

## 1. Gaming Corp. articles of incorporation provisions

In TX, a corporation's articles of incorporation ("AOI") may provide as not prohibited by law. Whether Gaming Corp. may contain the provisions Sally requested is discussed below re each provision:

- Corporate bookmaking, etc — A corporation may engage in any activity authorized by its AOI and not prohibited by law. To the extent bookmaking and selling board games with gambling motifs is illegal in Texas, Gaming Corp.'s AOI may not authorize those activities as Gaming Corp.'s corporate purpose.
- Loans to officers — In Texas, corporations are authorized to make loans to officers when doing so conveys a benefit to the corporation. Thus, this provision may be included in the AOI.
- Profit-sharing plan — This provision is permissible, though a corporation does not permit profit sharing in the same way as a partnership, in which each partner is entitled to equal share of profits. In a corporation, profits go to the corporation and, to the extent proper, may be distributed to shareholders on account of their shares, upon authorization by the corporation's Board of Directors (not render corporation insolvent and not exceed corporation's required surplus). Thus, to extent this provision contemplates an appropriate profit-sharing plan it may be included in the AOI.
- Donate funds to charity — A corporation takes action through its Board of Directors ("BOD"), which must act pursuant to their fiduciary duty. Where BOD exercises their business judgment, such donations are permissible. OK in AOI.
- Limited liability of Sally — An officer of a corporation has a duty to the corporation to exercise duty of care, duty of loyalty and exercise duties in good faith and best interests of the corporation. Officers and directors are protected by the Business Judgment Rule, a presumption protected BOD's actions taken in good faith. To extent the proposed provision seeks to protect Sally from personal liability, that is inherent in Texas corporate law to extent Sally acts within her duties as an officer. Breach of duty cannot be protected from liability, but may be indemnified by the corporation (as discussed below). Depending on how Sally seeks to draft this provision, it may be permissible in the AOI.

## 2. Indemnification of Sally by XYZ

The Texas BOC provides that under certain circumstances a corporation may indemnify its current and former officers and directors and, in certain circumstances, must indemnify such individuals.

A Texas corporation, such as XYZ, may indemnify current or former officers, such as Sally, for civil liability for acts/omissions arising out of their capacity as an officer of XYZ, other than willful or gross negligence. Such indemnity must be approved by the BOD (not including directors sought to be indemnified in current proceedings). The indemnification can cover reasonable attorney's fees and costs incurred in defense and judgment against the officer, including advance payment of fees.

A Texas corporation must indemnify an officer that is sued because of acts/omission in its capacity as officer if the officer is completely successful. The BOD must approve the indemnification.

Thus XYZ Corp., under the Texas BOC, is permitted to indemnify Sally for actions other than willful or gross negligence in the breach of loyalty suit by Ben. If Sally is completely successful in defending the suit, XYZ must indemnify her.

**END OF EXAM**

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1. The articles of Gaming Corp. cannot include a statement that its purpose is bookmaking and the limited liability article must exclude willful violations of duty to corporation. All other provisions are acceptable.

A corporation cannot be incorporated for an illegal purpose. Since bookmaking is illegal, Gaming Corp. cannot include a statement in its articles of incorporation, which asserts one of its purposes is bookmaking. Selling board game with gambling motifs only would be a legal purpose, which could be included in the articles of incorporation.

A corporation is not barred from loaning money to its officers as long as those loans are in the corporation's best interests and approved by a majority of disinterested directors. It is perfectly acceptable for the corporation's articles of corporation to say so.

A corporation's Board of Directors determines when dividends, i.e. share of corporation profits, will be issued to shareholders. The articles of incorporation can include a provision to set up a profit-sharing plan since the Articles of Incorporation are required to set up the capital structure within which the Board can issue dividends. The articles are free to limit the board's discretion in issuing dividends with a profit-sharing plan.

The Articles of Incorporation set the corporation's purpose and if that includes charitable giving, that is acceptable so long as it is in the corporation's best interests.

The articles of incorporation may limit officer liability; however, it may not limit liability for willful or deliberate violations of a duty to the corporation by officers. The limited liability article is acceptable if the above exception is included.

2. The TBOC requires a corporation to indemnify its officers in actions against them in their capacity as officers if they win the entire suit against them, i.e. found not liable. If Sally is found not liable in the suit XYZ Corp. must indemnify her for her attorney's fees and court costs. (There will be no judgment costs since she won.)

The XYZ Corporation may not indemnify Sally if she is found to have willfully or intentionally violated her duty to the company. Under any other circumstances, so long as Sally did not violate her duty of loyalty, i.e. she acted in good faith based on what she reasonably believed to be the company's best interests, she is eligible to be indemnified.

Sally can be indemnified for court costs, attorney's fees and the judgment against her.

**END OF EXAM**

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3)

1) The certificate of formation (formerly known as articles of incorporation) of Gaming Corp cannot contain the provision stating that the corporation is incorporated to engage in bookmaking but can contain the rest of the provisions. At issue, is what activities a corporation may lawfully undertake.

Under the Texas Business Organisations Code (TBOC) when a corporation incorporates, a certificate of formation must be submitted to the Secretary of State in Austin listing the name of the corporation (which must include "Incorporated" or "Corporation" or a shorter version at the end of its name), its registered address and the name and address of its registered agent, the duration of the corporation (which may be perpetual), the names of the organizers of the corporation, its initial director(s), its stock structure, including any par value shares to be issued and its purpose, it is usual to simply state "for lawful purposes" on the certificate.

Directors and officers are fiduciaries of the corporation and owe duties of care and loyalty to the corporation and each other. Duty of care means that the directors and officers must act in good faith (honesty in fact and reasonable commercial dealing) and observe ordinary care (which is the standard of a reasonably prudent person managing thier own affairs). Duty of loyalty means good faith and acting in the best interest of the corporation. This means they must not undertake activities which compete with the interests of the corporation.

A corporation may do many things provided the duties of care and loyalty are met. The Business Judgment Rule means that courts generally will not second guess board decisions if it can be shown that they were taken in good faith, on an informed basis and they were rationally based.

Here, Gaming Corp would be the name, and that is fine, Sally would be the organizer, plus any other shareholders already identified, Sally can be the sole director and take on multiple offices, including president and company secretary.

The problem here is that Gaming Corp will have as one of its purposes "making and laying best on sporting events" which is unlawful in Texas and a corporation can only be incorporated for lawul purposes. It would not make a difference if Sally listed "lawful purpose" on the certificate and then listed bookmaking in the by-laws (if this is what is intended by the reference to articles of incorporation) as it would mean that the officers and directors were acting ultra vires everytime they authorised the unlawful activity. The purpose of selling coard games with gambling motifs for home-use would be acceptable.

A corporation may loan money to its officers, and donate funds to charities of its choosing from time to time provided it does not commit waste of corporate resources. Loans to officers could rationally benefit the corporation and donations to charities may benefit by raising the profile and reputation of the corporation or gaining tax deductions. Therefore, both of these provisions in the proposed articles of incorporation are acceptable.

A corporation may provide for profit-sharing plans for its officers and employees. The compensation of officers, directors and employees is within the discretion of the board and, provided it is supported by the business judgment rule and does not commit waste, a court will allow the board to decide. Therefore, if Gamin Corp decides to share profits with its employees this would be ok and the provision is acceptable.

Finally, it is acceptable that Sally (and other directors and officers) will have limited liability to Gaming Corp's shareholders as limiting personal liability is one of the main reasons for

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incorporating. This is subject the previously discussed duties of directors and officers.

2) XYZ Corp is required to indemnify Sally for her court costs and attorneys fees incurred in defending Ben's action if she is successful and it may choose to do so if she is not successful. The indemnity provided by XYZ Corp may not indemnify Sally for wilful misconduct, gross negligence or fraud. At issue, is the indemnities available to directors and officers of a corporation from the corporation.

Under the TBOC, a corporation may or may not indemnify a director / officer for his or her court costs and attorneys fees incurred while defending actions brought against them in their capacity as directors and officers of the corporation. If the director/officer is successful in their action then the board of the corporation must vote to indemnify the director/officer and if they are not successful then they may be indemnified, subject to it not being a waste of corporate resources because the director/officer was not acting within their fiduciary duties.

Here, Sally may have been acting within her fiduciary duties as an officer of XYZ Corp because she was running a side business but it did not directly compete with XYZ's business. This is probably not a breach of her duty of loyalty so she may be entitled to indemnification from Ben's claim as there are no facts to indicate that she received a personal benefit from her actions.

**END OF EXAM**

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