

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 34865

ARKANSAS MIDLAND RAILROAD COMPANY, INC.  
--PETITION FOR DECLARATORY ORDER--  
CADD VALLEY RAILROAD COMPANY

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RESPONSE TO PETITION FOR DECLARATORY ORDER AND MOTION TO DISMISS

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Pursuant to 49 C.F.R. § 1104.13(a), this Response is filed on behalf of Caddo Valley Railroad Company (“CVR”) and its shareholders. It is respectfully submitted that the Petition for Declaratory Order is but the latest phase of a 13-year campaign by Arkansas Midland Railroad Company, Inc. (“AMR”) to impede or defeat the preservation of vital rail service over the Norman Branch in southwestern Arkansas pursuant to the Feeder Line Development Program (49 U.S.C. § 10907). As will be shown, AMR’s Petition is patently frivolous and should be summarily dismissed.

By its Petition, AMR is seeking to prevent a sale of the corporate stock of CVR, apparently on the wholly disingenuous theory that CVR is selling the Norman Branch line. In reality, AMR is well aware that the sale of the CVR’s stock will not involve the sale or abandonment of all or any portion of a line of railroad. Hence, based on the language of the governing statutory provision, AMR is not entitled to the relief that it seeks. *See*, 49 U.S.C. § 10907(h). In short, there is no reason whatsoever for the Board to take action at this time.

**Background**

The underlying proceeding was triggered when AMR, in December 1993, embargoed the Shippers on the northern end of the line and refused to make minor repairs to the line that were

capable of being made in a matter of hours. That embargo led to over six years of litigation that culminated in the Board finding that the Shippers on the line were entitled to purchase the line from AMR and that AMR, by unlawfully prolonging its embargo, had violated its common-carrier obligation.

When CVR assumed ownership of the line in September 2000, both it and the Shippers knew that the line was in serious need of costly repairs. However, it would have been imprudent to launch full-scale rehabilitation program prior to the time when they acquired ownership of the entire line. Hence, in September 2000, CVR was faced with a situation that was far more dire than would have been the case had it been granted ownership of the line in 1995, when the Interstate Commerce Commission ("ICC") issued its initial decision that was reversed by the Court of Appeals. Nevertheless, after acquiring the line, CVR has made a concerted effort to deal with the legacy of AMR's neglect.

In the Summer of 2005, after grave safety defects were discovered in several bridges, which forced a temporary embargo, CVR's shareholders, who have had no other experience in operating a railroad, decided that it would be in everyone's best interests if they could find an experienced short-line railroad to which they could sell their stock. Simply stated, the shareholders focused on finding an experienced operator who would purchase their corporate stock and who would agree to upgrade the line and provide service to all shippers on the line.

The shareholders believe that they have located a reliable owner and are planning on closing on a stock purchase agreement in the very near future. As a result, it is imperative that the Board summarily dismiss AMR's petition so as to avoid chilling the investor's interest in acquiring the stock. Any delay will further frustrate the efficient workings of the Feeder Line Development Program.

## ARGUMENT

### **I. All Concerned Have Known For Years That CVR Was Created As A New Corporation For The Purpose Of Owning And Operating The Norman Branch Line.**

Contrary to AMR's insinuations, there was no effort by the Shippers to "hide the ball" with regard to the creation of CVR as a carrier to own and operate the Norman Branch subsequent to its sale under section 10709. As reflected by the Board's August 12, 1999 Decision in F.D. No. 32479, *Caddo Antoine and Little Missouri Railroad Company--Feeder Line Acquisition--Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR* ("CALM I"), 4 S.T.B. 326, 331 (1999), the Shippers, who had financially supported the feeder application filed by the Caddo Antoine and Little Missouri Railroad Company ("CALM"), notified the Board that they intended to create a new corporation to which they and CALM would contribute their respective interests. In their "Comments and Views Concerning the Future Course of this Proceeding," dated December 2, 1996, the Shippers advised the Board that:

they were in the process of incorporating a new noncarrier entity to which they would assign their interests, including those received from Mr. Robbins [the President of CALM]. The Shippers stated that if their acquisition of the line is approved, the new corporation would hold title to it even though the Shippers would provide financial backing and exercise control over the new entity.<sup>1</sup>

As the foregoing plainly shows, the Board was well aware that the Shippers had determined that it would be necessary to form a new corporation that they would own and control in order to carry out the Congressional policy underlying the Feeder Railroad Development provisions.

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<sup>1</sup> AMR seeks to make a federal case out of the Shippers' failure to identify the name of the new corporation at an earlier time. However, the identity of the new corporation was merely academic when it was formed in 1997, because the litigation with AMR was to drag on for another three years before CVR would be in a position to acquire and operate the Norman Branch line. More importantly, the identity of the new corporation was of little or no significance in that the Shippers agreed to ensure its financial viability. Moreover, AMR knowingly conveyed the deeds to CVR (and not to the Shippers) in 2000 following closing. Last, the line has been operated for over six years following its acquisition by CVR. That is more than sufficient to satisfy the Board's regulations governing the feeder process.

The Board plainly understood the Shippers' concerns and position. When it established the Closing Terms for the transaction in its August 12, 1999 Decision, the Board specifically ordered AMR to deliver all "original documents conveying interest in the right-of-way to the Shippers **or their designee** within 90 days from closing." *Id.* at 346 (emphasis added). Although AMR now says that the formation of a new corporate entity should be viewed as "a structural artifice" that was established in order to "subvert the feeder line statute and deprive former owners of the right of first refusal they were plainly intended to have,"<sup>2</sup> there is nothing to support AMR's position. In point of fact, AMR conveyed the deeds to CVR at closing. Hence, it is disingenuous for AMR to feign surprise that CVR holds title to the line, and not the Shippers.

AMR's "artifice" contentions must be rejected in light of the Board's own reasoning in *Caddo Antoine and Little Missouri Railroad Company--Feeder Line Acquisition--Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR* ("CALM II"), 4 S.T.B. 610, 634-35 (2000). In applying the ICC's "alter ego" test, the Board in that decision focused on whether the subsidiary corporation "was created to purchase the line for legitimate and substantial business reasons (e.g., insulation from financial risk, preservation of service, or time constraints) and not solely to avoid regulatory requirements." Although the alter ego test has been employed primarily in the parent/subsidiary context, it applies equally well in situations such as that herein. Without question, CVR was created for legitimate and substantial business reasons, including insulation from financial risk, potential limitation of liability, and preservation of rail service, which is the overarching purpose of the Feeder Railroad Development provisions in section 10907.

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<sup>2</sup> AMR Petition at pp. 4-5.

There is nothing to suggest that CVR was established in order to avoid regulatory requirements. Indeed, any sale to a third party of the stock of CVR would be in the interest of preserving needed rail service for all the Shippers on the line. The third party now considering such a transaction, Pioneer Railcorp, is well known to the Board as an experienced and financially sound operator of short line railroads. With its management and financial resources, Pioneer would be in a much better position than the current CVR shareholders to address and correct the years of neglect and deferred maintenance that is AMR's legacy on the line.<sup>3</sup>

Last, on July 19, 2000, the Board was expressly advised that CVR, as the designee of the Shippers, would assume responsibility on September 1, 2000 for all operations over the entire Norman Branch pursuant to the Board's decisions. *See*, Letter to Vernon A. Williams from Richard H. Streeter, dated July 19, 2000 (CVR Ex. 1). In short, the Board has long been aware of the Shippers' intention to establish a new corporation to operate the line, and the Board was apprised of the identity of the new corporation long before such operations were commenced in September 2000. And as noted previously, because AMR conveyed the deeds to the line to CVR nearly six full years ago, AMR is not in a position to suggest that it just now becoming aware that CVR is the owner of the line.

Finally, until it was forced to embargo service while repairing several bridges in 2005, CVR provided continuous rail service to all the shippers on the line. CVR lifted its embargo immediately after completing the bridge repairs and is currently operating the line. Because it provided rail service for more than two years in excess of what is required by the Board's

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<sup>3</sup> It is significant that AMR's pleading contains no mention of any intent on the part of AMR to reacquire the line in order to provide rail service. Given its past, well-documented violations of the common carrier obligation that caused the Board to award damages of several hundred thousand dollars to the shippers, there is every reason to presume that AMR intends to repurchase the line in order to abandon it and sell the steel rail at a price that is substantially higher than the price for which it sold the line in 2000. That step would obviously be counter to the Congressional intent (preservation of rail service to shippers) that underlies the feeder provisions.

governing regulations codified at 49 CFR § 1151.3(a)(3)(ii), it is specious to suggest that the corporate form was a mere “structural artifice” that was devised in order to deprive AMR of its right of first refusal to repurchase the line.<sup>4</sup>

**II. Because CVR is not selling or abandoning its line of railroad, the statutory provisions of 49 U.S.C. § 10907(h) are not applicable.**

As a matter of statutory law, there is a plainly defined distinction between the sale of an asset of a corporation (which would be covered by 10907(h)) and the sale of stock of such a corporation (which is not covered by 10907).<sup>5</sup> AMR has chosen to ignore this fundamental distinction. Even worse, instead of candidly telling the Board what CVR had told it, *i.e.*, that the CVR shareholders were considering a possible sale of their stock, AMR falsely claims that it has become “aware of a potential sale of the Norman Branch by CVR.” AMR Petition at 2 (emphasis added).

Nothing could be further from the truth. As AMR was specially advised by letter dated October 5, 2005, “*CVRR is not proposing to sell or abandon all or any portion of the Norman Branch line.*” See Petition, Ex. 3, Letter to Charles Laggan from Corey Thomason (emphasis added). Nothing has transpired since that date that would cause the information provided to AMR to be incorrect.<sup>6</sup> While there may well be an opportunity for the current shareholders to sell all or a portion of CVR’s stock to Pioneer Raicorp (if AMR’s tortious interference does not

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<sup>4</sup> CVR was incorporated in Arkansas on June 11, 1997. A copy of its Articles of Incorporation is attached as CVR Ex. 2.

<sup>5</sup> *Cf.*, 49 U.S.C. § 10902 and 49 U.S.C. § 11323(a)(5). See also, F.D. No. 33326, *I&M Rail Link, LLC -- Acquisition & Operation Exemption -- Certain Lines of Soo Line Railroad Company*, 2 S.T.B. 167 (1997), which proceeding also includes F.D. No. 33327, *Dennis Washington, Et. Al. -- Continuance in Control Exemption -- I&M Rail Link, LLC* and F.D. No. 33328, *Montana Rail Link, Inc. -- Acquisition of Control Exemption -- I&M Rail Link, LLC*.

<sup>6</sup> If AMR were truly concerned about the statutory interpretation of its rights, it should have acted immediately after receiving the letter in October. That it did not do so is a further indication that it is more interested in disrupting the sale of the stock than in resolving the phony academic issue that it has raised at the last moment.

“sour the deal”), there is *no* intent whatsoever (on the part of either CVR or its current shareholders) to sell or abandon the line of railroad that is but one of the assets owned by CVR.

Any transaction that may be structured with Pioneer Railcorp will take the form of a sale of the common stock of CVR rather than taking the form of an asset purchase or sale agreement. While AMR says that this approach would violate the Section 10907(h), in reality, such an approach is wholly consistent with the clear and unequivocal language of 49 U.S.C. § 10907(h), which AMR would have the Board ignore. That section reads as follows (emphasis added):

If a purchasing carrier under this section proposes to **sell or abandon all or any portion of a purchased railroad line**, such purchasing carrier shall offer the right of first refusal with respect to such line or portion thereof to the carrier which sold such line under this section.

Although AMR suggests that the sale of stock “would provide a roadmap to future feeder line applicants to essentially write Section 10907(h) out of existence,”<sup>7</sup> it is respectfully submitted that it was Congress that provided the roadmap, not CVR. The rail-related provisions of the ICC Termination Act of 1995 carefully preserved the long-standing distinction in prior law between line sales (asset transactions) and carrier combinations (generally, stock transactions). Compare 49 U.S.C. § 10902 (line sales) with 49 U.S.C. § 11323 (mergers, acquisitions of control, and other combinations). Had Congress intended to include the latter categories of transactions in the first-refusal clause of section 10907(h), it well knew how to do so.

Most importantly, assuming that the CVR’s current shareholders actually sell CVR’s stock to new shareholders, the line of railroad will continue to be an asset of CVR. Because the explicit and carefully articulated statutory wording of § 10907(h) does not address the sale of stock to new shareholders, but only addresses the potential sale or abandonment of the line of

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<sup>7</sup> AMR Petition at p. 5.

railroad, which is but one of CVR's assets, AMR cannot be said to have any right of first refusal. The "purchasing carrier" (CVR) is not contemplating the sale of any asset, let alone the Norman Branch line.

As a matter of basic corporate law, after the transfer of stock ownership to the new owners, whoever they might be, the new stockholders will not own the individual assets of CVR. Instead, the new shareholders will only own the shares they have purchased and nothing more as CVR will continue to own the line of railroad. *See, e.g., Orzeck v. Englehart*, 195 A.2d 375, 377, 41 Del.Ch. 361, 365 (1963). AMR's arguments lack any merit and should be summarily dismissed.<sup>8</sup>

**III. The Board should sanction AMR for its contumacious refusal to comply with the Closing Terms established by the Board governing the release of mortgages.**

The Board is also asked to sanction AMR for its failure to comply with the Board's prior Decisions in CALM I and CALM II, *supra*. In the Board's August 10, 1999 Decision in CLAM I, 4 S.T.B. at 346, the Board established the following Closing Terms, which plainly anticipate that the Shippers would create and designate a separate rail corporation to acquire the line of railroad as a corporate asset and thereafter to operate it, and specifically ordered AMR to cooperate with that acquisition:

To ensure the smooth transfer of the line, we will establish the following terms: (1) payment will be made by cash or certified check; (2) closing will occur within 90 days after the service date of this decision; (3) AMR will convey all property by quitclaim deed; (4) **AMR will deliver all releases from any mortgages and original documents conveying interest in the right-of-way to the Shippers or their designee within 90 days from closing;** (5) all taxes should be prorated as of the date of closing; and (6) deed recording fees should be paid by Shippers. Mortgage or lien releases, taxes and recording fees should be paid by AMR. The

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<sup>8</sup> As an aside, AMR never owned the stock of CVR which, as authorized by the Board, was the designee of the shippers at the time the line of railroad was acquired from AMR.

parties may modify the terms of sale by mutual agreement.  
(Emphasis added).

Thereafter, in CALM II, 4 S.T.B. at 636, the Board ordered in May 2000 that "The sale is subject to the labor protection condition voluntarily undertaken by the Shippers and the other terms of sale set forth in the August 1999 Decision." As of this date, AMR has contumaciously refused to comply with the terms of the Board's Decisions that required it to deliver all releases from any mortgages within 90 days of closing. In summarily dismissing AMR's Petition for Declaratory Order, the Board should sanction AMR for its failure to deliver the releases that it was ordered to deliver nearly six full years ago.

#### **Conclusion**

For all the above-stated reasons, the Board should summarily dismiss AMR's petition based on the finding that CVR is not selling or abandoning all or any portion of the railroad line that it purchased from AMR in 2000. The Board should also find that, until the line of railroad is sold or abandoned, **AMR has no statutory right of first refusal that it could exercise!** Last, the Board should find that AMR is in continuing violation of the Board's prior Decisions and should award attorney fees to CVR to cover the costs that it has incurred in attempting to enforce the Board's Decisions in CALM I and CALM II.

Respectfully submitted,



Richard H. Streeter  
Counsel to Caddo Valley Railroad Company

Dated: April 18, 2006

## CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of April 18, 2006, a true copy of the foregoing was served by overnight delivery and by e-mail upon the following:

William C. Sippel  
Thomas J. Litwiler (tlitwiler@fletcher-sippel.com)  
Fletcher & Sippel LLC  
29 North Wacker Drive  
Suite 920  
Chicago, IL 60606-2832

In addition, a true copy was served by e-mail only upon the following:

Daniel A. LaKemper (lakemper@mtco.com)  
General Counsel  
Pioneer Railcorp  
1318 South Johanson Road  
Peoria, IL 61607

Mark J. Andrews (Mark.Andrews@strasburger.com)  
Strasburger & Price, LLP  
1800 K Street, N.W.  
Suite 301  
Washington, D.C. 20006



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Richard H. Streeter

**CVR Exhibit 1**

**Letter to Vernon A. Williams from Richard H. Streeter**

**Dated July 19, 2000**

BARNES & THORNBURG

ORIGINAL



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Franklin Tower  
Suite 200  
1401 First Street, N.W.  
Washington, D.C. 20004-1484  
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www.btlaw.com  
July 19, 2000

J

Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K St., N.W.  
Room 711  
Washington, D.C. 20423

Re: F.D. No. 32479, Caddo Antoine and Little Missouri Railroad Company-Feeder Line  
Acquisition-Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill,  
AR

Dear Mr. Williams:

This letter is written on behalf of all parties to the above-referenced proceeding. By its Order dated May 5, 2000, the Board established the price to be paid for the Norman Branch and stated that the "other terms of sale set forth in the August 1999 Decision" would apply. Those terms included the provision that "closing will occur within 90 days after the service date" of that decision. That would have required the parties to close on or before August 3, 2000. Thereafter, Arkansas Midland Railroad Company ("AMR") filed a petition seeking to stay the closing date of the underlying transaction pending judicial review of the purchase price set by the Board. That relief was opposed by the Shippers. By Order served June 26, 2000, the Board denied the stay petition.

Although the Shippers opposed that stay, and will oppose the request for a stay pending judicial review that is to be filed by AMR with the United States Court of Appeals for the Eighth Circuit, please be advised that the parties have mutually agreed that in order to ensure the smooth transfer of the line, closing will be delayed until the close of business on August 31, 2000. As of 12:01 a.m., September 1, 2000, the Caddo Valley Railroad will assume responsibility for all operations over the entire Norman Branch pursuant to the Board's decision if the closing date is not stayed by the Eighth Circuit.

Should the Board have any objection to the proposed course of action, please advise the undersigned immediately in order that steps can be taken to close on August 3, 2000. Thank you for your consideration in this matter.

Very truly yours,

Richard H. Streeter

ENTERED  
Office of the Secretary

JUL 20 2000

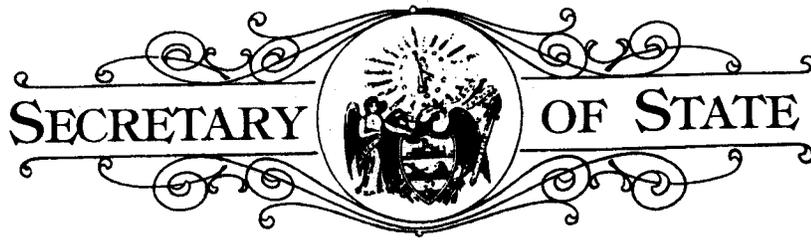
Part of  
Public Record

RHS:rs  
cc: Kevin M. Sheys

**CVR Exhibit 2**

**Articles of Incorporation of Caddo Valley Railroad Company**

# STATE OF ARKANSAS



*Sharon Priest*  
SECRETARY OF STATE

*To All to Whom These Presents Shall Come, Greetings:*

*I, Sharon Priest, Secretary of State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of*

## ARTICLES OF INCORPORATION

OF

## CADDO VALLEY RAILROAD COMPANY

ORIGINAL ARTICLES FILED:

June 11, 1997



*In Testimony Whereof, I have hereunto set my hand and affixed my official Seal. Done at my office in the City of Little Rock, this 11th day of June 1997.*

*Sharon Priest*  
Secretary of State

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148042

FILED  
CORPORATIONS DIVISION

ARTICLES OF INCORPORATION  
OF  
CADDO VALLEY RAILROAD COMPANY

97 JUN 11 AM 11:35  
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STATE OF ARKANSAS  
CORPORATIONS DIVISION  
RECEIVED

The undersigned natural person, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the Arkansas Business Corporation Act, hereby certify as follows:

1. The name of this corporation is the Caddo Valley Railroad Company.

2. The street address of the corporation's initial registered office is 300 Exchange Street, Suite A, Hot Springs, Arkansas 71901, and the name of the initial registered agent of the corporation at that address shall be Robert S. Hargraves.

3. The nature of the business of the corporation and the primary object or purposes proposed to be transacted, promoted or carried on by it, are as follows:

- (a) To engage in the operation of a short haul railroad extending from U.P. mile post number 426.3 in Gurdon, Arkansas to U.P. mile post number 479.2 in Bird's Mill, Arkansas.
- (b) To conduct any other business enterprise not contrary to law.
- (c) To exercise all of the powers enumerated in the Arkansas Business Corporation Act.

4. The total amount of the authorized capital stock of the corporation is one thousand (1000) shares of common stock with one dollar (\$1.00) par value each.

5. The name and address of the incorporator is:

Robert S. Hargraves  
300 Exchange Street, Suite A  
Hot Springs, Arkansas 71901

6. The number of directors constituting the Board of Directors shall be provided in the Bylaws of the corporation. The Board of Directors shall have all those powers and duties enumerated in the Arkansas Business Corporation Act.

7. The President and Secretary of the corporation shall have the authority on behalf of the corporation to enter into any contract between the corporation and all of its shareholders (a) imposing restrictions on the future transfer (whether inter vivos, by inheritance or testamentary gift), hypothecation or other disposition of its shares; (b) granting purchase options to the corporation or its shareholders; or (c) requiring the corporation or its shareholders to purchase such shares upon stated contingencies. In addition, any and all of such restrictions, options or requirements may be imposed on all shares of the corporation, issued and unissued, upon the unanimous resolution of the Board of Directors and the consent of all stockholders as of the date of the Board's resolution.

8. (a) The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed actions, suit or proceeding, whether civil, criminal, administrative or investigative by reason of the fact that he is or was a director, officers, employee or agent of the corporation, or is or was serving at the request of the corporation

as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorney's fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that this conduct was unlawful.

(b) The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorney's fees) actually and reasonably incurred by him in connection with the defense or settlement

of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnify for such expenses which such court shall deem proper.

(c) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) or (b), or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorney's fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsections (a) or (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standards of conduct set forth in subsections (a) or (b). Such determination shall be made (1) by the board of directors by the majority vote of the quorum consisting of directors who were not

parties to such action, suit or proceeding, or (2) if such a quorum is not obtainable, or, even if obtainable, a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the shareholders.

(e) Expenses (including attorney's fees) incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of any undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

(f) The indemnification provided by this Article shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement, vote of shareholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.,

(g) The corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability

asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

(h) The powers and duties of the corporation to indemnify any person under this Article shall apply with equal force whether an action, suit, or proceeding is threatened or commenced in this state or outside this state.

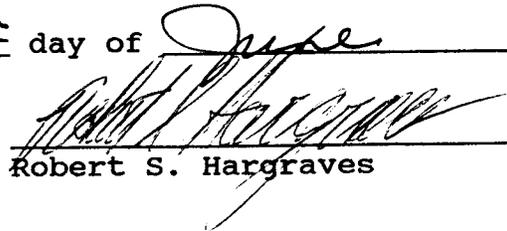
9. No member of the Board of Directors shall be liable to the corporation or the stockholders of the corporation for any monetary damages for breach of his duty as director.

10. The corporation elects only to have preemptive rights to the extent, if any, that the Bylaws of the corporation may provide.

11. Unless the Bylaws of the corporation otherwise provide for a greater number, a quorum at any meeting of the shareholders of the corporation shall consist of a majority of the votes entitled to be cast on the matter, represented in person or by duly authorized proxy at such meeting.

12. In any election of directors, the shareholders of the corporation shall be entitled to cumulative voting rights.

EXECUTED this 11<sup>th</sup> day of June, 1997.

  
\_\_\_\_\_  
Robert S. Hargraves