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SUPREME COURT
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Frank A. McGuire Clerk
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VIA OVERNIGHT MAIL

Honorable Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Walter Greb vs. Diamond International Corporation
Supreme Court Case No. S183365
Appellate Court Case No. A125472
Our File No: 29617 EGF

To The Honorable Justices of the Supreme Court:

Respondent Diamond International Corporation submits this letter brief regarding the recent decision by the Ohio Supreme Court in the matter of *In re all Cases Against Sager Corp*, 132 Ohio St. 3d 5, 967 N.E.2d 1203, as well as the September 21, 2012 First District Court of Appeal decision in *Robinson v. SSW, Inc.*, 2012 DJDAR 13297, because the decisions address issues that are raised in the pending appeal before this court in the above-referenced matter. For the sake of clarity, we report on the two decisions separately.

The Sager Decision

As detailed more thoroughly below, the court in *In re all Cases Against Sager Corp.* [hereinafter "*Sager*"] held that a dissolved Illinois corporation (Sager Corporation) lacked the capacity to be sued in Ohio because the Illinois corporation was immune from suit under the Illinois survival statute and, the Ohio court could not appoint a receiver to continue the existence of the corporation for the purpose of allowing a suit against it so that an individual could recover insurance proceeds of the dissolved corporation in an asbestos action. The salient facts and relevant rationale of the *Sager* decision are as follows.

Sager Corp. was a corporation organized under the laws of Illinois. The corporation dissolved in 1998. Pursuant to the Illinois survival statute, it became immune from suit in 2003.

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Plaintiff sued Sager Corp. and over 200 other defendants for asbestos-related injuries in state court in Ohio in 2007. Sager Corp. moved for summary judgment on the ground that it lacked the capacity to be sued. Plaintiff responded by moving the court to appoint a receiver to wind up the affairs of Sager by accepting service of process and marshalling its assets (consisting of unexhausted liability-insurance policies). Over the objection of Sager, the trial court appointed a receiver, nullifying the summary judgment motion and enabling the plaintiff's action to proceed against Sager.

When Sager appealed the trial court's ruling, the appellate court affirmed. However, the Ohio Supreme Court reversed the lower courts, holding that the capacity of Sager to be sued must be determined by the law of the state of incorporation (Illinois), and that Ohio courts could not circumvent the survival statute of Illinois by appointing a receiver for Sager. In so holding, the *Sager* court expressed a few key points which support the decision of the Court of Appeals in this action.

The *Sager* court begins its analysis by citing the United States Supreme Court decision in *Oklahoma Natural Gas Co. v. Oklahoma*, 237 U.S. 257 (1927) for the fundamental proposition that the life of a corporation is governed by the state which gave it existence—a point made by the Court of Appeal in the subject action. (*In Re All Cases Against Sager Corp.,* 967 N.E.2d 1203, 1207; Opinion 5.) The *Sager* court goes on to cite another United States Supreme Court decision, *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937), for the equally fundamental idea that a corporation can only exist under the laws of the state which created it. (*Id.* at 1208.) These concepts are fully in keeping with the notion that the existence or non-existence of Respondent here, a Delaware corporation, is governed by Delaware law—another point made by the Court of Appeal here. (Opinion 5.)

The *Sager* court next cites numerous authorities in support of the consensus view that the capacity of a corporation to be sued must be determined by the law of the state of incorporation. Specifically, the court cites decisions in twelve different states holding that courts must apply the law of the state of incorporation to determine if a corporation has the capacity to be sued. (*Id.* at 1208-1209.) The court adds that *Federal Rule of Civil Procedure* 17(b) (2) requires that the capacity of a corporation to be sued be determined by the laws of the state under which a corporation is organized. (*Id.* at 1209.) Further reinforcing this basic tenant of the law, the *Sager* court notes that the Restatement 2d Conflicts 299(l) also provides that the law of the state of incorporation governs the capacity of a corporation to be sued (*Id.*)—yet another point made by the Court of Appeal here. (*Id.*; Opinion 4.) These authorities all dovetail perfectly with the conclusion of the court in *Riley v. Fitzgerald*, 178 Cal.App.3d 871

(1986), relied on by the Court of Appeal here, that the effect of corporate dissolution "depends on the law of its domicile." (Opinion 11.)[1]

In the final analysis the *Sager* court concludes that Ohio's statute authorizing the appointment of a receiver for a dissolved corporation, when applied to a foreign corporation, is subject to Constitutional limitations, namely the Full Faith and Credit Clause. (*Id.* at 1211.) The court gives appropriate deference to Illinois corporate law which clearly barred plaintiff's action. Here, the Court of Appeal similarly held that plaintiff's action against Respondent, a Delaware corporation, was barred under Delaware law.

While the *Sager* decision does not speak directly to the intended scope of California *Corporations Code* § 2010, it persuasively reinforces the core legal principles relied on by the Court of Appeal in this matter. First and foremost amongst these principles is the bedrock notion that the life and death of a corporation is governed by the law of the state of incorporation. Deference to Delaware law in this matter, as was afforded Illinois law in *Sager*, would place California decisional law in concert not only with *Sager* but, also the multitude of authorities cited in the court's opinion.

The Robinson Decision

The salient facts of *Robinson* mirror those of the present action almost perfectly. In *Robinson*, as here, the plaintiff alleged that the decedent contracted an asbestos-related disease as a result of occupational exposure to products manufactured, distributed or sold by defendants. More particularly, plaintiff alleged that the decedent was exposed to asbestos while working on boilers that were manufactured by Nebraska Boiler Company, Inc., a division of National Dynamics Corporation; which later became defendant SSW, Inc. SSW, Inc. was incorporated in Nebraska. Pursuant to Nebraska law, the corporation dissolved on June 1, 2002. Nebraska has a five-year survival

[1] The *Sager* court's references to these state court decisions, *Federal Rule of Civil Procedure* 17(b)(2) and the Restatement 2d Conflict of Laws § 299, which alternatively refer to corporations "incorporated" or "organized under" the laws of another state, plainly suggest that the two descriptions of corporate birth are synonymous, contrary to Petitioner's assertion that formation and organization of corporations are distinct. Moreover, the cases cited in this portion of the *Sager* decision nearly all involve foreign corporations that were authorized to do business in the forum state, and which transacted business in the foreign state, but were not treated as having been "organized under" the law of the forum state, which is fully consistent with precedent cited and legal analysis set forth in Respondent's Answer Brief, including decisions of this court. (See, Respondent's Answer Brief on the Merits at 27-28.)

statute. However, the corporation was not named as a defendant in *Robinson* until February 18, 2009. (*Robinson,* 2012 DJDAR at 13297.)

Since plaintiff initiated her action against SSW, Inc. ("SSW") more than five years after its dissolution, SSW moved for summary judgment on the ground that it was immune from suit under Nebraska's five-year survival statute. Rejecting plaintiff's argument that California *Corporations Code* § 2010 applied to foreign corporations such as SSW, the trial court granted SSW's motion.[2] Plaintiff then appealed. (*Robinson,* 2012 DJAR 13297-13298.)

In *Robinson* the First District Court of Appeal (Division Three) revisited the split of authority arising out of that district as a result of the conflicting decisions in *Riley v. Fitzgerald* and *North American Asbestos Corp. v. Superior Court.* In so doing, the *Robinson* court took dead aim at the exact same issue facing this court: whether § 2010 was intended to apply for foreign corporations or, only domestic corporations. For essentially the same reasons outlined by the Court of Appeal in this matter, the *Robinson* court concluded that § 2010 should not be interpreted as applying to foreign corporations, affirming the trial court's decision.

To determine the scope of § 2010, the *Robinson* court honed in on the definition of "corporation" set forth in § 162. In so doing, the court noted that two key issues arise in the interpretation of § 162: 1) What does "organized under this division" mean? 2) What corporations are subject to division one under the provisions of § 102(a)?

Consistent with the analysis set forth in Respondent's Answer Brief on the Merits, the *Robinson* court reviewed the various provisions set forth in chapter two of division one to illustrate what it means to "organize" a corporation. (*Robinson,* 2012 DJDAR at 13300; Answer Brief on the Merits at 15-17.) The court concluded, as the Court of Appeal here previously concluded, that organizing a corporation involves undertaking the initial steps to create a corporation, starting with the filing of the articles of incorporation. (*Robinson,* 2012 DJDAR at 13300.)

The *Robinson* court then turned its attention to plaintiff's contention that SSW was organized under division one because it complied with the "organizational mandates" of chapter 21, the identical argument made by plaintiff throughout this case. On this point the *Robinson* court observed that chapter 21 deals with foreign

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[2] Unless otherwise noted, all further statutory references herein are to the California *Corporations Code*.

corporations that transact intrastate business in California, which "has nothing to do with the more fundamental procedures by which a corporation becomes organized under the General Corporation Law of this state." (*Robinson,* 2012 DJDAR at 13301.)

The *Robinson* court then examined key provisions in chapter 21 bearing on the issue. Initially, the court observed that chapter 21 regulates foreign corporations organized under the laws of another state who transact much of their business in California. In reaching this conclusion, the court relied on the legislative committee comment to § 2115 which notes that foreign corporations generally are not required to comply with the General Corporation Law of California even if all of its shareholders reside in California and it carries on all its business in California. The court then further observed that § 2105 requires that foreign corporations with minimum contacts with the state must file a statement identifying the "state or place of incorporation or organization" in order to obtain a certificate of qualification, an act which would not make any sense if compliance with § 2105 meant that a foreign corporation was organized under the laws of California. Lastly, the court explained that the act of qualifying to do business in California must be distinguished from the predicate act of organizing a corporation, citing *Riley* and § 2015(b). (*Robinson,* 2012 DJDAR at 13301.)

Having rejected the notion that SSW could be considered organized under the laws of California, the *Robinson* court next turned its attention to the question of whether SSW could be considered "subject to" division one pursuant to § 102(a). In order to resolve this question the court noted that § 102(a) states that division one applies to the following corporations: 1) corporations organized under this division; 2) certain domestic corporations; and, 3) other corporations "only to the extent they are expressly included in a particular provision of this division." Having already addressed the first issue and concluded SSW was not organized under division one, the court observed that no one contended that SSW was a domestic corporation; leaving only the last issue regarding other corporations that are expressly included in a particular provision of division one. On this point the court plainly observed that no one contended that § 2010 expressly included foreign corporations. Consequently, the court concluded that there was no basis for finding that the term "corporation" as defined in § 162 includes foreign corporations such as SSW. (*Robinson,* 2012 DJDAR at 13301-13302.)

In its final analysis, the *Robinson* court concluded that § 2010 does not apply to foreign corporations such as SSW. Instead, Nebraska's survival statute applied to SSW and barred plaintiff's action. This, the court noted, was consistent with the basic legal principle that the "continuing legal existence of a corporation depends on the law of the

state of incorporation," citing 6 Witkin, Summary of Cal. Law (8th ed. 1974) § 193, pp. 4468-4469; *C.M. Record Corp. v. MCA Records, Inc.* (1985) 168 Cal.App.3d 965; and, other authorities previously cited by Respondent. (*Robinson,* 2012 DJDAR at 13302.) This puts the *Robinson* court totally in concert with the *Sager* court, as well as all the numerous other state courts identified in *Sager*.

Very truly yours,

MURCHISON & CUMMING, LLP

Scott J. Hengesbach

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SLH:ct

PROOF OF SERVICE

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 14, 2012, I served true copies of the following document(s) described as **LETTER BRIEF RE WALTER GREB V. DIAMOND INTERNATIONAL, DATED NOVEMBER 15, 2012** on the interested parties in this action as follows:

SEE ATTACHED LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) 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(s) 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 14, 2012, at Los Angeles, California.

Chris Thomas

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