MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Eightieth Session
May 31, 2019

The Committee on Judiciary was called to order by Vice Chairwoman Lesley E. Cohen at 10:04 a.m. on Friday, May 31, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblywoman Lesley E. Cohen, Vice Chairwoman
Assemblywoman Shea Backus
Assemblyman Skip Daly
Assemblyman Chris Edwards
Assemblyman Ozzie Fumo
Assemblywoman Alexis Hansen
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblywoman Rochelle T. Nguyen
Assemblywoman Sarah Peters
Assemblyman Tom Roberts
Assemblywoman Jill Tolles
Assemblywoman Selena Torres
Assemblyman Howard Watts

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Traci Dory, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Robert C. Kim, Chair, Business Law Section, State Bar of Nevada
Scott W. Anderson, Chief Deputy, Office of the Secretary of State

Vice Chairwoman Cohen:
[Roll was called, and Committee protocol was explained.] I will open the hearing on Senate Bill 427 (1st Reprint) which revises provisions relating to business entities.

Senate Bill 427 (1st Reprint): Revises provisions relating to business entities. (BDR 7-306)

Robert C. Kim, Chair, Business Law Section, State Bar of Nevada:
Just to give a little background on Senate Bill 427 (1st Reprint), it is a product of the Business Law Section's amendments and revision efforts for the 2019 Legislative Session (Exhibit C). The text of the bill before you today has been reviewed by the other section leaders of the State Bar of Nevada for any comments or concerns and has been approved by the State Bar of Nevada for submission during this Legislature. As a standard disclaimer, although it has been approved by the State Bar Board of Governors, I am advocating on the bill on behalf of the State Bar of Nevada's Business Law Section specifically.

The goal of S.B. 427 (R1) is to clarify, add, and provide more functionality to Nevada's business law statutes. As we had done previously with Assembly Bill 207, this is a much shorter version with a shorter list of things to accomplish. I will go through the highlights, and will be happy to answer any questions the Committee might have.

The first item of S.B. 427 (R1) relates to section 1, and it is clarifying the affidavit requirement relating to the resignation of a registered agent. We had a proposal to remove an affidavit requirement, and in working with Nevada's Secretary of State, we have been able to present the language in section 1 that more accurately reflects the processes that people are utilizing when they are resigning from and then notifying their clients of their resignation as registered agent.

Sections 2, 3, 4, and 5 relate to books and records and proper purpose. This is an area that warrants some clarification for the purposes of when a demand for records and when a proper purpose has been properly requested and made. This is something that we are seeing a lot of litigation over with respect to stockholders who need some information regarding the corporation and the stockholders. The amendments here are meant to clarify and give greater

ease of use with respect to this area of law, given the fact that it is a heavily contested area. In doing so, we typically look to standards that may exist, such as the Model Business Corporations Act and the Delaware Business Corporation Act. We do so in a manner that is true to the language that we have in our statutes.

Section 6 relates to the record date for dividends. Although it is best practice for a corporation to set the record date for distributions—and as far as I know that is what people are doing—we thought it appropriate to merely state a board of directors may fix a date just to remind people that it is a proper course of action to do so when one is establishing any dividends or distributions to a stockholder. This is more of a housekeeping item.

Section 7 relates to maintaining a quorum at a stockholders' meeting. There are some meetings that are held in person where the presence of the parties with sufficient voting power is determined to be appropriate to convene a meeting, and unless there is some specific withdrawal of shares, the purpose of the amendment in section 7, subsection 8, is merely to state that the quorum is maintained until specifically addressed by someone's removal of shares from being present at the meeting.

Section 8 relates to something that has long been an oddity in Nevada corporate law as it relates to one of our larger industries, the gaming industry. We have a provision that provides, for the most part, that a director of a Nevada corporation cannot be removed unless there is a two-thirds vote of the voting power of stockholders. However, as reality tells us, we have situations involving Nevada corporations that submit themselves for licensing and at times find themselves with individuals who are deemed to be unsuitable or are advised that they cannot be found suitable and they are asked to withdraw their application. For the most part, these resolve themselves where someone that is given that indication, usually voluntarily, requests the withdrawal with some kind of terms agreed upon with the Nevada Gaming Control Board. We thought it was appropriate to provide a backstop in the extreme situation where that person who is found unsuitable or found not to be licensable may not want to voluntarily resign or may not want to cooperate and step aside. This provision is merely designed in that very instance to allow a corporation to do so—to petition a court of competent jurisdiction to provide for that person's removal.

Section 9 cleans up our Nevada statutes as it relates to the appointment of receivers of a corporation. In particular, we removed some duplicative grounds for the appointment of a receiver if that exists in other sections, and would also clarify that the 10 percent ownership requirement to petition the court for the appointment of a receiver is maintained throughout the pendency of the action.

Sections 10 through 28 relate to the application or the revision of the receivership statutes that exist in *Nevada Revised Statutes* (NRS) Chapter 78, and replicate them for the most part but tailored for limited liability company (LLC) purposes, using LLC nomenclature to put that same construct into NRS Chapter 86. That is why there are a number of sections; but for the most part they are conceptually very similar to what is already in NRS Chapter 78. What we are finding is that courts will or have been analogizing to NRS Chapter 78 as it is, so we

thought it was appropriate for us to adopt similar sections in NRS Chapter 86 so there was no need to analogize and there are clear grounds for the appointment of a receiver if one of these circumstances did bring itself to the situation.

Section 30 relates to dissenters' rights, which clarifies that there was no right to dissent for anyone who acquires shares after the date of announcement for any merger or combination that would trigger dissenters' rights. The purpose there is to prevent someone who is being issued new shares after the fact to then have some right to dissent when that right should not exist to shares issued after such date of announcement.

That covers the scope of what is being designed in S.B. 427 (R1), and I am happy to answer any questions from Committee members.

Vice Chairwoman Cohen:
I have a question about section 5, subsection 2, regarding the written demand for a person who wishes to exercise the rights set forth in subsection 1, and that person has to furnish an affidavit to the corporation stating that the inspection, copies, or audit is not desired for any purpose not relating to his or her interest as a stockholder. Could you tell us what some of those other interests are that the concern is that someone might be requesting the documentation for?

Robert Kim:
To give a little background before I go into the answer to your question, the new subsection 2 of section 5 is essentially the same language that currently exists in NRS 78.107. Again, we were trying to reorganize some of the sections to streamline the demand that must be made and the affidavit that must go with it so that it was not a multistep process and was done more efficiently. The proper purpose is a common concept in corporate law generally to ensure that someone is not using addresses or stockholder information to solicit, for example, investment in some other unrelated venture. There may be a situation where there might be a person who is a stockholder of a corporation who may have raised a series of funds, they have their own separate company, and are looking to find a pool of persons that might be willing to invest in a distinct, unrelated enterprise. That would be one instance where that would be an improper purpose.

Assemblywoman Backus:
In generalities—I had to look at NRS Chapter 78 as well with respect to sections 11 through 28. This is more of a public policy aspect—I was surprised we do this already for private corporations. In a state like Nevada, where we are trying to be pro-business, I was a little confused why we are giving tools to creditors. I feel creditors have the better bargaining position when they draft documents lending to companies, and why is it we are providing them a right to receivership as compared to having properly executed documents to collect on that debt? I do not know the legislative history behind why it is that way in private corporations, but can you explain that for us?

Robert Kim:
These receivership statutes have been in existence for quite some time and, in fact, the initial amendment that we had proposed with respect to the existing corporate receivership statutes, relating to section 9 of S.B. 427 (R1) but more specifically in NRS 78.650, I would note that that section had not been revised since its adoption. I do not have the notation in front of me, but I believe it is as far back as the 1930s. We thought it was appropriate to eliminate some duplicative standards. Also, to clarify, for example, that irreparable injury to the corporation is threatened or being suffered. I think we are trying to make clear that these are not remedies that a court should frequently turn to, and they must be faced with a relatively high bar, we believe, which is the fact that there is irreparable injury threatened or being suffered in the situation.

In addition, in this particular section, it is less about a creditor and more about an owner of 10 percent or more of the corporate stock who is able to petition. There is a stockholder who might be in a minority position who is seeing waste, seeing the inability of the corporation to properly fulfill its charter, or its director or trustees are guilty of fraud, collusion, or gross mismanagement; there are items that are of extreme nature that we are saying a stockholder with 10 percent or more has the ability to petition the court under this particular corporate section. As it relates to the balance of your question relating to sections 10, 11, and 20, we were just made aware of this through our colleagues and other members of the bar, that the courts were looking to the construct that existed in NRS Chapter 78 and applying that to LLCs as it was. We thought, instead of just allowing that to happen and knowing that they are looking for guidance, it was appropriate at least for now to duplicate or mimic the existing constructs that so many people are familiar with. To the extent that maybe it is a little too much, we will look at both sections and both constructs of NRS Chapters 78 and 86 in future sessions to make sure it is fair, appropriate, and reasonable given today's economic climate.

Assemblywoman Backus:
Because I do not do creditor law, I was surprised to find that in there since we are such a business-friendly state. I saw where you were talking about the members who have that pathway, but it also allows those that hold 10 percent to be creditors as well. My next question relates to section 7, subsection 8, and how that is drafted is it allows someone who appears at the beginning of a meeting to be deemed present for purposes of determining the quorum, I think either by proxy as well, for the entirety of the meeting. I wanted to clarify the intent when looking at section 1. One of the concerns as we were discussing this bill was a situation where you have everybody present for quorum including proxies, but then people may leave the meeting. I wanted to make sure that for any business that takes place, you have a proper majority and that the majority then is not reduced to those physically present, or where there may be a vote by proxy, that it is still intended that you have a majority of the people and this is not a way to usurp it if everybody leaves the meeting, that there is an alternative majority, if that makes sense.

Robert Kim:
This section was really designed to prevent properly called meetings to fall into potential noncompliance for want of someone stepping out of the room or walking away or some other nonintentional circumstance. It is not designed to call a meeting and have everyone be dismissed informally as that might be and then proceed with a meeting in an empty room with just the management existing. A lot of times a corporation will have its own rules of conduct as it relates to meetings. It will have its own bylaws and provisions that may specifically address this as well, and so it will depend on how a meeting is conducted. Most public companies invite their stockholders to attend the meeting but via the proxy solicitation process. Typically, a stockholder that attends a meeting has already delivered their proxy to designated persons—generally a proxy committee—so they could leave the room, they could be there for one item and then want to leave to catch their flight, and they have already delegated their voting power to a designated person. A lot of times this might not be a problem, and for public companies it should never be an issue because of the typical steps and circumstances or customs that relate to a public company's annual meeting. This is more for smaller meetings to the extent that it is more of a polling-type situation where people are coming and going and not having to recount the room every time somebody might walk away for a coffee. This is meant to give a baseline presumption that once the quorum is established, unless someone says I am leaving this meeting and I am withdrawing my shares from the meeting for the purposes of establishment of a quorum, barring that intent of a party, which they are free to do, the goal is to try to maintain the validity of the meeting until it concludes.

Assemblyman Daly:
I think most of my questions were touched on and maybe answered on that last one as I did have a question on section 7, subsection 8, that was just discussed. If I heard it correctly, a quorum is established and then if there is a shareholder or somebody who needs to leave and all of the business is not done, and he is concerned that he is not going to be able to be there or he has not delegated his authority, then he can make that declaration and say, I am calling into question that when I leave a quorum—so he would be able to have that control, if that is the way I understood it. I want to make sure that I understand that this is just the baseline that is in statute that you have to run by. If you have bylaws that are different than this, and establish different rules for quorum and those are all in order, then those would take precedence over this. But if I heard you right, I think that was what your original presentation of the bill stated. It is presumed, but that person—or anybody else in the room—always has the right to question the quorum if they have lost it.

Robert Kim:
Yes, you are correct in your understanding of my comments. This is meant to provide a standard operating rule for meetings to proceed and not be inadvertently found improper or inadequate. As I mentioned before and as you reiterated, if someone was not comfortable proceeding and had to leave the meeting for some reason and wanted to take their shares with them and not have them count toward a quorum, that person should be able to make that statement, barring some other provision in the articles and bylaws that the company may have adopted already. This is, again, meant to provide a baseline rule for operation and

allow people to work from there if they wanted to withdraw their shares from being present at the meeting.

Assemblyman Daly:
I wanted to make sure that there was a process, and we had at least something on the record here as shareholders need to know the rules and follow them. I did want to add a situation where there was a controversial thing, somebody maybe did not know their rights, they showed up, there was a long recess, that person had to leave, and left thinking there is nothing I can do, I have to go, and they did not withdraw their shares which would have called the quorum into question. I guess they need to know that that is there. I just did not want there to be shenanigans where people would try to wait somebody else out and make sure any opposition left the room and then they could do what they wanted. They would still maintain the quorum, so that person would be on them to challenge the quorum before they left.

My second question goes back to what Vice Chairwoman Cohen asked regarding the language that you said you moved from another section that is already there. Who decides what is related to the shareholder's interest? Who decides what that is? Different people have different ideas on what that is, they are going to ask for that information, they are going to sign an affidavit that they are not going to use it for anything other than their interests as a shareholder. Who is deciding what that is because everyone is going to have a different interpretation of that and a different perspective on what they want to get done? They may have a shareholder proposal that they want, or they bought the shares because they wanted to put in a shareholder proposal to change governance or whatever, and they want to get that list. Who is going to be able to challenge that you are using that for your interest or for some other interest? In my view, if I was doing it for that, that would be in my interest as a shareholder to be doing that and I would not want to be challenged over it.

Robert Kim:
You have squarely addressed the current concerns that exist between corporations and stockholders and a lot of the litigation that we have seen recently relating to requests for such records for the purposes of soliciting stockholders for stockholder proposals or for alternative board slates. It is an area that is left to some degree to the judgment of the people involved and to the discretion of those in current management, thus giving rise to actions in court to clarify the purpose or to demand the records by deciding what the proper purpose is. It is an area that has existed for quite some time in terms of just developing case law as it relates to what is a proper purpose; not just in Nevada but also in other jurisdictions, including Delaware. What we are doing here is not changing the parameters of what a proper purpose is. The intent of these provisions was merely trying to sequence the provisions a little better so that it was clear what had to be done and by when and what had to be stated. Our amendments are not designed to modify what is a proper purpose or what goes into that. We are just trying to clarify that so the staging of the request, the rejection by the company if that was its decision, then the response, and then the information that could be provided was laid out in a more user-friendly fashion than we thought currently.

Assemblyman Daly:
I appreciate that. So you do not have a definition on what the proper purpose is. There may be some case law on it; I am not familiar with it. But a shareholder who believes he is acting in good faith in his interests as a stockholder—whatever that might be whether someone else disagrees—he could sign that affidavit in good faith and move on about his business. Then someone could challenge it through the courts or whatever. Would they be able to deny preemptively getting the list if you sign the affidavit because we suspect you are going to use it for something that we disagree with and think would be inappropriate, or would they have to give them the information and then sue if they actually used it for inappropriate purposes? Which direction would that go? If I sign the affidavit and said, Hey, I am going to use it for my legitimate interest as a stockholder, could I be denied? Would I have to go to court to get it, or do they have to give it to me?

Robert Kim:
My focus is more on the transactional aspect of corporate law, not the litigation aspects, but my understanding is that a board of directors when presented with a demand and affidavit as to stating a proper purpose may have its own information and its own ideas of what the stockholder does intend to do. What I typically see is that board rejecting that demand and forcing the stockholder to petition the court to establish that proper purpose has been tendered and the list should be released to the stockholder. A lot of times it does occur in more contentious situations where the sides, to some extent, are already selected and peoples' motivations are already known, but that is how I have seen it play out. Typically, in those contentious situations, there is already a level of suspicion and a reluctance to just give the list to someone when you know their purpose is not in the best interest of the corporation.

Assemblywoman Krasner:
I am specifically looking at section 8, subsection 8, where it says, "If a court of competent jurisdiction, or other governmental entity . . . requires, without providing any other reasonable and practicable alternative, that any specified director of a corporation cease to be a director," and then jumps down to, "then that specified director may be removed as a director by not less than a majority of the voting power of the other directors, even if less than a quorum, acting at a meeting and not by written consent and without a vote of the stockholders." Does that language mean not less than a majority of the voting power of all other directors, or not less than a majority of the voting power of just the shares present at the meeting?

Robert Kim:
The majority of the voting power relates to the directors only, and in this extreme circumstance to extend that there is a situation where the corporation has been required to petition a court of competent jurisdiction, the board of directors itself can remove a director that has been or is going to be found unsuitable and does potentially jeopardize the corporation's license.

Assemblywoman Krasner:
I am sorry, I think I did not ask my question specifically enough because you did not answer it. Does that mean not less than a majority of the voting power of all other directors or not less than a majority of the voting power of the directors present at the meeting?

Robert Kim:
It is a majority of the directors present at the meeting, which could be less than a majority of the directors.

Assemblywoman Krasner:
So if only two directors are present at the meeting but they hold 51 percent, then it does not matter if the other ten directors are not present at the meeting and the stockholders do not need to consent either, is that correct?

Robert Kim:
I would say that is correct.

Vice Chairwoman Cohen:
Are there any other questions from Committee members? [There were none.] I will open it up for testimony in support of S.B. 427 (R1). [There was none.] I will open it up for testimony in opposition to S.B. 427 (R1). [There was none.] I will now open it up for neutral testimony on S.B. 427 (R1).

Scott W. Anderson, Chief Deputy, Office of the Secretary of State:
We are neutral on this bill. We do appreciate the work that Mr. Kim and his colleagues have done on this bill and we appreciate their working with us on the provisions that we had concerns with in the bill as introduced that we were able to come to an agreement on.

Assemblywoman Backus:
I have a question, but if it is more appropriate for the answer to be given offline, I completely understand. As a practitioner, I love the convenience of filings with the Secretary of State. I had a constituent reach out to me expressing concerns, and it made me think of it because we now have a revision regarding resident agents withdrawing and now no longer having to do the affidavit aspect. My question is with respect to now changing ownerships. Are there any checks and balances? Is the Secretary of State looking into that so people cannot easily go online and change directors or managing members at this point?

Scott Anderson:
That would be a good discussion to have offline.

Vice Chairwoman Cohen:
Seeing no other questions from Committee members, I invite Mr. Kim back to the table for concluding remarks.

Robert Kim:
I took the opportunity to reread section 8 of the bill relating to the removal, and I want to clarify what it says as I want to make sure I am not misstating anything. It does provide that, upon proper petition and exhaustion of appeals from that decision, a specified director may be removed by not less than a majority of the voting power of the other directors even if less than a quorum exists. The reason why it says "even less than a quorum" is that at times a board might have a two-thirds quorum requirement to conduct business, a higher threshold to establish a quorum; however, we are saying that the removal of a director in this specific circumstance must be by not less than a majority of the voting power of the directors present at the meeting. This cannot be done by written consent; it must be done at a meeting, and it does not require the vote of stockholders either. This is to clarify the comment made before as I may have answered it incorrectly based on a reread of this particular section.

Assemblywoman Krasner:
It is then the total shares that are a majority of the directors present at the meeting, not shares of all directors, correct?

Robert Kim:
It does not relate to share ownership at all; it just relates to the actual members of the board of directors who need not be shareholders. For example, if there is a ten-person board and there was a director that for some reason did not step aside, did not resign, was being uncooperative and needed to be removed, then if a meeting was called where eight directors were able to show up, a majority of those directors would have to vote for the removal and that would have to be more than four out of eight; that would have to be five directors that would vote in favor of the removal. The purpose of this is to state that it is a board decision, not a stockholder decision, to remove a director in this specific circumstance.

Assemblywoman Krasner:
So regardless of share ownership, the voting power is just the majority of the directors period, regardless of share ownership. That is irrelevant; but it says "even if it is less than a quorum," so if there are ten directors and six is a quorum, if only two people show up, they would still be able to remove that director according to the language?

Robert Kim:
If that meeting was deemed to be properly convened by the chair of the board, then yes.

Vice Chairwoman Cohen:
Concluding remarks were waived. I will close the hearing on S.B. 427 (R1). I will open the hearing for public comment. [There was none.] The meeting is recessed [at 10:44 a.m.] until the call of the Chair.

Chairman Yeager:
[The meeting was reconvened behind the bar at 12:32 p.m.] I will take a motion to do pass Senate Bill 427 (1st Reprint).

ASSEMBLYWOMAN TORRES MADE A MOTION TO DO PASS SENATE BILL 427 (1ST REPRINT).

ASSEMBLYWOMAN NGUYEN SECONDED THE MOTION.

Is there any discussion on the motion? [There was none.]

THE MOTION PASSED. (ASSEMBLYMAN EDWARDS VOTED NO.)

I will assign the floor statement to Assemblywoman Backus. Are there any questions or comments from Committee members? [There were none.] The meeting is adjourned [at 12:34 p.m.].

RESPECTFULLY SUBMITTED:

_____
Traci Dory
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a memorandum dated April 1, 2019, to the Legislative Counsel Bureau from Brownstein Hyatt Farber Schreck, presented by Robert C. Kim, Chair, Business Law Section, State Bar of Nevada, regarding Senate Bill 427 (1st Reprint).