

## RESOLUTION 10-01-2019

### DIGEST

#### Franchise Agreements: Six Month Extension upon Franchisor's Refusal to Renew Franchise

Amends Business and Professions Code section 20025 to provide that the 180 day extension of the franchise agreement only applies if the franchisor refuses to renew the franchise.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Business and Professions Code section 20025 to provide that the 180 day extension of the franchise agreement only applies if the franchisor refuses to renew the franchise. This resolution should be disapproved because the resolution does not resolve any identifiable problem.

Under current law, the Franchise Relations Act ("Act") (Bus. & Prof. Code, §§ 20000, et seq.), requires franchisors to provide a franchisee with 180-days written notice of the franchisor's intention not to renew the franchise before the termination of the agreement. (Bus. & Prof. Code, § 20025.) The statute also requires that at least one additional circumstance out of a list of enumerated circumstances be met before a franchisor may decline to renew the franchise. (Bus. & Prof. Code, § 20025, subs. (a)-(f).) These additional circumstances are designed to protect the franchisee from any self-dealing by the franchisor, to give the parties time to negotiate any changes to the terms of the agreement, and to allow the franchisee to recoup their investment in the business.

A franchisor cannot use this statute to extend the franchise 180 days beyond the termination date of the franchise agreement. Instead, the franchisor can offer to extend the franchise agreement beyond the termination date in order to comply with the 180-day notice period, which suggests that the time only extends if the franchisee agrees. (Bus. & Prof. Code, § 20026.) Alternatively, a franchisor can agree to such an extension (the statute reads "offer or agree") (*ibid.*), suggesting that a franchisee can request the extension and the franchisor can agree to it.

If franchisors are improperly using Business and Professions Code section 20025 to extend the franchise 180 days beyond the termination date of the agreement to force a franchisee to continue to operate a business the franchisee no longer wishes to operate, as the proponent suggests, the proposed amendment cannot fix that problem. Instead, such franchisees can seek available legal remedies against franchisors who flout the law.

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Profession Code section 20025, to read as follows:

1 §20025

2 No franchisor may ~~fail~~ refuse to renew a franchise unless such franchisor provides the  
3 franchisee at least 180 days prior written notice of its intention not to renew; and

4 (a) During the 180 days prior to expiration of the franchise the franchisor permits the  
5 franchisee to sell his business to a purchaser meeting the franchisor's then current requirements  
6 for granting new franchises, or if the franchisor is not granting a significant number of new  
7 franchises, the then current requirements for granting renewal franchises; or

8 (b) (1) The refusal to renew is not for the purpose of converting the franchisee's business  
9 premises to operation by employees or agents of the franchisor for such franchisor's own  
10 account, provided, that nothing in this paragraph shall prohibit a franchisor from exercising a  
11 right of first refusal to purchase the franchisee's business; and

12 (2) Upon expiration of the franchise, the franchisor agrees not to seek to enforce any  
13 covenant of the nonrenewed franchisee not to compete with the franchisor or franchisees of the  
14 franchisor; or

15 (c) Termination would be permitted pursuant to Section 20020 or 20021; or

16 (d) The franchisee and the franchisor agree not to renew the franchise; or

17 (e) The franchisor withdraws from distributing its products or services through franchises  
18 in the geographic market served by the franchisee, provided that:

19 (1) Upon expiration of the franchise, the franchisor agrees not to seek to enforce any  
20 covenant of the nonrenewed franchisee not to compete with the franchisor or franchisees of the  
21 franchisor; and

22 (2) The failure to renew is not for the purpose of converting the business conducted by  
23 the franchisee pursuant to the franchise agreement to operation by employees or agents of the  
24 franchisor for such franchisor's own account; and

25 (3) Where the franchisor determines to sell, transfer, or assign its interest in a marketing  
26 premises occupied by a franchisee whose franchise agreement is not renewed pursuant to this  
27 paragraph:

28 (A) The franchisor, during the 180-day period after giving notice offers such franchisee a  
29 right of first refusal of at least 30 days' duration of a bona fide offer, made by another to  
30 purchase such franchisor's interest in such premises; or

31 (B) In the case of the sale, transfer, or assignment to another person of the franchisor's  
32 interest in one or more other controlled marketing premises, such other person in good faith  
33 offers the franchisee a franchise on substantially the same terms and conditions currently being  
34 offered by such other person to other franchisees; or

35 (f) The franchisor and the franchisee fail to agree to changes or additions to the terms and  
36 conditions of the franchise agreement, if such changes or additions would result in renewal of the  
37 franchise agreement on substantially the same terms and conditions on which the franchisor is  
38 then customarily granting renewal franchises, or if the franchisor is not then granting a  
39 significant number of renewal franchises, the terms and conditions on which the franchisor is  
40 then customarily granting original franchises. The franchisor may give the franchisee written  
41 notice of a date which is at least 30 days from the date of such notice, on or before which a

42 proposed written agreement of the terms and conditions of the renewal franchise shall be  
43 accepted in writing by the franchisee. Such notice, when given not less than 180 days before the  
44 end of the franchise term, may state that in the event of failure of such acceptance by the  
45 franchisee, the notice shall be deemed a notice of intention not to renew at the end of the  
46 franchise term.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Bar Association of Northern San Diego County.

### **STATEMENT OF REASONS**

The Problem: Franchisors are using this statute in an attempt to unilaterally extend the term of a franchise when the franchisee does not invoke their renewal rights. The franchisor waits until the end of the franchise term and then invokes this statute in order to extend the franchise another 180 days (past the end of the franchise agreement) in order to bind an unwilling franchisee into a franchise that they no longer want to belong to.

The Solution: This resolution clarifies that the franchisor must only give the 180 notice if the franchisor is refusing to renew the franchise. This distinguishes it from cases where the franchisee has not elected to invoke their renewal rights and is electing not to renew the franchise.

### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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**RESPONSIBLE FLOOR DELEGATE:** Melissa L. Bustarde, Esq.

## RESOLUTION 10-02-2019

### DIGEST

#### Tax: Deadline for Hearing Taxpayer Appeals from Franchise Tax Board Determinations

Amends Revenue and Taxation Code sections 19047, 30262, 38443, 40093, 41087, 43303, 45303, 46353, 50116, and 55083 to create a deadline for the Franchise Tax Board to set a hearing for some enumerated taxpayer appeals.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Revenue and Taxation Code sections 19047, 30262, 38443, 40093, 41087, 43303, 45303, 46353, 50116, and 55083 to create a deadline for the Franchise Tax Board to set a hearing for some enumerated taxpayer appeals. This resolution should be disapproved because the proposed amendment is unclear, and because Revenue and Taxation Code section 19047 does not contain the language ascribed to it.

Each of the ten statutes this wide-ranging resolution amends fall within a different part of division 2 of the Revenue and Taxation Code (“Code”). Each different part addresses a different tax issue (see details the end of the report). Nine of these ten statutes this resolution amends (i.e., all but Code section 19047) are identically worded. Those nine statutes govern procedures for a taxpayer’s request for a redetermination of a Franchise Tax Board (“Board”) determination of the tax issues that each chapter addresses.

Pursuant to these nine identically worded statutes, if a taxpayer seeks a redetermination from the Board within the prescribed deadline and requests a hearing, the Board is required to set a hearing and give the taxpayer at least 10 days’ notice of the time and place of the hearing.

Pursuant to Code section 15671, subdivision (a), the Office of Tax Appeals (“OTA”) conducts the requested hearing. Within the OTA, tax appeals panels (each consisting of three administrative law judges (“ALJ”s) designated by the OTA’s director) conduct the hearings pursuant to the Administrative Procedure Act. (Gov. Code, §§ 15670, 15674.) The OTA is empowered to adopt regulations as necessary to carry out its duties, powers, and responsibilities. (Gov. Code, § 15679.) Current regulations governing the hearings on the petitions for redetermination are found at California Code of Regulations, title 18, section 30000, et seq.

However, these nine statutes and the OTA’s regulations do not provide a time frame within which the Board must set the hearing, nor any timeframe within which the OTA must conduct the hearing. Further, the Board is permitted to continue the hearing as needed without any apparent temporal restraints, and without having to seek leave to continue the hearing from the OTA. Thus, a taxpayer has no certainty as to when the mandated hearing will take place, and no apparent recourse to ensure that the hearing takes place.

Thus, while the purpose of this resolution is to fix the open-ended process that may leave taxpayers hanging for long periods of time without resolution of their petitions for redetermination, the solution it offers fails to achieve its goal. Instead it is fundamentally unclear, and therefore ineffective.

First, the proposed amendment appears to want to ensure that the requested hearings occur within one year of filing the appeal. Instead, the resolution does not specify a deadline within which the hearing must be held. It only sets a deadline within which the Board must act to schedule the hearing.

Second, the proposed amendment does not cure the problem of the lack of deadline for the hearing. This resolution allows the Board to continue any hearing date that the Board may set by one year for any or no reason, and then seek continuances (by other unspecified means, before some unspecified tribunal, though one may presume the Board would need to file a motion with the OTA), beyond that initial year and make a good cause showing (the resolution fails to specify any standard of a 'good cause' finding). Thus, the hearing could be further continued for some indefinite amount of time.

Finally, this resolution than confusingly allows a taxpayer to file a motion to dismiss (presumably with the OTA, and presumably to dismiss the Board's original determination, though that is also not specified), if the hearing is not set within one year (but the triggering event for the one year period is not specified). The standard for the OTA to grant or deny the motion to dismiss is not specified.

In addition to these problems, Code section 19047 does not contain the language ascribed to it in this resolution; instead this section provides in its entirety: "The board shall hear and determine the appeal and thereafter shall forthwith notify the taxpayer and the Franchise Tax Board of its determination and the reasons therefor."

These issues would have to be corrected in order for this resolution to achieve its goals. Without these corrections, as written, this resolution will result in parties litigating the meaning of the statute, rather than being able to focus on the substance of the taxpayer's appeal / request for redetermination.

While the nine identically worded statutes can, in theory, be amended with identically worded changes, it helps to understand what each statute governs in order to get a better understanding of the changes that this resolution is proposing, and the impact the changes this long and complex resolution will have.

- Code section 30262 falls under division 2, part 13 of the Code, which governs cigarette tax.
- Code section 38443 falls under division 2, part 18.5 of the Code, which governs timber use tax.
- Code section 40093 falls under division 2, part 19 of the Code, which governs energy use

surcharge.

- Code section 41087 falls under division 2, part 20 of the Code, which governs emergency telephone users surcharge tax.
- Code section 43303 falls under division 2, part 22 of the Code, which governs hazardous substances tax.
- Code section 45303 falls under division 2, part 23 of the Code, which governs integrated waste management fee.
- Code section 46353 falls under division 2, part 24 of the Code, which governs oil spill response, prevention and administrative fees.
- Code section 50116 falls under division 2, part 26 of the Code, which governs underground storage tank maintenance fees.
- Code section 55083 falls under division 2, part 30 of the Code, which governs the Board's fee collection procedures.

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Revenue and Taxation Code sections 19047, 30262, 38443, 40093, 41087, 43303, 45303, 46353, 50116, and 55083, to read as follows:

1 §19047

2 If a petition for redetermination is filed within the 30-day period, the board shall  
3 reconsider the determination and, if the person has so requested in his petition, shall grant the  
4 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
5 hearing. The board may continue the hearing from time to time as may be necessary. However,  
6 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
7 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
8 a motion to dismiss.

9

10 §30262

11 If a petition for redetermination is filed within the 30-day period, the board shall  
12 reconsider the determination and, if the person has so requested in his petition, shall grant the  
13 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
14 hearing. The board may continue the hearing from time to time as may be necessary. However,  
15 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
16 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
17 a motion to dismiss.

18

19 §38443

20 If a petition for redetermination is filed within the 30-day period, the board shall  
21 reconsider the determination and, if the person has so requested in his petition, shall grant the  
22 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
23 hearing. The board may continue the hearing from time to time as may be necessary. However,  
24 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
25 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
26 a motion to dismiss.

27  
28 §40093

29 If a petition for redetermination is filed within the 30-day period, the board shall  
30 reconsider the determination and, if the person has so requested in his petition, shall grant the  
31 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
32 hearing. The board may continue the hearing from time to time as may be necessary. However,  
33 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
34 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
35 a motion to dismiss.

36  
37 §41087

38 If a petition for redetermination is filed within the 30-day period, the board shall  
39 reconsider the determination and, if the person has so requested in his petition, shall grant the  
40 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
41 hearing. The board may continue the hearing from time to time as may be necessary. However,  
42 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
43 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
44 a motion to dismiss.

45  
46 §43303

47 If a petition for redetermination is filed within the 30-day period, the board shall  
48 reconsider the determination and, if the person has so requested in his petition, shall grant the  
49 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
50 hearing. The board may continue the hearing from time to time as may be necessary. However,  
51 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
52 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
53 a motion to dismiss.

54  
55 §45303

56 If a petition for redetermination is filed within the 30-day period, the board shall  
57 reconsider the determination and, if the person has so requested in his petition, shall grant the  
58 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
59 hearing. The board may continue the hearing from time to time as may be necessary. However,  
60 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
61 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
62 a motion to dismiss.

63  
64 §46353

65 If a petition for redetermination is filed within the 30-day period, the board shall  
66 reconsider the determination and, if the person has so requested in his petition, shall grant the  
67 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
68 hearing. The board may continue the hearing from time to time as may be necessary. However,  
69 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
70 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
71 a motion to dismiss.

72  
73 §50116

74 If a petition for redetermination is filed within the 30-day period, the board shall  
75 reconsider the determination and, if the person has so requested in his petition, shall grant the  
76 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
77 hearing. The board may continue the hearing from time to time as may be necessary. However,  
78 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
79 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
80 a motion to dismiss.

81  
82 §55083

83 If a petition for redetermination is filed within the 30-day period, the board shall  
84 reconsider the determination and, if the person has so requested in his petition, shall grant the  
85 person an oral hearing and shall give him 10 days' written notice of the time and place of the  
86 hearing. The board may continue the hearing from time to time as may be necessary. However,  
87 in no event, except upon a showing of good cause, may a timely request for an oral hearing be  
88 delayed more than one year. If an oral hearing is not set within one year, the taxpayer may bring  
89 a motion to dismiss.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Contra Costa County Bar Association

## **STATEMENT OF REASONS**

The Problem: Under the existing law, a taxpayer must appeal an adverse decision by the Franchise Tax Board (“FTB”) within 30 days of the notice of action (or in some cases 60 – 90 days, usually with respect to interest abatement). A taxpayer who desires an oral hearing in connection with their petition must request one in writing at any time prior to completion of briefing in connection with their petition (or appeal).

There is no requirement regarding when the oral hearing must take place.

Under current law, a taxpayer who meets all deadlines has no guarantee or even approximate time frame in which it must receive a timely requested oral hearing before the Office of Tax Appeals (“OTA”). In one particular case, a taxpayer filed an appeal in or around 2012 (in connection with their 2007 tax year). The hearing did not take place until April 2018.

The taxpayer paid the tax in full in excess of \$70,000.00, and converted the appeal to a claim for

refund. Following the hearing, the taxpayer received a favorable opinion.

Accordingly, the taxpayer paid tax she did not owe (interest free) and did not receive an oral hearing for approximately 5 to 6 years after it was requested.

At one point, legal counsel for the taxpayer contacted Fiona Ma (a member of the Board of Equalization at the time) to try to find the taxpayer's case, as it was assumed it had been lost and there was no response from the BOE with respect to its location.

The taxpayer has already been unduly burdened and paid a tax for which she is not liable. The taxpayer is entitled to a timely hearing. This is wholly burdensome and onerous on the taxpayer, with little to no burden on the State or the OTA.

The Solution: This resolution would require that an oral hearing take place within one year of its timely request, unless there is a showing of good cause for further delay.

#### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

#### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Christina Weed, Mendes Weed, LLP, 1990 N. California Blvd., Suite 1020, Walnut Creek, CA 94596, Phone: (925) 953-2920, christina@mwlawca.com.

**RESPONSIBLE FLOOR DELEGATE:** Christina Weed

## RESOLUTION 10-03-2019

### DIGEST

#### Taxation: Impose One Year Deadline for Hearing on Petitions for Redetermination

Amends Revenue and Taxation Code section 19346 to require an oral hearing on a petition for redetermination within one year of a timely request.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Revenue and Taxation Code section 19346 to require an oral hearing on a petition for redetermination within one year of a timely request. This resolution should be disapproved because the resolution is amending provisions of section 19346 which do not exist.

The resolution seeks to limit to one year, the period within which the Franchise Tax Board ordinarily must hear a timely request for oral hearing on a petition for redetermination. However, the resolution fails to properly articulate a proposed amendment to the relevant statutory provisions which would affect the proposed deadline.

Although the proponent cogently articulates a problem with a lack of reasonable deadlines within the process of tax appeals, the resolution quotes to language that does not appear in that section. Revenue and Taxation Code section 19346, states when a determination of the Franchise Tax Board becomes final. It does not contain the language as stated in the resolution.

The proponent's placement of the proposed amendment in section 19346 puts it in the statutory scheme having to do with appeals of denial of interest on a refund, and would merely require the setting of a hearing within one year to that claim. It would not affect any other aspect of the timing of Franchise Tax Board appeals, such as the determination of whether the refund should occur at all. Also, the resolution does not articulate the consequences should the board fail to hold the hearing within the proposed one-year period.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Revenue and Taxation Code section 19346, to read as follows:

- 1 §19346
- 2       If a petition for redetermination is filed within the 30-day period, the board shall
- 3 reconsider the determination and, if the person has so requested in his petition, shall grant the
- 4 person an oral hearing and shall give him 10 days' written notice of the time and place of the
- 5 hearing. The board may continue the hearing from time to time as may be necessary. However,

6 in no event, except for a showing of good cause, may a timely request for an oral hearing be  
7 delayed more than one year.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Contra Costa County Bar Association

### **STATEMENT OF REASONS**

The Problem: Under the existing law, a taxpayer must appeal an adverse decision by the Franchise Tax Board (“FTB”) within 30 days of the notice of action (or in some cases 60 – 90 days, usually with respect to interest abatement). A taxpayer who desires an oral hearing in connection with their petition must request one in writing at any time prior to completion of briefing in connection with their petition (or appeal).

There is no requirement regarding when the oral hearing must take place.

Under current law, a taxpayer who meets all deadlines has no guarantee or even approximate time frame in which it must receive a timely requested oral hearing before the Office of Tax Appeals (“OTA”). In one particular case, a taxpayer filed an appeal in or around 2012 (in connection with their 2007 tax year). The hearing did not take place until April 2018.

The taxpayer paid the tax in full in excess of \$70,000.00, and converted the appeal to a claim for refund. Following the hearing, the taxpayer received a favorable opinion.

Accordingly, the taxpayer paid tax she did not owe (interest free) and did not receive an oral hearing for approximately 5 to 6 years after it was requested.

At one point, legal counsel for the taxpayer contacted Fiona Ma (a member of the Board of Equalization at the time) to try to find the taxpayer’s case, as it was assumed it had been lost and there was no response from the BOE with respect to its location.

The taxpayer has already been unduly burdened and paid a tax for which she is not liable. The taxpayer is entitled to a timely hearing. This is wholly burdensome and onerous on the taxpayer, with little to no burden on the State or the OTA..

The Solution: This resolution would require that an oral hearing take place within one year of its timely request, unless there is a showing of good cause for further delay.

### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

**AUTHOR AND/OR PERMANENT CONTACT:** Christina Weed, Mendes Weed, LLP, 1990 N. California Blvd., Suite 1020, Walnut Creek, CA 94596, Phone: (925) 953-2920, christina@mwlawca.com.

**RESPONSIBLE FLOOR DELEGATE:** Christina Weed

## **RESOLUTION 10-04-2019**

### **DIGEST**

#### Corporations: Establish Deadline for Dissolution Buyout Valuation Applications

Amends Corporations Code section 2000 to require buyout valuation applications to be filed by the response date in dissolution proceedings.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

**APPROVE IN PRINCIPLE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Corporations Code section 2000 to require buyout valuation applications to be filed by the response date in dissolution proceedings. This resolution should be approved in principle because it would promote the intent of the existing statute, to provide a mechanism for swift and final resolution of dissolution disputes.

Under Corporations Code section 1800, et seq., dissenting shareholders in a corporation holding more than one-third of its shares may file an action for its involuntary dissolution. Shareholders owning 50 percent or more of a corporation's shares may seek voluntary dissolution of the corporation by petitioning the superior court for an order of dissolution under section 1907. If successful, such actions result in dissolution of the corporation, sale of its assets, and distribution of the proceeds after corporate debts are paid.

In response to an action or petition for dissolution, holders of 50 percent or more of the corporation's stock may seek to buy out the complaining shareholders' interests in the corporation by filing an application under Corporations Code section 2000, in order to maintain the corporation as a going concern. If the parties cannot agree on a price, section 2000 provides a procedure for determining the fair value of the corporation at the time the dissolution action was initiated. Once the valuation occurs, the applying shareholders can either purchase the complaining shareholders' shares at the determined value, or decline to purchase and pay the complaining shareholders' fees and costs for the valuation procedure, after which the dissolution will proceed. (Corp. Code, § 2000, subd. (d).)

A potential pitfall in this procedure is that section 2000 does not provide any time limit for filing a valuation application and as a result, such applications can be filed as long as the dissolution action is still pending. Moreover, the fact that valuation of the corporation is tied to the initial date of filing of the original dissolution action makes it possible for a party to engage in arbitrage by filing a section 2000 application only if the value of the corporation increases significantly during the pendency of the dissolution proceeding - even years after the initial filing - allowing them to purchase the plaintiff's shares at a value far below their current value. This resolution would prevent such behavior by requiring parties to file section 2000 applications relatively soon after the dissolution proceeding is initiated.

If this resolution were enacted, similar changes should also be considered to the equivalent provision for limited liability companies in Corporations Code section 17707 subdivision (c)(2).

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Corporations Code section 2000 to read as follows:

1 §2000

2 a) Subject to any contrary provision in the articles, which may include a reference to a  
3 separate written agreement between two or more shareholders pertaining to the purchase of  
4 shares: In any suit for involuntary dissolution, or in any proceeding for voluntary dissolution  
5 initiated by the vote of shareholders representing only 50 percent of the voting power, the  
6 corporation or, if it does not elect to purchase, the holders of 50 percent or more of the voting  
7 power of the corporation (the “purchasing parties”) may avoid the dissolution of the corporation  
8 and the appointment of any receiver by purchasing for cash the shares owned by the plaintiffs or  
9 by the shareholders so initiating the proceeding (the “moving parties”) at their fair value.  
10 The fair value shall be determined on the basis of the liquidation value as of the valuation date  
11 but taking into account the possibility, if any, of sale of the entire business as a going concern in  
12 a liquidation. In fixing the value, the amount of any damages resulting if the initiation of the  
13 dissolution is a breach by any moving party or parties of an agreement with the purchasing party  
14 or parties may be deducted from the amount payable to the moving party or parties, unless the  
15 ground for dissolution is that specified in paragraph (4) of subdivision (b) of Section 1800. The  
16 election of the corporation to purchase may be made by the approval of the outstanding shares  
17 (Section 152) excluding shares held by the moving parties.

18 (b) If the purchasing parties (1) elect to purchase the shares owned by the moving parties,  
19 and (2) are unable to agree with the moving parties upon the fair value of those shares, and (3)  
20 give bond with sufficient security to pay the estimated reasonable expenses (including attorneys'  
21 fees) of the moving parties if those expenses are recoverable under subdivision (c), the court  
22 upon application of the purchasing parties, either in the pending action or in a proceeding  
23 initiated in the superior court of the proper county by the purchasing parties in the case of a  
24 voluntary election to wind up and dissolve, shall stay the winding up and dissolution proceeding  
25 and shall proceed to ascertain and fix the fair value of the shares owned by the moving  
26 parties. The purchasing parties must make application not later than the response date of the  
27 purchasing parties to the suit for involuntary dissolution or proceeding for voluntary dissolution  
28 is due.

29 (c) The court shall appoint three disinterested appraisers to appraise the fair value of the  
30 shares owned by the moving parties, and shall make an order referring the matter to the  
31 appraisers so appointed for the purpose of ascertaining the value. The order shall prescribe the  
32 time and manner of producing evidence, if evidence is required. The award of the appraisers or  
33 of a majority of them, when confirmed by the court, shall be final and conclusive upon all  
34 parties. The court shall enter a decree, which shall provide in the alternative for winding up and  
35 dissolution of the corporation unless payment is made for the shares within the time specified by  
36 the decree. If the purchasing parties do not make payment for the shares within the time  
37 specified, judgment shall be entered against them and the surety or sureties on the bond for the

38 amount of the expenses (including attorneys' fees) of the moving parties. Any shareholder  
39 aggrieved by the action of the court may appeal the court's decision.

40 (d) If the purchasing parties desire to prevent the winding up and dissolution, they shall  
41 pay to the moving parties the value of their shares ascertained and decreed within the time  
42 specified pursuant to this section, or, in case of an appeal, as fixed on appeal. On receiving  
43 payment or the tender thereof, the moving parties shall transfer their shares to the purchasing  
44 parties.

45 (e) For the purposes of this section, "shareholder" includes a beneficial owner of shares  
46 who has entered into an agreement under Section 300 or 706.

47 (f) For the purposes of this section, the valuation date shall be (1) in the case of a suit for  
48 involuntary dissolution under Section 1800, the date upon which that action was commenced, or  
49 (2) in the case of a proceeding for voluntary dissolution initiated by the vote of shareholders  
50 representing only 50 percent of the voting power, the date upon which that proceeding was  
51 initiated. However, in either case the court may, upon the hearing of a motion by any party, and  
52 for good cause shown, designate some other date as the valuation date.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Bar Association of Northern San Diego County

### **STATEMENT OF REASONS**

The Problem: Corporations Code section 2000 provides, where shareholders file suit or initiate other proceedings to dissolve a corporation, the corporation itself or holders of at least 50 percent of the shares can apply for court order that a procedure be implemented to establish the valuation of the shares of the parties seeking dissolution and for the corporation or applying parties to buyout the others. The proceeding enables parties to maintain a going concern and as a protection from the misuse of the dissolution cause of action. However, the section does not provide any deadline for the application for the order imposing the procedure. As long as the dissolution suit or procedure is pending, there is always the potential that the section 2000 proceeding application can be filed, regardless of the state of the litigation generally. A significant point of this legislation is to resolve these cases without full court procedures, much like arbitration. This benefit is lost if the parties fully litigate the case, and the prospective purchasers then decide to invoke the procedure. This is particularly true given the provision for in subdivision (f) that the valuation date is tied to the date of initiation of the original dissolution proceeding.

The Solution: This resolution would require the purchasing corporation or shareholders to initiate the application process within the time frame for response to the original pleading seeking the dissolution, thereby enabling all parties to know at the outset whether the section 2000 proceeding will be invoked, and eliminate any potential for prejudice to the party seeking dissolution from having to fully litigate the question up to trial, only to be met with a buyout procedure with a valuation date tied to the filing date of the original proceeding. As an example of the effect of this delay, see *Ontiveros v. Constable* (2018) 27 Cal.App.5th 259, where the action was originally filed on December 19, 2012, the section 2000 proceeding was not sought until late 2016 after an appeal on an unrelated issue, was denied, the denial was appealed, and the

procedure would not have been implemented until sometime after the September 18, 2018 opinion became final.

**IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

**CURRENT OR RELATED LEGISLATION**

None Known.

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## RESOLUTION 10-05-2019

### DIGEST

#### Post Judgment Collection: Definition of “Person” for Judgment Debtor Examination

Amends Code of Civil Procedure section 708.120 regarding the definition of third party “persons” subject to post-judgment discovery.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 708.120 regarding the definition of third party “persons” subject to post-judgment discovery. This resolution should be disapproved because Code of Civil Procedure section 708.150, subdivision (a) already provides a clear definition.

Where a judgment debtor is owed a debt by a third party, or the third party holds an asset in which the judgment debtor has an equitable interest, the judgment creditor may attempt to collect on their judgment through that third-party’s debt or asset. (Code Civ. Proc., § 708.120.) One way to acquire information about such property is to use an ex parte application to obtain a court order directing third parties to appear for examination about such debts or assets. (Code Civ. Proc., § 708.120, subd. (a).)

Code of Civil Procedure section 708.150 requires that in responding to such orders, a third party that is not a natural person (i.e., such as a corporation, partnership, association, trustee, or other organization) must designate “one or more officers, directors, managing agents, or other persons who are familiar with its property and debts” to appear for examination.

Additionally, the Judicial Council form used for the purpose of subpoenaing third parties, AT-138/EJ-125 (Application and Order for Appearance and Examination), on its face applies to both Code of Civil Procedure sections 491.110 (attachments) and 708.120 (enforcement of judgments). Just as the provisions relating to pre-judgment attachments specifically refer to third parties, and section 491.140 directly requires a third party that is not a natural person (i.e., such as corporations, partnerships, associations, trustees, or other organizations) to designate a person most knowledgeable, as is done in other discovery situations, similar language appears in section 708.150, subdivision (a). Further, Civil Code section 17, subdivision (b)(6), defines “person” as including “a corporation as well as a natural person,” and California Rules of Court, rule 1.6(14) adds “or other legal entity” to that definition. Therefore, the resolution’s proposed amendment to Code of Civil Procedure section 708.120 is unnecessary.

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 708.120 to read as follows:

1 §708.120

2 (a) Upon ex parte application by a judgment creditor who has a money judgment and  
3 proof by the judgment creditor by affidavit or otherwise to the satisfaction of the proper court  
4 that a third person has possession or control of property in which the judgment debtor has an  
5 interest or is indebted to the judgment debtor in an amount exceeding two hundred fifty dollars  
6 (\$250), the court shall make an order directing the third person to appear before the court, or  
7 before a referee appointed by the court, at a time and place specified in the order, to answer  
8 concerning such property or debt. The affidavit in support of the judgment creditor's application  
9 may be based on the affiant's information and belief. As used in this section "person" means any  
10 individual, trust, firm, joint stock company, or corporation, including, but not limited to, a  
11 partnership, limited liability company and association.

12 (b) Not less than 10 days prior to the date set for the examination, a copy of the order  
13 shall be:

14 (1) Served personally on the third person.

15 (2) Served personally or by mail on the judgment debtor.

16 (c) If the property in the third person's possession or control in which the judgment debtor  
17 has an interest or the debt owed by the third person to the judgment debtor is described in the  
18 affidavit or application for an order under subdivision (a) in a manner reasonably adequate to  
19 permit it to be identified, service of the order on the third person creates a lien on the judgment  
20 debtor's interest in the property or on the debt for a period of one year from the date of the order  
21 unless extended or sooner terminated by the court.

22 (d) The judgment debtor may claim that all or any portion of the property or debt is  
23 exempt from enforcement of a money judgment by application to the court on noticed motion,  
24 filed with the court and personally served on the judgment creditor not later than three days  
25 before the date set for the examination. The judgment debtor shall execute an affidavit in support  
26 of the application that includes all of the matters set forth in subdivision (b) of Section 703.520.  
27 If a claim of exemption is made pursuant to this section, a notice of opposition to the claim of  
28 exemption is not required. The court shall determine any claim of exemption made pursuant to  
29 this section. Failure of the judgment debtor to make a claim of exemption does not preclude the  
30 judgment debtor from later claiming the exemption unless the property or debt is described in the  
31 order in a manner reasonably adequate to permit it to be identified and the judgment debtor  
32 receives notice of the examination proceeding at least 10 days before the date set for the  
33 examination.

34 (e) An order made pursuant to subdivision (a) shall contain the following statements in  
35 14-point boldface type if printed or in capital letters if typed:

36 (1) "NOTICE TO PERSON SERVED. If you fail to appear at the time and place  
37 specified in this order, you may be subject to arrest and punishment for contempt of court and the  
38 court may make an order requiring you to pay the reasonable attorney's fees incurred by the  
39 judgment creditor in this proceeding."

40 (2) "NOTICE TO JUDGMENT DEBTOR. The person in whose favor the judgment was  
41 entered in this action claims that the person to be examined pursuant to this order has possession

42 or control of property which is yours or owes you a debt. This property or debt is as follows:  
43 (Description of property or debt). If you claim that all or any portion of this property or debt is  
44 exempt from enforcement of the money judgment, you must file your exemption claim in writing  
45 with the court and personally serve a copy on the judgment creditor not later than three days  
46 before the date set for the examination. You must appear at the time and place set for this  
47 examination to establish your claim of exemption or your exemption may be waived.”  
48 (f) An order made pursuant to subdivision (a) is not effective unless, at the time it is served on  
49 the third person, the person serving the order tenders to the third person fees for the mileage  
50 necessary to be traveled from the third person's residence to the place of examination. The  
51 mileage fees shall be in the same amount generally provided for witnesses when legally required  
52 to attend civil proceedings in the court where the examination proceeding is to be conducted

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Orange County Bar Association

### **STATEMENT OF REASONS**

The Problem: Code of Civil Procedure section 708.150 requires a corporation, partnership, association, trust, or other organization served with an order to appear for examination to designate one or more officers or other person familiar with its property and assets. However, some courts refuse to issue an order for an entity to appear for an examination under Section 708.120. When judgment creditors do not know the names of individuals associated with the business entities, they have no recourse. Entities are required to register an agent for service of process with the Secretary of State. Many times, these agents are themselves entities. Judgment creditors should be able to obtain an order requiring an entity to appear for examination.

The Solution: This resolution clarifies that an order for examination may be issued to entities as well as individuals

### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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**RESPONSIBLE FLOOR DELEGATE:** Elaine B. Alston

**RESOLUTION 10-06-2019**

**DIGEST**

Judgments: Examinations of Limited Liability Companies

Amends Code of Civil Procedure section 708.150 to specify how limited liability companies must respond to orders to appear in judgment enforcement proceedings.

**RESOLUTIONS COMMITTEE RECOMMENDATION  
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 708.150 to specify how limited liability companies must respond to orders to appear in judgment enforcement proceedings. This resolution should be disapproved because it does not appear to identify an actual problem with the existing statute.

Section 708.150 as currently written requires such an appearance from “a corporation, partnership, association, trust, or other organization.” A limited liability company is a form of business organization. Indeed, rather than filing articles of incorporation, a limited liability company files articles of organization. (Corp. Code, § 17702.01.) Thus, the term “other organization” would apply to a limited liability company. Moreover, there is no indication that courts have rejected this understanding of the statutory language.

The resolution seeks to clarify that a limited liability company must designate an officer, director, managing agent, or other person to respond to an order to appear in a proceeding to enforce a judgment. However, there is no indication that a clarification is needed.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 708.150 to read as follows:

- 1 §708.150
- 2 (a) If a corporation, partnership, association, trust, limited liability company or other
- 3 organization is served with an order to appear for an examination, it shall designate to appear and
- 4 be examined one or more officers, directors, managing agents, or other persons who are familiar
- 5 with its property and debts.
- 6 (b) If the order to appear for an examination requires the appearance of a specified
- 7 individual, the specified individual shall appear for the examination and may be accompanied by
- 8 one or more officers, directors, managing agents, or other persons familiar with the property and
- 9 debts of the corporation, partnership, association, trust, limited liability company or other
- 10 organization.

11 (c) If the order to appear for the examination does not require the appearance of a  
12 specified individual, the order shall advise the corporation, partnership, association, trust, limited  
13 liability company or other organization of its duty to make a designation under subdivision (a).  
14 (d) A corporation, partnership, association, trust, limited liability company or other  
15 organization, whether or not a party, may appear at an examination through any authorized  
16 officer, director, or employee, whether or not the person is an attorney.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Orange County Bar Association

### **STATEMENT OF REASONS**

The Problem: The list of entities required to designate persons most knowledgeable in response to an order for examination by a judgment creditor does not specifically list a limited liability company. When this statute was last amended in the 1980s limited liability companies did not exist in California. However, this form of entity is quite common now and should be specifically listed to prevent confusion and abuse by limited liability companies.

The Solution: This resolution adds a limited liability company as a type of entity required to designate person(s) most knowledge to appear for an ordered examination under Section 708.150.

### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

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