Case Number 183365

In the

SUPREME COURT OF CALIFORNIA

WALTER GREB and KAREN GREB

Plaintiffs and Appellants,

vs.

DIAMOND INTERNATIONAL CORPORATION,

Defendant and Respondent,

AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE, APPEAL NO. A125472;
ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SAN FRANCISCO, THE HONORABLE PETER J. BUSCH,
JUDGE PRESIDING, CASE NO. CGC-08-274989

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The sole question presented by this appeal is whether or not California Corporations Code § 2010 applies to dissolved foreign corporations. The answer is no.

The issue arises because California Corporations Code § 2010, unlike many of its foreign counterparts, provides that a dissolved corporation shall exist indefinitely for limited purposes, including prosecuting and defending lawsuits. In contrast, many foreign corporate laws provide for limited survival periods that create definite and certain time limits in which a dissolved corporation may sue and be sued following dissolution.

Respondent, Diamond International Corporation (hereinafter "Diamond"), is a dissolved Delaware corporation. Under Delaware's limited survival statute, Diamond has been dissolved for a sufficient period of time (i.e., 3 years) such that it no longer has the capacity to sue or be sued. 8 Delaware Code § 278. Invoking Delaware law, Diamond successfully demurred to Plaintiffs' complaint on grounds that Delaware Code § 278 operates as a bar to Plaintiffs' claims against Diamond. The Court of Appeal correctly affirmed that decision.

Throughout their appeal, Plaintiffs have contended that the courts below inappropriately applied Delaware Law. Plaintiffs argue that California Corporations Code § 2010 applies to Diamond and, under choice-of-law principles, the courts below should have applied California law instead of Delaware law. Plaintiffs' position is misguided because California Corporations Code § 2010 does not apply to Diamond. As a result, there is no conflict of law between Delaware Code § 278 and California Corporations Code § 2010 and, thus, no need to invoke a governmental interest analysis.

The decision of the Court of Appeal is affirmed by a plain reading of California Corporations Code. The interpretation and construction of Corporations Code § 2010 begins with Corporations Code § 102(a) and § 162. Pursuant to § 102(a), Division 1 of the Corporations Code is expressly confined to three groups of corporations: (i) certain domestic corporations, (ii) corporations organized under Division 1, and (iii) all other corporations only to the extent expressly included in a provision of the Corporations Code. Cal. Corp. Code § 102.[1] As discussed below, as a foreign corporation,

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[1] Unless otherwise indicated, all statutory references herein are to the California Corporations Code.

Diamond does not fall into either of the first two categories of corporations. Therefore, unless the provision in Division 1 under consideration (in this case, § 2010) expressly includes foreign corporations within its scope, such provision must be construed to apply only to certain domestic corporations and corporations organized under Division 1 and not to foreign corporations. The specific provision in question, § 2010, omits any reference to foreign corporations. This omission manifestly expresses the Legislature's intent to apply § 2010 only to certain domestic corporations and corporations organized under Division 1. Since Diamond cannot be considered to be either a domestic corporation or a corporation organized under Division 1 of the California Corporations Code, § 2010 does not apply to it.

This conclusion is supported by California Corporations Code § 162 which defines "corporation" for purposes of Division 1, including § 2010, as "a corporation organized under this division" (language identical to the first phrase in § 102(a)) or "a corporation subject to this division under the provisions of subdivision (a) of section 102." This means that when § 2010 refers to a "corporation"

it is referring to a corporation described in § 102(a). As noted above, Diamond does not fit that description.

Giving credence to the plain language of the statute, the Court of Appeal correctly reasoned that § 2010 does not apply to foreign corporations. If the Legislature had intended § 2010 to apply to foreign corporations, it would have expressly so provided.

FACTS

This Court normally accepts the Court of Appeal's statement of the facts unless an error or omission is pointed out in a petition for rehearing. Cal. R. Ct. 8.500(c)(2); Marriage of Goddard (2004) 33 Cal.4th 49, 53. Neither party here petitioned the Court of Appeal for rehearing. Consequently, "we take the facts largely from that court's opinion." Jacob B. v. County of Shasta (2007) 40 Cal.4th 948, 952.

Diamond was "a dissolved Delaware corporation." (Opinion 1; JA 43-49.)[2] It was incorporated in Delaware (JA 47) and dissolved on July 1, 2005. (Opinion 2; JA 43-49.) On December 22, 2008, more than three years after Diamond dissolved, Plaintiffs filed this lawsuit

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[2] The reason Diamond dissolved is not part of the record, the matter never having been raised below.

against numerous defendants, including Diamond, alleging personal injuries from alleged asbestos exposure. (Opinion 2; JA 1.)

Plaintiffs' filing over three years after dissolution is dispositive under the governing Delaware law. Three years after dissolution, a Delaware corporation ceases to exist for any purpose except prosecuting and defending lawsuits or other proceedings initiated during the three-year period. 8 Del. Code § 278.

In the Superior Court, Diamond demurred on the grounds that it lacked the capacity to be sued under the governing Delaware law. (JA 31-42.) Plaintiffs asserted that Corporations Code § 2010 overrode Delaware law and allowed the suit. (JA 73-76.) The Superior Court held that § 2010 does not apply to a foreign corporation such as Diamond, and that "plaintiffs' suit, not having been brought within three years of its dissolution, was time-barred." (JA 115-116.)

Plaintiffs timely appealed. Although the appeal was dismissed by stipulation after the matter was fully briefed, the Court of Appeal elected to decide the matter, and affirmed the decision of the trial court. (See, Opinion at 2, fn. 1.) The Court of Appeal held that § 2010 does not apply to foreign corporations and, therefore,

Delaware Code § 278 required dismissal of Diamond. It therefore affirmed. This Court subsequently granted review.

I.

ARGUMENT

A. Standard of Review.

Whether California Corporations Code § 2010 applies to dissolved foreign corporations is a question of statutory construction. Consequently, the question is reviewed de novo. Barner v. Leeds (2000) 24 Cal.4th 676, 683.

B. Under Delaware Law, Diamond Ceased To Exist Three Years After It Was Dissolved.

Diamond was dissolved on July 1, 2005. (JA 43-49) As Plaintiffs concede, "Under Delaware law, this dissolution cut off lawsuits against Diamond three years later – i.e., on July 1, 2008." (Petitioners' Opening Brief [hereinafter "POB"] at 8.)

Specifically, under Delaware Code § 278, Diamond continued as a "body corporate" (see Delaware Code § 258), capable of suing

and being sued, for three years following its dissolution. Delaware Code § 278 provides that all corporations that are "dissolved" shall "nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its direction direct, bodies corporate for the purpose of prosecuting and defending suits," and of winding up their affairs. 8 Del. Code § 278. Once that three-year window passes, the corporation continues as a body corporate "solely" for the purpose of continuing lawsuits or other proceedings that were filed within the three-year window:

> With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

8 Del. Code § 278 (emphasis added); See, In re RegO Company (Del. Ch. 1992) 623 A.2d 92, 95.

After the end of the three-year period, new lawsuits cannot be initiated against the dissolved corporation. Id. at 96; accord, Territory of the United States Virgin Islands v. Goldman, Sachs & Co. (Del. Ch. 2007) 937 A.2d 760, 789 (where suit was brought more than three years after dissolution, Delaware Code § 278 barred judgment against corporation; creditors of dissolved corporation could not get around bar by suing corporation's former shareholders); In re Dow Chem. Int'l Inc., 2008 Del. Ch. LEXIS 147 ("there is a three-year window during which suits can be brought against a dissolved corporation. Once the three-year period has expired, no new suits can be brought against the corporation."); Marsh v. Rosenbloom (2d Cir. N.Y. 2007) 499 F.3d 165, 170, 173-76 (After three-year period under Delaware Code § 278, "the corporation ceases to exist and lacks capacity to be sued"; affirming dismissal of suit brought more than three years after dissolution); Town of Oyster Bay v. Occidental Chemical Corp. (E.D.N.Y. 1997) 987 F.Supp. 182, 211 ("Courts have consistently concluded that upon expiration of the three-year period, the corporation ceases to exist as a legal entity and no claims may be asserted against it"; "As the complaint in this matter was filed in 1994, almost thirteen years after [the corporation defendant] was

dissolved, the Town's assertion of state law claims against [the defendant] is prohibited by [section 278]").[3]

Plaintiffs filed this lawsuit more than three years after Diamond's dissolution. Diamond dissolved on July 1, 2005, but Plaintiffs did not file this suit until December 22, 2008. (JA 1.) Consequently, Delaware Code § 278 bars their lawsuit against Diamond, as the courts below held. (Delaware Code § 278 does not bar their lawsuit against the numerous other defendants, who will be liable if Plaintiffs can prove their case.)

C. Section 2010 Does Not Extend Diamond's Life.

Searching for a way to resuscitate and sue Diamond's "body corporate," Delaware Code § 278, Plaintiffs wrongly assert that Diamond remains in existence under California Corporations Code § 2010. (POB at 12- 32.) As detailed below, however, by the plain terms of the Corporations Code, § 2010 does not apply to foreign corporations like Diamond. Division 1 of the Code, including § 2010,

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[3] As noted by the court in Riley v. Fitzgerald, (1986) 178 Cal.App.3d 871, several other courts have interpreted "survival" or "saving" statutes of other states in a manner that is consistent with these decisions applying Delaware Code § 278. Id. at 879.

applies only to corporations organized under Division 1, to domestic corporations not organized under specified other laws, and to other corporations only as expressly provided in a particular provision. *See* § 102(a). A foreign corporation, such as Diamond, does not fall into any of these categories, and § 2010 does not provide that it expressly applies to foreign corporations. Consequently, § 2010 does not apply. Indeed, California law has traditionally held that the effect of a corporation's dissolution is determined by the law of the corporation's domicile, here Delaware.

Plaintiffs' attempt to apply § 2010 to Diamond is inconsistent with numerous provisions of the Code. Indeed, Plaintiffs' argument would lead to a startling result. It would mean that all of Division 1 of the Corporations Code applies to any foreign corporation that qualifies to do business in California. The Legislature certainly did not intend that result, and so holding would produce unpredictable consequences at odds with numerous provisions in the Code.

Statutory construction begins with the statute's language taken in context and in light of the entire statutory scheme. Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal.4th 503, 507-508; Boyer v. Jones (2001) 88 Cal.App.4th 220, 224. Thus, when attempting to

resolve conflicting constructions of a statute, the analysis shall begin by "examining the statutes words, giving them a plain and commonsense meaning" and harmonizing these words with other provisions relating to the same subject matter. Faulder v. Mendocino County Bd. of Supervisors (2006) 144 Cal.App.4th 1362, 1370. "[I]f those words have a well-established meaning, . . . there is no need for construction and courts should not indulge in it." Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 24. That is this case.

1. Diamond Is Not A "Corporation" Under Division 1 of the Corporations Code.

By its clear terms, § 2010 applies only to a "corporation," a statutorily-defined term that does not include foreign corporations such as Diamond. § 2010 provides:

> A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

§ 2010 (emphasis added). The definition of "corporation" is limited by § 162. That section provides that as used in Division 1, the word "corporation" refers "only" to a corporation organized under Division 1 or one described in section 102(a):

> "Corporation", unless otherwise expressly provided, refers only to a corporation organized under this division or a corporation subject to this division under the provisions of subdivision (a) of Section 102.

§ 162 (emphasis added). In turn, § 102(a) applies Division 1 to three categories of corporation: those "organized under" Division 1, certain enumerated "domestic" corporations, and other corporations "only" to the extent "expressly" set out in another section:

> ... [T]his division applies to corporations organized under this division and to domestic corporations which are not subject to Division 2 ... or Part 1 ... , 2 ... , 3 ... , or 5... of Division 3 on December 31, 1976, and which are not organized or existing under any statute of this state other than this code; this division applies to any other corporation only to the extent expressly included in a particular provision of this division. :

§ 102(a) (emphasis added). In other words, § 2010 applies to a business entity only if it is a "corporation" as defined by § 162, and an entity meets that definition only if (1) it is a corporation "organized

under this division," i.e., Division 1; (2) it is a domestic corporation of the kind specified in § 102(a); or (3) another statute specifically so provides. If a corporation is "organized under this division" – as Plaintiffs assert Diamond is – then "this division," all of it, "applies" to the corporation. § 102(a).

A foreign corporation like Diamond does not fall into any of these categories, as detailed in the following sections. That is not a technicality. The Legislature did not intend Division 1 to govern foreign corporations wholesale. Because Diamond is not a "corporation" within the meaning of Division 1, § 2010 does not apply.

(a) Diamond Is Not Organized Under Division 1.

The gravamen of Plaintiffs' argument is that Diamond was "organized under" Division 1 because it filed papers to qualify for transacting intrastate business under §§ 2105-2107.[4] (POB at 18-21.)

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[4] In support of their argument, Plaintiffs point out that Diamond was qualified in California in 1937 and continued to be qualified in California until December 1983 when Diamond surrendered its right to transact business in California. When discussing these qualification matters, Plaintiffs are mistakenly referring to the Diamond International Corporation that was originally incorporated as The Diamond Match Company on December 26, 1930. That Diamond International Corporation was merged into Diamond (USA) Inc. on September 28, 1983, and was not the (footnote continued)

Plaintiffs fail to cite a scintilla of authority in support of this contrived interpretation of § 102(a) or, the requirements set forth in §§ 2105-2107. Instead, Plaintiffs whimsically label the provisions of §§ 2105—2107 as "organizational mandates". (POB at 19.) Close scrutiny of the Code reveals, however, that Plaintiffs' argument simply does not hold water.

Diamond International Corporation that dissolved in Delaware on July 1, 2005. Diamond (USA) Inc. changed its name to Diamond International Corporation at the time of this merger.

Diamond (USA) Inc. was incorporated on April 2, 1982 and qualified under that name in California on July 21, 1983 - shortly before the merger noted above. (See, Diamond's Request for Judicial Notice ("RJN"), Exhibit A.) Diamond (USA) Inc. changed its name to Diamond International Corporation on its California qualification documents on December 28, 1983. Id. This Diamond International Corporation terminated its qualification in California by filing a Certificate of Surrender of Right to Transact Interstate Business in California on March 21, 1986. Id. This Diamond International Corporation dissolved in Delaware on July 1, 2005.

Plaintiffs argue that, by qualifying in California, Diamond became "organized under" Division 1 and therefore Section 2010, which is within Division 1, applies to the dissolution of Diamond as a foreign corporation. This argument assumes that Diamond remained qualified in California at the time of its dissolution on July 1, 2005 and was therefore still "organized under" Division 1 and still subject to Section 2010 at that time. Plaintiffs offered no evidence that Diamond was qualified in California at the time of its dissolution on July 1, 2005, and in fact this was not the case, as seen from the documents discussed above which confirm that Diamond terminated its qualification in California on March 21, 1986. A key fact critical to Plaintiffs' argument - Diamond's qualification in California at the time of its dissolution - is missing.

Under the Code, "organization" refers to the incorporation of a corporation -- the steps required to bring the corporation into existence legally – and other related formation activities. It does not include mere filings by a corporation to qualify to transact business in a foreign jurisdiction after the corporation has been formed. Indeed, as the Court of Appeal observed, "It is a substantial stretch to conclude that a corporation from another state can be fairly characterized as one 'organized' under the California Corporations Code." (Opinion at 13.) Further, Plaintiffs' argument would mean that the entirety of Division 1 governs every foreign corporation that qualifies to do business in California, a bizarre result the Legislature certainly did not intend.

(i) "Organization" Refers to the Corporation's Incorporation and Other Formation Activities.

When the Legislature used the word "organize" in the Code, it was talking about the incorporation and related formation activities of the corporation including such actions as the preparation and filing of the articles of incorporation (and the contents thereof), actions to be taken by the incorporators, the selection of a permissible name for the

corporation, the naming of the initial directors and the adoption of bylaws by the corporation (and the contents thereof). Division 1 includes a specific chapter entitled "Organization and Bylaws." Corp. Code tit. 1, ch. 2, §§ 200-213 (emphasis added). The subjects of this chapter are formation and basic incorporation provisions, and do not remotely relate to a foreign corporation's filing of papers to transact business. The organizational provisions of Chapter 2 cover formation and incorporation of the corporation (§ 200); identity and powers of incorporators (the people who initially form and incorporate the corporation) (§§ 200, 210); naming of the initial directors (§ 200); the corporation's name (§§ 201, 201.5, 202(a)); the contents and effect of articles of incorporation (§§ 202, 204, 204.5, 209); the classes, numbers and par value of shares (§§ 202(d),(e), 203, 203.5); and, specification of the corporation's powers (those imposed by the corporation's own rules, not by external law) (§§ 207, 208).

Other sections of the Code also use the word "organization" to mean the corporation's incorporation and related formation activities. For example, § 210 provides that if the articles of incorporation do not name initial directors, the incorporators may do "whatever is necessary and proper to perfect the organization of the corporation,

including the adoption and amendment of bylaws of the corporation and the election of officers and directors." § 210 (emphasis added).

(ii) The Corporations Code Demonstrates That Filing Papers to Transact Intrastate Business Is Not "Organizing" Under Division 1.

The Code clearly does not contemplate that a foreign corporation is "organized" under California law simply by virtue of qualifying to transact intrastate business. None of the "organization" activities defined in Chapter 2 relates to a foreign corporation's mere filing of papers to qualify for the right to transact business in California.[5] Further, the provisions in Chapter 2 clearly indicate that qualifying to do business in another state is not part of the process of organizing a corporation but, rather, is a power a corporation may exercise after it is organized. (In other words, a corporation can fully organize itself without qualifying to do business in a foreign state – in fact, many corporations never qualify to do business in a foreign

[5] § 207(c), the only provision in Chapter 2 which references qualification, clearly speaks to California corporations qualifying to do business "in another state."

jurisdiction because they do not conduct business outside of their state of incorporation.) Additionally, nothing in §§ 2105-2107, the statutes governing qualification to transact business in California, refer to such qualification as "organization." These requirements are simply qualifications to do business in California. See, e.g., Capital Gold Group, Inc. v. Nortier (2009) 176 Cal.App.4th 1119; Steiner v. 20th Century-Fox Film Corp. (C.A. 1956) 232 F.2d 190. The purpose of these qualification provisions is to facilitate service of process on foreign corporations and prevent state tax evasion. Capital Gold Group, Inc., supra, 176 Cal.App.4th at 1132. Failure to qualify subjects a foreign corporation to various penalties, such as preclusion from maintaining a lawsuit in California. Id. None of this relates to the formation activities the Code labels "organization." Thus, it should come as no surprise that Plaintiffs fail to cite any authority for the proposition that §§ 2105-2107 are "organizational mandates".

The very statute on which Plaintiffs rely, governing foreign corporations' qualification to transact business in California, contemplates that the foreign corporation is "organized" under the law of its home state. See § 2105 (foreign corporation desiring to transact business in California must file statement identifying "the state or

place of its incorporation or organization"). Even after a foreign corporation is qualified to do business in California – the act that Plaintiffs urge makes a corporation "organized under" Division 1 – the Code contemplates that it is "organized" in its home state, not California. See §§ 2112 (when a foreign corporation surrenders the right to transact business in California, its surrender form must include "the state or place of incorporation or organization"), 2116 (as to foreign corporation "transacting intrastate business," the directors are liable to corporation and specified others "according to any applicable laws of the state or place of incorporation or organization"). Sections 2112 and 2116 operate only on corporations that have qualified to transact business in California. On Plaintiffs' theory, every corporation subject to § 2112 or § 2116 would be "organized" in California. By referring to the "state or place of ... organization," these sections make clear that that state is not California.

The Code also refutes Plaintiffs' theory in other ways. On Plaintiffs' theory, a corporation would be "organized" under the laws of every state where it qualifies to do business. A large national corporation, doing business in every State, would be "organized"

under the laws of most every state in the Union. But the Legislature did not think a corporation would be "organized" under the laws of more than one state. The Code uniformly speaks of "the jurisdiction" or "the state" – singular – where a corporation is organized. E.g., §§ 317 (under specified circumstance, corporation issuing insurance must abide the laws of "its jurisdiction of organization"), 1108 ("If the surviving corporation is a foreign corporation, the merger shall become effective in accordance with the law of the jurisdiction in which it is organized"), 1109 (requiring specified action when corporation owning California real estate merges pursuant to laws of California or "of the state or place in which any constituent party to the merger was incorporated or organized"), 1113(j)(4) ("If the surviving party [in a merger] is a foreign corporation or foreign other business entity, the merger shall become effective in accordance with the law of the jurisdiction in which the surviving party is organized"), § 1152 (corporation desiring to convert to domestic business entity must file statement including "The jurisdiction of the organization of the converted entity"), 1155 (certificate of conversion of corporation to another form of business must list "The ... jurisdiction of organization" of the converted entity), 1156 (referring to conversion

under "the laws of this state or of the state or place in which the corporation or other business entity was organized"), 2101 (foreign corporation desiring to preserve name in California may provide certificate of public official of "the state or place in which it is organized" attesting to corporation's good standing).

Plaintiffs' argument runs afoul of distinctions in the Code between "foreign corporations" and corporations "organized under this division". For example, the distinction between existing domestic corporations, corporations organized under the new Division 1, and foreign corporations can be found within the language of § 2106. § 2106 prohibits existing foreign corporations from using a name in California which would not be available to a new corporation "organized under this division" unless the foreign corporation either obtains and files an order enjoining the other corporation using the same name, or the Secretary of State finds that the business of the two corporations are not the same or too similar and that the public is not likely to be deceived by the use of the two names by both corporations, and the foreign corporation agrees to transact business under an assumed name. § 2106(b). In setting forth these restrictions, § 2106 clearly contrasts "foreign corporations" with those "organized

under this division". The statute also contrasts corporations "organized under this division" with foreign corporations that "transact business in this state or qualify to do so under this division", again illustrating that "organizing" and "qualifying to do business" are not the same thing.

Plaintiffs' proposal would eviscerate the statutory distinctions between those provisions applicable to foreign corporations and those that are not. If Plaintiffs were right, every foreign corporation that qualified to do business in California would be governed by all of Division 1 since § 102(a) declares that "this division applies to corporations organized under this division ...." Plaintiffs' thesis is that a foreign corporation that qualifies to transact business in California is necessarily "organized under this division" (POB at 18-19) and so governed by Division 1 by virtue of section 102(a).

By making all of Division 1 applicable to any foreign corporation that qualified to do business in California, Plaintiffs' proposal would render § 2115 largely superfluous. Section 2115 expressly applies various sections of Division 1, Chapters 1, 12, 13 and 16, to foreign corporations that, in substance, conduct more than fifty percent of their business in California and are more than fifty

percent owned by Californians. Yet, under Plaintiffs' interpretation of the requirements of § 2105 -2107, all of the sections of Chapters 1, 12, 13 and 16 of Division 1 would *already apply* to these foreign corporations because all such corporations would be considered "organized under" Division 1. Yet under these circumstances, there would be no need for § 2115 to delineate certain provisions within Chapters 1, 12, 13 and 16 that apply to foreign corporations doing more than fifty percent of their business in California. In other words, § 2115 would become meaningless.[6]

Similarly, Plaintiffs' tortured interpretation of the phrase "organized under this division" in § 102 would also render almost completely irrelevant the other provisions of Chapters 1 through 20 that expressly apply to foreign corporations. See §§ 208, 1108(a)-(f), 1157(a)-(f), 1201(d), 1202(c), 1501(g), 1600(d) and 1602. For example, § 1501(g), which pertains to annual reports to shareholders, states that

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[6] Indeed, the idea that the provisions of Chapter 1 which are referenced in § 2115 apply to all foreign corporations that qualify to do business in California is squarely at odds with the conclusion of the court in In re Flashcom., Inc. Bkrptcy (C.D.Cal. 2004) 38 B.R. 485. In that case the court held that § 2115 did not apply to a foreign corporation because the activity in question occurred before the foreign corporation met the criteria for a "full income year" as that term in § 2115(d) was interpreted and, hence, the provisions of Chapter 1 upon which Plaintiffs based certain causes of action *did not apply to the foreign corporation at all.* Id. at 488.

the requirements apply to a certain subset of foreign corporations—those with their principal executive office in the state or, that customarily hold board meetings in the state. The intended scope of § 1501 would be significantly altered under Plaintiffs' interpretation of the Code, again because all foreign corporations qualified to do business in California would fall within the ambit of Division 1, including Chapter 15, not just those foreign corporations with their principal office in the state or, that customarily hold board meetings in the state.[7] This strains the bounds of commonsense interpretation of the Code.

More broadly, Plaintiffs' theory would create a bizarre regime that the Legislature obviously did not intend. Again, Plaintiffs' theory is that Diamond was "organized under" Division 1 because it qualified to transact intrastate business. (POB at 18-19.) If that were the case, Division 1, all of it, would apply by virtue of section 102(a). Plaintiffs provide no basis to pluck out particular sections, such as 2010, and hold that the particular section applies but the rest of

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[7] The scope of § 1602 would be altered in the exact same manner because it too applies, by its terms, only to "...directors of any foreign corporation having its principal executive office in this state or customarily holding meetings of its board in this state."

Division 1 does not. There is no basis. If a corporation is organized under Division 1, then Division 1 applies to it. § 102(a).

Consequently, on Plaintiffs' theory, every foreign corporation that qualified to do business in California would be required to follow all of California's general corporate laws in Division 1. For example, every foreign corporation that qualified to do business in California would be bound by California law on organization and bylaws (Division 1, Chapter 2), directors and management (Chapter 3), shares and share certificates (Chapter 4), dividends and reacquisition of shares (Chapter 5), shareholder meetings and consents (Chapter 6), voting of shares (Chapter 7), shareholder derivative actions (Chapter 8), amendment of articles (Chapter 9), sale of assets (Chapter 10), dissenters' rights (Chapter 13), records and reports (Chapter 15), rights of inspection (Chapter 16), dissolution (Chapters 18-20), and crimes and penalties (Chapter 22). The Legislature could not have intended to apply California's general corporate law to every corporation that qualified to do business here. Holding that a foreign corporation is "organized under this division," § 102(a), whenever it qualifies to transact business in California would work a radical change that the Legislature obviously did not intend.

If, as Plaintiffs maintain, Division 1 applies to all foreign corporations that qualify to do business in California, because all such corporations should be considered "organized under this division," foreign corporations would find themselves having to follow a litany of requirements regarding various corporate activities that their home state already regulates, creating innumerable, treacherous conflicts of law that the corporation would find impossible to navigate. For example, if a Delaware corporation wanted to amend its charter, engage in a merger, or declare a dividend, matters governed by both Delaware and California law, and the provisions of the two states differed as to these matters, the foreign corporation would have to engage in its own choice-of-law analysis to determine which states' laws it needed to follow.[8] More confounding, if it were concluded that California law controlled, and the completion of the activity in question required making a filing with the California Secretary of State, such as an amendment of the articles of incorporation or

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[8] For example, California Corporations Code § 500 and Delaware Code § 170 (and related provisions) set forth different financial tests that must be satisfied for a corporation to be able to pay a dividend.

certificate of merger,[9] that would be impossible to accomplish because the California Secretary of State logically would never accept such filings for a Delaware corporation--only the Secretary of State of Delaware would ever accept such filings.

(iii) This Court's Precedents Confirm That A Foreign Corporation Is "Organized Under" The Foreign State's Law.

Besides being inconsistent with the Code's language and structure, and leading to wild and unforeseen results, Plaintiffs' proposal also flies in the face of this Court's precedents. The Court has repeatedly recognized that a foreign corporation – including one qualified to transact business in California – is "organized" under the laws of its state of incorporation. For example, in Commonwealth Acceptance. Corp. v. Jordan (1926) 198 Cal. 618, 630, the Court expressly envisioned that a foreign corporation that was "transacting business" in California was nevertheless "organized" under the foreign state's law. Id. ("the stockholders of such [foreign] corporations, regardless of the laws of the state wherein they were

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[9] Regarding filing certificates of amendments to articles of incorporation, see generally, Corporations Code §§ 900-911 and Delaware Code §§ 241-242.

organized ... are subjected to the same liabilities as are the stockholders of domestic corporations when such foreign corporations see fit to enter California for the purpose of transacting business therein."). See also, Peck v. Noee (1908) 154 Cal. 351 (corporation was "organized" in Nevada even though its purpose was to do business in California); H.K. Mulford Co. v. Curry (1912) 163 Cal. 276 (foreign corporation was "organized" in Pennsylvania even though it did extensive business in California and issue before Court related to filing needed to qualify to do business in California); Nessbit v. Superior Court (1931) 214 Cal. 1, 2 ("...Automated Electrical Machine Company, Inc., was a foreign corporation organized under the laws of the state of Delaware, and authorized to do business in California..."); Buckeye Boiler Co. v. Superior Court (1969) 71 Cal.2d 893, 897 ("Buckeye is a foreign corporation, organized and existing under the laws of the State of Ohio..."); Ponsonby v. Sacramento Suburban Fruits Land Co. (1930) 210 Cal. 229, 230 ("...appellant has been, and is now, a foreign corporation, organized and existing under and by virtue of the laws of Minnesota...").

(iv) Giving "Organized" Its Normal Meaning Does Not Make Section 102(a)'s Reference to Domestic Corporations Superfluous.

Plaintiffs offer only one supposed reason to construe "organized under this division," § 102(a), to include a foreign corporation such as Diamond. It is wrong.

Plaintiffs assert that "organized under this division" must include foreign corporations because otherwise section 102(a)'s reference to "domestic corporations which are not subject to Division 2 ...." would be superfluous. Their theory is that section 102(a) applies Division 1 to two classes of corporations: (1) all "corporations organized under this division," and (2) all "domestic corporations" that are not of specified types. They argue that "If all corporations 'organized under' Division 1 is construed to mean 'domestic' corporations, then listing the second class of 'domestic' corporations would be superfluous ...." (POB at 18-19.) They claim that if the Legislature had intended that, it would simply have applied Division 1 to "all corporations organized under this division which are not subject to' the other Divisions governing nonprofits, etc." (POB at 18-19; see also POB at 4.)

Contrary to Plaintiffs' assertion, the words "organized under this division" as used in § 102(a) does not encompass all domestic corporations. They encompass only those organized under Division 1 ("this division"). But important categories of business corporations organized in California were not organized under Division 1. Division 1 was not effective until January 1, 1977. Thus, business corporations organized under prior laws and special statutes were not organized under Division 1. Section 102(a)'s second prong, covering "domestic corporations" that are not of specified types, ensures that Division 1 applies to pre-existing business corporations and others that were organized under laws other than Division 1.

Specifically, Division 1 was enacted in 1975, effective January 1, 1977. See Stats. 1975, c. 682, p. 1627, § 18. Before its enactment, numerous sets of other corporation laws had existed. The prior General Corporation Law was adopted in 1947; it was repealed when the new Division 1 went into effect in 1977. Stats. 1947, c. 1038 (enactment); Stats. 1975, c. 682, p. 1516, § 6 (repeal). The Civil Code had also contained many provisions governing incorporation. See Stats. 1931, c. 862.

The Legislature intended that the new Division 1 would govern existing corporations incorporated under such prior laws. It enacted transition provisions specifically to make clear that Division 1 applied to such pre-existing corporations and to smooth their transition from prior law to Division 1. Corp. Code §§ 2300 ("new law" is new Division 1"), 2301(a) ("new law" will apply to all corporations referred to in section 162 existing on effective date of new law); see generally Corp. Code §§ 2300-2319 (transition provisions governing application of new law to pre-existing corporations). Thus, the Legislative Committee Comment to Chapter 23 states: "The purpose of this chapter is to provide for the orderly application of the new law to corporations existing on, and to all actions taken by the directors or shareholders of such corporations before and after, its effective date." Legis. Com. Com., Deering's Ann. Corp. Code, Tit.1, Div. 1, ch. 23 Note (2009). Consistent with this proclamation, § 2301(a) states: "Except as otherwise expressly provided in this chapter, the provisions of the new law apply on and after the effective date to all corporations referred to in Section 162 existing on the effective date and to all actions taken by the directors and shareholders of such corporations on and after the effective date." The application of

Division 1 to existing corporations gives rise to subsequent provisions of Chapter 23 which intricately detail how to apply the various provisions of Division 1 to existing corporations.[10] If § 102(a) did not bring existing domestic corporations within the ambit of Division 1, there would be no need for the transition provisions set forth in Chapter 23.[11]

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[10] A cursory glance at §§ 2302 – 2319 of the Code reveals that Chapter 23 is replete with provisions specifying if and how particular parts of the new law apply to corporations existing on the effective date of the law. See, e.g., §§ 2302 (§ 202 and parts of §§ 204 and 205 of the new law "do not apply to corporations existing on the effective date" unless a corporation elects to be governed by the these provisions); 2302.1 (new provisions of § 204 regarding provisions in corporate articles "do not apply to the provisions of bylaws in effect on the effective date and valid under prior law" until an amendment is filed); 2303 (new §§ 206 and 207 "apply to corporations existing on the effective date" but with specified modification); 2304 (§ 212 of the new law does not govern "corporation existing on the effective date, which shall continue to be governed by the prior law" unless amendment of bylaws is filed); 2305 (§ 312 of new law "applies to a corporation existing on the effective date" but with modification); 2306 (statement concerning indemnification in articles of incorporation or bylaws "on the effective date" has specified effect); 2307 (§§ 417 and 418 of new law apply to certificates representing shares of "corporations existing on the effective date" only under certain conditions); 2305 (Chapter 5 of new law applies to distribution to shareholders "by a corporation existing on the effective date" with certain exceptions); 2317 (specifying service on agent for service of process "designated prior to the effective date" of the new law).

[11] The application of Division 1 to existing corporations was necessitated by the fact that the former Corporations Code was repealed at the time of the adoption of the new Code. Stats. 1975 ch. 682, p. 1516, § 6.

While the Legislature intended the new Division 1 to apply to such corporations organized under prior law, it did not think that such pre-existing corporations were covered by the words "organized under this division" in § 102(a). Instead it broke such corporations out separately, covering them with the second prong in § 102(a). As originally enacted in 1975, the new section 102(a) stated that Division 1 applied to both corporations organized under Division 1 and corporations organized under prior general corporate laws or special statutes: "... the provisions of this division apply to corporations organized under this division and to business corporations organized under any predecessor general corporation law or by any act of the Legislature creating a private corporation prior to the enactment of a general incorporation statute ...." Stats. 1975 c. 682 § 7, section 102(a); Assembly Legislative Committee Comment to Chapter 23 (1975) ("Section 102 provides that the new law is applicable to any corporation organized under it or to any business or private corporation organized under predecessor laws or by special act of the Legislature."). The year after enactment, the second prong was amended to its current form, encompassing all domestic corporations which are not subject to Division 2 or parts of Division 3 as of

December 1976, and which are not organized or existing under California laws not contained in the Corporations Code. Stats. 1976, c. 641, § 1.3. Under both the original and amended wording, this second prong applies § 102(a) and Division 1 to corporations that were not organized under Division 1 and instead were organized under prior general corporation laws and special statutes. That, again, is precisely what the Legislature intended. §§ 2300, 2301(a).

Thus, contrary to Plaintiffs' assertion, each of the two prongs of section 102(a) has distinct meaning without stretching the bounds of "organized under this division" in include foreign corporations. The first prong, "organized under this division," refers to corporations organized under new Division 1 after its effective date. The second prong, "domestic corporations" except those specified, refers to business corporations that were not organized under Division 1, including those in existence at the time of passage of the new law that, subject to the Chapter 23 transition rules, are also covered by new Division 1. Contrary to Plaintiffs' suggestion, the Legislature could not have achieved its objective by applying Division 1 to "'all corporations organized under this division which are not subject to' the other Divisions governing nonprofits, etc." (POB at 18-19

[emphasis added].) That would incorrectly have left out business corporations organized under other laws, such as prior versions of the Corporations Code and Civil Code.

Nor is § 102(a)'s distinction between "corporations organized under this division" and "domestic corporations" at odds with Riley v. Fitzgerald (1986) 178 Cal.App.3d 871 or, the Court of Appeal opinion here, as Plaintiffs urge. (See POB at 17-18.) In neither decision did the court conclude that § 102 applies only to "domestic corporations". In both decisions, parroting the language of the court in North American Asbestos Corp. v. Superior Court (1982) 128 Cal.App.3d 138 (hereinafter "North American I"), the Courts of Appeal made the caveat that "with certain exceptions not applicable here, the provisions of the Corporations Code apply to domestic corporations only...". Opinion at 12; Riley, supra, 178 Cal.App.3d at 877 (emphasis added). The "exceptions" referenced clearly are "corporations organized under this division", and those provisions of Division 1 which expressly apply to foreign corporations, which both courts obviously felt had no application to either case since the corporations at issue were organized under the laws of another state and § 2010 does not expressly apply to foreign corporations.

In sum, Diamond was not "organized under" Division 1. It was organized under Delaware law. Its mere qualification to transact business in California does not make it "organized under" Division 1.

(b) Diamond Does Not Otherwise Meet The Definition of "Corporation."

Besides corporations organized under Division 1, two other categories of corporation fall within section 102(a) and thus qualify as "corporations" under section 162: "domestic corporations which are not subject to Division 2 ... or Part 1 ... , 2 ... , 3 ... , or 5... of Division 3 on December 31, 1976, and which are not organized or existing under any statute of this state other than this code," and other corporations "to the extent expressly included in a particular provision." Cal. Corp. Code § 102(a). Diamond does not fall within either category.

First, Diamond is not a "domestic corporation." Section 167 defines "domestic corporations" as those "formed under the laws of this state." Diamond was not formed under California law. It was formed under Delaware law. (JA 47.)

Second, § 2010 does not "expressly include[]" foreign corporations such as Diamond. Section 2010 does not mention foreign corporations at all.

In short, Diamond does not meet any of the tests laid out in section 102(a), so it is not a "corporation" under § 162. Because it is not a "corporation" as defined, it does not fall within § 2010. Nor did the Legislature intend foreign corporations to be swept up wholesale in Division 1.

2. Traditional Rules of Interpretation Confirm That The State of A Corporation's Domicile Governs The Effect of Dissolution.

Traditional California principles of corporate law confirm that California's corporate law does not generally apply to foreign corporations, and that the consequence of a corporate dissolution is governed by the law of the corporation's domicile – here, Delaware.

(a) California Corporate Laws Presumptively Do Not Apply to Foreign Corporations.

In California it has long been understood that provisions of the Corporations Code that do not expressly apply to foreign corporations cannot be applied to foreign corporations. For example, in Pratt v. Robert S. Odell & Co. (1942) 49 Cal.App.2d 550, the court observed that former "Section 366 makes no reference to foreign corporations, [thus], the liability of a director or a corporation for a violation of official duty may be enforced in this state, but according to the laws of the state of incorporation." Id. at 560. Similarly, in Cooke v. Odell (1943) 59 Cal.App.2d 820, the court held that the failure of a foreign corporation to comply with former § 358 was of no value in determining fraud on its part because the obligations imposed by § 358 do not specifically refer to foreign corporations. Id. at 825.

More recently, the applicability of § 1157 of the California Corporations Code to foreign corporations was addressed in the matter of Capital Gold Group, Inc. v. Nortier (2009) 176 Cal.App.4th 1119. Capital Gold Group involved a Nevada corporation that converted to a Delaware corporation after it filed an action against the defendants. Id. at 1123-1124. In response to a motion to strike by

defendants, plaintiff maintained that as a foreign corporation is was not obligated to follow the corporate conversion requirements set forth in § 1157. Id. at 1130. Focusing on the reference to "a corporation" in § 1157, the court agreed, holding that the reference was to domestic corporations organized under the laws of California and did not include foreign corporations. Id. at 1130-1131. In so holding, the court observed: "When the Legislature intended to include foreign business entities or foreign corporations in section 1157, it expressly used the terms 'foreign other business entity' and 'foreign corporation.'" Id. at 1131.

Plaintiffs' suggestion that the Court of Appeal mistakenly held that Division 1 applies to foreign corporations only when its provisions expressly state that they apply to foreign corporations (POB at 21), flies directly in the face of the holdings in Pratt, Cooke and Capital Gold Group, Inc. Furthermore, the North American II court's reference to "a myriad of statutory provisions that apply to foreign corporations", cited by Plaintiffs in support of their criticism of the Court of Appeal (POB at 21), is not in any way at odds with the holdings of Pratt, Cooke and Capital Gold Group, Inc. as the North American II court was simply noting that many provisions of the

Code apply to foreign corporations other than those delineated in § 2115—an entirely valid point given that several provisions of the Code expressly apply to foreign corporations. See, North American II, supra, 180 Cal.App.3d at 910. Pratt, Cooke and Capital Gold Group, Inc. support the conclusion that only provisions expressly applicable to foreign corporations can be applied to foreign corporations. This, of course, is entirely consistent with the last clause in § 102(a) which indicates that "this division applies to any other corporation only to the extent expressly included in a particular provision of this division." § 102(a) (emphasis added). Accordingly, § 2010, which omits any reference to "foreign" corporations, must be read as applying only to certain domestic corporations and corporations organized under Division 1, excluding from its reach foreign corporations which have dissolved.

As an aside, Plaintiffs' suggestion that the Court of Appeal's holding--that Division 1 does not apply to any foreign corporations, unless expressly specified--would "create absurd results", amounts to mere supposition by Plaintiffs. In contrast to the numerous provisions which expressly apply to foreign corporations, the provisions highlighted by Plaintiffs, §§ 105, 107 and 114, by their terms, do not

apply to foreign corporations. Plaintiffs cite no authority for the proposition that these provisions were intended to apply to foreign corporations, nor any authority to support the notion that absurd results would flow from the failure to apply these provisions to foreign corporations. In fact, Plaintiffs do not even explain how the "absurd results" they speak of would come to fruition.[12]

On the subject of California precedent, it should also be pointed out that the Court of Appeal correctly held that it was not bound by the passing references by this court to North American II in the cases of Peñasquitos, Inc. v. Superior Court (1991) 53 Cal.3d 1180, and McCann v. Foster Wheeler LLC (2010) 48 Cal.4th 68, contrary to Plaintiffs' assertion. (See, POB at 28.) As poignantly noted by the Court of Appeal, the Peñasquitos case did not involved a foreign corporation, rendering the court's discussion of the application of §

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[12] Plaintiffs' failure in this regard is understandable because no absurdity would result. For example, holding that § 105 does not apply to foreign corporations would not cause any problems because § 2105(a)(5) requires foreign corporations to give irrevocable consent to service of process and, § 2110, coupled with Code of Civil Procedure §§ 416.10 and 395.5, detail how foreign corporations can be served and where they can be sued. Effective service provides the courts with jurisdiction to render judgments against foreign corporations. Holiness Church of San Jose v. Metropolitan Church Ass'n (1910) 12 C.A. 455. As to § 107, Delaware law prohibits the placement of money in circulation by corporations organized under Delaware's corporate code. 8 Delaware Code § 126(a).

2010 to foreign corporations mere dicta. (Opinion at 12 (citing People v. Macias (1997) 16 Cal.4th 739, 743).) Because there was no need to resolve whether § 2010 applies to foreign corporations, the Peñasquitos court did not even mention the Riley decision.[13] (Opinion at 12.) Nor did the McCann court mention Riley when making passing reference to North American II, undoubtedly because the citation to North American II related to the allocation of competing interests between states in a choice-of-law analysis that related to Oklahoma's statute of repose. See, McCann, supra, 48 Cal.4th at 101.

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[13] Close examination of the Peñasquitos decision reveals that the court's rationale has no bearing on the issue at hand here. First, the court rejected the defendant's seemingly convoluted argument that Corporations Code § 2010 should be interpreted as meaning that dissolved corporations could continue to exist to defend actions, but not that they could be sued, labeling the position "analytically incoherent". Peñasquitos v. Superior Court (1991) 53 Cal.3d 1180, 1185-6. In so doing, the court relied on the reasoning of a handful of out of state decisions reaching the same conclusion. Id. at 1186. Next, the Peñasquitos court turned to California decisions discussing the propriety of bringing actions against dissolved corporations, citing North American II for the singular relevant proposition that under Corporations Code § 2010 that "'there is no time limitation for suing a dissolved corporation for injuries arising out of its predissolution activities [citation omitted], other than the time prescribed by the statute of limitations.' [citation omitted.]" Id. at 1188. The court then cited a federal decision, Abington Heights School Dist. v. Speedspace (3d Cir. 1982) 693 F.2d 284 for the exact same proposition and, another California Court of Appeal decision permitting a cross action against a dissolved (California) corporation, Allen v. Southland Plumbing, Inc. (1988) 201 Cal.App.3d 60. Id. Finally, the court held that post-dissolution actions are not limited to those brought on pre-dissolution claims. Id. at 1188-1193.

In the end, it is clear that the Court of Appeal's analysis as to the scope of the application of Division 1 to foreign corporations is fully consistent with decisional law in California.

(b) California Traditionally Holds That The Domicile's Law Governs The Effect of Dissolution.

It is firmly established in both California and Delaware that the law of the corporation's domicile governs the effect of dissolution. In California, as observed both by the Court of Appeal and the court in Riley, "It is settled law in California that the effect of corporate dissolution or expiration depends upon the law of its domicile..." Riley, supra, 178 Cal.App.3d at 876. (Opinion at 8.) See also, Thatcher v. City Terrace Cultural Center (1960) 181 Cal.App.2d 433, 440-441 ("the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile"); MacMillan Petroleum Corp. v. Griffin (1950) 99 Cal.App.2d 523, 528; Fidelity Metals Corp. v. Risley (1946) 77 Cal.App.2d 377, 381. Likewise, in Delaware, "the existence or nonexistence of a Delaware corporation is governed by Delaware law." Akande v. Transamerica

Airlines, Inc. (In re Transamerica Airlines, Inc.), 2007 Del.Ch. LEXIS 68, *63 (Del. Ch. May 25, 2007).[14] As pointed out by the court in Riley, "Nothing in the California Corporations Code indicates that this long-held principle has been overruled or superseded by statute." Riley, supra, 178 Cal.App.3d at 876.

As the Court of Appeal aptly noted, this basic understanding of the law governing corporations has been affirmed in the Restatement Second of Conflict of Laws. Under the Restatement Second of Conflict of Laws, whether a corporation continues its existence after it has been dissolved or been suspended is decided by the state of incorporation. Rest.2d Conf. of Law, § 299(1). This principle applies even where corporate assets are situated elsewhere or all corporate business is conducted in other states. Rest.2d Conf. of Laws, § 299(1), com. a, p. 295. Additionally, "wind up" statutes promulgated by states of incorporation that extend corporate life facilitating the opportunity for creditors claims against dissolved businesses are recognized in other states including the forum state. Rest.2d Conf. of Laws, § 299(2), coms. (d) & (e), pp. 295-296.

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[14] As noted by the court in Riley, the law in Texas is to the same effect. Riley, supra, 178 Cal.App.3d at 876.

As the Court of Appeal further observed, the foregoing is in keeping with the basic legal fact that the legislature of the state of incorporation controls the post-dissolution existence of corporations. Opinion at 5. Accord, Capital Gold Group, Inc., supra, 176 Cal. App.4th at 1127; Riley, supra, 178 Cal.App.3d at 895 ("Strict construction of corporate continuance statutes are required because matters concerning corporate continuance upon dissolution affect fundamental law of corporations enacted by a state which allowed their birth."). As noted by the Supreme Court (as quoted by the Court of Appeal):

> "...corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being." Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 259-60 (1927) (71 L.Ed. 634, 47 S.Ct. 391); see also Bazan v. Kux Machine Co., 52 Wisc. 2d 325-333-334 (190 N.W.2d 521, 525) (products liability claim); Johnson v. Helicopter & Airplane Services Corp., 404 F.Supp. 726, 729 (D.Md. 1975) (Products liability claim); Stone v. Gibson

Refrigerator Sales Corporation, 366 F.Supp. 733, 734 (E.D.Pa. 1973) (products liability claim).

Plaintiffs' interpretation of the Code clearly is at odds with the very basic legal concept that the law of the state of incorporation governs the dissolution of corporations formed in such state.

(c) California Traditionally Does Not Apply Its Continuing-Existence Statute to Foreign Corporations.

The substantively indistinguishable predecessor to § 2010, California Civil Code § 399, also did not apply to foreign corporations. The statutory definition of "corporation" then found in former Civil Code § 278 was limited to "domestic corporations". See, Note, Foreign Corporations: Continued Existence After Dissolution (1947) 35 Cal. L.Rev. 306, 309. (Opinion at 10, fn. 7.) Additionally, the subsequent version of the Civil Code § 399, as set forth in former Corporations Code § 5400 – 5402 (adopted in 1947), applied to "corporations", which were then defined in Corporations Code § 106 as "domestic corporations," and had no application to foreign corporations. Former § 106, as amended by Stat. 1947, ch.

1038, p. 2311. In other words, the Legislature has never expressly applied the dissolution continuation provisions now found in § 2010 to foreign corporations.

Indeed, legal commentary dating back to the adoption of the General Corporation Law in 1931 indicated the new law generally did not apply to foreign corporations. Speaking of the new law, Professor Ballentine noted: "[T]he new law is declared applicable to all existing corporations, regardless of the date of incorporation.... The act does not cover foreign corporations except where they are expressly referred to." Ballantine, Questions of Policy in Drafting a Modern Corporation Law (1931) 19 Cal. L. Rev. 465. This same understanding was echoed by the Los Angeles Bar Association Bulletin which advised: "Application of New Law. One of the first questions naturally to occur to a lawyer is that of the application of the new statute. Will it apply to corporations formed prior to August 14, 1931, without the necessity of their taking any special corporate proceedings to that end? Does it apply to state banks, insurance companies, railroads, etc.? Does it apply to foreign corporations? ... As to foreign corporations, it is to be noted that the word "corporation" as used in the new law, refers only to domestic, i.e.,

California, corporations, unless otherwise expressly stated." Sterling, The New General Corporation Law of California (1931) 6 L.A. Bar Assoc. Bulletin 368.

That the General Corporation Law historically was not intended to generally apply to foreign corporations was further observed when the new Corporations Code was drafted as A.B. 376. At that time it was noted that as to A.B. 376: "The bill revises a major part of the law governing business corporations. Major changes are as follows: 5. Foreign Corporations: Present California law does not apply to a corporation incorporated elsewhere, even though all of its business may be conducted in this state. Under this bill, foreign corporations would be subject to our laws that protect shareholders and creditors if half or more of both the corporation's business and shareholders are in this state. Whether 50 percent or more of its business is done in California is determined by averaging out its property, payroll and sales figures. (Sec. 2115)" Assem. Com. on Judiciary, Digest of Assembly Bill No. 376 (hearing date May 1, 1975), p.3. That provision became Corporations Code section 2115 – which does not apply section 2010 to foreign corporations even when half the business and shareholders are in California.

While the foregoing makes it clear that the Legislature never intended § 2010 to apply to foreign corporations, this is further evident from the language of the Code. In the first place, while § 2115 specifies that several particular sections of Division 1 apply to foreign corporations, conspicuously, § 2010 is not among them. Riley, supra, 178 Cal.App.3d at 876 ("[c]onspicuous by its absence is section 2010."); accord, Opinion at 14.)[15] Secondly, several provisions in Division 1 expressly state that they apply to foreign corporations, (see §§ 208, 1108(a)-(f), 1157(a)-(f), 1201(d), 1202(c), 1501(g), 1600(d) and 1602,), yet § 2010 does not state that it applies to foreign corporations. The obvious conclusion is that the Legislature did not intend § 2010 to apply to foreign corporations.

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[15] That § 2115 does not set forth all of the requirements in the Code which apply to foreign corporations, as noted by Plaintiffs, proves nothing. (See POB at 22.) The bottom line is that the Legislature had two opportunities to expressly apply § 2010 to foreign corporations, either in § 2115 or, in the text of § 2010 itself, but did not do so.

D. The Court Should Not Adopt The Constitutional Analysis Employed By The North American II Court.

1. Plaintiffs' Reliance On Repealed Provision Of The California Constitution, Article XII, § 15 Flies In The Face Of The Premise Of Their Argument.

Plaintiffs go to extreme lengths to persuade this Court that foreign corporations such as Diamond should be regarded as "organized under" the laws of California. (POB at 16-25.) Thereafter, Plaintiffs' rely on the reasoning of the North American II decision for the proposition that § 2010 was meant to apply to foreign corporations—a decision grounded in the language of former Article XII, § 15 which read: "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State." (See POB at 25-29.) The language of Article XII, § 15 not only illustrates the unalterable fact that corporations are not organized under the laws of two different states but, more importantly, demonstrates the blatant contradiction in Plaintiffs' reliance on North American II: In one

breath Plaintiffs claim Diamond was organized under the laws of California, yet in the next breath they claim Diamond should be viewed as "organized outside the limits of this State". This clearly signals the inconsistency of their positions.

2. The Reasoning Of North American II Is Fundamentally Flawed.

In North American, a personal injury claimant sued a dissolved Illinois Corporation after the expiration of the Illinois' survival statute. The court held that § 2010 should not be read to exclude foreign corporations "under the circumstances of the case at bench, but should be read to protect the interests of California." North American II, supra, 180 Cal.App.3d at 908. The court based its reasoning, which the Court of Appeal fairly described as "convoluted", on an interpretation of a California constitutional provision adopted in 1879, yet repealed in 1972. Id. (See Opinion at 9.) The North American II court surmised that because this constitutional provision was in effect when the original version of § 2010 was adopted--in 1929--the California Legislature must have intended that § 2010 apply to all corporations, both domestic and

foreign. Id.

3. The Approach Followed By North American II In Interpreting § 2010 Fails To Abide By Standard Principles Of Statutory Construction.

Rather than beginning its analysis with the language of the Corporations Code itself, the North American II court began its analysis by utilizing an archaic constitutional provision, now repealed, as its primary interpretive tool. This approach is flawed because "although a court may properly rely on extrinsic aids, it should first turn to the words of the statute to determine the intent of the Legislature. If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." Page v. Superior Court (1995) 31 Cal.App.4th 1206, 1211; see also, Miklosy v. Regents of Univ. of California (2008) 44 Cal.4th 876, 888 ("If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls.") See, Opinion at 10.

North American II's resort to historical evidence, to the exclusion of the plain language of the statute, is improper and should be rejected. As recognized but ignored by the court in North American II, "[t]he transaction of business in California by foreign corporations also is governed by extensive statutes." North American II, supra, 180 Cal.App.3d at 909. Those statutes, when read together, specifically, with §§ 102, 162, 2010, and 2115, as well as other statutes referenced earlier, unambiguously provide that California's dissolution statutes have no application to dissolved foreign corporations.

4. The North American II Decision Speculates As To The Intent Of The Legislature.

In relying upon Article XII, § 15, it is assumed by the North American II court that the Legislature had this constitutional provision in mind when enacting § 2010. In support, the court points out that § 162 (which defines a corporation to include only "domestic" corporations and corporations organized under Division 1) had not yet been adopted when the predecessor to § 2010 (Civil Code § 339) was

enacted. Id. at 908-909. However, Civil Code § 278, the predecessor to § 162, which defined a corporation to mean only a "domestic" corporation, was enacted only two years later in 1931 (see former § 278, added by Stats. 1931, ch. 862, § 2, p. 1764). Even more compelling, Civil Code § 278 was enacted decades before the repeal of Article XII, § 15. Presumably, by repealing Article XII, the electorate understood the consequence of removing the only remaining bar to treating foreign corporations more favorable than domestic corporations.

In assuming what the Legislature intended, the North American II court also ignores the fact that the current statutory framework underwent significant revision in 1975, which included the simultaneous enactment of §§ 102, 162 and 2010. 1-1 Ballantine and Sterling California Corporation Laws § 6 (The General Corporation Law of this State was completed revised in 1975 to "modernize and streamline" the law). During the complete restructuring of the General Corporation Law in 1975, Article XII, § 15, had already been repealed (repealed in 1972). If the Legislature wanted to incorporate this repealed provision into the revised statutory framework, they could have. Instead, the Legislature enacted §§ 102 and 162,

concurrently with § 2010. Giving effect to each of these statutes, there can be no doubt that § 2010 does not have any application to foreign corporations. 3-18 Ballantine and Sterling California Corporation Laws Section 389 ("The General Corporation Law only applies to foreign corporations when its provision expressly so provide.").

Along the same lines, the court also fails to reconcile its decision with its prior decision in North American I. In North American I, the court found that § 2010 did not apply to foreign corporations relying, in part, on the following citation:

> In a law review note entitled Foreign Corporations: Continuance of Existence After Dissolution (1947) 35 Cal.L.Rev. 306, the author observed that Civil Code section 399, the predecessor to Corporations Code section 2010, was applicable only to domestic corporations and suggested an amendment to include foreign corporations. No such amendment has taken place.

North American I, supra, 128 Cal.App.3d at 144. As the court did in North American II, Plaintiffs completely ignore the history of § 2010.

5. The North American II Decision Rests On The Faulty And Illogical Premise That Article XII, § 15 Pertained To Corporate Dissolution.

Article XII, § 15, speaks of a level playing field between corporations transacting business. In contrast, § 2010 deals with dissolved corporations, i.e., corporations that are no longer transacting business. Presumably, the former constitutional provision applied only to ongoing business activities of a corporation. As dissolved corporations are no longer going concerns, it is a stretch to believe that the Legislature had this provision in mind when enacting § 2010.

Of course, the contention by the North American II court that § 2010 was intended to apply to foreign corporations makes no sense in the first place. California Corporations Code § 2010 and Delaware Code § 278 are survival statutes. Both statutes are tailored to govern the dissolution of their own domestic corporations, not foreign corporations. As pointed out by the court in Riley, it is well settled--and makes perfect sense--that each state would spell out the details as

to dissolution of its own corporations. Riley, supra, 178 Cal.App.3d at 876.[16]

6. The North American II Court Improperly Interpreted Other Provisions Of The Code.

North American II further argues that "[t]here are a myriad of statutory provisions that apply to foreign corporations that are not included in section 2115. And the absence of these statutory provisions is for a good reason, because they apply to all foreign corporations, not just to corporations which meet the percentage figures prescribed in section 2115." North American II, supra, 180 Cal.App.3d at 910. As pointed out earlier, this supposition overlooks the fact that § 2115 sets forth all the provisions in Division 1 that apply to foreign corporations to the exclusion of the law of the corporation's domicile and, is in direct contradiction to § 102. While it is true that certain sections of California Corporations Code not listed in § 2115 still apply to foreign corporations, such as § 1501,

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[16] It is equally logical that Chapter 21 of the Code, which applies to foreign corporations, does not include a survival provision for dissolved foreign corporations.

unlike § 2010, those sections expressly state that they are to be applied to foreign corporations.

Moreover, § 2115 operates concurrently with the other provisions of the Code. Havlicek v. Coast-to-Coast Analytical Services, Inc. (1995) 39 Cal.App.4th 1844, 1852. Thus, a foreign corporation may be subject to the provisions of Code if a provision of the Code expressly so provides or if the corporation meets the specified minimum contacts outlined in § 2115. As previously explained, to adopt the reasoning of North American II would render § 2115(b) meaningless. Such an interpretation must be avoided. Id. at 1854.

E. Public Policy Is Defined By the Statute.

In a last gasp, Plaintiffs assert that § 2010 should apply to Diamond as a matter of supposed public policy. (POB at 29-32.) The Legislature, however, makes public policy. The statutory scheme that it enacted does not apply § 2010 to foreign corporations such as Diamond.

"[A]side from constitutional policy, the Legislature, and not the courts, is vested with the responsibility to declare the public policy of

the state" Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66, 71; accord, Superior Court v. County of Mendocino (1996) 13 Cal.4th 45, 53 ("The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function"); City and County of San Francisco v. Sweet (1995) 12 Cal.4th 105, 121 ("When the Legislature has spoken, the court is not free to substitute its judgment as to the better policy".)

Consequently, courts must apply statutes according to their terms, not try to mold the statute to some undisclosed contrary intent. "In construing this, or any, statute, our office is simply to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does. We may not rewrite the statute to conform to an assumed intention that does not appear in its language." Vasquez v. California (2008) 45 Cal.4th 243, 253.

Here, the Legislature has determined the relevant public policy. It has clearly defined the outer limits of a "corporation" subject to Division 1, and clearly defined which portions of Division 1 apply to

foreign corporations. It did not intend to apply Division 1 wholesale to foreign corporations, the result Plaintiffs urge.

Indeed, it is Plaintiffs' argument that would upend public policy. Plaintiffs' theory would mean that Division 1 applies to all foreign corporations that qualify to do business in California, because all such corporations would be considered "organized under this division." As noted earlier, foreign corporations would have to follow a litany of requirements regarding various corporate activities that their home state already regulates, which would wreak havoc with corporate planners. (See pp. 21-22 above.)

The Legislature's decision not to apply Division 1 wholesale to foreign corporations makes sense and comports with California's traditional approach of not applying its corporate law, and specifically its dissolution law, to foreign corporations. That statutory scheme – the one the Legislature enacted – is public policy. Under it, Diamond is not a "corporation" generally subject to Division 1 and § 2010 does not apply.

F. Because California and Delaware Law Do Not Conflict, The Court Need Not Apply The Governmental Interest Test.

Because § 2010 does not apply to Diamond, there is no conflict between Delaware and California law, and no need for a governmental interest analysis.

Specifically, "Analysis of a choice-of-law question proceeds in three steps: 'First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state" [citation], and then ultimately applies "the law of the state whose interest would be the more impaired if its law were not applied." [Citation.]' (Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal.4th 95, 107-108 [45 Cal.Rptr.3d 730, 137 P.3d 914].)

The fact that two states are involved does not itself indicate that there is a "conflict of laws" or "choice of law" problem. Hurtado v. Superior Court (1974) 11 Cal.3d 574, 580. If California law does not apply by its terms, there is no occasion for applying choice-of-law rules. Norwest Mortgage, Inc. v. Conley (1999) 72 Cal.App.4th 214, 228. Here, § 2010 does not apply. Because no conflict of law exists, there is no occasion to apply the governmental-interest test.

If this Court disagreed, however, the correct course would be remand. As Plaintiffs correctly observe, the courts below never reached the choice-of-law question because neither court perceived a conflict exists between Delaware law and California law. (POB at 9.) This Court does not ordinarily decide questions in the first instance, and there is no reason to do so here. Accordingly, in the unlikely event that the Court concluded that § 2010 applies to foreign corporations, the Court should remand for application of the governmental-interest test.

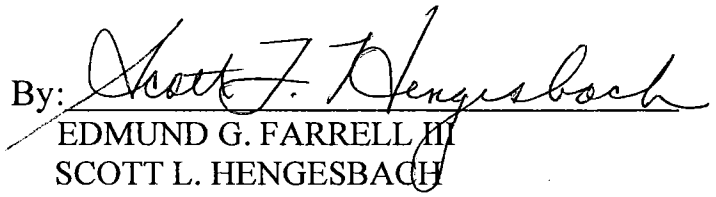
II

CONCLUSION

The Court should affirm.

DATED: November 15, 2010.

MURCHISON & CUMMING, LLP

By: 

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CERTIFICATION OF COMPLIANCE

Counsel of record hereby certifies that pursuant to Rule 8.204(c) of the California Rules or Court, the enclosed Respondent's Brief is produced using 14-point Roman type with 13-point Roman type footnotes and contains approximately 11,072 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: November 15, 2010.

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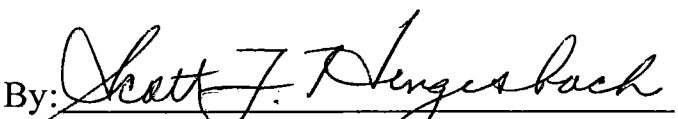
By: 

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PROOF OF SERVICE VIA OVERNITE EXPRESS MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 South Grand Avenue, Ninth Floor, Los Angeles, California 90017-4613.

On November 15, 2010, I served a true copy of the following document described as **RESPONDENT'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

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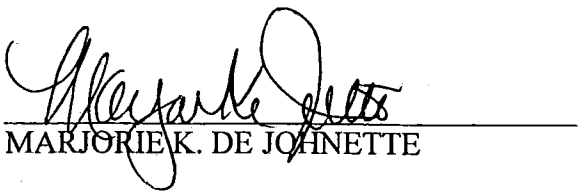
BY OVERNIGHT DELIVERY: I enclosed said document in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2010, at Los Angeles, California.



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