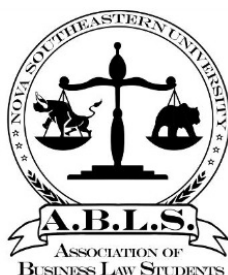




**NSU Law's Entrepreneur Simulator**  
*Business Startups from the Attorney-Client Perspective*

**Friday, February 17, 2017  
11:50 am – 3:45 pm  
NSU Shepard Broad College of Law  
3305 College Avenue  
Ft. Lauderdale, FL 33314**

Sponsored by:



## **Course Outline & Timeline**

**Registration** - 11:00 am - 11:50 pm

**Welcome & Introduction** - 11:50 am - 12:00 pm

Introduce Jeffrey S. Bartel, Michael B. Chesel, and Brandon Esposito

**Phase 1 - Business Formation** - 12:00 pm - 1:00 pm

Attendees witness firsthand the thought processes involved in assessing a business's legal foundation as an esteemed attorney guest speaker recalls meaningful experiences in advising businesses. The speaker will focus on an "entrepreneur timeline" and will present personal accounts in view of this timeline. The speaker will discuss the owners' goal to limiting potential liability associated with the business, including selecting an appropriate entity structure under specific state laws. Given a keen perspective of the entrepreneur timeline based on real life scenarios, attendees learn what different potential situations to expect when providing legal services to aspiring entrepreneurs.

The Simulator then introduces a "mock business," including its hypothetical industry, purpose and revenue projections to be used for the remainder of the event.

**Coffee Break** - 1:00 pm - 1:30 pm

**Phase 2 - Operation of the Business Entity** - 1:30 pm - 2:30 pm

The Simulator presents three hypothetical scenarios where attendees step into the roles of our mock business's legal advisors and work together to formulate solutions that address various business concerns. During this activity, attendees are divided into three groups in which they are assigned a hypothetical scenario focused on a particular facet of business law. At the end of the activity, each group will present its solutions to a panel of local legal professionals.

**Phase 3 - Guest Speaker Panel** - 2:30 pm - 3:30 pm

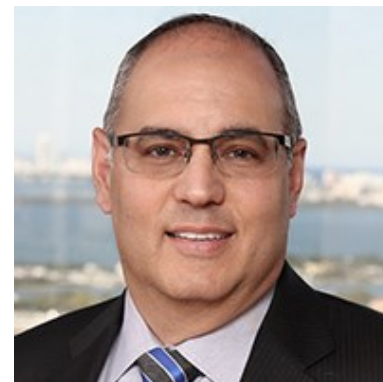
The Simulator's panel of legal professionals reviews the groups' proposed business solutions under the three different hypotheticals, and provides feedback to the groups. In turn, the professionals determine whether such solutions are legally feasible within a business context. In assessing the hypothetical scenarios, the panel may draw upon their own experiences in growing and maintaining businesses.

After the panel's final assessment, there will be a brief Q&A session for attendees to ask the panel questions regarding their particular interests in business and intellectual property law. The panel may also discuss other relevant topics and emerging trends in entrepreneurship.

**Final Remarks** - 3:30 pm - 3:45 pm

Dean Jon M. Garon will close with final remarks on the event and the legal significance of the entrepreneur timeline.

**Michael Chesal** is a founding and managing member of Peretz Chesal & Herrmann, an intellectual property law firm located in Miami, Florida. He was one of nine inaugural members of The Florida Bar Intellectual Property Law Certification Committee, which he Chaired from 2009-10. Michael previously served as Chairman of The Florida Bar Business Law Section's Intellectual Property Law Committee. Over the years, Michael has chaired a number of committees of The Florida Bar Business Law Section, and currently serves as its Secretary/Treasurer. Michael is a Florida Supreme Court Certified Circuit Civil Mediator and is a member of the International Trademark Association's Panel of Mediators. He has been recognized by Best Lawyers® as "Lawyer of the Year" in Miami in Copyright Law (2013 and 2016) and in Intellectual Property Litigation (2014). Michael resides in Hollywood where he serves as Chairman of Aish South Florida.



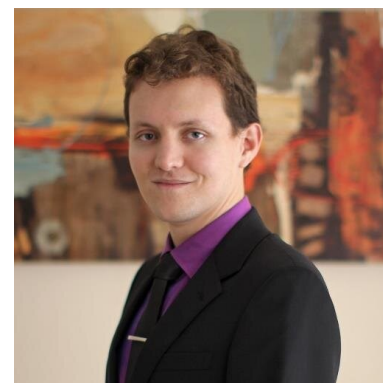
**Jeff Bartel** is a Partner on Berger Singerman's Government and Regulatory Team with his practice focused on land use and zoning, real estate development and finance, governmental and regulatory affairs, corporate governance and compliance, energy and utility, and private equity and venture capital issues. In business and in law, Jeff has transformed operations, improved business performance, and created value in dozens of companies and public sector entities. Jeff is recognized for his depth and breadth of expertise in management, public-private partnerships, regulatory and government affairs, external and public affairs, and operations – together with his extensive subject-matter knowledge of real estate and real estate finance, land use and development; corporate responsibility, compliance and governance; organizational leadership, innovation and change management; energy and electric utilities; and entrepreneurial ventures and capital markets. Jeff also heads a private equity and debt firm, Hamptons Group LLC, based in South Florida, focused on capital markets and a diversified class of traditional and alternative assets and venture-oriented investments.



### **Brandon M. Esposito**

PMA Venture Capital Group, Associate & Acting General Counsel

As Director of Operations and Acting General Counsel for PMA Venture Capital Group, Brandon is involved at every stage of PMA's VC and real estate investment activities. His responsibilities include investment evaluation; deal-sourcing; deal structuring; drafting convertible debt and equity instruments; drafting corporate bylaws and LLC operating agreements; risk mitigation and asset protection; due diligence; corporate, IP, and regulatory filings; and direct operational management and oversight of PMA's portfolio companies.



**Professor Donna Litman**

Nova Southeastern University Shepard Broad College of Law, Professor of Law

Professor Donna Litman joined the full-time faculty in 1983 and has been a tenured full professor since 1988. She teaches in the areas of business planning, comparative law, estate planning, and tax law. Professor Litman serves as faculty advisor for the Jewish Law Students Association and the Transactional Law Practice Group and as co-advisor to The Real Property, Probate, and Trust Law Society at the College of Law. She also coaches student teams for transactional competitions, including the National Health Law Moot Court Competition and the National Transactional LawMeet. Professor Litman has presented at international and national conferences and authored and co-authored books, chapters, portfolios, articles, and newspaper columns.

**Dean Jon M. Garon**

Nova Southeastern University Shepard Broad College of Law, Dean and Professor of Law

Jon M. Garon is dean of Nova Southeastern University Shepard Broad College of Law. Dean Garon serves as chief academic officer for the law school, providing strategic leadership on programming, curriculum, enrollment management, marketing, and finance. He is a nationally recognized authority on technology law and intellectual property, particularly copyright law, entertainment and information privacy. His teaching and scholarship often focus on business innovation and structural change to media, education and content-based industries. He is the author of three books and numerous book chapters and articles, including *The Independent Filmmaker's Law & Business Guide to Financing, Shooting, and Distributing Independent and Digital Films* (A Cappella Books, 2d Ed. 2009); *Own It – The Law & Business Guide to Launching a New Business Through Innovation, Exclusivity and Relevance* (Carolina Academic Press 2007); and *Entertainment Law & Practice* (2d Ed. 2014 Carolina Academic Press). Additionally, he has presented at more than 60 forums across the U.S.



## **Conducting an Initial IP Start-Up Consultation Checklist and Discussion<sup>1</sup>**

Jon M. Garon

An initial interview for an IP Start-Up is typically an intake process covering multiple legal disciplines. The identification of the client often triggers a professional responsibility issue involving the identity of the client; the corporate form, including its tax liability issues; the rights to secure the business assets through various intellectual property regimes; and the employment issues that may involve transitions from the former employer to the new entity as well as the various employment agreements needed to secure the intellectual property for the new entity.

This initial checklist provides the basis for these initial considerations. The more the client is aware of these issues, the more successful the client will be when meeting with the attorney for the first time. This document is supplemented by the form at the end of the discussion.

### **Pre-Consult Preparation**

#### **The Intake Process**

- As a potential client, the party or parties interested in representation should complete an intake questionnaire. On the form and in the follow-up interview, the expectations of the clients and the lawyers should be made clear.

#### **Review parties for potential conflict**

- All proposed owners
- All related parties
- All current and recent employers of the proposed owners
- If potential, but not actual conflicts exist, assess the appropriateness of seeking waivers
- The retainer agreement will then reduce those understandings to writing and be signed by the lawyer and representing party.
  - Identification of the client: Typically, the client will be the entity being formed rather than the individuals. The communication, therefore, is by the founders in their capacity as future officer of the Company and its affiliates.
  - Clarify fees and payment structures.
  - Check for filing deadlines or triggering events, e.g., for filing trademarks, patents, etc.
  - Review the costs involved in the representation.
  - Review the purpose of the consultation for scope of representation, which may be general or may be limited to a particular aspect of the representation.
  - Confirm that the intake meeting is a step prior to accepting representation, and representation will only be accepted after the firm approves accepting the client and the initial payment is received.

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<sup>1</sup> Based generally on checklists provided by Practical Law. See, e.g., *Conducting an Initial Plaintiff-Side Employment Consultation (Individual) Checklist*, Practical Law Labor & Employment, available at Westlaw Next.

## **Confidentiality and the Attorney-Client Privilege**

- Explain to parties that communications between a client and counsel during the initial consultation are protected by the attorney-client privilege, but subject to certain limitations.
  - Retaining the attorney is not needed to protect the attorney-client privilege.
  - Statements made among the participants in the counseling meeting are not privileged from one-another. If a dispute arises among the founding members, there will be no privilege as to those members.
  - To maintain the privilege, all persons attending must be principals.
  - To maintain the privilege, all persons must treat the information as confidential. Social media, publications, or other disclosures destroys the privilege to all parties.
- Attorney-client privilege is not the same as non-publication for purposes of patent, trade secret, or contractual duties. Each has its own definition of confidential and different people can be provided information as is appropriate for the person's role.

## **Identify Nature of business and its core value propositions**

- Determine the nature of the business IP. Have the client explain the business strategy, and key elements of business plan success assumptions.
  - Nature of the IP (list all): \_\_Copyright, \_\_Trademark, \_\_Trade Dress, \_\_Utility Patent, \_\_Design Patent, \_\_Trade Secret, \_\_Publicity Rights, \_\_Other
- **For each identified item of intellectual property, please provide the following:**
  - Brief name and description of the IP-work, e.g., novel, patent, trademark, invention, etc.
  - Dates of creation and completion
  - Parties involved, stating the ownership of each aspect, if known
  - Disclosures, if any, in the marketplace
  - Publications related to the IP (published papers, publications, sales of items, public performances, etc.)
  - Exclusions from claims of ownership, e.g., public domain materials, licensed source materials, fair use,
  - Materials or rights necessary to acquire, if any
  - Timeline to market
  - Regulatory approvals status, e.g., patent, FDA, etc.
- Assess what research has been done into the competitive marketplace
  - Scope of exclusivity: Is this a potential blocking/foundational patent or a minor process innovation
  - How many forms of IP will be utilized, and how does the combination strategy assure an unencumbered marketplace
- Assess what third party claims might there be on the potential business
  - Determine whether the client has ongoing or post-employment obligations through a former employer's letter of hire, separation agreement, nondisclosure agreement, or company policies, product development agreement, or other written understanding.
  - Determine whether any protected information was accessed through unauthorized reverse engineering, transferring employees using corporate know-how, or other rights retained by third parties.
- Nolo.com<sup>2</sup> provides the following list of questions for potential patents that is very useful:
  - Is it marketable?

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<sup>2</sup> Rich Stim, *Checklist: Should You Patent Your Invention?*, Nolo.com, <http://www.nolo.com/legal-encyclopedia/checklist-should-you-patent-invention-29456.html>

- Did you invent it?
- Do you own it?
- Is it useful?
- Does it fit in one of the patent "classes" of processes and methods, machines, articles of manufacture, and compositions of matter?
- Is it new (or "novel")?
- Is it something that is not obvious to other inventors?

### **Identify Nature of business and its core value propositions**

- Determine the nature of the business financial and enterprise structure. Have the client explain the business strategy, and key elements of business plan success assumptions.
- Discuss the anticipated form of entity, \_\_C-Corp, \_\_S-Corp, \_\_LLC, \_\_Single-Person entity \_\_Other
- Determine the preparedness or decisions already made regarding enterprise ownership, management and control allocation
  - Distribution of ownership positions
  - Capital contributions, including overcalls and duties to continue financial support
  - Other contributions, including intellectual property
  - Additional management and control provisions
  - Employee agreements
- Determine initial finance strategies and start-up capital needs, e.g., \_\_Self-funded for initial stage, \_\_Angel funding, \_\_Crowd Funded, \_\_IPO
- Assess business preparedness
  - Determine prior business ownership and C-level experience
  - Assess client resilience and stress tolerance for business ownership
  - Explore client's ability to collaborate with peers, subordinates, employees, and others

### **Managing a Client's Expectations**

- Discuss the client's business plan to be sure the client understands the stages, timelines, and costs associated with each stage of the business development.
- Discuss the client's intellectual property strategy to be sure the client understands the strengths, weaknesses, and limitations of each aspect of the IP strategy.
- Determine what the client wants to accomplish and whether client's expectations are sufficiently mature to need representation.
- Determine whether the client has realistic financial strategy to address the milestones needed to launch the business.
- Discuss the costs of representation and the costs associated with the various filings and obligations.

### **Post-Consult Considerations**

- Document the representation with a retainer/engagement letter. Include the appropriate payment requirement to initiate representation.
- Create a work-flow plan for each aspect of the representation.
- If the representation will involve multiple lawyers or departments, create a transmittal memorandum to apprise each department of the new client and plan for provision of lawyer and paralegal services.



**Sample checklist: An intake form should have the following areas that can be filled in.**

**Personal – for each initial Partner/Member/Shareholder** -The information regarding parties (obtain this information for both husband and wife):

Name [\_\_\_\_\_]

Address [\_\_\_\_\_]

Other addresses [\_\_\_\_\_]

Telephone numbers: home, office or employment, other [\_\_\_\_\_]

E-mail address(es) [\_\_\_\_\_]

Social security number [\_\_\_\_\_]

Date of birth [\_\_\_\_\_]

Maiden name [\_\_\_\_\_]

Spouses name and contact information (needed for community property waivers, etc.)

Education, degrees, and licenses [\_\_\_\_\_]

### **Prior Employment**

Employer, address of employer, length of employment [\_\_\_\_\_]

Dates of employment, status of employment – past three employers

Occupation, prior occupation [\_\_\_\_\_]

Prior employment, length of employment, potential changes or out-of-state transfers, promotion, etc. [\_\_\_\_\_]

Did any person sign a confidentiality agreement, nondisclosure agreement, or work restriction agreement or covenant? If yes, please provide the agreement or as much information as possible related to that item.

### **Other Related Parties**

*Are there any persons who were involved in earlier stages of development of the product/service or of the business?*

*If yes,*

Name [\_\_\_\_\_]

Address [\_\_\_\_\_]

Other addresses [\_\_\_\_\_]

Telephone numbers: home, office or employment, other [\_\_\_\_\_]

E-mail address(es) [\_\_\_\_\_]

### **IP**

Nature of the IP (list all): \_\_Copyright, \_\_Trademark, \_\_Trade Dress, \_\_Utility Patent, \_\_Design Patent, \_\_Trade Secret, \_\_Publicity Rights, \_\_Other

For each identified item of intellectual property, please provide the following:

Brief name and description of the IP-work, e.g., novel, patent, trademark, invention, etc.

Dates of creation and completion

Parties involved, stating the ownership of each aspect, if known

Disclosures, if any, in the marketplace

Publications related to the IP (published papers, publications, sales of items, public performances, etc.)

Exclusions from claims of ownership, e.g., public domain materials, licensed source materials, fair use,

Materials or rights necessary to acquire, if any

Timeline to market

Regulatory approvals status, e.g., patent, FDA, etc.

### **Corporate**

Anticipated form of entity, \_\_C-Corp, \_\_S-Corp, \_\_LLC, \_\_Single-Person entity \_\_Other

Ownership allocation

Additional management and control provisions

Employee agreements

### **Finance**

Describe status of start-up capital needs:

\_\_Self-funded for initial stage

\_\_Angel funding

\_\_Crowd Funded

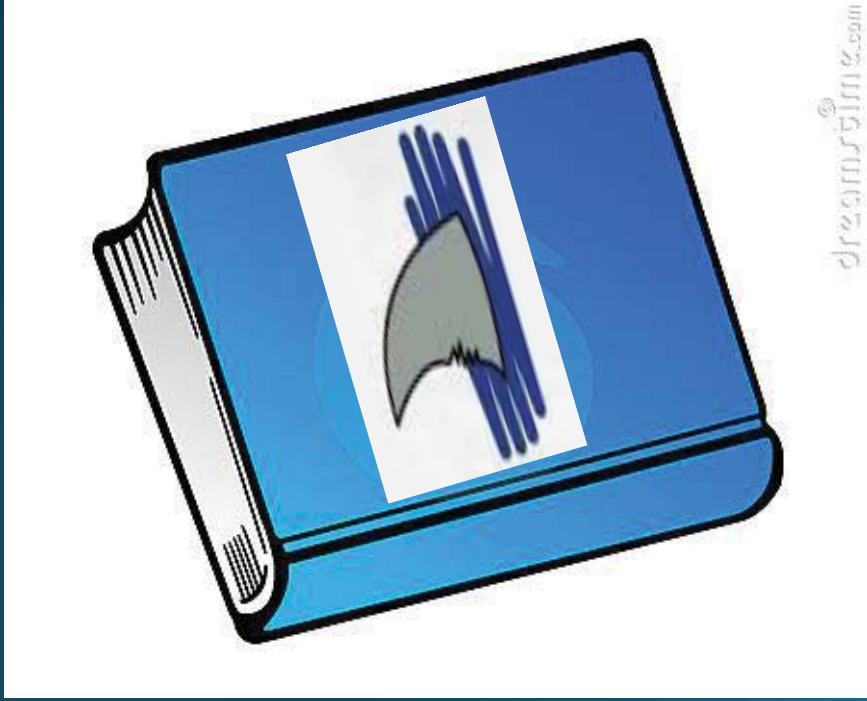
\_\_IPO



# Sharkbook

# Agenda

- Mission Statement
- Business Prospects
- Risks
- Business Hypotheticals



# Mission Statement

- Founded in 2015, **Sharkbook's mission** is to give the Nova Southeastern University the power to share and make the NSU community more open and connected. People use **Sharkbook** to stay connected with alumni and the current student base, to discover job opportunities, and to share and express what matters to them.



# What is Sharkbook?

- Social media networking platform
- Website
- Application
- Alumni and students create online profiles where one can connect and communicate with other profiles as well as share information, including job posting, networking opportunities, and scholarship options.
- Only available to Nova students and alumni.

Sign in



The image shows a landing page for NSU Sharkbook. At the top, a blue banner reads "Welcome to Sharkbook". Below this is a large photo of the NSU campus with palm trees and a building. Overlaid on the photo is a "JOIN NOW" section with buttons for "LinkedIn", "Facebook", and "Email". A text box asks "Why is it safe to register with LinkedIn / Facebook?". Below the photo is a horizontal navigation bar with five icons and labels: "Re-connect", "Give back", "Expand", and "Advance". Each icon has a corresponding description of the service.

**Welcome to Sharkbook**

**JOIN NOW**  
Connect with —  
**LinkedIn**  
**Facebook**  
**Email**

Why is it safe to register with LinkedIn / Facebook?

**Re-connect**  
Find and reminisce with fellow graduates, see what they have been up to and stay in touch.

**Give back**  
Introduce, employ and offer to act as a mentor to our graduating students.

**Expand**  
Leverage your professional network to get introduced to people you should know.

**Advance**  
Advance your career through inside connections working in top companies.

This image was modified to support this presentation. visit: [nsuconnect.net](http://nsuconnect.net)

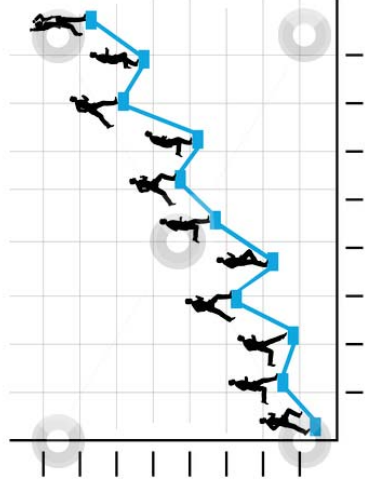
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# Business Prospects

| Year            | Revenue   | Expenses  | Net       |
|-----------------|-----------|-----------|-----------|
| 2015            | \$150,000 | \$75,000  | \$75,000  |
| 2016            | \$250,000 | \$50,000  | \$200,000 |
| 2017 (expected) | \$400,000 | \$100,000 | \$300,000 |

# Business Prospects

- Revenue
  - Advertisements
    - Pay-per-click
  - Merchandising
  - Premium memberships
  - Donations
- Expenses
  - Website maintenance
  - Employee salaries
  - Insurance (e.g., information security, malpractice)
  - Taxes
  - “Sharkbook Scholarship” funds





# Risks

- Attracting older alumni (retention)
- Security
- Privacy
- Protection
- Intellectual property
- Publicity issues
- HR/Employee issues

# Hypotheticals

- Choice of Entity and Profitability Hypothetical:
  - The mock business has the ultimate goal to sell its business after a few years of profitability. Here, attendees will choose an entity structure for the business and discuss the management and operations issues that may arise under this chosen entity.
- Intellectual Property Hypothetical:
  - The mock business faces an intellectual property issue involving infringement upon a competitor's intellectual property rights (e.g., a trademark, copyright, or patent). Here, attendees will propose modifications to the business in order to prevent or cease such infringement.
- Business Marketing Hypothetical:
  - The mock business seeks to increase brand awareness under a developed marketing plan. Here, attendees assess what legal issues arise from this proposed business decision. Answers are evaluated based on various criteria, such as profitability, marketability and other business issues.

# Solutions?

### **Choice of Entity and Profitability Hypothetical:**

Sharkbook has a dilemma. Although the goal of Sharkbook's creators is to sell Sharkbook after a few years of profitability, they are concerned because choosing the best organizational structure, tax set up, and financial makeup of the entity has been difficult. They want to keep 80% of Sharkbook for themselves, but they also want Sharkbook's entity structure to be appealing to investors who will be receiving preferred ownership rights. In addition, because the creators are not experienced with running a business, they are concerned about how the management of the day-to-day operations of the business should flow. Finally, because the creators want to reap the rewards of their hard work, they are also concerned about choosing the best tax category to meet their needs.

The creators have narrowed the entity choices to either: a Limited Liability Company (LLC) or a C-Corporation. After not being able to agree on a structure, the creators have asked you, their lawyers and business advisors, to discuss some of the advantages and disadvantages of each entity choice, and if possible, to make a recommendation.

Assume Sharkbook is projected to reach maximum profitability during the first three years of operation and will be sold before the end of this period. Also assume that the creators want to know how profits will be taxed and shared, considering that they have contributed 80% of the entity's total capital contributions.

**Which choice of entity best suits their profit-sharing concerns?**

Now assume that after two years of being successful, Sharkbook's creators have decided that their new goal is to become the largest and most viable social media platform to ever exist and that they are no longer concerned with how profits will be shared. The creators want to continue the rapid growth of their business and raise venture capital to facilitate that growth.

**Which choice of entity best suits the creator's goals for the future of Sharkbook?**

(Supplements on the following pages)

## **Supplement: The difference between an LLC and a C-Corporation:**

· *The purpose of this supplement is to serve as a guide in answering the Choice of Entity and Profitability Hypothetical and to help generate thoughtful discussion within your group. Please note that you may use sources that are not listed within this supplement to answer the question.*

· One key difference between these two entities is their federal income tax characteristics. At the same time, both provide investors limited liability to help shield personal assets from business liabilities.

· **LLC:** LLCs are “pass-through” entities, which means that their owners (known as members) pay tax on the portion of the LLC’s income that is allocated to them based on the LLC agreement. For LLCs with multiple members—which is exactly what happens when you have investors—the LLC is treated as a partnership, and the members of the LLC are treated as partners for federal income tax purposes. Additionally, when it comes to actions of the LLC or making business decisions, the individual LLC members have legal protection over their personal assets.

· **C Corporation:** Unlike LLCs that are treated as partnerships, C Corporations are subject to state and federal income tax on their net income—that is, the income that is realized after expenses (including salaries) are paid. Shareholders are not subject to tax unless the corporation pays them in the form of dividends, distributions, or salary. However, since dividends are paid from net income, shareholder dividends are effectively taxed twice—once when the corporation pays tax on its net income, and again when the shareholder receives the dividends. Essentially, there is an entity level tax that applies to C Corporations as well as a second layer of taxation on individual shareholders when corporate profits are paid in the form of dividends. When shares of stock are sold some gains, as well as dividends, may qualify for preferential capital gains rates.<sup>1</sup>

## **THE LLC RULES INFORMATION PACKET**

· The IRS does not have a dedicated tax category for the LLC. Instead, it permits LLCs with more than one member to be taxed as a partnership or a corporation.<sup>2</sup> The default rule is for partnership taxation; however, an LLC could opt to be taxed as a corporation.

### **Partnership Taxation**

· Under partnership taxation rules, an LLC is treated as a pass-through entity. The business does not pay entity-level taxes. Instead, the company’s profits and losses pass through to the members and the members report their share of profits and losses on their individual tax returns. For income tax purposes, profits are allocated to the members based on their ownership percentage or based on a special percentage allocation as agreed by the members. For example, two members who each own 50 percent of an LLC can allocate profits and losses 50-50, or they can

<sup>1</sup> *Tax Policy Center Briefing Book*, TAX POLICY CENTER, (last visited Jan. 17, 2017).

<sup>2</sup> Terry Masters, *How are Profits Split in an LLC*, LEGAL ZOOM, (last visited Jan. 17, 2017), <http://info.legalzoom.com/profits-split-llc-20063.html> (discussing LLC profit splits).

agree to allocate profits and losses 60-40 to reimburse one member for a special contribution to the company.<sup>3</sup>

### **Corporate Taxation**

· For the unusual case in which an LLC is taxed as corporations, the rules discussed in the *C Corporations rule packet* would apply.

### **LLC Management**

· An LLC may be *Member-managed*, which gives the individual members the right to manage the business of the company themselves, or an LLC may be *Manager-managed*, which allows LLC members to choose one or more members or nonmembers to run the company on their behalf. In a Manager-managed LLC the members retain the right to make major business decisions, but the managers operate the LLC, which includes hiring employees or agents to handle business activities.

## **Title XXXVI - BUSINESS ORGANIZATIONS**

### **Chapter 605 - FLORIDA REVISED LIMITED LIABILITY COMPANY ACT STATUTES**

#### **605.04071 Delegation of rights and powers to manage.—**

· A member or manager of a limited liability company has the power and authority to delegate to one or more other persons the member's or manager's, as the case may be, rights and powers to manage and control the business and affairs of the limited liability company, including the power and authority to delegate to agents, boards of managers, members, or directors, officers and assistant officers, and employees of a member or manager of the limited liability company, and the power and authority to delegate by a management agreement or similar agreement with, or otherwise to other persons. The delegation by a member or manager will not cause the member or manager to cease to be a member or manager, as the case may be, of the limited liability company.

History.—s. 2, ch. 2013-180.

#### **605.0304 Liability of members and managers.—**

(1) A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the company.

(2) The failure of a limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member or manager of the company for a debt, obligation, or other liability of the company.

(3) The limitation of liability in this section is in addition to the limitations of liability provided for in s. 605.04093.

History.—s. 2, ch. 2013-180.

<sup>3</sup> Terry Masters, *LLC & Profit Distribution*, LEGAL ZOOM, <http://info.legalzoom.com/llc-profit-distribution-3593.html> (last visited Jan. 17, 2017) (discussing distribution of profits for profitable LLCs).



#### **605.0407 Management of limited liability company.—**

(1) A limited liability company is a member-managed limited liability company unless the operating agreement or articles of organization:

(a) Expressly provide that:

1. The company is or will be manager-managed;
2. The company is or will be managed by managers; or
3. Management of the company is or will be vested in managers; or

(b) Include words of similar import to those in subparagraphs (a)1.-3. except that, unless the context in which the expression is used otherwise requires, the terms “managing member” and “managing members” do not, in and of themselves, constitute words of similar import for this purpose.

(2) In a member-managed limited liability company, the management and conduct of the company are vested in the members, except as expressly provided in this chapter.

(3) In a manager-managed limited liability company, a matter relating to the activities and affairs of the company is decided exclusively by the manager, or if there is more than one manager, by the managers, except as expressly provided in this chapter.

(4) A member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities and affairs of the company, in the absence of an agreement to the contrary.

(5) A limited liability company shall reimburse a member for an advance to the company beyond the amount of capital the member agreed to contribute.

(6) The dissolution of a limited liability company does not affect the applicability of this section and ss. 605.04071-605.04074. However, a person who wrongfully causes dissolution of the company loses the right to participate in management as a member and a manager.

History.—s. 2, ch. 2013-180.

## **THE C-CORPORATION RULES INFORMATION PACKET**

### **C-Corporation Definition**

· The C-Corporation is a corporation under state law that is taxed as a corporation for federal income tax purposes. The alternative of qualifying as an S-Corporation for federal income tax purposes is beyond the level and scope we are dealing with here due to the issuance of preferred stock.

### **C-Corporation Double Taxation**

· Double taxation happens when a C-Corporation's profits are taxed at both the business and individual levels. First, business profits will be reported and then taxed at the corporate level. Next, if the C-Corporation distributes any of the profits remaining after payment of the corporate tax to shareholders by way of dividends, then shareholders have to report the dividends as personal income and they will have to pay taxes on the dividends at the individual level. To alleviate the burden of the double taxation, certain dividends qualify for preferential capital gains rates.

· Thus, C-Corporation's initial profits are essentially taxed once and then another time after shareholder dividends have been distributed. Moreover, personal (individual) and corporate

(business) tax brackets vary at times, and this difference may have an effect on salary amounts paid.

- In some cases, C-Corporations may be able to reduce double taxation, through reasonable compensation, employee benefits and other ordinary and necessary expenses.

### **C-Corporation's Organizational Structure**

- Under state law, a C-Corporation's organizational structure includes three groups, the shareholders, directors, and officers. Shareholders own a C-Corporation even though they typically do not manage the company directly. However, shareholders have influential authority with corporate decision making. Shareholders elect and may remove directors, while they also vote on major important corporate issues and approve or disapprove of amendments to the Articles of Incorporation and mergers and acquisitions.

- The "board of directors" is comprised of directors who are responsible and in charge of managing the C-Corporation's affairs. Typically, these directors solely make the major C-Corporation business decisions, while appointing and supervising officers to make the other minor daily business decisions.

- Officers are the ones who are responsible for, and in charge of, the daily company management.

*Note: In closely held corporations, with a small number of shareholders, shareholders may be involved in corporate management as directors or officers.*<sup>4</sup>

### **C-Corporation Common Advantages**

- Typical advantages stemming from conducting business as a C-Corporation include limited liability protection. As C-Corporations have an unlimited number of shareholders (owners), while having an easy process for transferring ownership. C-Corporations also have an unlimited life span and they will not stop their existence in the event of a shareholder's death.

- Additionally, other advantages for C-Corporations include the ability for C-Corporations to have a flexible capital structure, flexible tax deductible expenses along with a lower audit risk when they are raising capital.

- A corporation is a business entity having legal existence that is separate from the corporation's owners. Shares of stock may be freely transferable providing liquidity advantages for shareholders; however, closely held stock may not have a ready market for sale. With this advantage, these shareholders will no longer be a part of that corporation, but the corporation will still continue to exist. Corporations have perpetual duration unless their articles of incorporation provided state otherwise.

## **Title XXXVI - BUSINESS ORGANIZATIONS**

### **Chapter 607 - FLORIDA BUSINESS CORPORATION ACT STATUTES**

#### **607.0302 General powers.—**

- Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

<sup>4</sup>C Corporation FAQs, BIZ FILINGS, <http://www.bizfilings.com/c-corp-faqs.aspx#c290f954-6b48-47c4-ba03-482935c094c4> (last visited Jan. 19, 2017). (discussing a C-Corporation's organizational structure with shareholders serving on the board of directors and as officers).

(15) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents and for any or all of the current or former directors, officers, employees, and agents of its subsidiaries;

**607.0601 Authorized shares.—**

(1) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and prior to the issuance of shares of a class the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. All shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by s. 607.0602 or s. 607.0624.

(2) The articles of incorporation must authorize:

- (a) One or more classes of shares that together have unlimited voting rights, and
- (b) One or more classes of shares (which may be the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution.

(3) The articles of incorporation may authorize one or more classes of shares that:

- (d) Have preference over any other class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(4) The description of the designations, preferences, limitations, and relative rights of share classes in subsection (3) is not exhaustive.

(5) Shares which are entitled to preference in the distribution of dividends or assets shall not be designated as common shares. Shares which are not entitled to preference in the distribution of dividends or assets shall be common shares and shall not be designated as preferred shares.

History.—s. 33, ch. 89-154; s. 10, ch. 93-281.

**607.06401 Distributions to shareholders.—**

(1) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitations in subsection (3).

(2) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a purchase, redemption, or other acquisition of the corporation's shares), it is the date the board of directors authorizes the distribution.

(3) No distribution may be made if, after giving it effect:

- (a) The corporation would not be able to pay its debts as they become due in the usual course of business; or
- (b) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

**607.1201 Sale of assets in regular course of business and mortgage of assets.—**

(1) A corporation may, on the terms and conditions and for the consideration determined by the board of directors:

(a) Sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business;

(b) Mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), create a security interest in, or otherwise encumber any or all of its property whether or not in the usual and regular course of business; or

(c) Transfer any or all of its property to a corporation all the shares of which are owned by the corporation.

(2) Unless the articles of incorporation require it, approval by the shareholders of a transaction described in subsection (1) is not required.

**History.**—s. 116, ch. 89-154.

· When selling a corporate business, the sale may be structured as an asset sale or a stock sale, as discussed below:

**C-Corporation Asset Sale**

· When conducting an asset sale to sell a business, it is important to understand that the seller is the Corporation, which may continue as a separate legal entity. The buyer is purchasing the individual assets that are being held by the corporation at the time of the asset sale. These individual assets typically include things such as fixtures and equipment, but they also extend further into categories such as customers' and business contacts' telephone numbers, inventory items, trade secrets, and more.

· Typically, an asset sale will not include any kind of cash-based assets with the seller retaining any kind of long-term debt obligations held by the business and the business's legal entity. Additionally, typically in asset sales, the net working capital is also an asset sold over to the buyer from the seller and this usually includes certain elements such as accounts receivable and payable, along with accrued expenses and other current assets and liabilities.

**C-Corporation Stock Sale**

· A stock sale, is when the buyer is directly purchasing shares of stock from the corporation's shareholders. After the sale, the buyer is the new shareholder, and the corporation generally retains all of its assets and liabilities, which may include nontransferable contracts and other rights. A stock sale also may include provisions that indemnify the seller for liabilities discovered after the sale, including liabilities that were not disclosed or known prior to the sale. With stock sales, when a buyer expresses that they do not want any specific asset or liability, then they will either be distributed (with assets) or paid off in full (with liabilities) before the sale is completed.

· One of the main differences between a stock sale and an asset sale is that with stock sales there is no requirement to have individual assets separately conveyed in order for the actual sale of the business to be completed. This is mainly because each asset's original title stays within the corporation.

### **Asset Sale Benefits v. Stock Sale Benefits**

- Buyers usually prefer asset sales over stock sales since asset sales provide them with certain tax benefits and it is easier to insulate the buyer from corporate liabilities. While sellers typically prefer stock sales because it usually gives them less responsibility with certain future liabilities that may arise including employee lawsuits, benefit plan disputes and product liability claims and may provide preferential tax treatment on gains.

- The biggest reason for why asset sales are preferred by buyers is that the company's basis in assets purchases that will be subject to depreciation is based on the purchase price for the assets. Thus, asset sales typically provide a higher value for assets depreciating rapidly.

A particular piece of equipment that the business owns, for examples, likely has a three- to seven-year shelf life. At the same time, lower values are given to certain assets that amortize much more slowly. Goodwill, for example, is generally considered to have a 15-year shelf life. This generates additional tax benefits on behalf of the buyer, doing a lot to reduce taxes as quickly as possible and thus improving the overall cash flow of the company during the first few years of its life.<sup>5</sup>

For the federal income deduction for depreciation, the "shelf life" for equipment is called a recovery period for depreciation. Thus, Goodwill may qualify for an amortization deduction.

- Buyers also typically prefer asset sales as it is much easier to avoid any kind of potential resulting liabilities such as product warranty issues or contract disputes.
- However, asset sales are not always easier for buyers, as certain types of assets may be difficult to transfer. For example, intellectual property, typically requires the seller to obtain some kind of third party consent thereby slowing down the sale's process significantly.
- A major reason for why sellers typically prefer a stock sale is because all the stock sale proceeds are taxed at lower capital gains rates compared to taxation with asset sale proceeds.
- For stock sales with C-Corporations, corporate level taxes are avoided but corporate liabilities may present a problem for buyers, such as corporate tax liabilities or any kind of future liabilities, such as products liability claims.

### **Asset Sale Popularity v. Stock Sale Popularity**

- Within the last few years, around 30 percent of all business sales were stock sales.
- However, it must be kept in mind, that this percentage fluctuates and varies depending on the size of the company in the sale. Larger companies are usually a lot more likely to be sold through a stock sale than sold through an asset sale.

<sup>5</sup> *Asset Sales Versus Stock Sales: What You Need to Know*, E-FILE FLORIDA, <http://www.efileflorida.com/blog/asset-sales-versus-stock-sales-what-you-need-to-know/41389> (last visited Jan. 19, 2017). (discussing differences between asset sales and stock sales and how asset sales provide a higher value for assets depreciating rapidly).

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### **Intellectual Property Hypothetical**

Sharkbook's most significant and dominant assets are in the form of intellectual property. These assets consist of multiple trademarks, patents, copyright, and trade secret. Sharkbook has obtained the registration of the following trademarks:

#### **Trademark #1:**



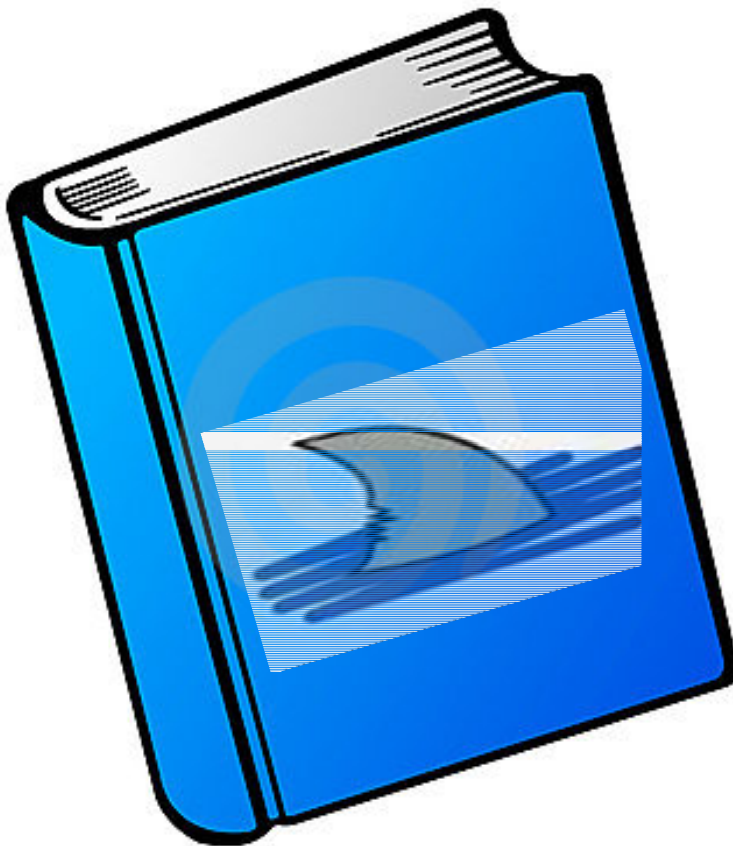
#### **Trademark #2:**



**Trademark #3:**

Sharkbook ®

**Trademark #4:**



®



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**Problem 1:** Sharkbook's legal team has been notified that there is a competitor, SharkU, located only 10 miles away from NSU that has created a nearly identical business model. The competitor has created a professional social media interface, which has been coined "SharkFace." However, the competitor has not received any trademark protection for the term "SharkFace." SharkFace has been using the following logo, since the company began two (2) weeks ago:

**SharkU's SharkFace Logo:**

**SharkFace™**

The CEO of Sharkbook needs the legal division to determine if the competitor has violated any of the aforementioned trademarks. If so, what remedies are available to Sharkbook?

**Practical Hint (Digression):**

- Trademarks have several different symbol to inform the public of the trademark, such as ™, ®, □.
- The ™ is utilized when the trademark has not been recognized by the USPTO. The ™ is used whenever a person/company wishes to make a trademark claim. Generally, the ™ marking will put competitors on notice that the logo/markings is considered a trademark by the person/company.
- The ® symbol can only be used when the person/company already received a Federal registration certificate, which cannot be used when the

**Problem 2:** Sharkbook's legal division believes that Sharkbook has a valid trade secret over the method used to create the interface on the company platform. However, with competitors growing and emerging every day, Sharkbook's CEO wants to assure that the employees are unable to disclose the trade secret to other competitors. Such improper disclosure could result in a huge effect to Sharkbook's strength in the marketplace. The CEO has requested the legal division to determine what appropriate methods are available for protecting the Sharkbook's trade secret. Specifically, the CEO would like to prevent disclosure from current and former employees.

## **Business Marketing Hypothetical**

Sharkbook seeks to increase its brand awareness. The Board of Directors believes that hiring a celebrity spokesperson has the ability to reach a wide audience and develop a defined reputation for the Sharkbook brand.

On the list of potential spokespersons is Clark Duban, renowned billionaire tech-mogul and the outspoken owner of the Texas Ponies. The Board of Directors is very keen on hiring Duban because of his involvement in the tech industry and his influential persona to a desired demographic of consumers. Duban has been instrumental in the growth of several business ventures, including the phone app called *Snapperchat*. Discovered by students at the University of South Coastal Florida (“home of the fighting snappers”), *Snapperchat* allows university graduates to share pictures and videos of student memories with other registered alumni. An alumnus himself, Duban remains actively involved in Snapperchat’s business operations and from time promotes the app on his personal Twitter account.

As part of Sharkbook’s marketing objectives, the Board wants to promote the brand on Duban’s high-profile Twitter account. However, Duban maintains a relatively political presence on the internet. For instance, Duban likes to live-tweet during the Presidential Debates and other controversial issues in the country. Therefore, the Board is concerned that their promotional tweets will be muddled with heavily political and hotly debated topics.

Suppose Clark Duban agrees to become Sharkbook’s next spokesperson. The Board of Directors comes to you as its legal advisor to assess this business decision.

(1) How should Sharkbook structure its contract with Clark Duban?

- How should you structure Duban’s compensation?
- What terms and conditions should you include in the contract? (e.g., morality clause, indemnification, liquidated damages, warranties, arbitration, etc.)

(2) What conflicts of interest (legal, business, political) might arise with Clark Duban’s involvement in Sharkbook?

- What should the Board and Duban do to avoid conflict? (FL § 607.0832)

## **Business Marketing Supplement**

*The purpose of this supplement is to serve as a guide in answering the Business Marketing Hypothetical and help generate thoughtful discussion within your group. Please note that you may use sources that are not listed within this supplement to answer the question.*

### **Compensation Term Sheet**

#### **A. Paid upon completion of the project**

1. Salary or Wage
2. Fixed fee

#### **B. Sharing in the success of the project**

1. Royalty - amount earned as a percentage of retail or wholesale sales
2. Profit Participation - percentage share in operating income or profits

- a. Gross, Adjusted Gross or Net

#### **C. Paid upon execution of initial agreement**

1. Advance - non-refundable payment that vests to licensor, but is then deducted from any royalties or deferral payments
  - a. *Recoupable*: advance must be repaid if the royalties/participation is insufficient
  - b. *Non-recoupable*: advance is fully earned when received and not deducted from future royalties
  - c. *Cross-collateralize*: advance not recouped from one project will be recouped from next project in contract
2. Deferral - Right to payment vests, but paid only out of company revenue
  - a. Gross, Adjusted Gross or Net

### **NOTE**

1. Gross – all money received
2. Adjusted Gross – money received from defined sources less certain identified expenses
3. Net – money received from defined sources less all expenses

**Title XXXVI - BUSINESS ORGANIZATIONS**  
**Chapter 607 - FLORIDA BUSINESS CORPORATION ACT**

**607.0832 Director conflicts of interest.**

(1) No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association, or entity in which one or more of its directors are directors or officers or are financially interested shall be either void or voidable because of such relationship or interest, because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies such contract or transaction, or because his or her or their votes are counted for such purpose, if:

(a) The fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves, or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors;

(b) The fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve, or ratify such contract or transaction by vote or written consent; or

(c) The contract or transaction is fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the shareholders.

(2) For purposes of paragraph (1)(a) only, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no relationship or interest in the transaction described in subsection (1), but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no such relationship or interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with such relationship or interest in the transaction does not affect the validity of any action taken under paragraph (1)(a) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection, but such presence or vote of those directors may be counted for purposes of determining whether the transaction is approved under other sections of this act.

(3) For purposes of paragraph (1)(b), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a relationship or interest in the transaction described in subsection (1) may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under paragraph (1)(b). The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of this act. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.



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