities that foreign corporations can now engage in that will not trigger the necessity of qualifying to do business in Nevada pursuant to NRS 80.015 and 80.016.

i. Delete the new sections of the bill; or

ii. Repeal the following activities that currently do not constitute doing business in the State under NRS 80.015 and 80.016, and delete the same activities from the new sections in the bill:

- Make sales through independent contractors;
- Soliciting or receiving orders outside this State through or in response to letters, circulars, catalogs or other forms of advertising;
- Accepting those orders outside this State and filling them by shipping goods into this State; and

- Creating or acquiring indebtedness, mortgages and security interests in real or personal property.

Two additional activities might also be considered for deletion:

- Securing or collecting debts or enforcing mortgages and security interests in property securing the debts; and
- Owning, without more, real or personal property.

- d. **Section 266 (page 149)—Penalty for a violation of Chapter 602 of NRS (Doing Business Under an Assumed Name) or falsely filing a certificate of termination.**

Maintain the existing penalty of a misdemeanor.

AJWS-05-14-03

Introduction To
SENATE BILL 436, FIRST REPRINT

Executive Committee
Business Law Section
State Bar of Nevada
April 24, 2003

To the Assembly Judiciary Committee:

The Executive Committee of the Business Law Section, meeting as a "committee of the whole", met many times in the Spring, Summer and Fall of 2002 to draft the statutes that became Senate Bill 436, concerning Nevada business and business entities. These suggestions have been approved and endorsed by the Executive Committee of the Business Law Section and by the State Bar's Board of Governors.

A list of the members of the Executive Committee and others who assisted that effort are attached to this memo.

The following memo describes the reasoning and intent behind the changes made by SB 436. One conceptual change involves almost every statute contained in SB 436 and accounts for most of its bulk. That set of changes is discussed first. All references to sections in this memo are references to sections in SB 436. There were very few changes to SB 436 in its passage through the Senate. Where important, I refer to those changes in this Memo.

If the Committee has any questions, please email, call, write or ask questions of the undersigned or any of the other members of the Section's Executive Committee.

Respectfully Submitted,

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Chair, Executive Committee
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1. Electronic Records: Permitting Them Throughout Title 7; "Mailing" Addresses.

Ellen Schulhofer, a member of the Executive Committee, pointed out that in 1999, the Legislature cleaned up many of the inconsistencies in Chapter 78 with respect to who must sign filed documents and whether the signature must be acknowledged. The requirements for an acknowledgment were deleted. At the same time, the Legislature added definitions of "sign" and "signature" to standardize the statutes and in partial preparation for the electronic filing and retrieval of documents. However, these terms are not consistently used in Chapter 78 or elsewhere in Title 7 (Chapters 78 through 92A). Chapter 78 and the other Title 7 chapters uses the term "executed" rather than "signed". For example, NRS 78.030 requires that the articles be "executed". In other instances, the requirement of signature is only implicit. For example, NRS 78.039(1) refers only to a "written, acknowledged consent" and not a "signed, acknowledged consent". Accordingly, we should amend all of Title 7 to employ the term "sign" or "signed" uniformly and uniformly define the terms "record", "sign" and "signature". These terms will allow the use of electronic filing and signatures for private transactions and official filings.

The Executive Committee discussed electronic signatures and the use of the word "sign" everywhere in Title 7. The Committee decided:

1. All references to "executed", "execute", etc. in Title 7 should be changed to "sign" and its derivatives. However, the Secretary of State's Office requested some exceptions to this blanket replacement. Each Title 7 chapter contains statutes allowing one entity to allow another entity to use its name. The Secretary of State requested we retain the requirement that the consent allowing such use filed with the Secretary be actually executed by an officer of the entity whose name will be used and that the signature be acknowledged. See Sections 11, 12, 26, 79, 80, 112, 148, 149 and 201.
2. There is a question whether the Uniform Electronic Transactions Act ("UETA"), NRS Chapter 719, covers electronic single-party record keeping. See definition of "transaction" at NRS 719.180 as involving 2 or more persons. Corporate record keeping statutes should permit electronic corporate records. Any such statute should employ the term "information processing system" defined at NRS 719.130 and used in Chapter 719.
3. The "transaction" definition in UETA was intended to cover nonprofit "transactions", not just commercial ones.
4. Amend 78.105(2) to include all corporate records and make it a separate statute referring to all records. Section 2.
5. A statute should establish that a corporation may maintain its written records in written form or another form capable of conversion into a "perceivable" (15 U.S.C. §7001 et seq.) form. See definition of "record" in each Title 7 chapter. Section 4 (78.010) and Sections 62, 72, 89, 102,

129, 140, 166, 177, 195, 210, 217, 233 and 242.

6. A corporation should have an obligation to convert NRS 78.105 records to writing as in Del. Gen. Corp. Act §224. See Section 2.
7. Chapter 78 should specifically allow corporations to refuse to accept electronic signatures, analogous to NRS 719.220. See Section 3.
8. The definition of "signature" at NRS 78.010(1) and elsewhere in Title 7 must be changed to include language like UCC §9.102(1)(g) ("identify the person and adopt and accept a record"). Sections 4, 64, 75, 92, 107, 132, 145, 166, 177, 199, 210, 244.

Finally, Chapter 82 on nonprofit corporations lacks but needs a statute like other chapters in Title 7 permitting the correction of a filed document. This new statute has previously been added to the other Title 7 statutes but was inadvertently omitted from Chapter 82. Section 103.

A change to NRS 78.035, NRS 78.105, NRS 78,150(1)(d), NRS 78.165, NRS 78.580 and NRS 78.730 and other statutes makes consistent all references to the "post office box or street address" of a stockholder, director or officer. The references will now be to a "mailing or street address" since the term "mailing address" includes a post office box in a post office, private postal service or street address.

2. Reinstating Corporation After Charter Is Forfeited – Certificate of Reinstatement As Amendment To Articles – Section 26.

NRS 78.185 provides for the reinstatement of a corporation after its charter has been forfeited. NRS 78.185(1) provides that if its name has been reserved for or acquired by another entity, the original corporation can reinstate under a new name. However, no statute has ever specifically provided that the Certificate of Reinstatement is deemed an amendment to the articles of incorporation changing the name.

New language in NRS 78.185, Section 26, provides that such a Certificate of Reinstatement is deemed an amendment to the articles of incorporation. NRS 78.010(1)(b) is also changed to include language providing that such certificates of reinstatement are included within the defined term "articles" as used in Chapter 78. Section 4.

3. NRS 78.060 and 78.070 – General Powers – Deleting Duplicative Language; Sections 13 and 15.

The provisions of NRS 78.060(2)(d) repeats language contained more briefly in NRS 78.070 listing "specific powers". The deleted language is in NRS 78.060, Section 13; added language mentioning the power of a corporation to lease and take property by devise or bequest appears at NRS 78.070(4), Section 15.

4. Management Firms Allowed to Manage Corporations; Minimum And Maximum Number of Directors No Longer Stated; Section 19.

Two changes to NRS 78.115 are recommended at Section 19 of the Bill. The first allows the board of directors to employ management companies; the corporation will be "under the direction of" the board, not "managed by" the board.

The second change deletes the requirement that when a variable number of directors are desired, a minimum and a maximum number must be stated in the articles or the bylaws. The directors are given the freedom to change the number of directors to whatever number they wish.

5. Conflict Between Bylaws Adopted By Directors and Stockholders; Section 20.

Existing NRS 78.120 allows both the stockholders and the directors to adopt bylaws, but the stockholder-adopted bylaws control. This new version of NRS 78.120(2), Section 20, permits the articles to grant the power to adopt bylaws only to the directors. Absent such a provision, stockholders can adopt bylaws but, unless the bylaw prohibits it, the directors can change any stockholder-adopted bylaw. The revisions were based on Delaware General Corporation Law §109 and Title 2 and §2-109 of the Code of Maryland, Corporations and Associations.

6. Board Committees Do Not Need Names; Section 21.

This amendment to NRS 78.125 eliminates the requirement that each board committee have a specific name, thus eliminating a trap for the unwary. Under the existing statutory language, the lack of a name stated in the resolution creating the committee clouds the legitimacy of any action the committee takes. The requirement is unnecessary.

7. Director and Officer Liability Protections: Creditors Added and Alternative Standards Permitted; Section 23.

The 2001 amendments to NRS 78.138, 78.295 and 78.300 have clouded the issue as to a director's liability for unlawful distribution, as to corporate creditors' claims. Formerly NRS 78.138 did not permit an exculpation provision for a director's personal liability for the unlawful payment of distributions but NRS 78.295 contained a "safe harbor" provision. In 2001, the "safe-harbor" was repealed and 78.300 was amended to make director liability for unlawful distributions subject to NRS 78.138. NRS 78.138 was amended to contain a provision eliminating a director's personal liability to the corporation or its shareholders for any act unless that act is both (i) a breach of fiduciary duty, and (ii) the breach involved intentional misconduct, fraud, or a knowing violation of

the law. NRS 78.138(7); see also S.B. 577 from the 2001 Session, § 3. The amendments gave directors greater protection from stockholder's claims. In other words, a director can never be personally liable to the corporation or a shareholder without a showing of intentional misconduct, fraud, or a knowing violation of the law. However, some complained that the director and officer protection was too great and the articles should be able to contain provisions imposing a more strict rule of director and officer liability to stockholders if the corporate founders wish.

The exculpation contained in NRS 78.138 does not expressly extend to corporate creditors, who are given a claim for personal liability against directors under NRS 78.300. While an argument can be made that, despite the failure to expressly include creditors, the spirit and intent of the recent revisions to NRS 78.138 and 78.300 was to expand the protections afforded corporate officers and directors, not to reduce those protections, the effect of the amendments with respect to liability to creditors is not crystal clear.

Thus, a change is suggested to NRS 78.138(7), Section 23, to add creditors to the groups from which an officer and director is protected. In addition, new language is added to allow the articles to contain provisions imposing a stricter standard of director and officer liability. These articles or an amendment must be filed after the 2003 legislation becomes law. The effect of the 2001 change to NRS 78.138(7) is to impose a standard for recovering damages from a director for breaching his or her fiduciary duties on all Nevada corporations. If articles or an amendment thereto filed before the effective date of the 2003 legislation could negate the 2001 standard of director damage liability, many provisions pre-dating the 2001 legislation make the 2001 legislation a dead letter and ineffective. Those corporations counting on the 2001 legislation to provide a standard of liability despite previously ineffective old articles provisions would find the old provisions unexpectedly coming to life.

8. Facts or Events Upon Which Stock Rights Can Depend Expanded to Include Events Caused By the Corporation; Sections 27 and 28.

In 2001 the Legislature amended NRS 78.195(4) to clarify what a "fact or event" includes with respect to the determination of the rate, condition or time of payment of a distribution, so that this statute would be more like Section 151(a) of the Delaware Code. However, the 2001 change did not expressly provide that such a "fact or event" can be an action by the corporation itself. That language is included with this change in Section 27 of the Bill.

The change to NRS 78.196(2)(f) at Section 28 also clarifies what is a "fact or event" (as in Section 151(a) of the Delaware Code) as was included in 2001 at NRS 78.195(4).

9. Allow Officers to Grant Options After Director Approval; Section 29.

Since the board of directors of many public companies are comprised of individuals residing throughout the country, the board of directors are often authorized in the exercise of their general powers to set the terms of the stock options and to delegate the power to actually grant the options to an officer. This is permitted under existing Nevada law. The proposed changes make this grant of power more explicit. See new subsections 3 and 4 of 78.200. The revisions to subsection (2) of NRS 78.200 reflect additional provisions contained in Delaware General Corporation Law § 157.

With the change to subsection 1 of 78.200, we clarify that rights and options can be created at any time or to any person, deleting language allowing an argument that the rights and options must be issued only in connection with an issue and sale of stock or other securities.

10. True Nonvoting Stock Permitted; Sections 32, 41, 44, 249.

Chapter 78 of the Nevada Revised Statutes presently allows for the creation of nonvoting classes or series of stock. However, Chapter 78 requires the vote of such nonvoting classes or series of stock where an amendment to the corporation's articles of incorporation would "adversely alter or change any preference or any relative or other right", 78.390, where a forward or reverse stock split adversely affects the nonvoting stockholders' rights, 78.207 and when a control shares acquisition would adversely affect the nonvoting stockholders' rights, 78.3791. Existing NRS 92A.120(7) requires nonvoting stockholder approval on a merger if the merger would adversely affect that class of stockholders.

The proposed amendments to these statutes would allow provisions of the articles or a filed certificate of designation creating a nonvoting class or series of stock to deny voting rights, even where an amendment to the corporation's articles would "adversely alter or change any preference or any relative or other right." Complete denial of voting rights to a class or series of stock is uncommon – a preliminary review of the law in other jurisdictions identified only Utah as having a similar provision. See Utah Code Ann. § 16-10a-1004(5); Erik G. Davis, Comment, Restricting Shareholder Voting Rights Under the Utah Revised Business Corporation Act, 1995 B.Y.U. L. Rev. 1297. In other words, permitting the provisions of the preferred stock to deny all voting rights would put Nevada corporate law in a unique position in comparison to almost all other states, including Delaware.

The changes to NRS 78.207, 78.3791, 78.390 and 92A.120 allow a true nonvoting class of stock with no voting rights at all. We recommend deleting NRS 92A.120(7) for other reasons as we describe later in this memo.

11. **Exemption to Stockholder Right To Inspect Financial Records: Companies Filing Reports Under Securities Exchange Act of 1934; Section 34.**

Current laws allows a 15% or greater stockholder to inspect a corporation's financial records but not those listed on "any recognized stock exchange". New language changes that rule to those companies which have filed all the periodic reports they are required to file under the Securities Act of 1934, thus clearly placing NASDAQ and pink sheet companies within the exception. See new NRS 78.257(6).

The Committee considered eliminating the seemingly duplicative last sentence of NRS 78.257(6) providing that 15% or greater stockholders of a subchapter "S" corporation may demand and receive an inspection of the corporation's books. Remember, NRS 78.257(b), first sentence, does away with the right of 15% stockholders to demand financial records if the company furnishes a "detailed annual financial statement" or the company is a public company. Upon contacting the authors of the language, the Committee learned it was intended to make sure that subchapter "S" corporations, even those that send out detailed annual financial information, furnish necessary financial information to stockholders before the end of the year in order to allow them time for useful end-of-the year tax planning. Otherwise, such stockholders would not receive financial information until after the end of the year.

12. **Director Position Created During Default of Corporation In Financial Covenant Disappears When Default Is Over; Section 35.**

Often certain classes of shareholders are given a right to only elect directors in the event of a default in payment of their dividends or other financial obligations of the corporation. The parties often desire that when those defaults are cured the right to designate the directors goes away. However, existing NRS 78.335 creates some element of concern that once a director is elected his position cannot be eliminated during midterm. The amendment could clarify that this is not the case where the directorship itself disappears.

In addition, changing the words "voting power" to "vote" in subsections 1 and 3 of NRS 78.335 more carefully delimits the stockholders who can remove directors to those entitled to actually vote for the directors being removed in the first place.

13. **Record Dates for Written Consents for Stockholders; Change to Record Date Rules for Stockholder Meetings; Section 36.**

Stockholders can act by written consent in lieu of a meeting. A suggested new subsection 3 to 78.350 would allow directors to adopt a record date establishing which stockholders can sign a written consent and default record dates if the directors fail to establish one.

Subsection 2 of 78.350 provides that record dates to determine the stockholders who can vote at meetings cannot be less than 10 nor more than 60 days before the meeting date. The existing statute allows the articles and bylaws to vary these periods in any way. The

Committee decided to allow the periods to be different but not unless they are permitted in the articles of incorporation (not the bylaws). The Committee also decided not to add the words "or action" after the word "meeting(s)" since NRS 78.320(2) makes clear that stockholder action by written consent is always a substitute for a meeting.

14. Stockholder Proxies. When Is a Proxy "Coupled With An Interest" And Irrevocable; Section 37.

Two changes were suggested to 78.355. The first deletes most of subsection 2(a) describing the kind of acts which can constitute a stockholder's signature. This will be superceded by new provisions defining the word "sign" to include electronic signatures.

New subsection 5 will be added, adapted from a provision in the Revised Model Business Corporation Act, Section 7.22, setting forth those legal acts that can make a proxy "coupled with an interest" and thus irrevocable. A change is also made to subsection 4 deleting a reference to a proxy coupled with an interest.

15. Electronic Stockholder Meeting Notices Permitted; Section 38.

New subsections 8, 9 and 10 to NRS 78.370 (with conforming changes in the rest of the statute) is proposed allowing corporations to give notices of stockholder meetings electronically if the stockholder consents to it. Additional proposed changes establish default rules for determining when the notices will be deemed to have been given. Subsection 6 of the existing statute would be deleted as it deals with signing waivers of notice, covered specifically by NRS 78.375.

In addition, a change is marked to subsection 3 of NRS 78.370 adding limited liability companies to the last of entities to which notice may be personally delivered to an individual in a representative capacity.

16. Waiver of Notice - Electronic Waivers; Section 39.

The Committee drafted a change to NRS 78.375 allowing electronic transmission of waivers of notice, picking up language from Delaware General Corporation Law Section 229 and merging in the Committee's creation of an "electronic record" definition.

17. NRS 78.380, 78.385 and 78.390: Amendment of Articles Before Issuing Stock; Sections 42, 43 and 44.

The Secretary of State's Office has been faced with a situation where only nonvoting preferred stock has been issued and the corporate directors wish to amend the articles of incorporation. The procedure to amend the articles is not clear since NRS 78.380, setting forth a procedure whereby incorporators or the board of directors can, acting alone, amend articles before stock is issued, is predicated on there being no stock issued at all,

whether voting or nonvoting.

Therefore, the Committee proposes to change NRS 78.380 to allow the incorporators or directors to amend articles without any stockholder vote at any time before voting stock is issued. In other words, the incorporators or the board of directors can amend articles without any stockholder approval if only nonvoting stock has been issued.

The words "having stock" are deleted from subsection 1 of NRS 78.385. The statute becomes one indicating the possible scope of any amendment, whether or not the corporation has issued stock at the time of the amendment.

18. Changes to NRS 78.390 – Procedures for Amending Articles – Various Changes; Section 44.

Changes to subsection 1 make clear that the procedures set forth at NRS 78.390 (director actions and notification by stockholders) apply to corporations which have issued voting stock. NRS 78.380 controls the amendment procedure of a corporation before it has issued voting stock.

The change to subsection 1(a) deletes the requirement that the Board, when approving an amendment, specifically declare it "advisable". Such a specific requirement often leads to problems when counsel must opine on an amendment, since the resolution might omit that specific word. The Board would not recommend the amendment unless the Board supported it. Thus, omitting the requirement that the Board resolution specifically mention the word "advisable" deletes nothing of value.

Finally, NRS 78.390 at Section 44 contains the new language in subsection 2 which we recommend in our discussion of true nonvoting stock at item 10 above.

19. Business Combinations Statutes; Sections 46 through 53; Section 267.

Recommended changes to these statutes clarify confusing language referring to when an "interested stockholder" first became an "interested stockholder". NRS 78.419 defining the term "date of acquiring shares" is repealed. Section 267. The definition makes it more difficult to understand the statutes. Thereafter, the terminology refers to the "time that the person first became an interested stockholder". See NRS 78.433, 78.434, 78.437, 78.438, 78.439, 78.441, 78.443 and 78.444.

Changes to NRS 78.434(1) and new subsection (2) allow a corporation originally exempt from the Business Combinations Act to elect to be subject to it without it affecting the rights of any shareholder at the time of the change. New subsection 5 of NRS 78.434 allows corporations which have too few shareholders to be subject to the act automatically to elect to be exempt from the act provided the election is made before the

corporation has the requisite number of stockholders. Section 47.

The changes to NRS 78.437, Section 48, exempts from the Business Combinations Act a person who owns or controls more than ten percent of a corporation's stock on the date the corporation first has enough shareholders to become a domestic resident corporation.

The Committee believes that the intention of NRS Sections 78.438 and .439 (Sections 49 and 50) is that the Business Combinations Act does not apply if, before the date a person becomes an interested stockholder, one of the following conditions is satisfied:

- (a) The combination is approved by the Board of Directors; or
- (b) The transaction by which such person becomes an interested stockholder is approved by the Board of Directors.

Unfortunately, the language used in phrasing the second alternative refers to the "purchase" of stock (78.439(1)) which makes a person an interested stockholder. Under the Business Combinations Act, a purchase is not the only way a person may become an interested stockholder. For instance, entering into a voting agreement with an existing interested stockholder by which a third party could control how that stockholder votes would generally make the third party also an interested stockholder. Thus, arguably, in cases such as the example, the Board of Directors could not approve a person, but only a particular transaction with that person. The language in both 78.435 and 78.439 is so condensed as to lead to some confusion as to what it means.

The changes to NRS 78.438, Section 49, clarify that if the Board of Directors approves a person becoming an interested stockholder before that person becomes an interested stockholder, they are not subject to the Business Combinations Act regardless of the means by which they become an interested stockholder. The change to NRS 78.439, Section 50, is made with the same intent.

NRS 78.441, Section 51, provides for approval of a business combination if all the common stockholders receive a certain minimum price for their shares. The change to NRS 78.441 makes clear that, in determining the price that non-interested shareholders must receive in connection with a business combination, the cost of any stock acquired by the interested stockholder in the previous three years is considered even if during a portion of that period the corporation did have enough shareholders to be a resident domestic corporation.

Finally, the change to NRS 78.442, Section 52, requiring that a minimum consideration be paid to the holders of preferred shares, makes clear that in determining the price that non-interested shareholders must receive in connection with a business combination the cost of any stock acquired by the interested stockholder in the previous three years is considered even if during a portion of that period the corporation did have enough shareholders to be a resident domestic corporation.

20. NRS Chapter 78.580 - Procedure for Dissolution After Issuance of Stock or Beginning of Business; Section 54.

A new subsection 3 allows a corporation's dissolution to take effect at the filing of the certificate of dissolution or on at a later date not more than 90 days after the filing. This change mirrors similar changes allowing documents filed in the Secretary of State's Office to take effect up to 90 days after the file date. We have also changed the statute to require only the signature of any officer to the Certificate of Dissolution.

21. Correction Statute for Nonprofit Corporations; Section 103.

The 1997 Legislature put in place a statute allowing a corporation to correct a document that was defective in some way when filed. NRS 78.0295, Section 103, places the same statute in NRS Chapter 82.

22. Chapter 82 – Nonprofits Acting By Written Ballots Can Still Act By Written Consent; Section 117.5.

New Section 117.5 amends NRS 82.326. The statute allows members to vote by use of written ballots. This procedure is often used by electric cooperatives like Wells Rural Power and Mt. Wheeler Power to elect directors. The amendment to 82.326, new subsection 6, makes clear that the use of the ballot procedure still allows the members to act by written consent.

23. Chapter 86 – Limited Liability Companies and Limited Partnerships – New Statutes Setting Forth Activities that Do Not Require Qualification In Nevada; Sections 141 and 142; Sections 175 and 176.

NRS 80.015 and 80.016 provide a list of activities that foreign corporations can engage in that will not trigger the necessity of qualifying to do business in Nevada. The Committee believes the same statutes should be included in Chapter 86 to allow foreign limited liability companies the same exceptions.

The same types of statutes are also added to Chapter 88 on limited partnerships.

24. Chapter 86 – Limited Liability Companies – Changing Members or Managers Do Not Require Filing; Section 147.

NRS 86.161(1)(d)(1) and NRS 86.161(1)(d)(2) should each be amended to insert the word "initial" after the word "each" so that, as in the corporate statutes, there is no suggestion that each time you change the managers or members from those named in the articles you have to file an amendment to the articles.

In addition, NRS 86.161(3)(a) is changed so that the articles of organization need not state the matters described in NRS 86.301 and in the exact wording of NRS 86.301.

25. Chapter 86 – Clarify No Need for Hyphen In Names; Section 148.

In 1991, the drafter of the NRS insisted on the use of a hyphen whenever a reference is made to a "limited-liability company". The rest of the world feels no such constraint. NRS 86.171 should be changed to make clear no one else needs the hyphen in referring to LLC's organized in Nevada.

26. Chapter 86 – Who Can Contract Debts and Sign Deeds and Mortgages; Sections 155 and 156.

Certain persons (including certain gaming investigators) have interpreted NRS 86.301 to require an express delegation in the articles of organization of the power to contract for debts (86.301) or convey or encumber real or personal property (86.311) to agents, employees, officers, etc. of the company. As a result, lawyers have had to add a paragraph to their form of articles allowing managers and members to delegate the right to contract debts and liabilities. Thus, both 86.301 and 86.311 will be reworded to allow such delegation of power to agents, employees or officers, etc. in any kind of writing signed by managers in a company with managers or by members in a company managed by members.

27. Chapter 86 – Clarifying Use of Defined Term; Sections 157 and 158.

NRS 86.483 and NRS 86.485 should be amended to delete the words "who owns a member's interest in a limited-liability company or a noneconomic member" since, by definition (NRS 86.081), a member means "the owner of a member's interest in a limited liability company or a noneconomic member."

28. Chapter 86 – Resident Agents; Section 159.

NRS 86.544 is changed at subsection 3 to add that the application of a foreign LLC must state the name and address of the resident agent in Nevada, not anywhere else.

29. Limited Partnerships – Charging Orders; Section 193.

The 2001 legislature changed both the chapters dealing with limited liability companies and limited partnerships to make charging orders issued by a court the exclusive method for satisfying a judgment out of an LLC ownership interest or a limited partnership interest. NRS 86.401 and 88.535. However, a typographical error appears in NRS 88.535 referring in subsection 4 to "articles of organization or operating agreement", references to the organizing documents of an LLC. These changes correct the typographical errors.

30. When and By What Document Is a Business Trust Created; Sections 197 and 200.

NRS 88A.060 defines a business trust as "created" by a trust instrument. NRS 88A.050

defines a "trust instrument" as one that "creates" the trust. NRS 88A.210 provides that a trust is "formed" by filing the certificate of trust. This confusion came to us from the Delaware origins of our business trust chapter.

After considerable discussion, it was decided that NRS 88A.050 should be changed to drop the word "business" and that NRS 88A.210 should be changed to make clear that a Nevada business trust is created when those forming the trust have both signed a trust instrument and signed and filed with the Secretary of State a certificate of trust accompanied by a certificate signed by the trust's resident agent.

31. **New Statutes in NRS Chapter 92A - Defining "Articles" and "Articles of Incorporation"; Section 240.**

The term "articles" and "articles of incorporation" are used in NRS Chapter 92A but are only defined in NRS Chapter 78. Thus, this new statute will define those terms and include all those documents listed in the "articles" definition of Chapter 78, those sections of Chapter 82 that are the analogous documents for nonprofit corporations and merger, conversion, etc. documents permitted by NRS Chapter 92A.

32. **New Statute in NRS Chapter 92A - "Charter Document" Defined; Section 241.**

The Executive Committee noted that several Chapter 92A statutes really need a term defining the charter document creating an entity filed with the Secretary of State's Office, as opposed to the term "constituent document" which includes non-filed documents such as bylaws, an LLC operating agreement, etc. Thus, the definition below for "charter document" includes articles of incorporation of a foreign corporation, domestic for-profit and nonprofit corporation, the articles of organization of an LLC, a certificate of limited partnership of an LP and a certificate of trust of a business trust and all amendments thereto. Note that the words "articles of incorporation" used in the "charter document" definition include all those documents included within that defined term in the new definition for "articles".

33. **Short Form Mergers; Section 247.**

This change to NRS 92A.100 makes it clear that in a short form merger under NRS 92A.180, the plan of merger need only contain the provisions set forth in NRS 92A.180 and not the provisions governing plans of merger for normal merger contained in 92A.100.

34. **NRS Chapter 92A.105 - Authority for Conversion; Section 248.**

NRS 92A.105 permits a domestic general partnership or domestic entity to convert into a domestic entity of any type, including one of its own type. This is unique to Nevada's statute. The Executive Committee wishes to conform Nevada's approach to that of virtually every other state and allow a conversion into an entity of a different type of entity only.

35. NRS Chapter 92A.120 – Delaware Rule On Stockholder Class Votes Adopted; Sections 249; 258.

Existing NRS Chapter 92A contains the provisions at 92A.120 requiring the vote of each class of otherwise non-voting stockholders on a merger if the articles of incorporation of the surviving domestic corporation or the articles of a domestic resulting entity have constituent documents that adversely change or alter any right given to that stock. This is existing NRS 92A.120(7). The statute as it currently exists is easily avoided (in other words, the class vote of the nonvoting stockholders is easily avoided) if the surviving entity is a foreign (meaning non-Nevada) entity.

Delaware requires no class votes. However, like Nevada, Delaware gives all stockholders (including nonvoting stockholders) the right to dissent and obtain fair value for their shares. See NRS 92A.380.

The Executive Committee decided to simplify Nevada law, choose the method chosen by Delaware and delete the easily-avoided nonvoting stockholder class vote of NRS 92A.120(7). In addition, NRS 92A.380 is further clarified by providing more clearly at subsection 1 that any stockholder is entitled to dissent from and attain fair value for his shares. Section 258.

36. Merger, etc. of Business Trusts; Section 250.

NRS 92A.165 is intended to authorize Nevada business trusts to merge, convert or enter into an exchange of ownership interest. However, the statute does not refer specifically only to "domestic" business trusts implying the Nevada statute intends to give such authority to non-Nevada business trusts. We recommend inserting "domestic" into the statute to clarify the statute's interest.

37. Post-Merger Service of Process on Surviving Foreign Entity; Section 251.

When a merger or exchange of a Nevada entity occurs with a foreign entity and the foreign entity survives, provisions must be in place to allow the foreign surviving entity to be served in Nevada with lawsuits against the disappeared Nevada entity over causes of action accruing before the merger or exchange. However, it is not fair to provide for such service in Nevada for causes of action accruing after the merger or exchange becomes effective, since the entity is now a foreign one. If the post-merger cause of action occurs in Nevada, then the "long arm" service of process statutes allows service of Nevada lawsuits on the foreign entity and jurisdiction of Nevada courts over the foreign entity in any event.

The Committee recommends changing NRS 92A.190 to add language making the Secretary of State the agent of the Nevada disappeared entity only if the service is one for a lawsuit against the Nevada entity which accrued before the merger or exchange became effective. This may not be a change to existing law depending on whether or not the courts interpret the existing language to allow service on the SOS for pre-merger causes of action only or both pre-merger and post-merger causes of action. However, the new language makes clear the intent of the statute.

38. Filing and Contents of Articles of Merger and Exchange (etc.); Use of New Defined Term; Sections 252, 253, 254 and 257.

92A.205, 92A.210 and 92A.270 are changed to provide for the use of the new defined term "charter document". Sections 253, 254 and 257.

In addition, 92A.200 is changed to delete all of subsection 4(b). Section 252. A close examination of that subsection reveals confusing requirements for setting forth certain stockholder vote totals by class which do little to ensure that the stockholder or owner ratification of the merger or exchange was properly conducted. As it currently exists, the statute allows articles of merger to recite the facts in the conclusory fashion permitted by subsection 4(a) and ignore subsection 4(b) altogether. Since little purpose was served by subsection 4(b) and is very difficult to decipher, the Committee decided to recommend its deletion.

39. Who Must Sign For Parties To Articles of Merger, Conversion or Exchange; Section 255.

Existing NRS 92A.230 informs us who must sign the articles of merger, conversion or exchange, the document filed in the Secretary of State's office. But it purports to do so only for Nevada entities, leaving to the statutes of the foreign jurisdiction to tell us who must sign articles filed in Nevada's office. This is sometime difficult to determine since the laws of that jurisdiction may be difficult to find and review.

The Committee recommends that Nevada's statute direct who must sign for each type of entity when articles are filed in the Nevada Secretary of State's office, whether it is a Nevada entity or that of a foreign jurisdiction.

40. Dissenters' Rights: Beneficial Owner's Demand For Payment; Section 259.

Under Nevada law in certain cases shareholders of record will be dissenting on behalf of the beneficial owners. Stockbrokers often do this. NRS 92A.440(1) should be changed to make clear that the stockholder's demand for payment may be made by the stockholder of record on behalf of the beneficial owner of the stock.

41. UCC - NRS 104.9318 - Sales of Receivables Are Not Secured Loans; Section 260.

Under the old UCC, the sale of certain receivables was subject to Uniform Commercial Code Article 9. The court in *Octagon Gas Systems, Inc. v. Rimmer*, 995 F.2d 948, 20 UCC Reporting Service 2d 1330 (10th Cir. 1993), suggested that this meant that those receivables could never really be sold, but that all apparent sales of those receivables were merely secured loans. Nevada adopted Revised Article 9 of the Uniform Commercial Code in 1999. The language proposed for NRS 104.9318 is language from the revised Uniform Commercial Code Article 9 which for some reason did not make it into the 1999 Nevada revision. The purpose of the language is to make it clear that the *Octagon* case is erroneous. This is particularly important because now the UCC covers

many more sales of receivables and rights to payment than was previously the case.

The Fall 2002 issue of the Nevada Law Journal published by the Boyd School of Law contains at p. 115 a very well written, exhaustive discussion of U.C.C. § 9-318(a), that Octagon case and the serious threat the lack of § 9-318(a) poses to the financing method known as asset securitization. The author of the article is to be commended for the clear, cogent and understandable discussion of a complicated subject. The article strongly recommends passage of § 9-318(a). The Section strongly recommends reading the article, as its plain English style shows just how good the Boyd students are and how high the standards are for the law school's most important publication.

42. **Recorded Metes and Bounds Legal Descriptions Must Include Either Name of Preparer or Recordation Info of Prior Document Where It Appears; Section 261.**

NRS 111.312(4) and (5) was changed in the last legislative session to require all documents with a metes and bounds description of real property to include the name and address of the engineer who prepared the description or the recordation information of the document from which the description was taken. The existing language provides that "If a document" was previously recorded, the recordation information of the prior document may be included, not if a "legal description" was previously recorded. The existing statutory language, if interpreted literally, would mean that the alternative method of stating the source of the metes and bounds description – the recordation information of the prior document containing the description – could be used only if the prior document was being re-recorded.

The simple change to NRS 111.312(5), Section 261, suggested here clarifies the intent of the statute.

43. **Changes to Fictitious Firm Name Statutes – NRS Chapter 602; Sections 262 through 266.**

In the 2001 session of the Nevada legislature, changes were made to NRS Chapter 602. These changes authorized the county commissioners to, by ordinance, require that a fictitious firm name statement be renewed every five (5) years after filing. Little thought was given by the drafters of the 2001 changes to how this would exactly work, where the various county clerks would find the information to send out reminder notices to the businesses and to the consequences that would flow from the failure of the county clerks to send out reminder notices or the failure by the county clerks to have current addresses to use in sending out the notices.

The Executive Committee, Business Law Section, suggests the following changes to the NRS Chapter 602 statutes. First, NRS 602.010, Section 262, requires a filing from every person doing business under a name "which does not indicate the real" name of each person who owns an interest in the business. This is a vague standard which does not require a fictitious firm name statement be filed if there is any difference between the fictitious name and the real names of the owners. The Section suggests a standard

requiring the filing of a certificate whenever the "legal" name of each person owning the business is different from that from the name used on a daily basis in the business.

NRS 602.050, Section 264, requires the county clerk to keep an alphabetical index in connection with the fictitious firm name statements. However, it is unclear how that index must be maintained; must the names be alphabetical by fictitious name or by the names of the owners of the business? The section's suggested change makes clear that the index is alphabetical according to the fictitious name and must contain the name of each person, general partner, etc. conducting the business and their mailing address. This gives the county clerks the mailing addresses needed to send out reminder notices before the five-year renewal certificates are due.

NRS 602.020, Section 263, would be changed to delete the requirement of supplying a street address. There is no real reason why one is necessary. The mailing address is the important one for the purposes of the county clerk's office and sending out notices that the five-year renewals are due. In addition, the certificate of fictitious firm name must be signed by any person authorized under the statutes to sign the annual list of officers and directors, managers and members, limited partners, etc. when the person behind the fictitious name is an artificial person required to make annual filings with the Secretary of State's office. Note also that, consistent with the changes made to the Title 7 statutes, there is no and should be no requirement that the fictitious firm name statement be notarized. This requirement is deleted from NRS 602.020 and from NRS 602.055, Sections 263 and 265.

NRS 602.090 makes any violation of Chapter 602 a misdemeanor. The Executive Committee believes this is far too much of a penalty to pay for a simple failure to file a business filing. The NRS Title 7 statutes requiring filings by corporations, LLCs, business trusts, etc. have no such misdemeanor penalty. A far more practical penalty is when suggested with these changes, a \$50.00 fine. Section 266.

SB 436, Introduced by the Senate Judiciary March 24, 2003, amended and Passed by the Senate April 24, 2003; and scheduled to be heard by the Assembly Judiciary on May 5, 2003

The following sections are found on Pages 147, 148 & 149 (the last three pages) of this lengthy bill:

Sec. 263 NRS 602.020 Contents and requirements of certificate and renewal certificate.

- Proposes to remove street address requirement for natural person, and use mailing address only.
- Proposes to remove street address requirement for each partner who is a natural person, and use mailing address only.
- Proposes to remove the street address requirement for a trustee of a trust, and use mailing address only.
- Proposes to replace the signature requirement for an artificial person from "a person required to sign the annual filing" to a person "authorized to sign the annual filing whether or not listed therein"
- Proposes to remove the notarial requirement for the person(s) signing the certificate.

We strongly object to these changes!

How can the county clerk's office provide the public with information needed to serve a lawsuit, if necessary, if a street address is not required by law? Only an artificial person, on file with the Secretary of State, will have a resident agent available for accepting service in the case of a lawsuit. The removal of the notarial requirement compromises the credibility of the document.

These changes will eliminate the protection provided to the public when doing business with any firm that is not a legal entity on file with the Secretary of State of Nevada.

The following statement can be found at the beginning of the printed version of NRS 602. Currently this is found in Volume 31.

*The purpose of the fictitious name statute "is to prevent fraud and to inform the public of the true identity of those with whom the public conducts business."
Brad Assocs. v. Nevada Fed Fin. Corp., 109 Nev. 145, 848 P.2d 1064 (1993)*

Sec. 265 NRS 602.055 Certificate of termination.

Proposes to remove the notarial requirement.

We strongly object to this change! The removal of the notarial requirement compromises the credibility of the document. As with the original certificate, the removal of the notarial requirement will make it very difficult to provide the public with accurate ownership information as required of the county clerk by NRS 602.

Our office has contacted each of the Nevada county clerks regarding this bill, who have indicated their support of the above position regarding SB 436. Only the Clark County Clerk expressed some concern regarding this position as it relates to future electronic filings, but we believe those concerns will be addressed in NRS 720, the statute covering digital signatures.

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