

The Texas Two Step: Divisive Mergers and Fraudulent Transfer

Choice, Governance & Acquisition of Entities

**TexasBar CLE
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Outline

- I. Texas Business Organization Code (“*TBOC*”)
- II. Delaware Limited Liability Company (“*LLC*”) and Limited Partnership (“*LP*”) Division Statutes
- III. Effect of Transaction
- IV. Divisive Mergers and Creditors
- V. Sample Texas Plan of Divisive Merger

I. Texas Business Organization Code

- Overview:
 - Divisive mergers have been permitted under Texas law since 1989.
 - TBOC governs mergers, including divisive mergers, and applies to corporations, partnerships and LLCs. A divisive merger under the TBOC can include entities organized under the laws of another state so long as such state permits divisive mergers.
 - TBOC § 1.002(55): Defines “**merger**” to include “(A) the division of a domestic entity into two or more new domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations.”

- A divisive merger is effected by:
 - (i) adoption of a plan of merger that provides
 - (a) the manner and basis for allocating and vesting the property of the parties, and
 - (b) the manner and basis of allocating each liability and obligation of the parties or making adequate provision for the payment and discharge thereof.
 - (ii) the filing with the Texas Secretary of State of a certificate of merger and a certificate of formation for each newly-formed entity.
- Under Texas statutes any kind of Texas entity can be divided into any kind of entity.

- Plan of Merger (TBOC § 10.002) (form attached at slides 37-50) must contain:
 - Name of each party to merger
 - Name of each surviving entity
 - Name of each entity created by the merger
 - Organization form and jurisdiction of each created entity
 - Manner and basis (including use of a formula) of converting or exchanging ownership or membership interests of each party to merger into ownership of surviving entities or other property
 - Any ownership interests that will be cancelled or remaining outstanding and not converted
 - Certificate of formation for each new entity
 - Governing documents for each new entity

- Approval – same as approval of any merger:
 - If a corporation, approved by the board of directors (TBOC § 21.452) and 2/3ds of shareholders entitled to vote (TBOC §§ 1.002(32) & 21.457) including class voting in some circumstances (TBOC § 21.458).
 - If an LLC, as provided in the company agreement (TBOC §§ 101.052 & 101.054), or if the agreement is silent, approved by a majority of all of the company’s members (TBOC §§ 1.002(37) and 101.356(c)).
 - If a partnership, the partnership agreement must contain provisions that authorize the merger and must be approved in the manner prescribed by the agreement (TBOC §§ 10.009(f) & (g)).
 - Approval required from any owner that will become liable under the merger for liability of any other person (TBOC § 10.001(e)).

- Certificate of Merger to be filed with Secretary of State:
 - Name, organization form and jurisdiction of each party to the merger.
 - Name and organization form and jurisdiction of each entity created by the merger.
 - Attach certificate of amendment for any party to the merger with a certificate being amended.
 - If no amendments, a statement of no amendments.
 - Attach certificate of formation for any entities being created by the merger.
 - Plan of merger on file at the principal place or business of each surviving entity and include addresses.
 - Plan of merger will be provided without cost to each any owner of an entity party to or created by the merger and any creditor or obligee of a party to the merger.
 - Statement that plan of merger approved as required by law and governing documents of each party to merger.
 - Certificate of merger signed on behalf of each party to merger.

- Dissent and Appraisal Rights:
 - Shareholders of Texas corporations are entitled to assert dissenters rights when objecting to a merger (including a divisive merger) and seeking to be paid the value of their shares as determined in a judicial appraisal.
 - LLCs and partnerships do not have statutory rights of dissent and appraisal unless the entity's governing documents expressly grant these rights.

II. Delaware Division Statutes

- Overview:
 - Delaware statutes allow “*divisions*” (equivalent to divisive merger under TBOC) of LLCs and LPs, but not corporations.
 - A division is effected by (i) the adoption of a plan of division setting forth the terms and conditions of the division, including, among others, the allocation of assets, property, rights, series, debts, liabilities and duties of the dividing LLC or LP among the resulting LLCs or LPs and, if it survives, the dividing LLC or LP and (ii) the filing with the Delaware Secretary of State of a certificate of division and a certificate of formation for each newly formed LLC or LP.
 - Under Delaware statutes an LLC can only be divided into LLCs and an LP can only be divided into LPs.

- **LLC Division**
- Title 6, § 18-217 (effective August 1, 2018) enables a Delaware LLC to divide into two or more LLCs, with the dividing LLC either continuing its existence or terminating as part of the division.
- Vocabulary:
 - “Dividing company” – the LLC effecting a division.
 - “Resulting company” – a domestic LLC formed as a consequence of a division.
 - “Surviving company” – a dividing company that survives.
 - “Division company” – a surviving company, if any, and each resulting company.

- **LP Division**
- Title 6, § 17-220 (effective August 1, 2019) enables a Delaware LP to divide into two or more LPs, with the dividing LP either continuing its existence or terminating as part of the division.
- Vocabulary:
 - “Dividing partnership” – the LP effecting a division.
 - “Resulting partnership” – a domestic LP formed as a consequence of a division.
 - “Surviving partnership” – a dividing partnership that survives.
 - “Division partnership” – a surviving partnership, if any, and each resulting partnership.

- **Plan of Division of LLC or LP:**
 - How are interests treated: exchanged/converted into cash, property, rights or securities of, or interests, in, the surviving company or any resulting company; may remain outstanding.
 - Is dividing company surviving?
 - Name of resulting companies.
 - Allocation of assets, property, rights, debts, liabilities.
 - Name and business address of contact person that has a copy of the plan of division.
- **Similarities to considerations in a traditional merger:**
 - For example, may amend LLC or LP agreement of surviving company.

- Approval (§18-217(c) and §17-220(c)):
 - Division approved as provided in the LLC agreement or LP agreement.
 - If not specifically addressed and not prohibited, approved in same manner as for merger or consolidation as set forth in LLC agreement or LP agreement.
 - If LLC agreement is silent, division must be approved by members who own more than 50% of the then current percentage or other interest in the profits of the dividing company.
 - If LP agreement is silent, division must be approved by all general partners of the dividing partnership and limited partners who own more than 50% of then current percentage or other interest in the profits owned by all limited partners of the dividing partnership.

- **Certificate of Division:**
 - Name of the dividing LLC or LP and whether it survives.
 - The date of filing of the dividing LLC's or LP's original certificate of formation.
 - The name of each division LLC or division LP.
 - The name and business address of the contact person.
 - Future effective date (if not effective upon filing).
 - Division has been approved in accordance with applicable statutes.
 - The plan of division is on file and state address.
 - A copy of the plan of LLC division will be provided to any member of the dividing LLC or partner of the dividing LP.
 - Certificate of formation for each resulting LLC or LP.

III. Effect of Transaction

- Texas:
 - TBOC §10.008(a) provides that, if properly allocated in the plan of merger, all assets and liabilities of the parties to the merger will be allocated (subject to existing contracts, liens and encumbrances) among the surviving entities in the manner provided in the plan, and not to any other party.
 - If the plan fails to provide for the allocation or vesting of any particular item of property or any liability or obligation of any party to the merger, TBOC 10.008(b) provides that “the unallocated property is owned in undivided interest by, or the liability or obligation is the joint and several liability and obligation of, each of the surviving and new organizations, pro rata to the total number of surviving and new organizations resulting from the merger.”

- Delaware:

- §18-217(1)(2) and §17-220(1)(2) provide that for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers, and all the property, real, personal and mixed, of the dividing LLC or LP and all debts due on whatever account to it, as well as all other things and other causes of action belonging to it, shall without further action be allocated to and vested in the applicable division LLC or LP in such a manner and basis and with such effect as is specified in the plan of division, and the title to any real property or interest therein allocated to and vested in any division LLC or LP shall not revert or be in any way impaired by reason of the division.
- If debts and liabilities are not allocated by the plan, they shall be the joint and several debts and liabilities of all of the division LLCs or division LPs.

IV. Divisive Mergers and Creditors

- A divisive merger/division may alter and reduce the pool of assets to which a creditor may look for repayment of a debt or assets needed to perform a contract.
- A division could result in moving collateral that secures a loan to a new entity that is not credit-worthy without breaching the terms of the credit agreement.
- Applies to lenders and all other creditors.

- Texas Statutory Protection:
 - Fraudulent transfer protections; creditors will continue to possess all other rights otherwise available under law and contract, including all security interests in the property of the debtor securing the payment of the debtor's claim (TBOC §10.008(a)(2) & §10.901).

- Delaware Statutory Protection:

- The Delaware statutes provide that if an LLC formed prior to 8/1/2018 is party to an agreement entered into before 8/1/2018, or if an LP formed prior to 8/1/2019 is party to an agreement entered into before 8/1/2019 and the agreement restricts a merger or consolidation by the entity, then such restrictions will be deemed to also apply to a division of the entity.
- A “**division contact**” must be specified in the plan of division to be available for 6 years following the division to advise creditors as to the division LLC to which such creditor’s claim was allocated.
- Any action or proceeding pending against a dividing LLC or LP may be continued against the surviving entity as if the division did not occur and against any resulting entity to which the asset, property, right, series, debt, liability or duty associated with the action was allocated pursuant to the plan of division.
- Each division LLC or LP is jointly and severally liable for any liabilities if a court determines that the division would constitute a fraudulent transfer under applicable law (§18-217(1)(5) & §17-220(1)(5)).

- ***Plastronics Socket Partners, Ltd. v. Don Weon Hwang, 2022 WL 108948 (Fed. Cir. 2022)***
 - **Facts:** The *Plastronics* case involved a dispute over royalty payments related to a device called an H-Pin used in testing semiconductor chips. The H-Pin was invented by Mr. Hwang. Hwang and Plastronics Sockets entered into a royalty agreement for payment of royalties to Hwang for sales of H-Pins with sockets. In 2012 Plastronics Sockets (Oldco) created Plastronics H-Pin (Newco) with a divisive merger that allocated all rights and obligations under the royalty agreement to Newco. After the merger, Newco began selling H-Pins without sockets to Oldco and Oldco continued to sell H-Pins with sockets to customers. Oldco refused to pay royalties because Newco only sold H-Pins without sockets, not H-Pins with sockets.
 - **Findings:** First the Court found that under common law “the assignment of rights through mergers cannot adversely affect the rights of parties contracting with the entities undergoing the mergers.” Then the Court relied on TBOC§10.901 to find “Plastronics Socket cannot divest itself of the obligation to pay royalties on sockets sold with H-Pins.”

TBOC§10.901 provides: “This code does not ... abridge any right or rights of any creditor under existing laws.”

- ***In re DBMP LLC, 2021 WL 3552350 (Bankr. W. D. North Carolina 2021)***
 - **Facts:** This case is one of a group of cases involving the “Texas Two Step.” The Court describes the “Texas Two Step” as “a Divisional Merger followed by a bankruptcy by the new company bearing the old company’s asbestos liabilities and in which the debtor seeks 525(g) relief for the entire enterprise.” CertainTeed Corporation was a manufacturer of building products with asbestos liability that converted to a Texas LLC and then used the Texas divisive merger provisions to convert into two Texas LLCs: CertainTeed LLC with all operations, employees and non-asbestos creditors of the old company and DBMP LLC with no operations, few assets and 100% of CertainTeed Corporation’s asbestos liabilities. On the same day following the division, CertainTeed LLC converted to a Delaware LLC and DBMP converted to a North Carolina LLC. The Court notes that the companies “were Texas entities for less than four hours.” The parties also entered into a Funding Agreement where CertainTeed gave DBMP a limited indemnity for asbestos claims and administrative costs. Ninety-one days later, DBMP filed for Chapter 11 bankruptcy protection in North Carolina.

- ***In re DBMP LLC, (cont.)***

- **Findings:** “[W]hile the TBOC permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors. The TBOC explicitly states that the merger provisions do not ‘abridge any right or rights of any creditor under existing laws.’” The Court cites legislative history and particularly a 1989 law review article by one of statute’s authors for the proposition that despite the “no transfer” language of the statute, the allocation of assets in the merger should constitute a transfer and conveyance under the fraudulent transfer statutes and the Bankruptcy Code. Even though the Court tells us that a fraudulent transfer claim has not been made (since it needed to be made by DBMP, controlled by CertainTeed), Court states “... if a corporation uses a divisional merger to dump its liabilities into a newly created ‘bad’ company which lacks the ability to pay creditors while its ‘good’ twin corporation walks away with the enterprise’s assets, a fraudulent transfer avoidance action lies.” The Court was critical of the Funding Agreement because it was not arm’s length and relied on management of CertainTeed (also managing DBMP) for its enforcement.

- Other recent “Texas Two Step” cases:
 - *In re Bestwall LLC*, 606 B.R. 243, (Bankr. W.D. North Carolina 2019)
 - *In re Aldrich Pump LLC*, 2021 WL 3729335 (Bankr. W.D. North Carolina 2021)
 - *In re LTL Management, LLC*, Case No. 21-30589(MBK), (Bankr. New Jersey) – the Johnson & Johnson case

- Johnson & Johnson

- Divisive merger (i.e., “corporate restructuring”) on October 12, 2021.
- Through a series of transactions Johnson & Johnson Consumer Inc. (“**OldJJCI**”) became (1) Johnson & Johnson Consumer Inc. (“**New JJCI**”) and (2) LTL Management, LLC (“**Debtor**”).
- **Funding Agreement**: J&J and New JJCI to provide funding to Debtor (1) for costs and expenses prior to and during bankruptcy, including cost of administering bankruptcy, and (2) to satisfy the Debtor’s talc-related liabilities via funding a trust, up to the full value of New JJCI.
 - “[M]ake certain that the Debtor has the same, if not greater, ability to fund the costs of defending and resolving present and future talc-related claims[.]” Kim Declaration, ¶ 21.

- Bankruptcy of LTL Management, LLC

- Filed October 14, 2021 (Western District of North Carolina)

- North Carolina limited liability company

- Principal assets were located in North Carolina

- Bank account with \$6 million; rights to the Funding Agreement; equity in Royalty A&M LLC, a North Carolina limited liability company (\$367.1 million)

BUT...

- Principal place of business in New Brunswick, New Jersey

- 92% of talc litigation cases pending in New Jersey (MDL)

- Venue: North Carolina to New Jersey

- On October 25, 2021, the Bankruptcy Administrator (i.e., U.S. Trustee) filed a Motion to Transfer Venue to New Jersey [Docket No. 205].
- On November 16, 2021, the Court ruled on the motion, acknowledging why the Debtor preferred North Carolina:

“Rather, the Debtor’s actions indicate a preference to file bankruptcy in this district, likely due to the Fourth Circuit’s two-prong dismissal standard and Judge Hodges’s estimation ruling in the Garlock case. *See In re Garlock Sealing Techs., LLC., et al.*, 504 B.R. 71 (Bankr. W.D.N.C. 2014).” Pg. 10.

“There are currently five mass tort bankruptcy cases pending in this district, including the four involving the ‘Texas Two Step.’” Pg. 11.

- Order Transferring Venue

- Entered on November 16, 2021 [Docket No. 416]:

“[T]he Debtor is not just forum shopping; the Debtor is manufacturing forum and creating a venue to file bankruptcy.” Pg. 10.

“There is no reason this Court should be the only bankruptcy court to have the opportunity to weigh in on these novel legal issues, especially considering that the ‘Texas Two Step’ tactic is being employed by national corporations and impacts tens of thousands of present and future claimants across the country.” Pg. 11.

- Motion to Dismiss

- Filed on December 1, 2021 by Official Committee of Talc Claimants [Docket No. 632]:

“J&J’s divisive merger subverts the very Texas law upon which it relies. The sole purpose of the merger was to hinder and delay talc claimants in the pursuit of their claims by separating the liability for those claims from the assets backing such claims.” ¶ 2.

Remember: TBOC Sec. 10.901: “This code does not affect, nullify, or repeal the antitrust laws or abridge any right or rights of any creditor under existing laws.”

- Fraudulent Transfer

The trustee may avoid any transfer incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily made such transfer or incurred such obligation with **actual intent to hinder, delay, or defraud** any entity.

See 11 U.S.C. § 548(a)(1)(A).

- Badges of Fraud

1. The transfer or obligation was to an insider;
2. the debtor retained possession or control of the property transferred after the transfer;
3. the transfer or obligation was closed or concealed;
4. before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. the transfer was of substantially all the debtor's assets;
6. the debtor absconded;
7. the debtor removed or concealed assets;
8. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. the transfer occurred shortly before or shortly after a substantial debt was incurred; and
11. the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

- Potential Risks to Creditors

- J&J and New JJCI could refuse to make payments under the Funding Agreement.
- Enforcement of the agreement rests with the Debtor, which is under the control of the funding parents (J&J and New JJCI).
- Funding agreement replaces assets with amorphous value of assets, which could take years to litigate.

See Motion to Dismiss [Docket No. 632], ¶ 23.

- Order Denying Motion to Dismiss

- Entered on February 25, 2022 [Docket No. 1572]:

“Let’s be clear, the filing of a chapter 11 case with the expressed aim of addressing the present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code.” Pg. 16.

“[T]he Court concludes that there have been no improprieties or failures to comply with the Texas statute’s requirements for implementation, and that the interests of present and future talc litigation creditors have not been prejudiced.” Pg. 42.

- BUT the Third Circuit dismissed the case in 2023
 - “What counts to access the Bankruptcy Code’s safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so. LTL was not. Thus we dismiss the petition.”
 - “Our precedents show a debtor who does not suffer from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith.”
 - Assets include \$61.5 billion payment right from J&J and J&J Consumer Inc.
 - J&J had \$400 billion in equity value, AAA credit rating and \$31 billion in cash and marketable securities

- The Second Bankruptcy Petition for LTL was filed immediately after Third Circuit decision in 2023

8. The Debtor is filing for bankruptcy a second time to effectuate the intent of its initial bankruptcy filing: to fully, equitably and efficiently resolve all current and future talc-related claims. This filing is supported by law firms on behalf of more than 60,000 thousands claimants and includes ovarian cancer and mesothelioma claims.² The Debtor, J&J, the Debtor's direct parent company, and these claimants have entered into Plan Support Agreements pursuant to which the parties have agreed to work together to finalize and seek confirmation of a plan of reorganization that would fund \$8.9 billion net present value to a trust for the benefit of all talc-related claims. This amount represents an increase of \$6.9 billion over the \$2 billion J&J previously agreed to advance to the Debtor to establish a qualified settlement fund in the 2021 Chapter 11 Case. Based on the breadth of claimant support, the Debtor believes it is well positioned to achieve a prompt resolution of this case.

- Possible Impact of 2023 Third Circuit Decision

- The Third Circuit opinion did **not** challenge the availability of a divisive merger pursuant to the provisions of the TBOC.
- The Third Circuit opinion did **not** address whether a divisive merger contradicted the principles and purposes of the Bankruptcy Code.
- Would the Third Circuit decision be different if LTL partially funded the Funding Agreement or left the talc claimants as the fulcrum?
- Bestwall, LLC – Motion to Dismiss [Docket 2882], filed on February 17, 2023
- Aldrich Pump LLC – Motion to Dismiss [Docket 1712], filed on April 6, 2023

Nondebtor Release Prohibition Act of 2021

- H.R. 4777 / S. 2497
- H.R. sponsor Jerrold Nadler (D-NY); Senate sponsor Elizabeth Warren (D-MA)
- Seeks to:
 - Prohibit nonconsensual third-party releases (opioid claims of Pharma Purdue and asbestos claims)
 - Prohibit divisional mergers
 - Upon request of an interested party, and after notice and a hearing, the court shall dismiss a Chapter 11 reorganization bankruptcy case if the debtor was involved in certain restructuring activity that (1) had the intent or foreseeable effect of separating a debtor's assets from a debtor's liabilities and the debtor assuming or retaining such liabilities, and (2) occurred in the 10-year period prior to the filing of the bankruptcy petition.

V. Sample Texas Plan of Divisive Merger

PLAN OF DIVISIVE MERGER OF [_____, LLC] INTO TWO TEXAS ENTITIES

This Plan of Divisive Merger (this “*Plan of Merger*”) is entered into as of the [__] day of [____], 2023 by [_____, LLC], a Texas limited liability company (the “*Merging Entity*”), pursuant to §10.001 of the Texas Business Organizations Code (as amended from time to time, or any corresponding provisions of succeeding law, the “*TBOC*”).

RECITALS:

WHEREAS, the Merging Entity is a limited liability company duly organized and existing under the laws of the State of Texas;

WHEREAS, the managers and members of the Merging Entity deem it advisable and in the best interests of such entity for the business, assets and liabilities of the Merging Entity to be divided between the Merging Entity and a new Texas limited liability company to be formed pursuant to this Plan of Merger to be named [_____, LLC] (“*Newco*”), all as more fully provided in this Plan of Merger (collectively, the “*Merger*”); and

WHEREAS, the managers and members of the Merging Entity have approved the Merger and this Plan of Merger in accordance with the governing documents of the Merging Entity and the TBOC.;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, the Merging Entity hereby adopts this Plan of Merger as follows:

ARTICLE I THE MERGER

1.1 The Merger and Organization of Newco. Subject to and upon the terms and conditions of this Plan of Merger, and in accordance with the provisions of the TBOC, on the Merger Effective Date (defined below):

(a) Newco shall be organized as a Texas limited liability company by the filing of a Certificate of Formation with the Texas Secretary of State in substantially the form attached as Exhibit A to this Plan of Merger (the “*Newco Certificate of Formation*”);

(b) the businesses, assets and liabilities of the Merging Entity shall be divided between the Merging Entity and Newco (collectively, the “*Post Merger Entities*”) as provided in Section 1.4; and

(c) the Merging Entity shall continue in existence as a Texas limited liability company, in accordance with the provisions of the TBOC.

1.2 Merger Effective Date. The Merger shall become effective at such time as a properly executed Certificate of Merger (the “*Certificate of Merger*”) in substantially the form of Exhibit B this Plan of Merger has been duly filed with the Secretary of State of Texas in accordance with the TBOC (the “*Merger Effective Date*”).

1.3 Certain Effects of the Merger. On the Merger Effective Date, the rights, privileges, immunities and franchises, both of a public and a private nature, possessed by the Merging Entity, all of the property, real, personal and mixed, and all debts due on whatever account, and all choses in action, and all and every other interest, of or belonging to the Merging Entity, shall be divided between, allocated to and vested in the Post Merger Entities, without further act or deed, without reversion or impairment, and without any transfer or assignment having occurred, as hereinafter provided in this Plan of Merger; and the Post Merger Entities shall thenceforth be responsible and liable for the liabilities and obligations of the Merging Entity as hereinafter provided.

1.4 Division of Business, Assets and Liabilities between the Merging Entity and Newco.

(a) On the Merger Effective Date, the Merging Entity is hereby allocated the following assets and liabilities of the Merging Entity existing immediately prior to the filing of the Certificate of Merger with the Secretary of State of Texas:

(i) The Merging Entity will retain all rights, privileges, immunities and franchises, both of a public and a private nature, possessed by the Merging Entity immediately prior to the Merger Effective Date, and all of the assets, property, real, personal and mixed, and all and every other interest, of or belonging to the Merging Entity immediately prior to the Merger Effective Date, except, in each case, for those allocated to Newco pursuant to Section 1.4(b)(i); and

(ii) the Merging Entity will retain all liabilities of the Merging Entity, except for those allocated to Newco pursuant to Section 1.4(b)(ii).

(b) On the Merger Effective Date, Newco is hereby allocated the following assets and liabilities of the Merging Entity existing immediately prior to the filing of the Certificate of Merger with the Secretary of State of Texas:

(i) Newco will be allocated all rights, privileges, immunities and franchises, both of a public and a private nature, possessed by the Merging Entity immediately prior to the Merger Effective Date, and all of the assets, property, real, personal and mixed, and all and every other interest, of or belonging to the Merging Entity immediately prior to the Merger Effective Date, in each case, as set forth on Exhibit C attached hereto; and

(ii) Newco will be allocated and assume all the liabilities of the Merging Entity set forth on Exhibit D attached hereto.

2.1 Certificates of Formation.

(a) The Certificate of Formation of the Merging Entity, as amended and existing and constituted immediately prior to the Merger Effective Date, shall be and constitute the Certificate of Formation of the Merging Entity after the Merger Effective Date, until further amended in accordance with its terms and as provided by the TBOC.

(b) The Newco Certificate of Formation filed with the Texas Secretary of State pursuant to Section 1.1 shall be the Certificate of Formation of Newco after the Merger Effective Date, until further amended in accordance with its terms and as provided by the TBOC.

2.2 Membership Interests; Company Agreements.

(a) The manner and basis of converting the [membership interests] of the Merging Entity into ownership interests of the Post Merger Entities and the mode of carrying the Merger into effect are outlined in Exhibit E.

(b) The Company Agreement of the Merging Entity (the “*Merging Entity Company Agreement*”), as amended and existing and constituted immediately prior to the Merger Effective Date shall be and constitute the Company Agreement of the Merging Entity, until further amended in accordance with its terms and as provided by the TBOC; provided, however, that [Exhibit A] to the Merging Entity Company Agreement shall be amended to reflect the change in members and [membership interests] set forth in Exhibit E hereto.

(c) The Company Agreement of Newco attached hereto as Exhibit F shall be deemed adopted on the Merger Effective Date and shall be the Company Agreement of Newco after the Merger Effective Date, until further amended in accordance with its terms and as provided by the TBOC.

ARTICLE III TAX COVENANTS

3.1 Information for Tax Returns. The Merging Entity and Newco shall cooperate with each other after the Merger Effective Date by providing the other such records and other information as may be reasonably requested from time to time by Newco or the Merging Entity, as the case may be, in connection with the preparation or audit of federal, state and local income and other tax returns, and disputes, refund claims or litigation relating thereto.

ARTICLE IV MISCELLANEOUS

4.1 Access to Company Records; Right to Audit. Newco and the Merging Entity shall keep their respective financial and accounting records in accordance with the requirements of applicable law and each shall afford access to the records of the other to the extent reasonably requested for the purposes of compliance with this Plan of Merger. Any such access shall be at the expense of the party seeking same.

4.2 Further Assurances. After the Merger Effective Date, Newco and the Merging Entity shall execute, acknowledge and deliver or cause to be executed, acknowledged and delivered, such instruments and take such other actions as may be reasonably requested by the other and as may be necessary or advisable to carry out their obligations under this Plan of Merger, and under any exhibit, document, certificate or other instrument delivered pursuant hereto.

4.3 Governing Law. This Plan of Merger shall be governed and construed under the laws of the State of Texas, without regard to the conflicts or choice of law principles thereof.

4.4 Captions. The headings of this Plan of Merger are inserted for convenience only and shall not constitute a part of this Plan of Merger or be used to construe or interpret any provision hereof.

IN WITNESS WHEREOF, the Merging Entity has caused this Plan of Merger to be executed as of the date first above written.

[_____], a Texas
limited liability company

By: _____
Name: _____
Its: _____

CERTIFICATE OF FORMATION

OF

[_____] , LLC

(a Texas limited liability
company)

The undersigned natural person of the age of eighteen years or more, acting as organizer of a limited liability company under the Texas Business Organizations Code (the “*TBOC*”), does hereby adopt the following Certificate of Formation for such limited liability company:

1. The filing entity being formed is a limited liability company. The name of the entity is [_____] , LLC (the “*Company*”).
2. The purpose for which the Company is organized is the transaction of any or all lawful purposes for which a limited liability company may be organized under the TBOC.
3. The street address of the initial registered office of the Company is [_____], and the name of the initial registered agent at such address is [_____].
4. The name and address of the organizer of the Company are as follows:

NAME

ADDRESS

[NAME]

[ADDRESS]

5. The Company will be manager-managed. The name and address of the sole initial manager is as follows:

NAME

ADDRESS

[NAME]

[ADDRESS]

6. The Company is being formed under a plan of merger of [_____], formed [_____, 20____] and assigned file number [_____] by the Texas Secretary of State.
7. The Company Agreement of the Company may provide that any action required or permitted to be taken at a meeting of members may be taken without a meeting if a written consent thereto shall be signed by members entitled to vote thereon having not less than the minimum number of votes that would be necessary to take such action at a meeting at which all members were present.

8. This Certificate of Formation shall be effective upon filing with the Secretary of State of the State of Texas.

The undersigned executes this Certificate of Formation as of the date first set forth above subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

_____, **LLC**

By: _____

Name: _____

Title: _____

**CERTIFICATE OF MERGER
DOMESTIC ENTITY
DIVISIVE MERGER
OF**

[_____, LLC]
INTO TWO TEXAS ENTITIES

[_____, 2023]

Pursuant to Chapter 10 of the Texas Business Organizations Code, as amended (the “*TBOC*”), the undersigned, as a duly authorized representative of _____, LLC, a Texas limited liability company, pursuant to a Plan of Merger adopted by the [members and managers] of such entity on [_____, 2023] (the “*Plan of Merger*”) pursuant to Section 10.001 of the TBOC, does hereby certify the following:

ARTICLE ONE

MERGING ENTITY INFORMATION

1. The name of the entity formed under the TBOC which is dividing itself is [_____], LLC, a Texas limited liability company (the “*Company*”), and such entity is the sole party to the merger.

2. The Company was formed on [_____, ____] and was assigned the file number [_____] by the Texas Secretary of State.

3. The principal place of business of the Company is at [_____, _____, Texas _____].
4. The Company will survive the merger.
5. No amendments to the certificate of formation of the Company are effected by the merger.

ARTICLE TWO

AVAILABILITY OF PLAN OF MERGER

6. An executed Plan of Merger is on file at the principal place of business of each entity surviving or created by the merger as set forth in Sections 3 and 11 of this Certificate of Merger.
7. On written request, a copy of the Plan of Merger will be furnished without cost by each surviving, acquiring, or new domestic entity or non-code organization to any manager or member of any entity that is a party to or created by the Plan of Merger.

ARTICLE THREE

LIMITED LIABILITY COMPANY CREATED BY MERGER

8. The name of the sole entity that is to be created by the Plan of Merger is [_____, LLC] (“*Newco*”).

9. Newco is a domestic limited liability company to be organized under the laws of the State of Texas and shall be governed by the TBOC.

10. The certificate of formation of Newco is being filed with this Certificate of Merger.

11. The principal place of business of Newco is at [_____, _____, Texas _____].

ARTICLE FOUR

APPROVAL OF THE PLAN OF MERGER

12. The Plan of Merger was authorized by all action required pursuant to the TBOC and the governing documents of the Company as the merging filing entity.

ARTICLE FIVE

EFFECTIVENESS OF FILING

13. The merger is to become effective when this document is accepted and filed by the Texas Secretary of State.

ARTICLE SIX

FRANCHISE TAXES

14. In lieu of providing a tax certificate and pursuant to the Plan of Merger, the Company shall be responsible and liable for the payment of any and all required franchise taxes.

The undersigned executes this Certificate of Merger as of the date first set forth above subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

_____, LLC

By: _____

Name: _____

Title: _____