

## LEGISLATIVE BILL 462

Approved by the Governor March 10, 2011

Introduced by Pirsch, 4.

FOR AN ACT relating to trade names; to amend sections 21-1931, 21-19,151, 21-2028, 21-20,173, 67-234, 67-455, 87-208, 87-209, 87-210, 87-211, 87-212, 87-213, 87-215, 87-216, 87-217, and 87-218, Reissue Revised Statutes of Nebraska, and sections 84-511 and 87-214, Revised Statutes Cumulative Supplement, 2010; to include statutory damages as a remedy; to eliminate a penalty for failure to register; to harmonize provisions; to repeal the original sections; and to outright repeal section 87-220, Reissue Revised Statutes of Nebraska.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 21-1931, Reissue Revised Statutes of Nebraska, is amended to read:

21-1931 (a) A corporate name may not contain language stating or implying that the corporation is organized for a purpose other than that permitted by section 21-1927 and its articles of incorporation.

(b) Except as authorized by subsections (c) and (d) of this section, a corporate name shall not be the same as or deceptively similar to, upon the records of the Secretary of State, any of the names referenced in subdivisions (b) (1) through (5) of this section:

(1) The corporate name of a nonprofit or business corporation incorporated or authorized to do business in this state;

(2) A corporate name reserved or registered under section 21-1932, 21-1933, 21-2029, or 21-2030;

(3) The fictitious name of a foreign business or nonprofit corporation authorized to transact business in this state because its real name is unavailable;

(4) A trade name registered in this state pursuant to sections 87-208 to ~~87-220~~, 87-219.01; and

(5) Any other business entity name registered or filed with the Secretary of State pursuant to Nebraska law.

(c) A corporation may apply to the Secretary of State for authorization to use a name that is deceptively similar to, upon the Secretary of State's records, one or more of the names described in subsection (b) of this section. The Secretary of State shall authorize use of the name applied for if:

(1) The other corporation or business entity consents to the use in writing; or

(2) The applicant delivers to the Secretary of State a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(d) A corporation may use the name (including the fictitious name) of another domestic or foreign business or nonprofit corporation or business entity that is used in this state if the other corporation or business entity is incorporated or authorized to do business in this state and the proposed user corporation:

(1) Has merged with the other corporation or business entity;

(2) Has been formed by reorganization of the other corporation or business entity; or

(3) Has acquired all or substantially all of the assets, including the name, of the other corporation or business entity.

(e) The Nebraska Nonprofit Corporation Act does not control the use of fictitious names.

Sec. 2. Section 21-19,151, Reissue Revised Statutes of Nebraska, is amended to read:

21-19,151 (a) If the corporate name of a foreign corporation does not satisfy the requirements of section 21-1931, the foreign corporation, to obtain or maintain a certificate of authority to transact business in this state, may use a fictitious name to transact business in this state if its real name is unavailable and it delivers to the Secretary of State for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

(b) Except as authorized by subsections (c) and (d) of this section, the corporate name (including a fictitious name) of a foreign corporation shall not be the same as or deceptively similar to, upon the records of the Secretary of State, any of the names referenced in subdivisions (b) (1) through

(5) of this section:

(1) The corporate name of a nonprofit or business corporation incorporated or authorized to transact business in this state;

(2) A corporate name reserved or registered under section 21-1932, 21-1933, 21-2029, or 21-2030;

(3) The fictitious name of another foreign business or nonprofit corporation authorized to transact business in this state;

(4) A trade name registered in this state pursuant to sections 87-208 to ~~87-220~~, 87-219.01; and

(5) Any other business entity name registered or filed with the Secretary of State pursuant to Nebraska law.

(c) A foreign corporation may apply to the Secretary of State for authorization to use in this state the name of another corporation or business entity (incorporated or authorized to transact business in this state) that is deceptively similar to, upon the records of the Secretary of State, the name applied for. The Secretary of State shall authorize use of the name applied for if:

(1) The other corporation or business entity consents in writing to the use; or

(2) The applying corporation delivers to the Secretary of State a certified copy of a final judgment of a court of competent jurisdiction establishing its right to use the name applied for in this state.

(d) A foreign corporation may use in this state the name (including the fictitious name) of another domestic or foreign business or nonprofit corporation or business entity that is used in this state if the other corporation or business entity is incorporated or authorized to transact business in this state and the foreign corporation:

(1) Has merged with the other corporation or business entity;

(2) Has been formed by a reorganization of the other corporation or business entity; or

(3) Has acquired all or substantially all of the assets, including the name, of the other corporation or business entity.

(e) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of section 21-1931, it shall not transact business in this state under the changed name until it adopts a name satisfying the requirements of section 21-1931 and obtains an amended certificate of authority under section 21-19,149.

Sec. 3. Section 21-2028, Reissue Revised Statutes of Nebraska, is amended to read:

21-2028 (1) A corporate name:

(a) Shall contain the word corporation, incorporated, company, or limited, or the abbreviation corp., inc., co., or ltd., or words or abbreviations of like import in another language, except that a corporation organized to conduct a banking business under the Nebraska Banking Act may use a name which includes the word bank without using any such words or abbreviations; and

(b) Shall not contain language stating or implying that the corporation is organized for a purpose other than that permitted by section 21-2024 and its articles of incorporation.

(2) Except as authorized by subsections (3) and (4) of this section, a corporate name shall not be the same as or deceptively similar to, upon the records of the Secretary of State, any of the names referenced in subdivisions (2)(a) through (f) of this section:

(a) The corporate name of a corporation incorporated or authorized to transact business in this state;

(b) A corporate name reserved or registered under section 21-2029 or 21-2030;

(c) The fictitious name adopted by a foreign corporation authorized to transact business in this state because its real name is unavailable;

(d) The corporate name of a not-for-profit corporation incorporated or authorized to transact business in this state;

(e) A trade name registered in this state pursuant to sections 87-208 to ~~87-220~~, 87-219.01; and

(f) Any other business entity name registered or filed with the Secretary of State pursuant to Nebraska law.

(3) A corporation may apply to the Secretary of State for authorization to use a name that is deceptively similar to, upon his or her records, one or more of the names described in subsection (2) of this section. The Secretary of State shall authorize use of the name applied for if:

(a) The other corporation or business entity consents to the use in writing; or

(b) The applicant delivers to the Secretary of State a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(4) A corporation may use the name, including the fictitious name, of another domestic or foreign corporation or business entity that is used in this state if the other corporation or business entity is incorporated or authorized to transact business in this state and the proposed user corporation has:

(a) Merged with the other corporation or business entity;

(b) Been formed by reorganization of the other corporation or business entity; or

(c) Acquired all or substantially all of the assets, including the name, of the other corporation or business entity.

(5) The Business Corporation Act shall not be construed to control the use of fictitious names.

Sec. 4. Section 21-20,173, Reissue Revised Statutes of Nebraska, is amended to read:

21-20,173 (1) If the corporate name of a foreign corporation does not satisfy the requirements of section 21-2028, the foreign corporation, in order to obtain or maintain a certificate of authority to transact business in this state, may:

(a) Add the word corporation, incorporated, company, or limited, or the abbreviation corp., inc., co., or ltd., to its corporate name for use in this state; or

(b) Use a fictitious name to transact business in this state if its real name is unavailable and it delivers to the Secretary of State for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

(2) Except as authorized by subsections (3) and (4) of this section, the corporate name, including a fictitious name, of a foreign corporation shall not be the same as or deceptively similar to, upon the records of the Secretary of State, any of the names referenced in subdivisions (2)(a) through (f) of this section:

(a) The corporate name of a corporation incorporated or authorized to transact business in this state;

(b) A corporate name reserved or registered under section 21-2029 or 21-2030;

(c) The fictitious name of another foreign corporation authorized to transact business in this state;

(d) The corporate name of a not-for-profit corporation incorporated or authorized to transact business in this state;

(e) A trade name registered in this state pursuant to sections 87-208 to ~~87-220~~, 87-219.01; and

(f) Any other business entity name registered or filed with the Secretary of State pursuant to Nebraska law.

(3) A foreign corporation may apply to the Secretary of State for authorization to use in this state the name of another corporation or business entity, incorporated or authorized to transact business in this state, that is the same as or deceptively similar to, upon his or her records, the name applied for. The Secretary of State shall authorize use of the name applied for if:

(a) The other corporation or business entity consents to the use in writing; or

(b) The applicant delivers to the Secretary of State a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(4) A foreign corporation may use in this state the name, including the fictitious name, of another domestic or foreign corporation or business entity that is used in this state if the other corporation or business entity is incorporated or authorized to transact business in this state and the foreign corporation:

(a) Has merged with the other corporation or business entity;

(b) Has been formed by reorganization of the other corporation or business entity; or

(c) Has acquired all or substantially all of the assets, including the name, of the other corporation or business entity.

(5) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of section 21-2028, it may not transact business in this state under the changed name until it adopts a name satisfying the requirements of section 21-2028 and obtains an amended certificate of authority under section 21-20,171.

Sec. 5. Section 67-234, Reissue Revised Statutes of Nebraska, is amended to read:

67-234 The name of each limited partnership as set forth in its certificate of limited partnership:

(1) Shall contain the words limited partnership or limited or the abbreviations L.P. or Ltd.;

(2) May not contain the name of a limited partner unless (i) it is also the name of a general partner, the corporate name of a corporate general partner, or the company name of a limited liability company general partner, (ii) the business of the limited partnership had been carried on under that name before the admission of that limited partner, or (iii) the use of the name of a limited partner in the name of the limited partnership is merely coincidental and not intended to mislead the public to believe that such limited partner is a general partner;

(3) Shall not be the same as or deceptively similar to, upon the records in the office of the Secretary of State, a trade name registered in this state pursuant to sections 87-208 to ~~87-220~~, 87-219.01;

(4) Shall not be the same as or deceptively similar to, upon the records in the office of the Secretary of State, any other business entity name registered or on file with the Secretary of State pursuant to Nebraska law, except that a limited partnership may register under any name which is deceptively similar to, upon the records in the office of the Secretary of State, a business entity name registered or on file with the Secretary of State pursuant to Nebraska law with the consent of the other business entity or with the transfer of such name by the other business entity, which written consent or transfer shall be filed with the Secretary of State; and

(5) May contain the following words or abbreviations of like import: Company; association; club; foundation; fund; institute; society; union; syndicate; or trust.

Sec. 6. Section 67-455, Reissue Revised Statutes of Nebraska, is amended to read:

67-455 (1) The name of a limited liability partnership shall:

(a) End with "registered limited liability partnership", "limited liability partnership", "R.L.L.P.", "RLLP", "L.L.P.", or "LLP";

(b) Not be the same as or deceptively similar to, upon the records in the office of the Secretary of State, a trade name registered in this state pursuant to sections 87-208 to ~~87-220~~, 87-219.01; and

(c) Not be the same as or deceptively similar to, upon the records in the office of the Secretary of State, any other business entity name registered or on file with the Secretary of State pursuant to Nebraska law.

(2) A limited liability partnership may register under any name which is deceptively similar to, upon the records in the office of the Secretary of State, any other business entity name registered or on file with the Secretary of State pursuant to Nebraska law with the written consent of the other business entity or with the transfer of the name by the other business entity. Written consent to the use of the name or written consent to the transfer of the name shall be filed with the Secretary of State.

Sec. 7. Section 84-511, Revised Statutes Cumulative Supplement, 2010, is amended to read:

84-511 The Secretary of State may provide for the electronic transmission and filing of documents delivered for filing under (1) the Business Corporation Act, the Limited Liability Company Act, the Nebraska Limited Cooperative Association Act, the Nebraska Nonprofit Corporation Act, the Nebraska Professional Corporation Act, the Nebraska Uniform Limited Partnership Act, the Nonstock Cooperative Marketing Act, the Uniform Partnership Act of 1998, and the Trademark Registration Act and (2) any filing provisions of sections 21-1301 to 21-1306, 21-1333 to 21-1339, and 87-208 to ~~87-220~~, 87-219.01. The Secretary of State shall adopt and promulgate rules and regulations to implement this section.

Sec. 8. Section 87-208, Reissue Revised Statutes of Nebraska, is amended to read:

87-208 As used in sections 87-208 to ~~87-220~~, 87-219.01, unless the context otherwise requires:

(1) Applicant means a person filing an application for registration of a trade name under such sections or his or her legal representatives, successors, or assigns;

(2) Person means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, unincorporated association, or two or more of the foregoing having a joint or common interest or any other legal or commercial entity;

(3) Registrant means a person to whom registration of a trade name

under such sections is issued or his or her legal representatives, successors, or assigns; and

(4) Trade name means every name under which any person does or transacts any business in this state other than the true name of such person.

Sec. 9. Section 87-209, Reissue Revised Statutes of Nebraska, is amended to read:

87-209 A trade name shall not be registered if it:

(1) Consists of or comprises immoral, deceptive, or scandalous matter;

(2) Consists of or comprises matter which may disparage, bring into contempt or disrepute, or falsely suggest a connection with, persons living or dead, institutions, beliefs, or national symbols;

(3) Consists of, comprises, or simulates the flag or coat of arms or other insignia of the United States, any state or municipality, or any foreign nation;

(4) Consists of or comprises the name, signature, or portrait of any living individual without his or her consent;

(5) (a) Is merely descriptive or misdescriptive, or is primarily geographically descriptive or geographically misdescriptive as applied to the business of the applicant, or (b) is primarily merely a surname, but nothing in this subdivision shall prevent the registration of a trade name which has become distinctive of the applicant's business in this state. The Secretary of State may accept as evidence that a trade name has become distinctive proof of continuous use by the applicant as a trade name in this state or elsewhere for five years preceding the date of the filing of the application for registration;

(6) Consists of or comprises a trade name which so resembles a trade name registered under sections 87-208 to ~~87-220~~, 87-219.01, registered in this state, or the name of a business entity on file or registered with the Secretary of State pursuant to Nebraska law as to be likely to cause confusion, mistake, or deception of purchasers, except that a name, although similar, may be used if the business entity affected consents in writing and such writing is filed with the Secretary of State. The word incorporated, inc., or corporation shall not be a part of the trade name being registered unless the firm is duly incorporated in the State of Nebraska or some other state; or

(7) Consists of the word geologist or any modification or derivative of such word, and the applicant does not meet the requirements of subsection (6) of section 81-3528.

Sec. 10. Section 87-210, Reissue Revised Statutes of Nebraska, is amended to read:

87-210 (1) Subject to the limitations set forth in sections 87-208 to ~~87-220~~, 87-219.01, any person who adopts a trade name for use in this state may file in the office of the Secretary of State on a form furnished by the Secretary of State an application, in duplicate, for registration of the trade name setting forth, but not limited to, the following information:

(a) The name and street address of the applicant for registration; and, if a corporation, the state of incorporation;

(b) The trade name sought to be registered;

(c) The general nature of the business in fact conducted by the applicant;

(d) The length of time during which the trade name has been used in this state;

(e) The signature of the applicant; and

(f) A filing fee of one hundred dollars.

(2) Upon compliance by the applicant with the requirements of sections 87-208 to ~~87-220~~, 87-219.01, the Secretary of State shall return the duplicate copy stamped with the date of filing to the applicant or the representative submitting the applications for filing.

Sec. 11. Section 87-211, Reissue Revised Statutes of Nebraska, is amended to read:

87-211 Registration of a trade name under sections 87-208 to ~~87-220~~ 87-219.01 shall be effective for a term of ten years from the date of registration and, upon application filed in duplicate within six months prior to the expiration of such term on a form to be furnished by the Secretary of State, the registration may be renewed for a like term. A renewal fee of one hundred dollars payable to the Secretary of State shall accompany the application for renewal of the registration.

A trade name registration may be renewed for successive periods of ten years in like manner.

The Secretary of State shall notify registrants of trade names under sections 87-208 to ~~87-220~~ 87-219.01 of the necessity of renewal within

the year next preceding the expiration of the ten years from the date of registration or of last renewal by writing to the last-known street address of the registrants.

Any registration in force on August 27, 1971, shall expire ten years from the date of the registration or of the last renewal thereof, whichever is later, and may be renewed by filing an application with the Secretary of State on a form furnished by him or her and paying the renewal fee as provided in this section within six months prior to the expiration of the registration.

All applications for renewals under sections 87-208 to ~~87-220~~ 87-219.01 whether of registrations made under sections 87-208 to ~~87-220~~ 87-219.01 or of registrations effected under any prior act shall include a statement that the trade name is still in use in this state.

Sec. 12. Section 87-212, Reissue Revised Statutes of Nebraska, is amended to read:

87-212 Any trade name registered under sections 87-208 to ~~87-220~~ 87-219.01 shall be assignable with the goodwill of the business in which the trade name is used. Assignment shall be by an instrument in writing duly executed, in duplicate, and may be recorded with the Secretary of State upon the payment of a fee of five dollars. The street address, city, and state of the assignee must be included in the assignment. Upon recording of the assignment, the Secretary of State shall return the duplicate copy stamped with the date of filing to the applicant or the representative submitting the applications for filing. An assignment of any registration under sections 87-208 to ~~87-220~~ 87-219.01 shall be void as against any subsequent purchaser for value without notice unless the assignment is recorded with the Secretary of State prior to the subsequent purchase.

Sec. 13. Section 87-213, Reissue Revised Statutes of Nebraska, is amended to read:

87-213 The Secretary of State shall keep for public examination a record of all trade names registered or renewed under sections 87-208 to ~~87-220.~~ 87-219.01.

Sec. 14. Section 87-214, Revised Statutes Cumulative Supplement, 2010, is amended to read:

87-214 The Secretary of State shall cancel from the register:

(1) Any registration concerning which the Secretary of State shall receive a voluntary request for cancellation from the registrant or the assignee of record;

(2) Any registration granted under sections 87-208 to ~~87-220~~ 87-219.01 and not renewed in accordance with such sections;

(3) Any registration concerning which a court of competent jurisdiction shall find:

(a) That the registered trade name has been abandoned;

(b) That the registrant is not the owner of the trade name;

(c) That the registration was granted improperly; or

(d) That the registration was obtained fraudulently;

(4) Any registration that a court of competent jurisdiction shall order canceled on any ground; and

(5) Any registration where the registrant has failed to publish such trade name within forty-five days from the filing in the office of the Secretary of State and filing proof of publication with the Secretary of State and county clerk within the forty-five days.

Sec. 15. Section 87-215, Reissue Revised Statutes of Nebraska, is amended to read:

87-215 Any person who, for himself or herself or on behalf of any other person, procures the registration of any trade name in the office of the Secretary of State under the provisions of sections 87-208 to ~~87-220,~~ 87-219.01, by knowingly making any false or fraudulent representation or declaration, verbally or in writing, or by any other fraudulent means, shall be liable to pay all damages sustained in consequence of this filing or registration, to be recovered by any party injured in any court of competent jurisdiction.

Sec. 16. Section 87-216, Reissue Revised Statutes of Nebraska, is amended to read:

87-216 Subject to the provisions of section 87-218, any person shall be liable to a civil action by the registrant of the trade name for any or all of the remedies provided in section 87-217 if that person shall:

(1) Use in connection with his or her business, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a trade name registered under sections 87-208 to ~~87-220~~ 87-219.01 in a manner likely to cause confusion, mistake, or deception of purchasers; or

(2) Reproduce, counterfeit, copy, or colorably imitate any registered trade name and apply the reproduction, counterfeit, copy, or

colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be in conjunction with another business in this state; except that the registrant shall not be entitled to recover profits or damages unless the acts were committed with knowledge that the imitation was intended to be used to cause confusion, mistake, or deception of purchasers.

Sec. 17. Section 87-217, Reissue Revised Statutes of Nebraska, is amended to read:

87-217 Any registrant of a trade name may proceed by suit to enjoin the use, display, or sale of any counterfeits or imitations thereof, and a court of competent jurisdiction may restrain ~~this~~ such use, display, or sale on terms which the court deems just and reasonable and may require the defendants to pay to the registrant ~~either~~ (1) all profits attributable to the wrongful use, display, or sale, or (2) all damages caused by the wrongful use, display, or sale, or (3) both such profits and damages, and reasonable attorney's fees. In lieu of the remedies available in subdivisions (1), (2), and (3) of this section, the court may require the defendants to pay statutory damages of one thousand dollars and reasonable attorney's fees. The court may order that any counterfeits or imitations in the possession or under the control of any defendant be delivered to an officer of the court, or to the complainant, to be destroyed.

Sec. 18. Section 87-218, Reissue Revised Statutes of Nebraska, is amended to read:

87-218 Sections 87-208 to ~~87-220~~ 87-219.01 shall not adversely affect rights in trade names, or the enforcement of rights in trade names, acquired at any time in good faith at common law.

Sec. 19. Original sections 21-1931, 21-19,151, 21-2028, 21-20,173, 67-234, 67-455, 87-208, 87-209, 87-210, 87-211, 87-212, 87-213, 87-215, 87-216, 87-217, and 87-218, Reissue Revised Statutes of Nebraska, and sections 84-511 and 87-214, Revised Statutes Cumulative Supplement, 2010, are repealed.

Sec. 20. The following section is outright repealed: Section 87-220, Reissue Revised Statutes of Nebraska.