The State of South Carolina

Office of the Attorney General

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Burnet R. Maybank, III, General Counsel
Department of State
Post Office Box 11350
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Dear Mr. Maybank:

As you are aware, your letter of April 5, 1991 to Attorney General Medlock was referred to me for response. In that letter, you indicate that your Office has had some difficultly in administering the provisions of 1976 S. C. Code, Ann., Section 33-4-101. In relevant part, that statute provides that:

"(b) Except as authorized by subsections (c) and (d), a corporate name must be distinguishable upon the records of the Secretary of State from:

(1) the corporate name of a corporation incorporated or authorized to transact business in this State...."

You state that, in light of Section 33-4-101, your office now receives "numerous requests for corporate names that are almost (but not quite) identical to existing corporate names." To illustrate this phenomenon, you set forth a circumstance wherein a corporation seeks to reserve the name "Robert D. Cook, Inc. of South Carolina" even though there presently exists a South Carolina corporation with the name "Robert D. Cook, Inc." Given this circumstance, you ask for this Office's guidance on the following issues: (1) Just how close may one corporation's name be to that of another corporation; and, (2) Does the Secretary of State have the authority to reject the registration or filing of a corporate name?

Responding first to your second inquiry, we note that, pursuant to Section 33-1-300, the Secretary "has the power

reasonably necessary to perform the duties required of him by Chapters 1 through 20" of Title 33. We also note that, pursuant to Section 33-4-101(b), a corporate name may not be filed or registered unless it is distinguishable upon the records of the Secretary. We note, further, that, pursuant to the provisions of Section 33-4-101(c), the Secretary, under certain circumstances, is empowered to authorize the use of a name that is not distinguishable. By necessary implication of the express provisions of these statutes, the Secretary, as the custodian of the records of corporations, must make the determination as to whether a name is distinguishable and capable of registration. In the construction of a statute, that which is fairly implied is as effective as if expressed. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840, (1938).

In the matter of Trans-Americas Airlines, Inc. v. Kenton, Del. Supr., 491 A.2d 1139, (1985), the Supreme Court of Delaware reviewed a statute which required that "the certificate of incorporation shall set forth....the name of the corporation such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names of other corporations...registered...under the laws of this State." In defining the scope of the Secretary of State's responsibility under the statute, the Court held that "the Secretary of State has only one statutory duty; to ensure, in the exercise of his discretion, that a new corporate name can be distinguished on the records of the Division of Corporations from those names previously registered." In accord with this decision, we conclude that the Secretary of State of South Carolina has the discretion to refuse to register or file a corporate name which, in his view, is not sufficiently distinguishable from the corporate name of a corporation incorporated or authorized to transact business in this State.

With respect to your second question, it would be difficult to establish "hard and fast" parameters of distinguishability. However, the views expressed in the Official Comment annotated to Section 33-14-101 offer some useful observations. The author of the Comment states that:

"The principal justifications for requiring a distinguishable official name are (1) to prevent confusion within the secretary of state's office and the tax office and (2) to permit accuracy in naming and serving corporate defendants in litigation. Thus, confusion in an absolute or linguistic sense is the appropriate test under the Model Act, not the competitive relationship between the corporations, which is the test for fraud or unfair

competition. The precise scope of "distinguishable upon the records of the secretary of state" is an appropriate subject of regulation by the office of the secretary of state in order to ensure uniformity of administration. Corporate names that differ only in the words used to indicate corporateness are generally not distinguishable. Thus, if ABC Corporation is in existence, the names "ABC Inc.," "ABC Co.," or ABC Corp." should not be viewed as distinguishable. Similarly, minor variations between names that are unlikely to be noticed, such as the substitution of a "." for a "," or the substitution of an arabic numeral for a word, such as "2" for "Two", or the substitution of a lower case letter for a capital, such as "d" for "D," generally should not be viewed as being distinguishable."

Of particular usefulness is the author's assertion that "minor variations between names that are unlikely to be noticed" generally should not be viewed as being distinguishable. While this phrase does not wholly eliminate the element of subjectivity, it does help to bring the distinguishability analysis into somewhat sharper focus.

With the reasoning suggested by the phrase in mind, the test of distinguishability becomes whether, in the Secretary's view, the variation between the corporate name applied for and the corporate name of an already-authorized corporation is so minor that it is "unlikely to be noticed." By way of illustration, the application of this test might yield the following results:

(a) The filing of the name, Robert D. Cook, Inc., of Columbia, might be permitted when there already exists a corporation with the name Robert D. Cook, Inc.

(b) The filing of the name Good Books, Inc. might be refused when there already exists a corporation with the name Good Book, Inc.

(c) The filing of the name Ho-Bo, Inc. might be permitted when there already exists a corporation with the name Hobo, Inc. (Compare: Trans-Americas Airlines, supra, wherein the Court held that the Secretary had fulfilled his statutory duty in determining that the name Transamerica Airlines, Inc. is distinguishable from the name Trans-Americas Airlines, Inc.).

(d) The filing of the name delights, Inc. might be refused when there already exists a corporation with the name Delight, Inc.

(e) The filing of the name Good-2-Go, Inc. might be refused when there already exists a corporation named Good-to-Go, Inc.

The above-mentioned examples are certainly not exhaustive of the infinite combinations of words and numerals that may be fashioned into names and forwarded to the Secretary for filing. They are set forth solely for the purpose of providing some guidance on the manner in which the "unlikely to be noticed" test should be applied.

Of course, the threshold and, in most cases, the ultimate decision on distinguishability of names rests with the Secretary. Consequently, it may be useful for the Secretary to develop some guidelines on the issue so as to reduce, to the extent possible, the element of subjectivity. To reiterate the view of the author of the Official Comment: "The precise scope of 'distinguishable upon the records of the Secretary of State' is an appropriate subject of regulation by the Office of the Secretary of State in order to ensure uniformity of administration."

I trust that you will find the foregoing information to be responsive to your concerns. Please contact me if I can be of further assistance.

Very truly yours,

Wilbur E. Johnson
Assistant Attorney General

WEJ/fc

REVIEWED AND APPROVED:

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