

LEGISLATIVE BILL 453

Approved by the Governor March 13, 1997

Introduced by Wesely, 26

AN ACT relating to trade practices; to amend sections 87-123, 87-208 to 87-218, and 87-220, Reissue Revised Statutes of Nebraska, and sections 21-1931, 21-19,151, 21-2028, and 21-20,173, Revised Statutes Supplement, 1996; to change provisions relating to trademarks and trade names; to harmonize provisions; and to repeal the original sections.

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

Section 1. Section 21-1931, Revised Statutes Supplement, 1996, 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 must be distinguishable upon the records of the Secretary of State from:

(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; and

(4) A trade name registered in this state pursuant to sections 87-208 to 87-220 and section 17 of this act.

(c) A corporation may apply to the Secretary of State for authorization to use a name that is not distinguishable upon the Secretary of State's records from 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 consents to the use in writing and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation; 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 that is used in this state if the other corporation is incorporated or authorized to do business in this state and the proposed user corporation:

(1) Has merged with the other corporation;

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

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

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

Sec. 2. Section 21-19,151, Revised Statutes Supplement, 1996, 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 must be distinguishable upon the records of the Secretary of State from:

(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; and

(4) A trade name registered in this state pursuant to sections 87-208 to 87-220 and section 17 of this act.

(c) A foreign corporation may apply to the Secretary of State for authorization to use in this state the name of another corporation (incorporated or authorized to transact business in this state) that is not distinguishable upon the records of the Secretary of State from the name applied for. The Secretary of State shall authorize use of the name applied for if:

(1) The other corporation consents in writing to the use and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation; 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 that is used in this state if the other corporation is incorporated or authorized to transact business in this state and the foreign corporation:

(1) Has merged with the other corporation;

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

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

(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, Revised Statutes Supplement, 1996, 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 sections 8-101 to 8-1,21 may use a name which includes the word bank without using any such words or abbreviations; and

(b) May 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 be distinguishable upon the records of the Secretary of State from:

(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; and

(e) A trade name registered in this state pursuant to sections 87-208 to 87-220 and section 17 of this act.

(3) A corporation may apply to the Secretary of State for authorization to use a name that is not distinguishable upon his or her records from 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 consents to the use in writing and submits an undertaking in a form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation; 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 that is used in this state if the other corporation is incorporated or authorized to transact business in this state and the proposed user corporation has:

(a) Merged with the other corporation;

(b) Been formed by reorganization of the other corporation; or
 (c) Acquired all or substantially all of the assets, including the corporate name, of the other corporation.

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

Sec. 4. Section 21-20,173, Revised Statutes Supplement, 1996, 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 be distinguishable upon the records of the Secretary of State from:

(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; and

(e) A trade name registered in this state pursuant to sections 87-208 to 87-220 and section 17 of this act.

(3) A foreign corporation may apply to the Secretary of State for authorization to use in this state the name of another corporation, incorporated or authorized to transact business in this state, that is not distinguishable upon his or her records from the name applied for. The Secretary of State shall authorize use of the name applied for if:

(a) The other corporation consents to the use in writing and submits an undertaking in a form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation; 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 that is used in this state if the other corporation is incorporated or authorized to transact business in this state and the foreign corporation:

(a) Has merged with the other corporation;

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

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

(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 87-123, Reissue Revised Statutes of Nebraska, is amended to read:

87-123. Any owner of a trademark registered under sections 87-111 to 87-125 may proceed by suit to enjoin the manufacture, use, display, or sale of any counterfeits or imitations thereof, and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display, or sale as may be by such court deemed just and reasonable, and may require the defendants to pay to such owner all profits derived from and all damages suffered by reason of such wrongful manufacture, use, display, or sale and reasonable attorney's fees. The 7 and such court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in such case, be delivered to an officer of the court, or to the complainant, to be destroyed. The enumeration of any right or remedy herein shall not affect a registrant's right to prosecute under any penal law of this state.

Sec. 6. Section 87-208, Reissue Revised Statutes of Nebraska, is amended to read:

87-208. As used in sections 87-208 to 87-219 87-220 and section 17 of this act, unless the context otherwise requires:

(1) Applicant shall ~~mean~~ 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 shall ~~mean~~ 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 shall ~~mean~~ 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 shall ~~mean~~ means every name under which any person does or transacts any business in this state other than the true name of such person.

Sec. 7. 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; or

(6) Consists of or comprises a trade name which so resembles a trade name registered under sections 87-208 to 87-219 87-220 and section 17 of this act, registered in this state, or the name of a corporation incorporated or authorized to do business in this state as a foreign corporation as to be likely to cause confusion, mistake, or deception of purchasers, except that a name, although similar, may be used if the corporation affected shall consent in writing and such writing is filed with the Secretary of State. The words 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.

Sec. 8. 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 87-219 87-220 and section 17 of this act, 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, which must be acknowledged before a notary public; and

(f) A filing fee of one hundred dollars.

(2) Upon compliance by the applicant with the requirements of sections 87-208 to 87-219 87-220 and section 17 of this act, 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. 9. Section 87-211, Reissue Revised Statutes of Nebraska, is amended to read:

87-211. Registration of a trade name under sections 87-208 to 87-219 87-220 and section 17 of this act 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 87-219 87-220 and section 17 of this act 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 87-219 87-220 and section 17 of this act whether of registrations made under sections 87-208 to 87-219 87-220 and section 17 of this act or of registrations effected under any prior act shall include a statement that the trade name is still in use in this state.

Sec. 10. Section 87-212, Reissue Revised Statutes of Nebraska, is amended to read:

87-212. Any trade name registered under sections 87-208 to 87-219 87-220 and section 17 of this act 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 87-219 87-220 and section 17 of this act 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. 11. 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 87-219 87-220 and section 17 of this act.

Sec. 12. Section 87-214, Reissue Revised Statutes of Nebraska, is amended to read:

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

(1) ~~All registrations under prior acts which are more than ten years old and not renewed by January 1, 1970, in accordance with sections 87-208 to 87-219;~~

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

(3) ~~(2)~~ Any registration granted under sections 87-208 to 87-219 87-220 and section 17 of this act and not renewed in accordance with ~~its~~ provisions such sections;

(4) ~~(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;

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

(6) ~~(5)~~ Any registration where the registrant has failed to publish such trade name within thirty 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 thirty days.

Sec. 13. Section 87-215, Reissue Revised Statutes of Nebraska, is amended to read:

87-215. Any person who shall for himself or herself or on behalf of any other person, procure procures the registration of any trade name in the office of the Secretary of State under the provisions of sections 87-208 to 87-219 87-220 and section 17 of this act, 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. 14. 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 87-219 87-220 and section 17 of this act 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. 15. 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 use, display, or sale on terms which the court deems just and reasonable, and may require the defendants to pay to the registrant either all profits attributable to the wrongful use, display, or sale, or all damages caused by the wrongful use, display, or sale, or both such profits and damages 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. 16. Section 87-218, Reissue Revised Statutes of Nebraska, is amended to read:

87-218. Sections 87-208 to 87-219 87-220 and section 17 of this act 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. 17. (1) Within sixty days after the publication of a new registered trade name as provided in section 87-219, a person holding a valid registration of a trade name, corporate name, or limited liability company name may protest the registration of the new trade name. The protest shall be submitted in writing to the Secretary of State. The Secretary of State shall forward a copy of the written complaint to the new registrant who shall have thirty days to respond to the complaint in writing. If, upon review of the complaint and the response to the complaint, the Secretary of State finds that the new registered trade name violates any provision of section 87-209, the Secretary of State shall cancel such trade name. Unless the dispute over the registration of the new trade name is otherwise resolved or settled by the parties, the Secretary of State shall make his or her finding within fifteen days after the response by the new registrant.

(2) The Secretary of State's decision may be appealed to the district court of Lancaster County within thirty days after notice of the decision is received by the appealing party. The appeal shall be commenced by petitioning the district court to compel the Secretary of State to cancel or reinstate such trade name, and attached to the petition shall be copies of the original filing for the trade name, proof of publication, the complaint, the response to the complaint, if any, and the Secretary of State's finding. The district court may summarily order the Secretary of State to cancel or reinstate such trade name or take any other action the district court considers appropriate. The district court's final decision may be appealed as in other civil proceedings.

Sec. 18. Section 87-220, Reissue Revised Statutes of Nebraska, is amended to read:

87-220. Any person, not excepted by section 87-210, who shall engage in or transact any business in this state under a trade name, as defined in sections 87-208 to 87-219 87-220 and section 17 of this act, without registering such trade name shall be deemed guilty of a Class V

misdeemeanor. Each day any violation shall continue shall be deemed a separate and distinct offense.

Sec. 19. Original sections 87-123, 87-208 to 87-218, and 87-220, Reissue Revised Statutes of Nebraska, and sections 21-1931, 21-19,151, 21-2028, and 21-20,173, Revised Statutes Supplement, 1996, are repealed.