

2009 Legislative Update  
June 10, 2009

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## CHAPTER 252

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**CORPORATIONS AND ASSOCIATIONS**

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HOUSE BILL 09-1248

BY REPRESENTATIVE(S) Gerou, Summers, Gardner B.;  
also SENATOR(S) Shaffer B.**AN ACT**

CONCERNING THE MODIFICATION OF LAWS APPLICABLE TO THE CONDUCT OF BUSINESS IN COLORADO, AND, IN CONNECTION THEREWITH, MODIFYING THE REQUIREMENTS OF TITLE 7 OF THE COLORADO REVISED STATUTES APPLICABLE TO DOCUMENTS FILED WITH THE SECRETARY OF STATE, PARTNERSHIP LAW, AND THE REQUIREMENTS FOR BOARDS OF DIRECTORS OF NONPROFIT CORPORATIONS TO TAKE ACTION WITHOUT A MEETING, AND MAKING AN APPROPRIATION.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** 7-42-112 (2), Colorado Revised Statutes, is amended to read:

**7-42-112. Procedure to extend term.** (2) The votes shall be taken by ballot, and each stockholder shall be entitled to as many votes as the stockholder owns shares of stock in ~~said~~ THE company or holds proxies therefor. If a majority of the votes cast is in favor of a renewal of the corporation, the president and secretary of ~~said~~ THE company, under the corporate seal of ~~said~~ THE company, shall certify the fact, and shall make as many certificates as may be necessary. ~~and~~ The company shall record one CERTIFICATE in the office of the recorder of deeds in each county in which the company does business and SHALL deliver ~~one~~ to the secretary of state for filing pursuant to part 3 of article 90 of this title A STATEMENT OF EXTENSION OF TERM THAT STATES THAT THE TERM OF THE COMPANY HAS BEEN EXTENDED, THE PRINCIPAL OFFICE ADDRESS OF THE COMPANY, AND THE REGISTERED AGENT NAME AND REGISTERED AGENT ADDRESS OF THE COMPANY. The corporate life of ~~said~~ THE company shall be renewed upon ~~the~~ SUCH recording and filing of the declaration, and all stockholders shall have the same rights in the renewed corporation as they had in the company as originally formed.

**SECTION 2. Repeal.** 7-55-102 (1) (d), Colorado Revised Statutes, is repealed as follows:

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

**7-55-102. Articles of incorporation - filing.** (1) Five persons or more, except as specified elsewhere in this article, a majority of whom are residents of Colorado, may be associated and incorporated pursuant to this article for the cooperative transaction of any lawful business, except banking. Persons desiring to avail themselves of the provisions of this article shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of incorporation stating:

(d) ~~The duration for which the association is to exist, which may be in perpetuity;~~

**SECTION 3. Repeal.** 7-56-201 (2) (d), Colorado Revised Statutes, is repealed as follows:

**7-56-201. Articles of incorporation.** (2) The articles shall state:

(d) ~~The duration for which the cooperative is to exist, which shall be in perpetuity unless otherwise stated in the articles;~~

**SECTION 4.** 7-62-101 (5), (6), and (7), Colorado Revised Statutes, are amended to read:

**7-62-101. Definitions.** As used in this article, unless the context otherwise requires:

(5) "General partner" means a person:

(a) Who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement OR THIS ARTICLE, INCLUDING A PERSON WHO IS ADMITTED AS A GENERAL PARTNER WITHOUT MAKING OR BEING OBLIGATED TO MAKE A CONTRIBUTION OR WITHOUT ACQUIRING A PARTNERSHIP INTEREST, IF IN EITHER CASE SUCH ADMISSION IS PURSUANT TO A WRITTEN PARTNERSHIP AGREEMENT OR OTHER WRITING CONFIRMING THE ADMISSION; and

(b) WHO IS named in the certificate of limited partnership as a general partner.

(6) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner IN ACCORDANCE WITH THE PARTNERSHIP AGREEMENT OR THIS ARTICLE, INCLUDING A PERSON WHO IS ADMITTED AS A LIMITED PARTNER WITHOUT MAKING OR BEING OBLIGATED TO MAKE A CONTRIBUTION OR WITHOUT ACQUIRING A PARTNERSHIP INTEREST, IF IN EITHER CASE SUCH ADMISSION IS PURSUANT TO A WRITTEN PARTNERSHIP AGREEMENT OR OTHER WRITING CONFIRMING THE ADMISSION, as provided in sections 7-62-301 and 7-62-306 or, in the case of a foreign limited partnership, in accordance with the law of the foreign jurisdiction under which the limited partnership is formed.

(7) "Limited partnership" or "domestic limited partnership" means ~~a partnership~~ AN ENTITY formed UNDER THIS ARTICLE by two or more persons ~~under the law of this state~~ and having one or more general partners and one or more limited partners. ~~The term includes a limited partnership that is~~ A limited liability limited partnership IS FOR ALL PURPOSES A LIMITED PARTNERSHIP. AT FORMATION, A LIMITED PARTNERSHIP SHALL HAVE AT LEAST ONE PARTNER WHO HAS A PARTNERSHIP

INTEREST.

**SECTION 5.** 7-62-301 (1), Colorado Revised Statutes, is amended to read:

**7-62-301. Admission of limited partners.** (1) After the filing of a limited partnership's original certificate of limited partnership, a person may be admitted as an additional limited partner:

(a) In the case of a person acquiring a partnership interest directly from the limited partnership, upon compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the written consent of all partners; ~~and~~

(b) In the case of an assignee of a partnership interest of a partner who has the power, as provided in section 7-62-704, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power; AND

(c) EITHER UPON FORMATION OF THE LIMITED PARTNERSHIP OR THEREAFTER WITHOUT MAKING A CONTRIBUTION OR BEING OBLIGATED TO MAKE A CONTRIBUTION TO THE LIMITED PARTNERSHIP OR ACQUIRING A PARTNERSHIP INTEREST, IF IN EITHER CASE SUCH ADMISSION IS PURSUANT TO A WRITTEN PARTNERSHIP AGREEMENT OR OTHER WRITING CONFIRMING THE ADMISSION.

**SECTION 6.** 7-62-401, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

**7-62-401. Admission of general partners.** (1.5) A PERSON MAY BE ADMITTED AS A GENERAL PARTNER TO A LIMITED PARTNERSHIP EITHER UPON FORMATION OF THE LIMITED PARTNERSHIP OR THEREAFTER WITHOUT MAKING A CONTRIBUTION OR BEING OBLIGATED TO MAKE A CONTRIBUTION TO THE LIMITED PARTNERSHIP OR ACQUIRING A PARTNERSHIP INTEREST, IF IN EITHER CASE SUCH ADMISSION IS PURSUANT TO A WRITTEN PARTNERSHIP AGREEMENT OR OTHER WRITING CONFIRMING THE ADMISSION.

**SECTION 7.** 7-64-101 (18), Colorado Revised Statutes, is amended to read:

**7-64-101. Definitions.** As used in this article, unless the context otherwise requires:

(18) "Partner" means a person who ~~has associated with another person to carry on as co-owners a business for profit as a partnership. For purposes of part 10 of this article, the term "partner" shall have the meaning set forth in section 7-64-1001~~ (†) IS ADMITTED TO A PARTNERSHIP AS A PARTNER OF THE PARTNERSHIP.

**SECTION 8.** Part 2 of article 64 of title 7, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

**7-64-205. Admission without contribution or transferrable interest.** A PERSON MAY BE ADMITTED AS A PARTNER TO A PARTNERSHIP EITHER UPON FORMATION OF THE PARTNERSHIP OR THEREAFTER WITHOUT MAKING A

CONTRIBUTION OR BEING OBLIGATED TO MAKE A CONTRIBUTION TO THE PARTNERSHIP, AND A PERSON MAY BE ADMITTED AS A PARTNER TO A PARTNERSHIP EITHER UPON FORMATION OF THE PARTNERSHIP OR THEREAFTER WITHOUT ACQUIRING A TRANSFERRABLE INTEREST, IF IN EITHER CASE SUCH ADMISSION IS PURSUANT TO A WRITTEN PARTNERSHIP AGREEMENT OR OTHER WRITING CONFIRMING THE ADMISSION.

**SECTION 9.** 7-70-102 (2) (a), Colorado Revised Statutes, is amended to read:

**7-70-102. Statement of trademark registration.** (2) A statement of trademark registration shall state:

(a) The true name of the registrant OR, IN THE CASE OF A GENERAL PARTNERSHIP THAT IS NOT A LIMITED LIABILITY PARTNERSHIP, THE TRUE NAME OF AT LEAST ONE GENERAL PARTNER OF THE GENERAL PARTNERSHIP;

**SECTION 10.** 7-70-104 (3) (a) and (3) (c), Colorado Revised Statutes, are amended, and the said 7-70-104 (3) is further amended BY THE ADDITION OF THE FOLLOWING NEW PARAGRAPHS, to read:

**7-70-104. Duration and renewal.** (3) The statement of renewal of trademark registration shall:

(a) State the true name of THE registrant OR, IN THE CASE OF A GENERAL PARTNERSHIP THAT IS NOT A LIMITED LIABILITY PARTNERSHIP, THE TRUE NAME OF AT LEAST ONE GENERAL PARTNER OF THE GENERAL PARTNERSHIP;

~~(c) State any change in a statement made pursuant to section 7-70-102 (2) (c), (2) (d), or (2) (e) in the statement of trademark registration, or in any previously filed statement related to the statement of trademark registration, that is necessary to make the statement or statements made pursuant to section 7-70-102 (2) (c), (2) (d), or (2) (e) correct as of the date the statement of renewal of trademark registration is delivered for filing~~ IF THE REGISTRANT IS AN INDIVIDUAL, STATE THE INDIVIDUAL'S PRINCIPAL ADDRESS;

(c.5) IF THE REGISTRANT IS AN ENTITY OTHER THAN A REPORTING ENTITY, STATE THE ENTITY'S PRINCIPAL ADDRESS;

(c.7) IF THE REGISTRANT IS NEITHER AN INDIVIDUAL RESIDENT OF THIS STATE NOR AN ENTITY THAT IS REQUIRED TO MAINTAIN A REGISTERED AGENT PURSUANT TO PART 7 OF ARTICLE 90 OF THIS TITLE, STATE EITHER OF THE FOLLOWING:

(I) IF THE REGISTRANT DESIRES TO APPOINT A REGISTERED AGENT PURSUANT TO SECTION 7-70-108, THE REGISTERED AGENT NAME, THE REGISTERED AGENT ADDRESS, AND THAT THE PERSON APPOINTED AS THE REGISTERED AGENT FOR THE REGISTRANT HAS CONSENTED TO BEING SO APPOINTED; OR

(II) THE MAILING ADDRESS TO WHICH SERVICE OF PROCESS IN ANY PROCEEDING BASED ON A CAUSE OF ACTION WITH RESPECT TO THE STATEMENT OF TRADEMARK REGISTRATION MAY BE MAILED PURSUANT TO SECTION 7-70-108;

**SECTION 11.** 7-70-108 (1) (b), Colorado Revised Statutes, is amended to read:

**7-70-108. Service of process on a registrant.** (1) A registrant who is neither an individual resident of this state nor an entity that is required to maintain a registered agent pursuant to part 7 of article 90 of this title shall either:

(b) Be deemed to have authorized service of process on it in connection with any such cause of action by registered mail or by certified mail, return receipt requested, addressed to the registrant at the mailing address, if any, furnished pursuant to section 7-70-102 (2) (e) (II), 7-70-104 ~~(3)(c)~~ (3) (c.7) (II), or 7-70-106 ~~(2)(f)~~ (2) (f) (II), as it may have been corrected by a statement of correction filed pursuant to section 7-90-305 or changed in a statement of change filed pursuant to section 7-90-305.5, and, if no such address has been furnished, to the registrant at the registrant's principal address.

**SECTION 12.** The introductory portion to 7-71-105 (1) and 7-71-105 (1) (c), Colorado Revised Statutes, are amended, and the said 7-71-105 (1) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

**7-71-105. Renewal of statement of trade name.** (1) A person other than a reporting entity having an effective statement of trade name on file in the records of the secretary of state may renew the statement of trade name by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of trade name renewal at any time during the last three calendar months the statement of trade name is effective. A filed statement of trade name renewal ~~shall extend~~ EXTENDS, by one calendar year, the period during which the statement of trade name to which it relates is effective. A statement of trade name renewal shall state, with respect to the statement of trade name to be renewed:

(c) ~~Any change in any statement made in the statement of trade name, or in any previously filed statement related to such statement of trade name, necessary to make any statement made pursuant or with respect to section 7-71-103 (1) (c), (1) (e), or (1) (f) correct as of the date the statement of trade name renewal is delivered for filing; and~~ THE PERSON'S PRINCIPAL ADDRESS;

(c.5) A BRIEF DESCRIPTION OF THE KIND OF BUSINESS TRANSACTED, OR CONTEMPLATED TO BE TRANSACTED, IN THIS STATE UNDER THE NAME; AND

**SECTION 13.** 7-90-304 (2), Colorado Revised Statutes, is amended to read:

**7-90-304. Effective time and date of filed document.** (2) A filed document may state a delayed effective time and date, and if it does so the filed document becomes effective at the later of the time and date so stated or the time and date the filed document is filed by the secretary of state, as such time and date are stated in the records of the secretary of state. If a filed document states a delayed effective date but not a time, the filed document is effective at the later of ~~twelve midnight~~ 11:59 P.M. on that date or the time and date the filed document is filed by the secretary of state, as such time and date are stated in the records of the secretary of state. If a filed document states a delayed effective date that is later than the ninetieth day after the date the filed document is filed, the filed document is effective ~~twelve midnight~~ AT 11:59 P.M. on the ninetieth day after it is filed. A filed

document may state the order in which the matters provided for in the filed document are deemed to have occurred. ~~The provisions of~~ This subsection (2) may be limited by other provisions of this title. In the event of conflict between ~~the provisions of~~ this subsection (2) and any other provision of this title, such other provision of this title ~~shall control~~ CONTROLS.

**SECTION 14.** The introductory portion to 7-90-501 (1), Colorado Revised Statutes, is amended to read:

**7-90-501. Annual reports.** (1) Each reporting entity shall deliver to the secretary of state, for filing pursuant to part 3 of this article, an annual report that states the entity name of the reporting entity, the jurisdiction under the law of which the reporting entity is formed, and: ~~if different from the most recent information contained in the records of the secretary of state:~~

**SECTION 15.** The introductory portion to 7-90-604 (3) and 7-90-604 (3) (b) and (3) (c), Colorado Revised Statutes, are amended, and the said 7-90-604 (3) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

**7-90-604. Registered true name of a foreign entity.** (3) A foreign entity that has in effect a registration of its true name pursuant to this section may renew such registration by delivering to the secretary of state, for filing pursuant to part 3 of this article, on or before December 31 of the year of registration, a statement of renewal of registration of true name that complies with ~~the requirements of~~ this subsection (3). When filed, the statement of renewal of registration renews the registration for the following year. The statement of renewal of registration of true name shall state:

(b) The FORM OF ENTITY AND THE jurisdiction under the law of which it is formed; and

(c) ~~That the registration of its true name is renewed pursuant to this section:~~

(d) THE PRINCIPAL OFFICE ADDRESS OF THE ENTITY'S PRINCIPAL OFFICE.

**SECTION 16. Repeal.** 7-90-706, Colorado Revised Statutes, is repealed as follows:

**7-90-706. Application to dissolved or delinquent entities.** ~~This part 7, including, without limitation, section 7-90-704 (2), continues to apply to every domestic entity for which a constituent document is on file in the records of the secretary of state and to every foreign entity authorized to transact business or conduct activities in this state that has not relinquished such authority, after the dissolution or delinquency of the entity for any reason:~~

**SECTION 17.** 7-90-902 (2), Colorado Revised Statutes, is amended to read:

**7-90-902. Declaration of delinquency.** (2) If the entity does not correct each ground identified in the notice of the secretary of state for declaring it delinquent or demonstrate to the reasonable satisfaction of the secretary of state that such ground does not exist within sixty days after delivery of the notice, the entity shall be delinquent following the expiration of such sixty days. ~~Thereafter, the secretary of~~

~~state shall deliver notice of the fact of delinquency to the entity at the entity's principal office address and to the registered agent address of the entity's most recent registered agent; except that failure to deliver such notice shall not affect the fact of delinquency, and no person shall have a cause of action if the notice is not delivered.~~

**SECTION 18.** 7-90-904 (4) (a), Colorado Revised Statutes, is amended to read:

**7-90-904. Cure of delinquency.** (4) (a) Except as provided in paragraphs (b) and (c) of this subsection (4), the entity name of an entity following the curing of its delinquency shall be the same as the entity name, determined without regard to section 7-90-601.6, of the entity at the time the entity cures its delinquency if such entity name complies with section 7-90-601 at the time the entity cures its delinquency. If such entity name would not be distinguishable on the records of the secretary of state as contemplated in section 7-90-601, the entity name of the entity following curing of its delinquency shall be such entity name followed by the words "delinquency cured" and the MONTH, DAY, AND year ~~thereof~~ OF THE EFFECTIVE DATE OF THE STATEMENT CURING DELINQUENCY.

**SECTION 19.** 7-90-1004, Colorado Revised Statutes, is amended to read:

**7-90-1004. Entity name upon reinstatement.** The domestic entity name of a domestic entity following reinstatement shall be the domestic entity name, determined without regard to section 7-90-601.5, of the domestic entity at the time of reinstatement if such domestic entity name complies with section 7-90-601 at the time of reinstatement. If that domestic entity name does not comply with section 7-90-601, the domestic entity name of the domestic entity following reinstatement shall be that domestic entity name followed by the word "reinstated" and the MONTH, DAY, AND year of THE EFFECTIVE DATE OF THE ARTICLES OF reinstatement.

**SECTION 20.** 7-128-202, Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

**7-128-202. Action without meeting.** (1) UNLESS OTHERWISE PROVIDED IN THE BYLAWS, ANY ACTION REQUIRED OR PERMITTED BY ARTICLES 121 TO 137 OF THIS TITLE TO BE TAKEN AT A BOARD OF DIRECTORS' MEETING MAY BE TAKEN WITHOUT A MEETING IF NOTICE IS TRANSMITTED IN WRITING TO EACH MEMBER OF THE BOARD AND EACH MEMBER OF THE BOARD BY THE TIME STATED IN THE NOTICE:

(a) VOTES IN WRITING FOR SUCH ACTION; OR

(b) (I) VOTES IN WRITING AGAINST SUCH ACTION, ABSTAINS IN WRITING FROM VOTING, OR FAILS TO RESPOND OR VOTE; AND

(II) FAILS TO DEMAND IN WRITING THAT ACTION NOT BE TAKEN WITHOUT A MEETING.

(2) THE NOTICE REQUIRED BY SUBSECTION (1) OF THIS SECTION SHALL STATE:

(a) THE ACTION TO BE TAKEN;

(b) THE TIME BY WHICH A DIRECTOR MUST RESPOND;

(c) THAT FAILURE TO RESPOND BY THE TIME STATED IN THE NOTICE WILL HAVE THE SAME EFFECT AS ABSTAINING IN WRITING BY THE TIME STATED IN THE NOTICE AND FAILING TO DEMAND IN WRITING BY THE TIME STATED IN THE NOTICE THAT ACTION NOT BE TAKEN WITHOUT A MEETING; AND

(d) ANY OTHER MATTERS THE NONPROFIT CORPORATION DETERMINES TO INCLUDE.

(3) ACTION IS TAKEN UNDER THIS SECTION ONLY IF, AT THE END OF THE TIME STATED IN THE NOTICE TRANSMITTED PURSUANT TO SUBSECTION (1) OF THIS SECTION:

(a) THE AFFIRMATIVE VOTES IN WRITING FOR SUCH ACTION RECEIVED BY THE NONPROFIT CORPORATION AND NOT REVOKED PURSUANT TO SUBSECTION (5) OF THIS SECTION EQUAL OR EXCEED THE MINIMUM NUMBER OF VOTES THAT WOULD BE NECESSARY TO TAKE SUCH ACTION AT A MEETING AT WHICH ALL OF THE DIRECTORS THEN IN OFFICE WERE PRESENT AND VOTED; AND

(b) THE NONPROFIT CORPORATION HAS NOT RECEIVED A WRITTEN DEMAND BY A DIRECTOR THAT SUCH ACTION NOT BE TAKEN WITHOUT A MEETING OTHER THAN A DEMAND THAT HAS BEEN REVOKED PURSUANT TO SUBSECTION (5) OF THIS SECTION.

(4) A DIRECTOR'S RIGHT TO DEMAND THAT ACTION NOT BE TAKEN WITHOUT A MEETING SHALL BE DEEMED TO HAVE BEEN WAIVED UNLESS THE NONPROFIT CORPORATION RECEIVES SUCH DEMAND FROM THE DIRECTOR IN WRITING BY THE TIME STATED IN THE NOTICE TRANSMITTED PURSUANT TO SUBSECTION (1) OF THIS SECTION AND SUCH DEMAND HAS NOT BEEN REVOKED PURSUANT TO SUBSECTION (5) OF THIS SECTION.

(5) ANY DIRECTOR WHO IN WRITING HAS VOTED, ABSTAINED, OR DEMANDED ACTION NOT BE TAKEN WITHOUT A MEETING PURSUANT TO THIS SECTION MAY REVOKE SUCH VOTE, ABSTENTION, OR DEMAND IN WRITING RECEIVED BY THE NONPROFIT CORPORATION BY THE TIME STATED IN THE NOTICE TRANSMITTED PURSUANT TO SUBSECTION (1) OF THIS SECTION.

(6) UNLESS THE NOTICE TRANSMITTED PURSUANT TO SUBSECTION (1) OF THIS SECTION STATES A DIFFERENT EFFECTIVE DATE, ACTION TAKEN PURSUANT TO THIS SECTION SHALL BE EFFECTIVE AT THE END OF THE TIME STATED IN THE NOTICE TRANSMITTED PURSUANT TO SUBSECTION (1) OF THIS SECTION.

(7) A WRITING BY A DIRECTOR UNDER THIS SECTION SHALL BE IN A FORM SUFFICIENT TO INFORM THE NONPROFIT CORPORATION OF THE IDENTITY OF THE DIRECTOR, THE VOTE, ABSTENTION, DEMAND, OR REVOCATION OF THE DIRECTOR, AND THE PROPOSED ACTION TO WHICH SUCH VOTE, ABSTENTION, DEMAND, OR REVOCATION RELATES. UNLESS OTHERWISE PROVIDED BY THE BYLAWS, ALL COMMUNICATIONS UNDER THIS SECTION MAY BE TRANSMITTED OR RECEIVED BY THE NONPROFIT CORPORATION BY ELECTRONICALLY TRANSMITTED FACSIMILE, E-MAIL, OR OTHER FORM OF WIRE OR WIRELESS COMMUNICATION. FOR PURPOSES OF THIS SECTION, COMMUNICATIONS TO THE NONPROFIT CORPORATION ARE NOT EFFECTIVE

UNTIL RECEIVED.

(8) ACTION TAKEN PURSUANT TO THIS SECTION HAS THE SAME EFFECT AS ACTION TAKEN AT A MEETING OF DIRECTORS AND MAY BE DESCRIBED AS SUCH IN ANY DOCUMENT.

(9) ALL WRITINGS MADE PURSUANT TO THIS SECTION SHALL BE FILED WITH THE MINUTES OF THE MEETINGS OF THE BOARD OF DIRECTORS.

**SECTION 21.** 24-10-109 (3), Colorado Revised Statutes, is amended to read:

**24-10-109. Notice required - contents - to whom given - limitations.** (3) If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing body of the public entity or the attorney representing the public entity. Such notice shall be effective upon mailing by registered ~~mail~~ OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, or upon personal service.

**SECTION 22.** 31-25-806 (1), Colorado Revised Statutes, is amended to read:

**31-25-806. Board membership - qualifications - nominations - rules - removal.** (1) Each appointed member of the board, except any member from the governing body, shall reside, be a business lessee, or own real property in the downtown development district within the municipality in which the authority is located. ~~An officer or director of a corporation~~ A MANAGER, AS THAT TERM IS DEFINED IN SECTION 7-90-102, C.R.S., AN AGENT, OR AN EMPLOYEE OF AN ENTITY, AS THAT TERM IS DEFINED IN SECTION 7-90-102, C.R.S., having its place of business in the downtown development district shall be eligible for appointment to the board. No officer or employee of the municipality where the authority is located, other than any appointee from the governing body, shall be eligible for appointment to the board. Within thirty days after the occurrence of a vacancy, the governing body, except as provided in section 31-25-805 (3), shall appoint a successor.

**SECTION 23.** 7-42-101 (3), Colorado Revised Statutes, is amended to read:

**7-42-101. Additional statements in certificates.** (3) In the case of a municipal corporation, ~~which~~ COUNTY, SPECIAL DISTRICT, OR ENTITY, AS THAT TERM IS DEFINED IN SECTION 7-90-102, THAT is a member or stockholder of a corporation described in subsection (1) or (2) of this section, an individual officer, PARTNER, MEMBER, MANAGER, agent, or employee of the municipal corporation, ~~may be~~ COUNTY, SPECIAL DISTRICT, OR ENTITY AS designated BY THE MUNICIPAL CORPORATION, COUNTY, SPECIAL DISTRICT, OR ENTITY IS ELIGIBLE FOR ELECTION to serve as a director of the corporation irrespective of the fact that such individual is not a member or stockholder of the corporation.

**SECTION 24.** 13-17-102 (8), Colorado Revised Statutes, is amended to read:

**13-17-102. Attorney fees - definitions.** (8) ~~The provisions of~~ This section shall not apply to traffic offenses, matters brought under the provisions of the "Colorado Children's Code", title 19, C.R.S., or related juvenile matters, or matters involving

violations of ~~local government~~ MUNICIPAL ordinances. ~~and resolutions.~~ For purposes of this subsection (8), "local government" shall mean a county, home rule county, home rule or statutory city, town, territorial charter city, or city and county.

**SECTION 25. Adjustments to the 2009 long bill.** For the implementation of this act, appropriations made in the annual general appropriation act for the fiscal year beginning July 1, 2009, to the department of state, administration, are decreased by seventeen thousand three hundred forty-three dollars (\$17,343) cash funds. Said sum shall be from the department of state cash fund created in section 24-21-104 (3) (b), Colorado Revised Statutes.

**SECTION 26. Effective date - applicability.** This act shall take effect upon passage and shall apply to acts occurring on or after said date; except that sections 1, 2, 3, 15, and 17 of this act shall take effect December 1, 2009, and shall apply to acts occurring on or after said date.

**SECTION 27. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 14, 2009

CHAPTER 168

**WATER AND IRRIGATION**

**HOUSE BILL 09-1233**

BY REPRESENTATIVE(S) Vigil, Court, Curry, Fischer, Frangas, Hullinghorst, Labuda, Looper, McNulty, Merrifield, Pace, Tipton;  
also SENATOR(S) Schwartz, Bacon, Foster, Gibbs, Groff, Heath, Hodge, Newell, Romer, Sandoval, Tapia.

**AN ACT**

**CONCERNING THE RECOGNITION OF ACEQUIAS, AND, IN CONNECTION THEREWITH, AUTHORIZING ACEQUIA DITCH CORPORATIONS.**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1. Legislative declaration.** (1) The general assembly hereby finds that:

(a) The first nonnative Americans to settle in Colorado were Hispanics from colonial Mexico, who brought with them their ancient irrigation practices based on a community ditch called an "acequia", pursuant to which water was treated as a community resource and allocated based upon equity and need rather than priority of appropriation;

(b) Colorado's territorial session laws from 1868, 1872, and 1874 recognized the validity of acequias within the counties of Costilla, Conejos, Huerfano, and Las Animas, including the requirement for irrigators to contribute labor to the upkeep of the acequia and a preference over other diversions for acequias' diversions regardless of priority;

(c) As the general assembly recognized in the following excerpt from Senate Joint Resolution 02-028, the continued operation of these historic acequias is an "essential foundation for the sustenance of the local economy":

"WHEREAS, Spanish American settlers founded the Town of San Luis in the Culebra Valley in 1852, thus making it the oldest town in Colorado; and

"WHEREAS, In keeping with their ancestors' acequias tradition, these settlers

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

quickly initiated an irrigation system; and

"WHEREAS, The oldest water right in Colorado is attributed to the San Luis People's Ditch, with a priority date of April 10, 1852, in the amount of 21 cubic feet per second from Culebra Creek in Costilla County; and

"WHEREAS, Originally, the land adjacent to the Ditch was divided into strips approximately 100 yards wide and 16 to 20 miles long, allowing settlers to have irrigated farmland near the Ditch and also to have access to range and timber land, and today, the Ditch is 4 miles long and irrigates 1,600 acres of farmland; and

"WHEREAS, The San Luis People's Ditch has been continuously operated for irrigation purposes for 150 years, thus making it an essential foundation for the sustenance of the local economy; . . ."

(d) Upon adoption of Colorado's constitution, the prior appropriation system became the law governing water allocation; and

(e) The prior appropriation system is, in fundamental ways, inconsistent with the community-based principles upon which acequias were founded.

(2) The general assembly hereby determines that:

(a) Notwithstanding the constitutional establishment of the prior appropriation system, communities that were historically served by an acequia have used informal methods to continue to allocate water based upon equity in addition to priority and to treat water as a community resource; and

(b) Recognition by the general assembly of the continuing existence and use of acequias, while continuing to comply with the constitutional requirements of priority administration of tributary water, is critical to preserving the historic value that acequias provide to the communities in which they are located.

(3) The general assembly hereby declares that the purpose of this act is to promote and encourage the continued operation of acequias and the viability of the historic communities that depend on those acequias.

**SECTION 2.** Article 42 of title 7, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

**7-42-101.5. Acequia mutual ditch - definition - powers.** (1) FOR PURPOSES OF THIS SECTION, "ACEQUIA" MEANS A DITCH THAT:

(a) ORIGINATED PRIOR TO COLORADO'S STATEHOOD;

(b) HAS HISTORICALLY TREATED WATER DIVERTED BY THE ACEQUIA AS A COMMUNITY RESOURCE AND HAS THEREFORE ATTEMPTED TO ALLOCATE WATER IN THE ACEQUIA BASED UPON EQUITY IN ADDITION TO PRIORITY;

(c) RELIES ESSENTIALLY ON GRAVITY-FED SURFACE WATER DIVERSIONS;

(d) SUPPLIES IRRIGATION WATER TO LONG LOTS THAT ARE PERPENDICULAR TO THE STREAM OR DITCH TO MAXIMIZE THE NUMBER OF LANDOWNERS WHO HAVE ACCESS TO WATER;

(e) HAS HISTORICALLY BEEN OPERATED PURSUANT TO A ONE LANDOWNER-ONE VOTE SYSTEM; AND

(f) HAS HISTORICALLY RELIED ON LABOR SUPPLIED BY THE OWNERS OF IRRIGATED LAND SERVED BY THE ACEQUIA.

(2) SUBJECT TO ANY CONTRARY PROVISION OF SUBSECTION (3) OF THIS SECTION, THE PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF THIS ARTICLE OTHER THAN THIS SECTION THAT APPLY TO THE CREATION, POWERS, DUTIES, AND GOVERNANCE OF A DITCH CORPORATION SUBJECT TO THIS ARTICLE SHALL BE DEEMED TO APPLY TO THE CREATION, POWERS, DUTIES, AND GOVERNANCE OF AN ACEQUIA DITCH CORPORATION.

(3) AN ACEQUIA DITCH CORPORATION MAY BE ORGANIZED PURSUANT TO THIS ARTICLE, AND A DITCH CORPORATION ORGANIZED PURSUANT TO THIS ARTICLE MAY CONVERT TO AN ACEQUIA DITCH CORPORATION, IF:

(a) AT LEAST TWO-THIRDS OF THE IRRIGATED LAND SERVED BY THE DITCH IS PLATTED OR ORGANIZED INTO LONG LOTS, THE LONGEST AXES OF WHICH ARE PERPENDICULAR TO THE STREAM OR DITCH;

(b) SURFACE WATER RIGHTS PROVIDE ALL OF THE WATER RIGHTS USED FOR IRRIGATION IN THE DITCH, AND SUCH WATER RIGHTS HAVE HAD SUBSTANTIALLY UNINTERRUPTED USE SINCE BEFORE COLORADO'S STATEHOOD;

(c) THE IRRIGATED LAND SERVED BY THE DITCH IS LOCATED WHOLLY IN ONE OR MORE OF THE COUNTIES OF COSTILLA, CONEJOS, HUERFANO, AND LAS ANIMAS; AND

(d) AS REQUIRED PURSUANT TO SECTION 7-42-101, THE STOCKHOLDERS OF THE DITCH FILE ARTICLES OF INCORPORATION, OR AN AMENDMENT TO THE ARTICLES OF INCORPORATION, THAT STATE THE STOCKHOLDERS' INTENTION TO CREATE OR CONVERT TO AN ACEQUIA DITCH CORPORATION.

(4) AN ACEQUIA DITCH CORPORATION, IF ITS ARTICLES OF INCORPORATION SO STATE, MAY SPECIFY IN ITS BYLAWS THAT:

(a) ITS ELECTIONS MAY BE HELD PURSUANT TO A ONE LANDOWNER-ONE VOTE SYSTEM;

(b) OWNERS OF LAND IRRIGATED BY THE DITCH CAN BE REQUIRED TO CONTRIBUTE LABOR TO THE MAINTENANCE AND REPAIR OF THE ACEQUIA OR, IN THE ALTERNATIVE, TO PAY AN ASSESSMENT IN LIEU OF SUCH LABOR;

(c) WATER IN THE DITCH MAY BE ALLOCATED ON A BASIS OTHER THAN PRO RATA OWNERSHIP OF THE CORPORATION; AND

(d) THE CORPORATION HAS A RIGHT OF FIRST REFUSAL REGARDING THE SALE,

LEASE, OR EXCHANGE OF ANY SURFACE WATER RIGHT THAT HAS HISTORICALLY BEEN USED TO IRRIGATE LONG-LOT LAND BY THE ACEQUIA.

**SECTION 3. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 22, 2009

## HOUSE BILL 07-1135

(58) "Reporting entity" means ANY DOMESTIC ENTITY AS TO WHICH A CONSTITUENT FILED DOCUMENT IS ON FILE IN THE RECORDS OF THE SECRETARY OF STATE OTHER THAN A DOMESTIC LIMITED PARTNERSHIP THAT IS NOT A REPORTING LIMITED PARTNERSHIP, and any foreign entity authorized to transact business or conduct activities in this state. An entity ceases to be a reporting entity upon the dissolution of the entity, the entity becoming delinquent, the relinquishment of the entity's authority to transact business or conduct activities in this state, or, if the entity is a limited liability partnership or a limited liability limited partnership THAT IS NOT A REPORTING LIMITED PARTNERSHIP, its withdrawal of its statement of registration. A dissolved entity that was a reporting entity before its dissolution again becomes a reporting entity upon its reinstatement under part 10 of this article, and a delinquent entity again becomes a reporting entity upon the curing of its delinquency pursuant to section 7-90-904.

(58.5) "REPORTING LIMITED PARTNERSHIP" MEANS:

(a) A DOMESTIC LIMITED PARTNERSHIP FORMED AFTER JULY 26, 2009;

(b) A DOMESTIC LIMITED PARTNERSHIP FORMED UNDER ARTICLE 61 OF THIS TITLE THAT ELECTS AFTER JULY 26, 2009, TO BE GOVERNED BY ARTICLE 62 OF THIS TITLE;

(c) A DOMESTIC LIMITED PARTNERSHIP FORMED UNDER OR GOVERNED BY ARTICLE 62 OF THIS TITLE FOR WHICH, AFTER JULY 26, 2009, A STATEMENT OF REGISTRATION IS DELIVERED TO THE SECRETARY OF STATE, FOR FILING PURSUANT TO PART 3 OF THIS ARTICLE, AND WHICH IS SUBSEQUENTLY ON FILE IN THE RECORDS OF THE SECRETARY OF STATE; OR (d) ANY OTHER DOMESTIC LIMITED PARTNERSHIP FORMED UNDER OR GOVERNED BY ARTICLE 62 OF THIS TITLE AS TO WHICH A STATEMENT OF ELECTION TO BE A REPORTING ENTITY IS ON FILE IN THE RECORDS OF THE SECRETARY OF STATE AFTER JULY 26, 2009.

## CHAPTER 141

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**CONSUMER AND COMMERCIAL TRANSACTIONS**


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SENATE BILL 09-084

BY SENATOR(S) Scheffel;  
also REPRESENTATIVE(S) Scanlan, Middleton, Todd.

**AN ACT**

**CONCERNING DOCUMENTS RELATED TO THE ROLE OF THE OFFICE OF THE SECRETARY OF STATE AS  
FILING OFFICE FOR SECURED TRANSACTIONS.**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** The introductory portion to 4-9-514 (b) and 4-9-514 (b) (2), Colorado Revised Statutes, are amended, and the said 4-9-514 (b) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

**4-9-514. Assignment of powers of secured party of record.** (b) Except as otherwise provided in subsection (c) of this section, a secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement ~~which~~ THAT:

(1.5) PROVIDES THE DATE THAT THE INITIAL FINANCING STATEMENT WAS FILED OR RECORDED;

(2) Provides the name of the assignor; ~~and the name of one of the debtors;~~ and

**SECTION 2.** 4-9-514, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

**4-9-514. Assignment of powers of secured party of record.** (d) AN ASSIGNMENT THAT WAS FILED IN ACCORDANCE WITH THIS SECTION PRIOR TO AUGUST 5, 2009, AND THAT IS ON FILE IN THE FILING OFFICE AS OF AUGUST 5, 2009, WHETHER OR NOT IT PROVIDES THE DATE THAT THE INITIAL FINANCING STATEMENT WAS FILED OR RECORDED, SHALL BE DEEMED TO HAVE BEEN FILED PURSUANT TO AND IN ACCORDANCE WITH THIS SECTION AS AMENDED AND SHALL HAVE THE SAME EFFECT

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

AS IF FILED PURSUANT TO THIS SECTION AS AMENDED.

**SECTION 3. Repeal.** 4-9-519 (b), Colorado Revised Statutes, is repealed as follows:

**4-9-519. Numbering, maintaining, and indexing records - communicating information provided in records.** (b) ~~A file number assigned after July 1, 2001, must include a digit that:~~

~~(1) Is mathematically derived from or related to the other digits of the file number; and~~

~~(2) Aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.~~

**SECTION 4.** 4-9-523 (d), Colorado Revised Statutes, is amended to read:

**4-9-523. Information from filing office - sale or license of records.** (d) In complying with its duty under subsection (c) of this section, the filing office may communicate information in any medium. However, if requested, the filing office shall communicate information by issuing ~~its written certificate~~ **A RECORD THAT CAN BE ADMITTED INTO EVIDENCE IN THE COURTS OF THIS STATE WITHOUT EXTRINSIC EVIDENCE OF ITS AUTHENTICITY.**

**SECTION 5. Act subject to petition - effective date - applicability.** (1) This act shall take effect August 5, 2009.

(2) However, if a referendum petition is filed against this act or an item, section, or part of this act during the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution, then the act, item, section, or part, shall not take effect unless approved by the people at a biennial regular general election and shall take effect on the date specified in subsection (1) or on the date of the official declaration of the vote thereon by proclamation of the governor, whichever is later.

(3) The provisions of this act shall apply to acts occurring on or after the applicable effective date of this act.

Approved: April 20, 2009

**NOTE: This bill has been prepared for the signature of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.**



SENATE BILL 09-283

BY SENATOR(S) Sandoval;  
also REPRESENTATIVE(S) Scanlan and Summers, Priola, Ryden, Vigil.

CONCERNING THE REDACTION BY THE SECRETARY OF STATE OF TAX  
IDENTIFICATION NUMBERS FROM SECURED TRANSACTION RECORDS  
FILED WITH THE SECRETARY OF STATE.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** Article 21 of title 24, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW PART to read:

PART 3  
REDACTION OF TAX IDENTIFICATION NUMBERS

**24-21-301. Definitions.** AS USED IN THIS PART 3, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "REDACT" MEANS TO OBSCURE INFORMATION CONTAINED IN A COPY OF A SECURED TRANSACTION RECORD.

(2) "SECURED TRANSACTION RECORD" MEANS A RECORD THAT HAS BEEN FILED IN THE OFFICE OF THE SECRETARY OF STATE PURSUANT TO PART

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

5 OF ARTICLE 9 OR ARTICLE 9.5 OR 9.7 OF TITLE 4, C.R.S.

(3) "TAX IDENTIFICATION NUMBER" MEANS A GROUPING OF NUMERICAL DIGITS IN A SECURED TRANSACTION RECORD THAT THE SECRETARY OF STATE DEEMS LIKELY TO BE THE SOCIAL SECURITY NUMBER OR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER OF AN INDIVIDUAL IDENTIFIED IN SUCH SECURED TRANSACTION RECORD.

**24-21-302. Redaction of tax identification number from secured transaction records - liability - rules.** (1) THE SECRETARY OF STATE MAY REDACT ANY TAX IDENTIFICATION NUMBER CONTAINED IN A SECURED TRANSACTION RECORD AND, FOR THIS PURPOSE, MAY USE COMMERCIALY AVAILABLE OR OTHER REDACTION SOFTWARE OR OTHER METHODS DETERMINED BY THE SECRETARY OF STATE TO BE COST EFFECTIVE.

(2) SUBJECT TO THE PROVISIONS OF SECTION 4-9-522, C.R.S., THE SECRETARY OF STATE SHALL RETAIN THE UNREDACTED ORIGINAL OF A SECURED TRANSACTION RECORD THAT CONTAINS A TAX IDENTIFICATION NUMBER. NOTWITHSTANDING ANY PROVISION OF PART 2 OF ARTICLE 72 OF THIS TITLE OR ANY OTHER PROVISION OF LAW, THE SECRETARY OF STATE SHALL NOT BE REQUIRED TO OPEN ANY SUCH UNREDACTED ORIGINAL TO PUBLIC INSPECTION; EXCEPT THAT A COMPLETE COPY OF THE UNREDACTED ORIGINAL OF SUCH SECURED TRANSACTION RECORD SHALL BE FURNISHED UPON APPLICATION TO THE SECRETARY OF STATE FOR A CERTIFIED COPY OF THAT SPECIFIC SECURED TRANSACTION RECORD.

(3) (a) ANY PERSON WHO BELIEVES THAT THE SECRETARY OF STATE HAS REDACTED INFORMATION IN A COPY OF A SPECIFIC SECURED TRANSACTION RECORD OTHER THAN THE SOCIAL SECURITY NUMBER OR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER OF AN INDIVIDUAL IDENTIFIED IN SUCH SECURED TRANSACTION RECORD MAY APPLY TO THE SECRETARY OF STATE FOR THE RESTORATION OF SUCH REDACTED INFORMATION.

(b) IF, UPON APPLICATION PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (3), THE SECRETARY OF STATE DETERMINES THAT SUCH REDACTED INFORMATION IS NOT THE SOCIAL SECURITY NUMBER OR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER OF AN INDIVIDUAL IDENTIFIED IN SUCH SECURED TRANSACTION RECORD, THE SECRETARY OF STATE SHALL RESTORE SUCH REDACTED INFORMATION SO THAT THE

INFORMATION IS PERCEIVABLE, ACCESSIBLE, AND OPEN TO PUBLIC INSPECTION.

(c) NOTHING IN THIS SECTION SHALL PRECLUDE THE RESTORATION OF REDACTED INFORMATION THAT THE SECRETARY OF STATE DETERMINES SHOULD NOT HAVE BEEN REDACTED.

(4) THE SECRETARY OF STATE SHALL NOT BE LIABLE FOR REDACTING OR FAILING TO REDACT A TAX IDENTIFICATION NUMBER PURSUANT TO THIS SECTION.

(5) THE SECRETARY OF STATE MAY PROMULGATE RULES IN ACCORDANCE WITH ARTICLE 4 OF THIS TITLE TO ADMINISTER THE PROVISIONS OF THIS SECTION, INCLUDING ANY RULES NECESSARY TO ESTABLISH PROCEDURES FOR REQUESTING THE REDACTION OF A TAX IDENTIFICATION NUMBER OR THE RESTORATION OF REDACTED INFORMATION THAT IS NOT THE SOCIAL SECURITY NUMBER OR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER OF AN INDIVIDUAL IDENTIFIED IN SUCH SECURED TRANSACTION RECORD.

**SECTION 2. Repeal.** 4-9-531 (c), Colorado Revised Statutes, is repealed as follows:

**4-9-531. Removal of social security numbers from financing statements in the custody of the secretary of state.** (c) ~~The secretary of state shall retain an electronic record of a financing statement that contains a social security number, but such a record shall be open for inspection, and copies or printouts of the record or information from the record shall be furnished only upon application to the secretary of state and only for good cause shown notwithstanding any provision of part 2 of article 72 of title 24, C.R.S., or any other provision of law.~~

**SECTION 3. Applicability.** This act shall apply to any secured transaction record in the possession of the secretary of state before, on, or after the effective date of this act.

**SECTION 4. Safety clause.** The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

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Brandon C. Shaffer  
PRESIDENT OF  
THE SENATE

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Terrance D. Carroll  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

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Karen Goldman  
SECRETARY OF  
THE SENATE

---

Marilyn Eddins  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

APPROVED \_\_\_\_\_

---

Bill Ritter, Jr.  
GOVERNOR OF THE STATE OF COLORADO

COLORADO COURT OF APPEALS

---

Court of Appeals No.: 08CA0059  
City and County of Broomfield District Court No. 06CV236  
Honorable Chris Melonakis, Judge

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Sheffield Services Company, a Colorado limited liability company, and Sheffield  
Country Estates, a Colorado limited liability company,

Plaintiffs-Appellants,

v.

Charles A. Trowbridge and Roy W. Mason,

Defendants-Appellees.

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ORDER AFFIRMED IN PART, VACATED IN PART,  
AND CASE REMANDED WITH DIRECTIONS

Division IV

Opinion by: JUDGE HAWTHORNE  
Roy and Webb, JJ., concur

Announced: May 28, 2009

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Montgomery, Kolodny, Amatuzio & Dusbabek, L.L.P., John R. Chase, Thomas  
H. Bolmstrom, Denver, Colorado, for Plaintiff-Appellant

Head & Associates, P.C., John F. Head, Denver, Colorado, for Defendants-  
Appellees

Plaintiff, Sheffield Services Company, LLC (Sheffield), appeals the trial court's amended order dismissing its "piercing the corporate veil" and wrongful attempt to deplete assets claims against defendant Charles A. Trowbridge, and its "negligent misrepresentation/nondisclosure" claim against Trowbridge and co-defendant Roy W. Mason. We affirm in part, vacate in part, and remand with directions.

### I. Facts and Procedural Background

Trowbridge and Mason co-managed Colfax Industrial, LLC (Colfax) and Villas Ventures, LLC (Villas) (collectively LLCs). Each LLC owned residential lots in a subdivision in the City and County of Broomfield that it intended to develop.

In April 1998, Colfax entered into a subdivision agreement with Broomfield. The agreement required the LLCs to complete specific landscaping and infrastructure improvements to receive necessary building permits. When the LLCs did not complete this work, Broomfield declared a breach of the agreement.

Later, on behalf of each LLC, Trowbridge negotiated a separate purchase and sale contract with Sheffield to sell it the lots owned by

the LLCs. Both contracts provided that each LLC remained responsible for completing the subdivision agreement's requirements.

Prior to closing on either contract, Sheffield was aware that the LLCs had not completed the improvements. Nevertheless, Sheffield closed on the contracts.

After the Villas closing but before the Colfax closing, Trowbridge and Mason received a letter from Broomfield explaining that it would withhold building permits if the LLCs failed to comply with the subdivision agreement. Trowbridge and Mason did not disclose to Sheffield, prior to the Colfax closing, either the contents of the letter or the LLCs' continuing noncompliance with the subdivision agreement.

After the Colfax closing, Sheffield learned of Broomfield's letter. To mitigate its losses, Sheffield assumed the LLCs' obligations under the subdivision agreement. Sheffield then filed this action against the LLCs, Trowbridge, and Mason, asserting four claims for relief: (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) negligent

misrepresentation/nondisclosure, and (4) wrongful attempt to deplete the LLCs' assets.

The trial court entered judgment against the LLCs jointly and severally on Sheffield's breach of contract and breach of implied covenant of good faith and fair dealing claims (collectively breach of contract claims), and dismissed all remaining claims.

Sheffield now appeals the trial court's order dismissing its piercing the corporate veil claim, which the court concluded had been tried by consent; its wrongful attempt to deplete assets claim against Trowbridge; and its nondisclosure/negligent misrepresentation claim against both Trowbridge and Mason. Because Sheffield concedes that Mason's personal liability is limited to its negligent misrepresentation/nondisclosure claim discussed in Part IV below, we address only Trowbridge's personal liability in Part II. And, because the court made no findings as to Trowbridge's status as a member or manager of Villas, we address his personal liability only as it relates to Colfax, and remand to the trial court to determine his status as to Villas.

## II. Holding LLC Manager Personally Liable

Sheffield contends the trial court erred in relying on section 7-80-107(1), C.R.S. 2008, which recognizes personal liability of members of a limited liability company under certain circumstances, to dismiss its claim against Trowbridge because he was not a member of Colfax. We agree.

Initially, we consider and reject Trowbridge's assertions that (1) no veil piercing claim can be considered in this case because Sheffield's complaint did not allege this theory, and thus he was not put on notice to defend against this claim until Sheffield's closing argument; and (2) the trial court abused its discretion in considering this claim because it was not tried by consent of the parties.

In general, an appellee must file a cross-appeal for an appellate court to consider an alleged error of the trial court which prejudiced the appellee. *Blocker Exploration Co. v. Frontier Exploration, Inc.*, 740 P.2d 983, 989 (Colo. 1987). However, an appellee, such as Trowbridge, who prevailed in the trial court on an issue may, without filing a notice of cross-appeal, raise arguments to support the judgment that would not increase his or her rights

under the judgment. *Fonden v. U.S. Home Corp.*, 85 P.3d 600, 601-02 (Colo. App. 2003).

In Colorado, the claim's substance rather than the appellation applied to the pleading by the litigant controls. *LaFond v. Basham*, 683 P.2d 367, 369 (Colo. App. 1984). Therefore, a pleading need only serve notice of the claim asserted. *Id.* If the substantive law provides relief on any theory given the facts that have been alleged, the claim should proceed to judgment. *Id.*

Here, the pleadings put Trowbridge on notice that Sheffield sought to hold him personally liable. The complaint sufficiently identifies the transactions involved in this case and states that "the individual defendants are named in their individual capacities." It alleges that Trowbridge "participated in the torts through direct involvement in the wrongful conduct of the [LLCs], including specific authorization, direction, active participation, or cooperation in the wrongful conduct that is alleged in this complaint." It also alleges Trowbridge engaged in wrongful transfers of distributions and income he received from the LLCs to others despite the LLCs' existing obligations to Sheffield.

We agree with the trial court that the complaint need not expressly state that Sheffield sought judgment against Trowbridge for the LLCs' breaches of contract based on a veil piercing theory. *See Eliminator, Inc. v. 4700 Holly Corp.*, 681 P.2d 536, 539 (Colo. App. 1984) (theory of the pleader is not important; all that is required is that the complaint be sufficiently broad to identify the transactions and inform defendant of the general nature of the action). In addition, because Trowbridge did not object to the court admitting Sheffield's exhibits that related solely to the issue of personal liability and did present documentary evidence concerning the same issue, he impliedly consented to trial on that issue. *See First Nat'l Bank v. Hastings*, 7 Colo. App. 129, 133, 42 P. 691, 692 (1895); *see also Carlson v. Bain*, 116 Colo. 526, 529, 182 P.2d 909, 911 (1947) (no amendment of complaint to conform to evidence is necessary where defendant does not attack sufficiency of complaint and does not object to evidence).

Accordingly, the trial court did not abuse its discretion in concluding that Trowbridge's personal liability was tried by consent of the parties. *See C.R.C.P 15(b)*; *see also Anderson v. Dunton Mgmt. Co.*, 865 P.2d 887, 891 (Colo. App. 1993) (trial court did not

abuse its discretion by allowing plaintiff to proceed against defendant on a theory of respondeat superior after the conclusion of trial because the evidence presented, proposed jury instructions, and conference during trial put defendant on notice of that theory).

Thus, we turn to Sheffield's argument on appeal that it is entitled to pierce the LLC veil and hold Trowbridge personally liable for the improper actions of Colfax.

#### A. Effect of Section 7-80-107(1)

The trial court determined that section 7-80-107(1) prohibited it from applying the common law doctrine of piercing the corporate veil to impose personal liability on Trowbridge because, although he was a manager, he was not a member of Colfax. Sheffield contends that the trial court erred because it relied on legislative silence to reach a result inconsistent with longstanding equitable jurisprudence on the doctrine of piercing the corporate veil. We agree that the trial court misconstrued section 7-80-107(1) because the General Assembly did not expressly, or by clear implication, manifest an intent to prohibit courts from using the common law piercing the corporate veil doctrine to hold an LLC manager personally liable for the the LLC's improper actions.

## 1. Standard of Review

We review de novo statutory interpretation. *Lauck v. E-470 Pub. Highway Auth.*, 187 P.3d 1148, 1150 (Colo. App. 2008). When construing statutes, our primary duty is to give effect to the intent of the legislature, looking first to the statute's plain language. *McIntire v. Trammell Crow, Inc.*, 172 P.3d 977, 979 (Colo. App. 2007).

If a statute is clear and unambiguous on its face, we need not look beyond the plain language and must apply the statute as written. *Id.* However, we should avoid a statutory construction that leads to an absurd result. *Regional Transp. Dist. v. Lopez*, 916 P.2d 1187, 1192 (Colo. 1996).

## 2. Analysis

In 1990, the General Assembly enacted the Colorado Limited Liability Company Act, becoming the third state after Wyoming and Florida, to adopt such legislation. *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1000 (Colo. 1998). In addition to favorable tax treatment and flexibility in management and financing, a limited liability company formed under the Act offers members and

managers the limited liability protection of a corporation. § 7-80-705, C.R.S. 2008; *Water, Waste & Land, Inc.*, 955 P.2d at 1000.

However, section 7-80-107(1) of the Act addresses the “application of corporation case law to set aside limited liability” and provides:

In any case in which a party seeks to hold the *members* of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

(Emphasis added.) Section 7-80-107 is the only section of the Act that addresses applying the common law principle of piercing the corporate veil in the LLC context.

Here, the trial court’s analysis assumed that section 7-80-107(1) displaced the common law piercing the corporate veil doctrine, at least insofar as it can be applied in actions by third parties seeking to hold an LLC manager personally liable for the LLC’s improper actions. We disagree because section 7-80-107(1) does not expressly preclude a court from applying the common law doctrine to hold a manager personally liable for an LLC’s alleged

improper actions. *See Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 78 (Colo. 1998) (the creation of a statutory remedy does not bar preexisting common law rights of action in the absence of clear legislative intent to negate the common law right); *see also Kauntz v. HCA-Healthone, LLC*, 174 P.3d 813, 816-17 (Colo. App. 2007) (quoting *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004)) (“[W]here the interaction of common law and statutory law is at issue, we acknowledge and respect the General Assembly’s authority to modify or abrogate common law, but can only recognize such changes when they are clearly expressed.”).

To construe section 7-80-107(1) as precluding application of this common law doctrine to LLC managers, as Trowbridge urges, would open the door to fraud. We presume that in adopting section 7-80-107(1), the General Assembly did not intend to create a safe harbor for LLC managers to perpetrate fraud and deceit. *See Water, Waste & Land, Inc.*, 955 P.2d at 1003 (it is presumed the General Assembly did not intend to create a safe harbor for deceit in adopting section 7-80-208, C.R.S. 2008).

In addition, to so construe section 7-80-107(1) would be inconsistent with the established common law rule that the doctrine

may be applied if equity so requires. *LaFond*, 683 P.2d at 369 (if adherence to the corporate fiction would promote injustice, protect fraud, defeat a legitimate claim, or defend crime, the invocation of equitable principles for the imposition of personal liability may occur).

Therefore, we conclude that the plain language of section 7-80-107(1) does not prohibit a court from applying the equitable common law doctrine of piercing the corporate veil to hold an LLC manager personally liable for the LLC's improper actions. Having so concluded, we now examine whether, absent a statutory restriction, the common law piercing doctrine applies to LLC managers, a question of first impression in Colorado.

#### B. Extending Common Law Piercing to an LLC Manager

Because the common law doctrine of piercing the corporate veil is most fully developed in cases concerning corporate shareholders, we begin by examining those cases.

Piercing the corporate veil is an equitable, common law doctrine that penetrates the corporate veil of limited liability to impose liability on individual shareholders for the corporation's obligations. *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006). Its

application is appropriate when a corporation is merely a corporate shareholder's alter ego, and the shareholder uses the corporate structure to perpetrate a wrong. *Id.*

A corporation is a shareholder's alter ego when it is a "mere instrumentality for the transaction of the shareholder[']s own affairs, and there is such a unity of interest in ownership that the separate personalities of the corporation and the [shareholder] no longer exist." *Id.* (quoting *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859, 867 n.7 (Colo. 2004)).

Courts consider various factors in identifying such a unity of interest in ownership so as to disregard the corporate fiction and treat the corporation and shareholder as alter egos, including whether (1) the corporation is operated as a distinct business entity, (2) assets and funds are commingled, (3) adequate corporate records are maintained, (4) the nature and form of the entity's ownership and control facilitate misuse by an insider, (5) the business is thinly capitalized, (6) the corporation is used as a "mere shell," (7) shareholders disregard legal formalities, and (8) corporate funds or assets are used for noncorporate purposes. *In re Phillips*,

139 P.3d at 644 (citing *Leonard v. McMorris*, 63 P.3d 323, 330 (Colo. 2003)).

After finding an alter ego relationship, the court must determine whether justice requires recognizing the relationship's substance because the corporate fiction was "used to perpetrate a fraud or defeat a rightful claim." *In re Phillips*, 139 P.3d at 644 (quoting *Contractors Heating & Supply Co. v. Scherb*, 163 Colo. 584, 588, 432 P.2d 237, 239 (1967)).

Last, the court must evaluate whether disregarding the corporate form and holding the shareholder personally liable for the corporation's acts will lead to an equitable result. *In re Phillips*, 139 P.3d at 644 (citing *Water, Waste & Land, Inc.*, 955 P.2d at 1004). The claimant seeking to pierce the corporate veil must show by clear and convincing evidence that each consideration above has been met. *In re Phillips*, 139 P.3d at 644 (citing *Contractors Heating & Supply Co.*, 163 Colo. at 588, 432 P.2d at 239).

In *LaFond v. Basham*, a division of this court extended the piercing the corporate veil doctrine beyond corporate shareholders by concluding that a corporate entity may be disregarded and

corporate directors held personally liable if equity so requires. The division reasoned that:

If adherence to the corporate fiction would promote injustice, protect fraud, defeat a legitimate claim, or defend crime, the invocation of equitable principles for the imposition of personal liability may occur.

. . . .

[And] to allow a director to hide behind the cloak of the corporation would promote injustice in that it would allow the actions of a director who used assets of a corporation for his personal gain to defeat the valid claim of a creditor.

*LaFond*, 683 P.2d at 369-70.

We perceive no basis for declining to extend this reasoning to impose personal liability on LLC managers. See *Water, Waste & Land, Inc.*, 955 P.2d at 1003 (quoting Robert B. Thompson, *The Taming of Limited Liability Companies*, 66 U. Colo. L. Rev. 921, 945 (1995): “It would be an unwarranted stretch to say that these [limited liability company statutes] intend to extend the insulation of limited liability beyond that traditionally provided by the corporate form. That means that participants in closely held enterprises will continue to be liable for their acts taken in the

entity's name that are wrongful or violate regulatory provisions either under agency law or by a court piercing the entity's veil.”).

Other courts have recognized that LLC managers are similar to corporate officers or directors and that no reason exists in law or equity for treating an LLC differently from a corporation when considering whether to disregard the legal entity. See *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323, 327, 329 (Wyo. 2002) (“[I]f members *and officers* of an LLC fail to treat it as a separate entity . . . , they should not enjoy immunity from individual liability for the LLC’s acts . . . . No reason exists in law or equity for treating an LLC differently than a corporation when considering whether to disregard the legal entity.” (emphasis added)); *Roth v. Voodoo BBQ, LLC*, 964 So. 2d 1095, 1097 n.3 (La. Ct. App. 2007) (manager of an LLC is similar to an officer or director of a corporation).

Whether the conduct in question is that of a corporate director, as in *LaFond*, or an LLC manager, as in this case, the injustice wrought by adherence to the corporate or LLC fiction is the same: the director’s or manager’s actions in using corporate or LLC assets for personal gain would defeat a creditor’s valid claim.

Comparing the trial court's findings in *LaFond* with those of the trial court here supports this conclusion.

In *LaFond*, the division relied on the trial court's findings that the defendant, although not a shareholder of the involved corporations, was a board of directors member and an officer, whereby he (1) clearly dictated all policy and activity for both corporations; (2) ran the corporations, alone determined when he would draw money from them, when he would lend money to them, how and when the money would be repaid to him, and when the corporations would rent office space in a building that he owned and made payments on with corporate funds; and (3) when the corporations were virtually insolvent, demanded payment upon his notes and took over corporate assets to the detriment of other creditors.

Here, the trial court found, with record support, that (1) the complicated, interrelated and commingled financial circumstances of Trowbridge and his various business entities were intended to frustrate the entities' creditors; (2) Trowbridge's overall conduct resulted in a clear financial benefit to him, which was not properly documented because of his elaborate scheme of concealment; and

(3) Trowbridge engaged in various transactions and complicit conduct that disregarded the separate LLC entities, intending to keep the “ambulance chasers” from identifying and reaching the LLCs’ members’ assets at the time of liquidation and provide him and one LLC member “plausible deniability” to insulate preferential distributions to another member.

Because allowing an LLC manager to hide behind the LLC’s cloak of limited liability would promote injustice, protect fraud, or defeat legitimate creditors’ claims, we conclude that the equitable common law doctrine of piercing the corporate veil may be applied to hold an LLC manager personally liable for the LLC’s improper actions.

Accordingly, because the trial court’s order dismissing Sheffield’s claim to hold Trowbridge personally liable for the LLCs’ obligations was based on an erroneous conclusion of law, we vacate the order and remand for the court to determine whether its findings as to Trowbridge’s conduct warrant applying the common law doctrine of piercing the corporate veil to hold him personally liable for Colfax’s breach of contract. The court shall make specific findings, and determine whether, under the common law, (1) Colfax

is Trowbridge's alter ego, (2) justice requires recognizing the substance of Trowbridge's relationship with Colfax because he used Colfax to perpetrate a fraud or defeat a rightful claim, and (3) disregarding the relationship's form and holding Trowbridge personally liable would lead to an equitable result.

### III. Wrongful Attempt to Deplete Assets

Sheffield contends that the trial court erred by ruling that (1) section 7-80-606, C.R.S. 2008, does not provide a remedy to an LLC's creditors, and (2) an LLC manager is not subject to the common law duty imposed on corporate officers and directors to avoid favoring personal interests over those of the corporation's creditors. We disagree with the first contention and agree with the second.

#### A. Section 7-80-606

Section 7-80-606, entitled "Limitations on distribution," provides in relevant part:

(1) A limited liability company shall not make a distribution to a member to the extent that at the time of distribution, after giving effect to the distribution, all liabilities of the limited liability company . . . exceed the fair value of the assets of the limited liability company . . . .

(2) *A member who receives a distribution in violation of subsection (1) of this section and who knew at the time of the distribution that the distribution violated subsection (1) of this section, shall be liable to the limited liability company for the amount of the distribution.*

(Emphasis added.)

This section permits an *LLC* to recover the amount of a wrongful distribution from a *member* who received it. Sheffield argues that it should be allowed to pursue a claim against Trowbridge under section 7-80-606 to recover wrongful distributions made by Colfax to one of its members. According to Sheffield, we should extend the analysis in *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982), to this case and interpret section 7-80-606 as allowing an LLC's creditor to seek personal liability of an LLC manager who knowingly violates the terms of the statute.

The statute at issue in *Ficor*, section 7-5-114(3), C.R.S. 1973, provided:

The *directors* of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known debts,

obligations, and liabilities *shall be jointly and severally liable to the corporation* for the value of such assets which are distributed, to the extent that such debts, obligations, and liabilities of the corporation are not thereafter paid and discharged.

(Emphasis added.) *Cf.* § 7-108-403(1), C.R.S. 2008 (director who votes for or assents to distribution made in violation of section 7-106-401, C.R.S. 2008, or articles of incorporation is personally liable to corporation).

Although the statute's plain language expressly provided a remedy only for the corporation, the court in *Ficor*, 639 P.2d at 393, held that "all creditors of a corporation, as a group" may assert the remedy provided by the statute "on behalf of the corporation for their own benefit." Therefore, the creditors as a group could recover the wrongfully distributed assets from the defendant corporate directors because those defendants were the parties expressly made liable for the wrongful distribution by the language of section 7-5-114(3).

Section 7-80-606(2), C.R.S. 2008, expressly provides that LLC members who receive a wrongful distribution are liable to the LLC. Sheffield asserts that two LLC members who are not parties to this

action received wrongful distributions. Hence, if we accept Sheffield's invitation to apply the *Ficor* analysis and read into section 7-80-606(2) a remedy for LLC creditors, that remedy would be against one or both of those non-party members. Therefore, even assuming, without deciding, that we would extend the *Ficor* analysis to this case, Sheffield could not prevail because the proper parties against whom Sheffield could claim under section 7-80-606 are not parties to this action.

#### B. Common Law Duty

Alternatively, Sheffield argues that the trial court erred in not extending to the LLC setting the common law duty owed by corporate officers and directors to avoid favoring their own interests over creditors' claims. We agree.

Under the common law, an insolvent corporation's directors and officers are "trustees" for corporate creditors. *Alexander v. Anstine*, 152 P.3d 497, 502 (Colo. 2007). However, as trustees, corporate directors and officers do not owe the corporation's creditors the full set of fiduciary duties owed to a solvent corporation's shareholders. *Id.* Their duty is limited and requires that, when a corporation becomes insolvent, its directors and

officers must avoid favoring their own interests over creditors' claims. *Id.*; *Crowley v. Green*, 148 Colo. 142, 147, 365 P.2d 230, 232-33 (1961) (where a corporation is insolvent, its officers and directors cannot use corporate assets to prefer themselves to the prejudice of the corporation's creditors); *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1369 (Colo. App. 1993) (common law duty requires that when corporation is insolvent, directors may not defeat a creditor's claim by transferring corporate property for their own benefit). If the corporate director breaches this duty, he or she is personally liable to the corporate creditors for such "malfeasance." See *New Crawford Valley*, 877 P.2d at 1369; *Collie v. Becknell*, 762 P.2d 727, 731 (Colo. App. 1988).

We have concluded above that an LLC is a business entity alternative to a corporation, whose managers, like a corporation's shareholders and directors, are subject to the common law piercing doctrine. We perceive no basis for declining to extend our reasoning to impose personal liability on LLC managers under the common law "trustee doctrine" that requires corporate directors to avoid favoring their own interests over the corporation's creditors' claims when the corporation becomes insolvent.

Corporations and LLCs are equally susceptible to becoming insolvent and having a director or manager distribute entity assets in a manner favoring personal interests over the corporation's or LLC's creditors. Not to extend the common law trustee doctrine to LLC managers would open the door to fraud and create a safe harbor for managers to favor personal interests over the LLC's creditors.

Therefore, we conclude that when an LLC becomes insolvent, its manager owes a common law duty to the LLC's creditors to avoid favoring personal interests over those of creditors. Breach of this duty results in the LLC manager's personal liability to those creditors. *See id.* This personal liability is distinct from the personal liability that may be imposed by applying the piercing the corporate veil doctrine to LLC managers.

Here, the trial court found that when Trowbridge distributed LLC assets to one of the non-party members, those distributions were "preferential as to the claims of [Colfax's] creditors, including [Sheffield]." The court further found:

[The] entire factual pattern demonstrates complicit conduct intended to provide [Trowbridge] and one [non-party] member . . . plausible deniability

intended to insulate preferential distributions to another [non-party] member . The fair inference to be drawn from the overall conduct is that there was a clear financial benefit to [Trowbridge] although perhaps not documented, from this elaborate scheme of concealment.

However, the trial court made no findings whether Colfax was insolvent or whether Sheffield was its creditor at the time LLC assets were distributed. Therefore, we remand for the trial court to make those findings. If Colfax was or became insolvent when Trowbridge made those distributions, the court can then determine whether Trowbridge breached his common law duty owed to Colfax's creditors to avoid favoring his personal interests over theirs.

#### IV. Negligent Misrepresentation/Nondisclosure

Sheffield contends the trial court erred in dismissing its “negligent misrepresentation/nondisclosure” claim against Trowbridge and Mason based on Sheffield's failure to show it justifiably relied on their misrepresentation that all required development work had been completed such that it could obtain building permits. We disagree.

### A. Standard of Review

We review the trial court's legal conclusions de novo, *Hartsel Springs Ranch , Inc. v. Cross Slash Ranch, LLC*, 179 P.3d 237, 239 (Colo. App. 2007), and we defer to the trial court's findings of fact unless they have no support in the record. *Tatum v. Basin Res., Inc.*, 141 P.3d 863, 867 (Colo. App. 2005).

### B. Analysis

To prevail on a claim for “negligent misrepresentation,” Sheffield was required to prove that (1) Trowbridge and Mason supplied false information in their business transaction with Sheffield, (2) Trowbridge and Mason failed to exercise reasonable care or competence in communicating that information; and (3) Sheffield justifiably relied on the false information. *Campbell v. Summit Plaza Assocs.*, 192 P.3d 465, 477 (Colo. App. 2008).

Here, approximately two weeks prior to closing on the sale agreement between Colfax and Sheffield, Trowbridge and Mason received a letter from Broomfield informing them, in pertinent part:

Colfax Industrial, Ltd. [sic] has not completed the aforementioned improvements in the timeframe required by the Subdivision Agreement. Be advised that the City and County of Broomfield will withhold issuance of additional building permits . . . until these

matters are addressed.

Neither Trowbridge nor Mason disclosed this letter to Sheffield before closing. Nor did they tell Sheffield that Colfax failed to complete the infrastructure improvements between the time they received the letter and closing.

At the Colfax closing, Trowbridge signed the sales agreement with Sheffield, which contained Section 5.1, entitled “Development Work,” and provided:

Seller represents that to the best of its knowledge, the Lots [sic] are finished and all required development work with respect to the Lots and Subdivision [sic] have [sic] been completed in a good and workmanlike fashion in conformance with the approved construction drawings as required by the applicable subdivision improvement agreement, such that Buyer can obtain building permits for the construction of residential improvements thereon and certificates of occupancy upon the completion of same. The foregoing representations shall survive the Closing hereof.

Thus, because Trowbridge and Mason failed to disclose Colfax’s failure to complete the required infrastructure at or prior to closing, through Section 5.1 they misrepresented that the LLCs had complied with that section. Nevertheless, the trial court concluded that there “could not be justifiable reliance in this case,” and

dismissed Sheffield's "negligent misrepresentation/nondisclosure" claim.

Sheffield argues that the trial court erred in finding it did not justifiably rely on Trowbridge and Mason's contractual misrepresentations or failure to disclose the Broomfield letter because (1) the court should not have imputed inquiry notice to Sheffield, (2) Sheffield should not have been held to a heightened duty to investigate the representations because it is a sophisticated developer, (3) Trowbridge and Mason "enjoyed superior access to information concerning actions taken by Broomfield," (4) a "two-week window prior to closing in which to conduct an investigation" did not provide it with a "reasonable opportunity to investigate," and (5) defendants' knowledge of the contents of Broomfield's letter did not "transform their representation into a mere promise to do something in the future." Because we agree with the trial court that Sheffield did not justifiably rely on Trowbridge and Mason's misrepresentation and nondisclosure, we reject these arguments in turn. *See Nelson v. Gas Research Inst.*, 121 P.3d 340, 344 (Colo. App. 2005) (a necessary element to all fraud actions is that the plaintiff justifiably relied on the misrepresentation or the

nondisclosure). In our analysis we assume, but decline to decide, that although Mason did not sign the sales agreements, a claim against him for negligent nondisclosure would be viable. *Cf. Lininger v. Eisenbaum*, 764 P.2d 1202, 1214 (Colo. 1988) (J. Mullarky, concurring in part and dissenting in part) (law imposes upon physician duty of disclosing to patient certain information essential to patient’s informed consent to performance of medical or surgical procedure on patient).

#### 1. Inquiry Notice

The record includes evidence that prior to closing on either contract, Sheffield was aware that (1) it was purchasing real estate that was in foreclosure, (2) the LLCs had not completed the improvements required by the subdivision agreement, and (3) “non-performance by [the LLCs]” had created “turmoil . . . between [the LLCs] and [Broomfield].”

Sheffield’s general manager testified that, prior to closing on both contracts, he had at least one meeting with Broomfield personnel who were monitoring the LLCs’ progress. The general manager also testified that “[Broomfield] told [Sheffield] that [the LLCs’ landscaping requirements were] not complete,” and “nothing

was showing signs of it being completed.” In addition, the general manager stated that he had learned through thirty-seven years of experience that Broomfield had the option to withhold building permits if a developer failed to comply with subdivision agreement requirements.

Thus, the record shows that Sheffield knew specific facts that should have aroused its suspicion and prompted it to conduct a reasonably diligent inquiry into the LLCs’ compliance with Broomfield’s improvement requirements prior to the closing date. *See Adelson v. Bd. of County Comm’rs*, 875 P.2d 1387, 1389 (Colo. App. 1993) (imputation of inquiry notice requires sufficient facts to attract attention of interested persons and to prompt a reasonable person to inquire further). Therefore, we conclude that the trial court properly imputed inquiry notice to Sheffield.

## 2. Sophisticated Party

The trial court concluded that because Sheffield was a “sophisticated investor, laying out several million dollars as part of a transaction,” it should have proceeded more diligently before closing on the contracts with the LLCs. Sheffield concedes that it is a “sophisticated party” as to real estate development contracts.

However, it argues that its sophistication should not provide “legal protection” for the misrepresentations that “all development obligations had been sufficiently satisfied such that building permits could be obtained.”

In a negligent misrepresentation claim, a contracting party’s sophistication is relevant to determining whether a reasonable person in that party’s position would have diligently investigated the transaction’s subject matter prior to closing. *See Hart v. Ed-Ley Corp.*, 482 P.2d 421 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)) (purchaser with fifteen years experience in real estate investment could not complain of inadvertent false property tax statements given to him by vendors because purchaser had full and ample opportunity to make his own independent investigation).

Thus, we conclude that the trial court properly considered Sheffield’s sophistication.

### 3. Equal Access

Sheffield argues that “even if inquiry notice was properly imputed, such notice does not render reliance unreasonable unless the information is equally available to the parties and would lead to the discovery of the true facts.” Sheffield further asserts that

because only Trowbridge and Mason received Broomfield's letter, they "enjoyed superior access to information concerning actions taken by Broomfield."

A party cannot say they were deceived by the other's misrepresentations where the means of knowledge are equally available to both parties *and* the subject matter is equally open to their inspection. *See Hayden v. Perry*, 110 Colo. 347, 350, 134 P.2d 212, 213 (1943).

Here, the letter itself, which contained the information that Broomfield would not issue building permits, was not equally available to Sheffield. However, the information in the letter was equally available to both parties. Sheffield had an unfettered opportunity to conduct a reasonable investigation and discover the information contained in the letter. Again, by physically inspecting the lots and inquiry to Broomfield, Sheffield would have obtained the same information contained in the letter, which defendants did not disclose.

Because Sheffield failed to exercise that opportunity, we reject its argument. *Hayden*, 110 Colo. at 350, 134 P.2d at 213; *see also Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.*, 57 P.3d 738, 749

(Colo. App. 2002) (citing *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587 (Colo. App. 2000)) (if a party has access to information that was equally available to both parties and would have led to the discovery of the true facts, that party has no right to rely upon a misrepresentation).

#### 4. Reasonable Time to Investigate

Trowbridge and Mason received Broomfield's letter on or about June 16, 2004. The LLCs and Sheffield closed on the Colfax contract on June 30, 2004. No evidence in the record suggests that between these dates Sheffield could not have physically inspected the LLCs' progress and asked Broomfield whether it would preclude issuance of building permits. Thus, we agree with the trial court that two weeks was a reasonable time for Sheffield to investigate.

In sum, because Sheffield had a full and complete opportunity to investigate and ascertain facts concerning the lots it planned to purchase, we conclude that it may not recover from defendants on the theory that it was deceived by their misrepresentations. See *Cherrington v. Woods*, 132 Colo. 500, 506, 290 P.2d 226, 228 (1955).

## 5. Promise for Future Event

Having so concluded, we need not address Sheffield's additional argument that "the fact that [defendants'] knowledge changed based upon information regarding a potential future event does not transform their representation into a mere promise to do something in the future."

## V. Conclusion

The trial court's order is affirmed to the extent it dismisses (1) Sheffield's negligent misrepresentation/nondisclosure claim, and (2) Sheffield's claim of wrongful attempt to deplete assets under section 7-80-606. The order is vacated to the extent it dismisses Sheffield's claims against Trowbridge seeking to hold him personally liable for (1) the LLCs' breaches of contract under the equitable common law doctrine of piercing the corporate veil, and (2) wrongful depletion of the LLCs' assets under the common law duty of LLC managers to avoid favoring personal interests over creditors' claims. The case is remanded to the trial court to determine, based on the evidence before it, (1) whether Trowbridge is a member or manager of Villas, (2) whether it is equitable to hold Trowbridge personally liable for the LLCs' improper actions by piercing the corporate veil, and (3)

whether the LLCs were or became insolvent when Trowbridge distributed LLC assets to the non-party members, and if so, whether Trowbridge breached the common law duty of an LLC manager to avoid favoring personal interests over the LLCs' creditors' claims.

JUDGE ROY and JUDGE WEBB concur.