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THIS FORM HAS BEEN UPDATED TO REFLECT SENATE BILL 2019-086 (EFFECTIVE JULY 1, 2020). THE CHANGES REQUIRED OR SUGGESTED BY S.B. 086 ARE IN GREEN.

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CBCA, §7-102-101 – one or more persons, 18 years of age or older, may act as incorporators

§7-102-102 defines what must (and may) be in the articles – all of which is in the form provided on the Secretary of State’s website.

§7-102-102(2)(b)(V) – while it is generally expected that persons forming a corporation in Colorado or elsewhere intend to limit the personal liability of the shareholders for the debts of the corporation, articles of incorporation may, when circumstances require, include provisions that actually impose personal liability on shareholders for the debts of the corporation “to a stated extent and upon stated conditions.”

§7-102-103 states that a corporation is incorporated and its existence begins when the articles are filed with the Secretary of State unless there is a delayed effective date.

§7-102-102(4) states that the articles of incorporation need not state any of the corporate powers enumerated in articles 101 to 117 of Title 7. Our articles frequently do.

§7-102-105 provides that after incorporation, the corporation must be organized.

§7-102-106 provides that the incorporator, the board of directors, or the shareholders may adopt the initial bylaws of the corporation (§7-102-105(1)(a)).

The purpose of the Addendum is to address other provisions of the CBCA which the CBCA provides may be included in the articles.

**ADDITIONAL PROVISIONS TO THE
ARTICLES OF INCORPORATION
OF**

_____, INC.

I. NAME

The name of this Corporation is _____, Inc. [*§7-90-601 and §7-102-102(1)(a)*]

II. PURPOSE

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the Colorado Business Corporation Act. [*§7-103-102 and §7-102-102(2)(b)(I)*]

III. CAPITAL

A. The aggregate number of shares of all classes of capital stock which this Corporation shall have authority to issue is 1,100,000 shares, of which 100,000 shares shall be shares of preferred stock, par value of \$.01 per share ("Preferred Stock"), and 1,000,000 shares shall be shares of common stock, par value of \$.01 per share ("Common Stock"). [*§7-106-101*]

(1) Preferred Stock. The designations, preferences, limitations, restrictions, and relative rights of the Preferred Stock, and variations in the relative rights and preferences as between different series shall be established in accordance with the Colorado Business Corporation Act by the board of directors of the Corporation ("Board of Directors"). Except for such voting powers with respect to the election of directors or other matters as may be stated in the resolutions of the Board of Directors creating any series of Preferred Stock, the holders of any such series shall have no voting power. [*§7-106-101(3) and §7-106-102*]

(2) Common Stock. The holders of Common Stock shall have and possess all rights as shareholders of the Corporation, including such rights as may be granted elsewhere by these Articles of Incorporation, except as such rights may be limited by the preferences, privileges and voting powers, and the restrictions and limitations of the Preferred Stock. [*§7-106-101(2)*]

B. Subject to preferential dividend rights, if any, of the holders of Preferred Stock, dividends on the Common Stock may be declared by the Board of Directors and paid out of any funds legally available therefor at such times and in such amounts as the Board of Directors shall determine. [*§7-106-204 (share dividends) and §7-106-401 (other distributions)*]

C. The capital stock, after the amount of the subscription price has been paid in, shall not be subject to assessment to pay the debts of the Corporation. [*§7-106-203(2)*]

D. Any stock of the Corporation may be issued for money, property, services rendered, labor done, cash advances for the Corporation, or for any other assets of value in accordance with the

action of the Board of Directors, whose judgment as to value received in return therefor shall be conclusive and said stock when issued shall be fully paid and nonassessable. [*§7-106-202(2)-(4)*]

E. The holders of the Common Stock or Preferred Stock shall not have any preemptive or preferential right to purchase or subscribe for: (a) any shares of the Corporation that the Board of Directors may determine to issue, whether now or hereafter authorized, or (b) any bonds, debentures, notes or others securities convertible into or carrying options, warrants or privileges to purchase any shares of the Corporation, whether now or hereafter authorized, in all cases including any such shares, bonds, debentures, notes, or other securities held in the treasury of the Corporation. [*§7-106-301(1)*]

F. The Board of Directors shall have the authority to impose restrictions upon the transfer of the capital stock of the Corporation as it deems necessary in the best interests of the corporation or as required by law. [*§7-106-208*]

IV. PERPETUAL EXISTENCE

The Corporation shall have perpetual existence. [*Note that this is not required to be stated, and under the CBCA a corporation's existence is perpetual unless the articles state a more limited duration. § 7-103-102(1).*]

V. BOARD OF DIRECTORS

A. The governing board of this corporation shall be known as the Board of Directors, and the number of directors may from time to time be increased or decreased in such manner as shall be provided by the Bylaws of this corporation. There shall not be fewer than one member of the Board of Directors. [*§7-108-101 and §7-108-103*]

B. Cumulative voting in the election of directors shall not be permitted. [*§7-102-102(3), §7-107-209, and §7-107-104(1.5)*]

C. The Board of Directors may amend the Bylaws at any time to add, change, or delete a provision unless the articles of incorporation reserve such power exclusively to the shareholders in whole or in part or a specific Bylaw expressly prohibits the Board of Directors from doing so. The shareholders may amend the Bylaws even though the Bylaws may also be amended by the Board of Directors. [*§ 7-110-201; this is a prophylactic provision that follows the statute, but would be effective if the statute changes the Board's rights in the future. See discussion in Lidstone, Let's Keep All of the Lawsuits in One Place; Choice of Forum Provisions in a Corporation's Bylaws, <http://ssrn.com/abstract=2293002>.*]

VI. INDEMNIFICATION

A. The Corporation shall indemnify, to the fullest extent permitted by applicable law, any person, and the estate and personal representative of any such person, against all liability and expense (including attorneys' fees) incurred by reason of the fact that he is or was a director or officer of the Corporation or, while serving at the request of the Corporation as a director, officer, partner, trustee, employee, fiduciary, or agent of, or in any similar managerial or fiduciary position of, another domestic or foreign corporation or other individual or entity or of an employee benefit plan. The Corporation also shall indemnify any person who is serving or has served the Corporation as director, officer, employee, fiduciary, or agent, and that person's estate and personal representative, to the extent and in the manner provided in any bylaw, resolution of the shareholders or directors, contract, or otherwise, so long as such provision is legally permissible. [*§7-109-102 (directors); and §7-109-107 (employees, officers, fiduciaries and agents). § 7-109-103 requires that the corporation indemnify an individual who was wholly successful, on the merits or otherwise, in the defense of any such proceeding, "unless limited by its articles of incorporation." Furthermore, § 7-109-105 permits a director to apply to a court for indemnification or an advancement of expenses "unless otherwise provided in the articles. We see no reason to include either such limitation. § 7-109-109 provides that, as proposed above, a corporation may, in its articles or bylaws, provide in advance for mandatory indemnification.*

Note that unless the articles or bylaws provide for mandatory indemnification or advancement of expenses for officers, employees, fiduciaries, or agents, such indemnification or advancement is to be determined by the board of directors at the time requested.]

B. The Corporation shall advance expenses in advance of the final disposition of the case to or for the benefit of a director, officer, employee, fiduciary, or agent, who is party to a proceeding such as described in the preceding paragraph A to the maximum extent permitted by applicable law. [*§7-109-104*]

C. Any repeal or modification of the foregoing paragraph by the shareholders of the Corporation shall not adversely affect any right or protection of a director or officer of the Corporation or other person entitled to indemnification existing at the time of such repeal or modification. [*§ 7-109-109(2).*]

VII. LIMITATION OF DIRECTOR LIABILITY AND BUSINESS OPPORTUNITIES

A. A director of the Corporation shall not be personally liable to the Corporation or its shareholders for ~~monetary~~ money damages for any action taken, or any failure to take any action, as a director, ~~for breach of fiduciary duty as a director,~~ except for liability for (i) the amount of a financial benefit received by a director, to which the director is not entitled ~~(iv) for any transaction from which the director derived an improper personal benefit;~~ (ii) an intentional infliction of harm on the corporation or the shareholders; ~~for any breach of the director's duty of~~

~~loyalty to the Corporation or to its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) a violation of section 7-108-405 for acts specified under Section 7-108-403~~ of the Colorado Business Corporation Act or any amended or successor provision thereof, or (iv) **an intentional violation of criminal law**. If the Colorado Business Corporation Act is amended after this Article is adopted to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Colorado Business Corporation Act, as so amended. [~~§7-108-402, revised and reenacted as § 7-102-102(2)(d). It is important to note that in making decisions on behalf of a Colorado corporation, directors are subject to the “standards of liabilities” set forth in § 7-108-402(1), including requiring that the director “was at least grossly negligent. If desired, the articles of incorporation may raise the standard of liability to “knowing misconduct” or a “knowing violation of law,” or reduce the standard of liability to “negligence.” § 7-108-402(1)(c).~~]

B. No director or any affiliate of a director has any obligation to offer the Corporation the right to have or participate in any, or one or more classes or categories of, business opportunities before the pursuit or taking of the opportunity by the directors of affiliate except business opportunities which fall within any of the following categories (“corporate opportunities”) in which case the participation in the corporate opportunity must be approved by action of the disinterested directors taken in compliance with the procedures set forth in § 7-108-402. For the purposes of this Section, a “corporate opportunity” is _____. [~~7-102-102(2)(e)) and § 7-103-102(1)(s). See also § 7-108-501(1)(a)(IV) which describes a “conflicting interest transaction” as including “[t]he director’s taking a corporate opportunity, except to the extent permitted pursuant to a provision of the articles of incorporation adopted under section 7-102-102(2)(d). That cross-reference should likely be to § 7-102-102(2)(e).~~]

~~C~~B. Any repeal or modification of **either of** the foregoing paragraphs by the shareholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

VIII. ACTIONS OF SHAREHOLDERS

A. Meetings of shareholders shall be held at such time and place as provided in the bylaws of the Corporation or by resolution of the board of directors. [~~§7-107-101 (annual meeting) and §7-107-102 (special meeting)]~~

B. At all meetings of the shareholders, one-third of all votes entitled to be cast at the meeting shall constitute a quorum or, if there is more than one voting group, one-third of all shares entitled to vote within each voting group entitled to vote. [~~§7-107-206]~~

C. Any action for which the Colorado Business Corporation Act requires the approval of two-thirds of the shares or any class or series or voting group entitled to vote with respect thereto, unless otherwise provided in the Articles of Incorporation, shall require for approval, the

affirmative vote of a majority of the shares or any class or series or voting group outstanding and entitled to vote thereon. *[Amendment of articles requires more votes for than against (§7-110-103(5)), merger, conversion and share exchange require a majority of all votes entitled to be cast (§7-111-103(5)), sale of property not in the ordinary course of business requires a majority of all votes entitled to be cast (§7-112-102(6)), and dissolution requires a majority of all votes entitled to be cast (§7-114-102(5)). Thus this provision is left over from prior law which did require two-thirds from time to time, and is no longer necessary except for corporations in existence on June 30, 1994 which has not otherwise reduced the required vote. § 7-117-101.]*

D. Any vote of the shareholders of the Corporation may be taken either:

(1) at a meeting called for such purpose or,

(2) by the written consent of the shareholders in lieu of a meeting provided that shareholders holding shares 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 consent to such action in writing. *[§7-107-104(1)(b)]*

If the vote of shareholders is taken by written consent of fewer than all of the shareholders, the Corporation will give notice to the remaining shares of the action taken pursuant to such vote promptly thereafter, although the failure to give such notice does not invalidate either the shareholder consent or the action taken as a result thereof.

E. *[The articles of incorporation may limit or eliminate appraisal rights under Article 113 for any class or series of preferred shares (but not common shares). § 7-113-102(3).]*

F. *[In a proceeding for the judicial dissolution of a corporation under § 7-114-301, a corporation or the remaining shareholders have the right to purchase all shares owned by the petitioning shareholder at the fair value of the shares “unless otherwise provided in the articles of incorporation or the bylaws of the corporation.” § 7-114-305(1).]*

IX. CONFLICTING INTEREST TRANSACTIONS

[SB 086 redefined conflicting interest transactions to include certain transactions “with respect to a director of a corporation” where the transaction is “known to, and material to, the director.” § 7-108-501(1)(a). Previously it was not so expressly limited. The articles of incorporation may provide for voting on a conflicting interest transaction “by the disinterested shareholders in two or more voting groups. § 7-108-501(2)(b)(II). Unless otherwise provided in the articles of incorporation, a quorum of the disinterested shareholders must include a majority of the votes of disinterested shareholders entitled to be cast. Given the statutory changes, it appears that including such a provision in the articles would be redundant.]

~~—No act, contract, or other transaction between the Corporation and one or more of its directors, officers, or employees, or between the Corporation and any corporation or association of which one or more of this Corporation’s officers, directors, or employees are in any way interested, shall be affected or invalidated in any way because of such fact; provided, that such fact shall have been known to or disclosed to the Board of Directors of the Corporation prior to its authorization of such act, contract or other transaction. Any director or directors of the Corporation so interested may be present and may be counted in determining the existence of a quorum at any meeting of the Board of Directors which authorized or ratified such act, contract, or other transaction, and such director or directors may vote thereat with like force and effect as if they were not interested. [~~§7-108-501.~~]~~

X. FORUM SELECTION

All internal corporate claims must be brought exclusively in the District Court in and for the County of _____, State of Colorado. This section does not confer jurisdiction on any court or over any person or claim and does not apply if the court specified herein has the requisite personal and subject-matter jurisdiction. If the court specified herein does not have the requisite personal and subject-matter jurisdiction and another court of Colorado does have that jurisdiction, the internal corporate claim may be brought in that court (notwithstanding that such other court is not specified herein). For the purposes of this Article X, the phrase “internal corporate claim” means: (i) any claim that is based upon a violation of a duty under the laws of Colorado by a current or former director, officer, or shareholder in that capacity; (ii) a derivative action or proceeding brought on behalf of the Corporation; (iii) an action asserting a claim arising pursuant to any provision of Articles 101 to 117 of Title 7, Colorado Revised Statutes, these articles of incorporation or the bylaws of the Corporation; or (iv) an action asserting a claim governed by the internal affairs doctrine that is not included in the preceding clauses (i), (ii), and (iii). [*§ 7-102-108. The statute also provides that this forum selection provision may be incorporated in the bylaws.*]

§ 7-102-108(3) provides that the articles or bylaws MAY NOT prohibit bringing an internal corporate claim in the states of Colorado. It also provides that neither the articles nor the bylaws MAY REQUIRE that an internal corporate claim be determined by arbitration.

For the purposes of § 7-102-108, the term “internal corporate claim” is defined in § 7-102-108(4). That definition includes claims “based upon a violation of a duty” by a current or former director, officer, or shareholder, a derivative action, claims arising under the articles of incorporation, bylaws, or CBCA, and claims arising under Colorado’s version of the internal affairs doctrine found at C.R.S. § 7-90-805(4).

*In *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, C.A. No. 7220-CS (Del. Ch. Jun. 25, 2013), the Delaware Chancery Court upheld the enforceability of a bylaws provision, adopted by the directors of Chevron (and a similar one by FedEx), which required lawsuits regarding the internal affairs of a Delaware corporation to be brought only in Delaware courts. As a result of S.B. 086, this provision is now specifically contemplated by statute. See *discussion in Lidstone, Let’s Keep All of the Lawsuits in One Place; Choice of Forum Provisions in a Corporation’s Bylaws*, <http://ssrn.com/abstract=2293002> and Lidstone, “Wrong Law Applied, Wrong Words Used, But the Correct Result Reached: *Stockdale v. Ellsworth*, originally published in the December 2017 Colorado Bar Association’s Business Law Section Newsletter (available at www.cobar.org).]*