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Benyamin Ross


Blake Faller


Taylor Hathaway-Zepeda

Common Reasons the California Secretary of State Rejects Corporate Filings

Benyamin Ross, Blake Faller, Taylor Hathaway-Zepeda, and Janessa Huez

Every year, numerous corporate filings are rejected by the California Secretary of State. This article examines some of the most common reasons why the following types of filings are turned down: (1) mergers; (2) amendments to articles of incorporation; (3) conversions of business entities; and (4) dissolutions.

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We do the work for you: Here are the significant recent business law cases, with expert commentary on the most important ones.

- **In a case of great interest to financial services companies, the court held that financing subsidiaries of Harley-Davidson could be taxed by California, despite having no physical presence in the state. However, the court also found California's differential tax treatment of intrastate and interstate unitary businesses to be unconstitutional.**
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- **The belief that a patent is invalid is not a defense to a claim that one induced infringement by others.**
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- **Title VII prohibits an employer from taking adverse action based on an employee's religious practice, whether or not the employer has actual knowledge the practice was religious in nature.**
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- **An inability to work under a particular supervisor because of the stress caused by that supervisor's oversight does not constitute a "disability" for purposes of the Fair Employment and Housing Act.**
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EXPERT'S TAKE


Danton Richardson

Kimble v Marvel Entertainment **provides a great example how something you don't know (*e.g.*, the existence of a controlling Supreme Court decision) can come back to bite you. Danton Richardson discusses this and other takeaway lessons from the case.**

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FEATURED ARTICLES

Common Reasons the California Secretary of State Rejects Corporate Filings

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Every year, numerous corporate filings are rejected by the California Secretary of State. This article examines some of the most common reasons why the following types of filings are turned down: (1) mergers; (2) amendments to articles of incorporation; (3) conversions of business entities; and (4) dissolutions.

Mergers

The successful timing of a merger filing can be crucial in a merger transaction; the effectiveness of the merger filing often triggers other transactions contemplated by the merger agreement. The most common reasons for rejection of a merger filing vary depending on the nature of the entities being merged, as follows:

A. Mergers of corporations

1. **Including only one, rather than both, of the required officer signatures on the merger agreement.** For each corporation involved in the merger, the merger agreement must be executed and acknowledged by (i) the chairperson of the board, the president, or a vice president, and (ii) the secretary or an assistant secretary of the corporation. Corp C §1102.
2. **Including the corporation's name on, above, or near the officer signature blocks on the officers' certificate.** When a corporation effects a merger by filing a copy of the agreement of merger, the filing must include officers' certificates for the surviving corporation and each merging entity. Corp C §1103. Each officers' certificate must be signed by (i) the chairperson of the board, the president, or a vice president, and (ii) the secretary, chief financial officer, treasurer, or any assistant secretary or assistant treasurer of the corporation. Corp C §173. Both officers must sign in their individual capacities and not on behalf of the corporation. If the corporation's name appears on, above, or near an officer's signature block in such a way that the officer appears to be signing on behalf of the corporation, rather than in his or her individual capacity, the officers' certificate and the merger filing may be rejected.
3. **Submitting a file-stamped, rather than certified, copy of the merger document when the surviving corporation is a foreign corporation.** If a foreign corporation will be the surviving corporation in a merger

with a California corporation, there are three alternative methods for completing the merger filing in California (Corp C §1108(d)): (a) Submit a certified copy of the merger document filed in the foreign jurisdiction (*e.g.,* a certificate of merger certified by the Delaware Secretary of State); (b) Submit merger documents meeting the requirements of California law, including a copy of the agreement of merger and officers' certificates for the surviving foreign corporation and each domestic merging corporation, or, if appropriate, a certificate of ownership; or (c) Submit an executed counterpart of the merger document filed in the foreign jurisdiction (in the form required by the laws of the foreign jurisdiction); the submitter must also provide proof that the merger document has been filed in the foreign jurisdiction. Importantly, for the first option listed above, the copy of the merger document must be *certified* by the public official having custody over the original filed document. The filing will be rejected if the filer merely submits a file-stamped, and not certified, copy of the merger document.

4. **Failing to clearly identify the consideration being paid in the agreement of merger.** The agreement of merger filed with the California Secretary of State must clearly set forth the manner of converting the shares of each constituent corporation into shares, interests, or other securities of the surviving party. If any shares of any constituent corporation will not be converted solely into shares, interests, or other securities of the surviving party, the agreement of merger must specify (i) the cash, rights, securities, or other property that the holders of those shares are to receive in exchange for their shares (whether in addition to or in lieu of shares, interests, or other securities of the surviving party), or (ii) that the shares will be cancelled without consideration. Corp C §1101(d).
5. **Having an insufficient number of authorized shares to consummate the merger.** The surviving corporation must have enough authorized, but not yet issued or outstanding, shares to accommodate any new shares to be issued in consideration for the merger.

B. Merger of a corporation with any other business entity

1. **Submitting a certificate of merger without the required attachments.** The certificate of merger must be accompanied by both (i) a copy of the agreement of merger and (ii) officers' certificates for the surviving corporation and for each merging entity. Corp C §§1113(g)(1), 1113(j)(4). The California Secretary of State has posted a sample agreement of merger and a sample officers' certificate on its website, which samples have been designed to meet minimum statutory requirements in a situation when there is only one class of shares and 100 percent shareholder approval is received. The exception is, if only a disappearing corporation is merged into a California other business entity, the certificate of merger is the sole document required to be filed. Corp C §1113(g)(2).
2. **Filling out inapplicable items in the certificate of merger.** If the filer has filled out items on the certificate that are not applicable to the merger, the filing may be rejected. For example, if the merger does not involve the issuance of equity securities of a parent party, the filer should not check either of the boxes in Item 10 of the certificate of merger.
3. **If the merger involves a foreign entity, failing to identify the foreign law authorizing the merger.** When the merger involves a foreign entity, the certificate of merger must set forth in Item 14 the statutory authority or other basis under which the foreign entity is authorized by law to effect the merger (*e.g.,* for a Delaware merger of corporations, Delaware General Corporation Law §252). Corp C §1113(g).
4. **Failing to include the proper signatories.** The certificate of merger must be executed and acknowledged by both (i) the surviving entity and (ii) each other merging business entity. The California Secretary of State has prepared a table, available on its website, which summarizes the specific signatory requirements for each constituent entity. See Corp C §§1113(g)(1)–(2), 3203(g)(1)–(2), 6019.1(f), 8019.1(g), 12540.1(g), 15911.14(a), 16915(b), 17710.14(a).

Amendments to articles of incorporation

In order to amend its articles of incorporation, a corporation must file a certificate of amendment with the California Secretary of State. The four most common reasons that the California Secretary of State rejects certificates of amendment are noted below.

1. **Failing to identify class votes on the certificate of amendment.** If the corporation has issued shares, the certificate of amendment must include a statement that the amendment has been approved by the issued and outstanding shares of the corporation, including any required class votes, in accordance with Corp C §§902 and 903. The statement of shareholder approval must (i) indicate the total number of issued and outstanding shares of each class entitled to vote with respect to the amendment; (ii) set forth the percentage vote required of each class entitled to vote; and (iii) state that the number of shares of each class voting in favor of the amendment equaled or exceeded the vote required. Corp C §905(c).
2. **Failing to obtain or identify the statutory vote required to effect a corporate change of status.** A corporation may, by amendment of its articles of incorporation, change its status to that of a social purpose corporation, a nonprofit public benefit corporation, a nonprofit mutual benefit corporation, a nonprofit religious corporation, or a cooperative corporation. Corp

C §911. In order to do so, however, a corporation that has already issued shares must obtain the following vote(s), as applicable, and specifically state on the certificate of amendment that such vote(s) were obtained:

Proposed New Status	Vote Required
Nonprofit Corporation	All outstanding shares, regardless of limitations or restrictions on their voting rights. (Note that mutual water companies may be subject to a class-by-class vote.)
Cooperative Corporation	The outstanding shares of each class, regardless of limitations or restrictions on their voting rights.
Social Purpose Corporation	At least two-thirds of the outstanding shares of each class, or a greater vote if required by the articles of incorporation.

3. **Amending the agent for service of process.** A corporation may not change its agent for service of process by filing an amendment to the articles of incorporation. Corp C §900(b). The proper method for changing the name and/or address of the corporation's agent for service of process is to file a statement of information (Form SI-200) with the Secretary of State. Corp C §1502. However, after a statement of information has been filed, the corporation may file an amendment to delete the name and address of the initial agent for service of process from the articles of incorporation. Corp C §§900(b), 902(d).
4. **Blending pre-1977 statutory requirements with post-1977 statutory requirements.** Effective as of January 1, 1977, the California Legislature amended the Corporations Code to, among other things, set forth a new list of items that a corporation's articles of incorporation must and, in some cases, may, include (the amended law). Certain provisions of the amended law do not apply to any corporation existing on January 1, 1977, unless and until the corporation files an amendment to its articles affirmatively stating that the corporation elects to be governed by the provisions of the amended law. Corp C §2302. Regardless of whether or not a corporation makes such an election, the articles must contain the provisions required by the applicable law. If a corporation elects to be governed by the amended law, the corporation must (i) delete any pre-1977 requirements in its articles of incorporation that are inconsistent with the amended law (*e.g.,* the names and addresses of directors) and (ii) fully comply with the new requirements of the amended law (*e.g.,* including one of the purposes set forth in Corp C §202(b)). Similarly, if the corporation does not elect to be governed by the amended law, the corporation's articles of incorporation must continue to include the applicable provisions required under the pre-1977 law by the transition provisions set forth in Chapter 23 of the Corporations Law. Corp C §2302.

Entity conversion

Issues frequently arise when converting a limited liability company (LLC) into a corporation, particularly when filers ignore the new requirements established by the Revised Uniform Limited Liability Company Act (RULLCA) (Corp C §§17701.01–17713.13), which took effect on January 1, 2014. The three most common mistakes are noted below.

1. **Citing to the former LLC Act in the conversion statement.** An LLC converting into a corporation must include a statement of conversion within the articles of incorporation of the converted entity (a sample is available at http://bpd.cdn.sos.ca.gov/corp/pdf/articles/corp-arts-conv-llc-01012015.pdf). Corp C §17710.06(a)(3). Many filers continue to mistakenly reference the former LLC statute (the Beverly-Killea Limited Liability Company Act) in the conversion statement, rather than RULLCA.
2. **Managers mistakenly signing the statement or certificate of conversion.** A statement or certificate of conversion must be signed or acknowledged by all members—not managers—of the LLC, unless a lesser number is provided in the articles of organization or operating agreement. Corp C §17710.06(b).
3. **Failing to include the initial street address of the converted corporation.** A certificate of conversion must be filed to convert a California LLC into a foreign LLC. Corp C §17710.06(a)(4). The certificate of conversion can be found at http://bpd.cdn.sos.ca.gov/corp/pdf/obeconv.pdf and must include (Corp C §17710.06(c)): (a) the name, form, and jurisdiction of organization of the converted entity; (b) the name, street, and mailing address of the converted entity's agent for service of process; (c) the street address of the converted entity's chief executive office; and (d) the name of the converting limited liability company and the Secretary of State's file number for the converting limited liability company.

Dissolution

Dissolving a California domestic stock corporation is initiated by an election to dissolve. The corporation must then file certain documents with the Secretary of State, including a certificate of dissolution (available at http://bpd.cdn.sos.ca.gov/corp/pdf/dissolutions/corp_stkdiss.pdf). Common reasons why the certificate of dissolution is rejected are noted below.

1. **Failing to describe, in an attachment, the provision made for the corporation's known debts and liabilities.** When selecting "The corporation's known debts and liabilities have been adequately provided for as far

as its assets permitted" (the fourth option in section 3 of the certificate of dissolution), a filer must specify in an attachment the provision made and one of the following: (a) the address of the corporation, person, or government agency that assumed or guaranteed the payment; (b) the depositary with which the deposit has been made; or (c) other information necessary to enable creditors or others to whom payment is to be made to appear and claim payment. The format may be an attached page that contains the information listed above, the address of the assumer or the bank where the deposit was made, or other information to help creditors claim payment. Attaching a bankruptcy judgment instead of the required attachment is generally insufficient.

2. **Making contradictory statements regarding corporate assets.** Filers who select that "debts and liabilities have been paid as far as assets permitted" in section 3 cannot also state that the corporation has never acquired assets in section 4. If the corporation is paying its debts and liabilities with its own assets, it must have acquired assets. If the corporation has in fact never acquired assets, then the most likely answer for section 3 is that (a) another entity is assuming the debts and liabilities (the third option in Section 3), or (b) the corporation never incurred any known debts or liabilities (the fifth option in section 3).

3. **Making contradictory statements between the certificate of dissolution and the certificate of election.** If fewer than all of the outstanding shares vote to dissolve a corporation, a certificate of election to wind up and dissolve is also required. If a filer indicates in the certificate of dissolution that all of the shares voted to dissolve the corporation (section 5), the certificate of election cannot state that the corporation has no shares outstanding (the second option in section 3). If the corporation has no shares outstanding, then the certificate of election should state that no shares are outstanding (the second option in section 3) and the certificate of dissolution should state that the election to dissolve was not made by the vote of all outstanding shares ("No" in section 5), since outstanding shares cannot vote if they do not exist. Note that if this is the only filing deficiency with the certificate of dissolution, the Secretary of State will return the certificate of election and file the certificate of dissolution by itself since, on its face, the latter complies with the law and no election is needed. If there are additional deficiencies, then the certificate of dissolution and the certificate of election will both be returned and will need to be fixed.