

LEGAL USAGE IN DRAFTING

CORPORATE RESOLUTIONS

(WITH “BEFORE” AND “AFTER” EXAMPLES)

Kenneth A. Adams

Pruning out the legalisms and archaic usages is more than just good form.
For corporate resolutions, it enhances clarity.

AS A CORPORATE ATTORNEY in private practice, I am often called upon to draft or review corporate resolutions. To a greater or lesser degree, those resolutions that I encounter suffer from archaisms and structural deficiencies of the sort that afflict many corporate agreements. In my book *Legal Usage in Drafting Corporate Agreements* (which I will refer to as *LUDCA*), I

survey the language and structure of contracts and recommend more efficient alternatives to many flawed usages. I thought it a logical progression to subject resolutions to the same scrutiny, and that is what I attempt in this article; I have not seen this topic addressed anywhere else in the literature on drafting.

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MINUTES AND CONSENTS • The governing body of a U.S. legal entity will typically memorialize its decisions by adopting resolutions. *The Oxford English Dictionary* defines a resolution as “A formal decision, determination, or expression of opinion, on the part of a deliberative assembly or other meeting.” A governing body can adopt resolutions either during a meeting attended by the signatories or, depending on state law and the entity’s organizational documents, by written consent in lieu of a meeting. (Although I refer to such resolutions as “corporate” resolutions, they are used not only by the boards of directors and shareholders of corporations but also by limited liability companies, partnerships, indeed any entity.)

Lawyers in private practice tend to draft consents more often than minutes. For one thing, many governing bodies find it more convenient to adopt resolutions by written consent. Also, many companies prepare meeting minutes themselves, often inserting resolutions prepared by their lawyers. Consequently, in this article I focus on corporate resolutions as they appear in consents rather than meeting minutes. And to demonstrate the effect of my recommendations, I have included in an appendix a “before” and “after” form of consent of the board of directors of a Delaware corporation.

The traditional form of written consent has a number of elements: the title, the introductory clause, the recitals, the lead-in, the resolutions, the concluding clause, and the signature blocks. A consent may also include one or more attachments. I discuss below the issues raised by each of these elements.

THE TITLE • The title of a consent could be limited to simple *consent*, but invariably drafters also specify, for ease of reference, the governing body and the name of the entity. The title also usually refers to the consent as a “written consent.” This is not strictly necessary—a consent is

manifestly written, whether or not it is described as such in the title—but it serves to highlight that the resolutions were adopted by means of the statutory alternative to vote at a meeting. If a consent is unanimous or is by a sole director or shareholder, drafters usually say so in the title, although they often make the mistake of describing as unanimous a consent by a one-member governing body.

I, like most drafters, center the title and use all capitals, but I do not use boldface in the title or anywhere else in a consent, as I find it too emphatic.

THE LEAD-IN • Traditionally, consents open with a statement to the effect that the signatories are adopting the resolutions that follow. This statement is analogous to the part of a contract known as the “lead-in,” in which the parties state that they *agree as follows* (or *therefore agree as follows*, if the lead-in is preceded by “recitals,” namely one or more paragraphs that serve to set the stage for that agreement by, for example, describing the circumstances leading up to the making of the agreement). The lead-in, whether in contracts or consents, constitutes a category of contract language that I refer to as “language of performance” (see *LUDCA*), in that it memorializes an action of the parties that is concurrent with the signing of the document.

A consent lead-in contains more information than a contract lead-in. For one thing, it states the capacity in which the signatories are signing the consent (as shareholders, directors, or otherwise) and what proportion of the applicable governing body they represent (all of it, a majority, more than two-thirds, or otherwise). It is also usual to include a statement that the signatories are acting by written consent in accordance with a given section of whichever state law authorizes that governing body to make decisions by written consent in lieu of a meeting. (This is often stated, in the alternative or in ad-

dition, as a subtitle between the title and the lead-in, but you do not need to waste space by giving it such prominence, and you certainly do not need to state it twice.)

In the lead-in, drafters also invariably provide the defined term for the entity that is the subject of the consent. When drafting a contract, I generally prefer using for a party a defined term based on that party's name, but in consents, where the focus is on a single entity, I often use for that entity a generic defined term, such as *the Company*, so as to more readily distinguish it from any other entities that might be mentioned.

While most lead-ins state that the undersigned *hereby consent to the adoption of the following resolutions*, I prefer instead to have the signatories *resolve as follows*. (Since, as discussed in "Recitals," I prefer to place recitals before the lead-in, I follow the usage for contract lead-ins and have the signatories *therefore resolve as follows* when a consent contains recitals.) There are three reasons for my preferring *resolve as follows*. The first relates to structure: Using the verb *resolve* in the lead-in allows you to omit it from the resolutions, which in turn permits you to format the resolutions more efficiently. (This is discussed in "Resolutions—Where to Place the Verb *Resolve*.") The second relates to brevity: Since *resolve* means "to adopt or pass a resolution," *resolve as follows* expresses in three words what the traditional formula uses nine words to convey. The third relates to clarity: The indirection of the traditional formula—requiring consent plus adoption—leads some drafters to think that one must not only consent to adoption of a resolution, but also adopt it, and so use the formula *hereby consent to the adoption of, and hereby adopt, the following resolutions*. This only makes worse an already inferior usage.

Using the verb *resolve* in the lead-in does, however, raise the question whether, in order for a written consent to be effective, the signatories must *consent* to resolutions rather than sim-

ply *resolve*. Once one has stated that the signatories are acting by written consent, there is nothing in the relevant state laws that requires that one use the verb *consent*. Take section 228 of the Delaware General Corporation Law, Del. Code Ann. Tit. 8, §228, which governs shareholders acting by consent in lieu of a meeting. It merely requires that a consent "set forth the action taken without a meeting," and there is no reason why that cannot be accomplished by having the shareholders *resolve as follows*.

A further note on verbs: Many drafters would state that the signatories *do hereby resolve*. This is less than ideal, for two reasons. First, *do* used as an auxiliary in this manner is an archaism. Second, as discussed below under "Resolutions—Factual Resolutions—Use of *Hereby* in Performance Resolutions," *hereby* is best omitted in language of performance that uses a verb of speaking, and *resolve* is best thought of as a verb of speaking.

Another lead-in redundancy is a statement—often long-winded—that the resolutions were adopted as though at a meeting. That is implicit in the fact that the signatories are acting by written consent, and anyone with any questions as to the effect of a written consent can check the cited section of the applicable state statute.

Drafters sometimes double-space the lead-in, as well as the concluding clause, presumably view a view to distinguishing them from the resolutions. This practice is unnecessary, inefficient, and distracting.

RECITALS • A consent will often contain, after the lead-in, paragraphs beginning with *WHEREAS* that explain the background to the resolutions. Such paragraphs are analogous to the recitals that often precede a contract lead-in (contract recitals are, after all, commonly referred to as "whereas clauses"), so I am willing to use the term "recitals" to describe them.

(*Robert's Rules of Order*, however, refers to them collectively as the "preamble.")

As used in recitals, *whereas* means "in view of the fact that" or "considering that." This meaning of *whereas* is archaic, and you should omit *whereas* when drafting recitals, whether in contracts or consents. One can readily distinguish recitals from resolutions without using *whereas* to signpost them.

A more interesting issue is where in consents you should place recitals. In contracts they are placed before the lead-in, but in consents they invariably follow it. Since the form of lead-in and, as discussed below, the form of resolution that I favor do not permit any intervening language, I prefer to place recitals before the lead-in rather than after. One good reason why this unorthodox position is acceptable, even preferable, is that it is consistent with contract usage. And it is a little anomalous to place the recitals after the lead-in: The lead-in refers to the resolutions that follow, but recitals do not constitute resolutions.

RESOLUTIONS • It is the resolutions themselves that raise the most subtle issues of usage.

Where To Place the Verb "Resolve"

It has long been standard practice to introduce each recital with *resolved*, generally in all capitals. In this context, *resolved* constitutes language of performance and represents a truncated version of *it is resolved that*. (If a consent contains recitals, drafters often begin the first resolution with *it is therefore resolved*. And if there is more than one resolution, some drafters begin the second and subsequent resolutions with *it is further resolved*.) I am of the school of thought that legal usage should conform with standard usage unless there is compelling reason to do otherwise. This stilted and archaic use of *resolved* does not conform to standard usage.

There are two alternatives. One is to use, in each recital, language of performance that is less archaic, but your options would essentially be limited to introducing each recital with *it is re-*

solved that. This would not represent much of an improvement. A more effective solution is to modify the lead-in by having the signatories *resolve as follows* rather than, say, *adopt the following resolutions*, and to eliminate *resolved* from each resolution and instead phrase it as a *that*-clause. The result is resolutions that are clearer, more economical, and more consistent with standard usage.

That-clauses are not sentences, so I end each resolution with semicolon. (I tack *and* on to the penultimate resolution and end the final resolution with a period.) They are not paragraphs either, so are best broken out as what I call tabulated enumerated clauses (see *LUDCA*), except that I use bullet points, since little would be gained by numbering each resolution.

Factual Resolutions

Viewed from a grammar perspective, a resolution constitutes a *that*-clause functioning as an object. There are two main categories of verbs that precede such *that*-clauses, namely "factual" verbs and "suasive" verbs. Factual verbs such as *certify*, *claim*, and *declare* introduce factual information, while suasive verbs such as *beg*, *recommend*, and *urge* imply an intention to bring about some change in the future. Some verbs, such as *insist*, can be both factual (*I insisted that I was right*) and suasive (*I insisted that he apologize*), and in the context of corporate resolutions *resolve* can be both factual and suasive. For purposes of the following discussion, I use the terms "factual resolution" and "suasive resolution" to describe those resolutions in which *resolve* is used as a factual and a suasive verb, respectively.

Policy Resolutions and Performative Resolutions

There are two sorts of factual resolutions. First, there are those resolutions that simply assert facts and do not require that the signatories act. Since such resolutions are analogous to the category of contract language that I refer to as

“language of policy” (see *LUDCA*), I refer to such resolutions as “policy resolutions.” Some policy resolutions reflect a determination made by the signatories. One example would be a resolution stating *that it is in the best interests of Acme to enter into the Merger Agreement*. Another example would be a resolution that, after having authorized Acme to issue certain shares, states that upon issuance *the Shares will be validly issued, fully paid, and nonassessable shares of Acme common stock*. Other policy resolutions reflect rules implemented by the signatories; an example would be a resolution contained in the initial board consent of a newly formed corporation resolving *that the fiscal year of the Corporation ends on December 31 of each year*.

There are also those resolutions that, like the lead-in, constitute language of performance, in that they memorialize an action that is concurrent with the signing of the consent. A board of directors might, for example, resolve *that each of the officers of Acme is hereby authorized to execute and deliver the Merger Agreement*. I call such resolutions “performative resolutions.”

The most common performative resolutions are those that authorize an action or authorize someone to do something and those that direct someone to do something. Drafters will often in the same resolution direct *and* authorize someone to do something, but if Acme’s board of directors directs Smith to sign an agreement, by definition Smith is authorized to do so. Consequently, in a resolution stating that Smith *is hereby authorized and directed*, the *authorized* is redundant. (Note that I suggest in “Resolutions—Suasive Resolutions” that one can use suasive resolutions as an alternative to directing language.)

Also commonplace are performative resolutions that ratify an action, in other words approve it after the fact. Resolutions often state that a given action is *ratified, confirmed, approved and adopted*, or some variation thereon. There is a grand legal tradition of stringing together syn-

onyms or near-synonyms, presumably in the hope that between them they cover the necessary territory. This practice is generally unjustifiable, and it would be outlandish to suggest that, say, having the signatories ratify and approve a set of resolutions accomplishes something not accomplished by having them simply ratify those resolutions. *Ratified* on its own is sufficient.

A governing body can by means of performative resolutions take any number of other actions; it can, for instance, fill a vacancy, select a consultant, or acknowledge a fact. (A performative resolution acknowledging something can always be stated as a policy resolution; which form you elect to use would depend on whether you want to emphasize the act of acknowledgement.)

Passive Versus Active Voice in Performative Resolutions

While it is standard advice that you should use the active voice, performative resolutions are generally phrased in the passive voice. You should, however, be willing to be flexible. In the case of directing or authorizing resolutions, it would be pedantic to require the active voice (as in, for instance, *that the undersigned hereby authorize Acme*), as it is never in question who is doing the authorizing or directing, and using the active voice would make this kind of resolution slightly longer. In the case of ratifying resolutions, which voice is preferable is a function of whether the statement of what is being ratified is succinct. If it requires a couple of lines or more, you might want to use the active voice (*that the undersigned hereby ratify*), since the passive voice would result in the verb being rather awkwardly tacked on at the end. And I would use the active voice for resolutions in which the signatories acknowledge something, as *it is acknowledged that* is a particularly weak form of the passive voice.

Use of “Hereby” in Performative Resolutions

Use of *hereby* in performative language is a minor but nevertheless rather involved topic. (I address it at somewhat greater length in *LUDCA* than I do here.)

Language of performance involves use of a form of the present tense known as the “performative,” which is characterized by simultaneity of the event described and the speech itself. Some performatives use a “verb of speaking” describing the speech act of which it is a part. The lead-in represents this kind of performative: *Resolve*, like *agree* and *declare*, is best thought of as a verb of speaking. A performative resolution using *acknowledge* also represents this kind of performative.

A second kind of performative is that which describes ritual acts and is accepted as the outward sign that those acts are taking place. I use the term “ritual performative” for performatives falling in this category, which include all authorizing, directing, or ratifying performative resolutions.

It is in the context of ritual performatives that *hereby* has a role to play. Take a resolution stating *that each of the officers of Acme is authorized to execute and deliver the Merger Agreement*. While it is clear from the context that it is not the case, in purely grammatical terms this resolution could be read as meaning that the officers became authorized independently of that resolution, and even that they have been so authorized for some time. In general English usage, *hereby* has consequently come to act as a signal that the verb is being used as a performative verb, and in a resolution stating *that each of the officers of Acme is hereby authorized to execute and deliver the Merger Agreement* it serves to indicate that it is through the resolution that the officers derive their authority. Consequently, while some commentators dismiss *hereby* as legalese no matter how it is used, in this context I find *hereby* reas-

suring and think that a ritual performative without *hereby* sounds odd.

Suasive Resolutions

A suasive resolution allows consent signatories to express that they intend for a specified action to take place in the future. When a suasive verb is followed by a *that*-clause, as is the case in suasive resolutions, standard usage requires that one use in the *that*-clause either the putative *should* (We demanded that she *should* leave) or the mandative subjunctive mood (We demanded that she *leave*). A third possibility, using the indicative mood, is largely restricted to British English (We demanded that she *leaves*). The putative *should* is appropriate if you are referring to another person over whom you have no control, but does not make sense for purposes of corporate resolutions. Consequently, the mandative subjunctive is the only option open to U.S.-based drafters. A resolution *that Acme issue to Jones 1,000 shares of Series A preferred stock* represents a clear expression of intent. The verb *issue* is in the mandative subjunctive (the indicative would be *issues*). (Note that since suasive resolutions do not serve to memorialize an action that is concurrent with the signing of the consent, you should not use *hereby* with suasive resolutions.)

Instead of suasive resolutions, you could use factual resolutions (or, more specifically, performative resolutions) to express an intention to bring about some change in the future. For instance, as an alternative to the resolution stated immediately above, you could resolve *that Acme is hereby directed to issue to Jones 1,000 shares of Series A preferred stock*. This formulation is equally effective, but a little less economical; I generally prefer suasive resolutions.

More often than not, drafters have a board of directors resolve that each officer of the corporation *be, and hereby is, authorized*. (Some drafters insist on expending a few additional words to convey the same meaning by having the board

resolve that the officers of the corporation *be, and each of them hereby is, authorized.*) This bizarre usage has *resolve* act as both a factual and a suasive verb: *be authorized* is in the mandative subjunctive and is consistent with use of *resolve* as a suasive verb; *is authorized* is in the indicative and is consistent with use of *resolve* as a factual verb. This results in an inherent contradiction: If you are, by means of a ritual performative, conferring authority on someone, it makes no sense to use suasive language to convey an intention to authorize that person at some time in the future. You should use only factual resolutions to confer authority. (Note that drafters also use this inappropriate dual structure with directing and ratifying ritual performatives.)

Avoiding Language of Obligation

In the contract provision *Widgetco shall purchase the Shares from Jones, shall* means “has a duty to” and serves to impose a duty on the subject of a sentence. While use of *shall* is best limited to this context, drafters constantly use *shall* in other categories of contract language even if no duty is being imposed; in *LUDCA*, I examine the principal forms of this misuse. For purposes of drafting resolutions, the rule is simple: You should never use *shall* or the other main verb of language of obligation, *must*, as resolutions do not serve to impose legal duties. *Shall* nevertheless sneaks its way into resolutions. Drafters often use *shall* in policy resolutions; an example would be a resolution to the effect that *the fiscal year of the Corporation shall end [read ends] on December 31 of each year.* In addition, *shall* is often used to express future time, even when standard usage would require use of the present tense. (For examples of this latter inappropriate use of *shall*, see the “before” form of consent that follows this article.)

THE CONCLUDING CLAUSE • After the resolutions and before the signatures is a statement

as to when the consent is being signed. By analogy to contracts, I refer to this as the “concluding clause.”

Most concluding clauses use some variation on the following format: *IN WITNESS WHEREOF, the undersigned have duly executed this Unanimous Written Consent on the 3rd day of May, 2002.* This format has a number of shortcomings:

- *IN WITNESS WHEREOF*, like *WHEREAS*, is archaic, and furthermore state statutes do not require that signatures to a consent be witnessed;
- *The undersigned* is sufficiently cumbersome that I prefer to use the passive voice and exclude the *by-agent* (*the undersigned*);
- I prefer to use the verb *sign*. In this context, *execute* comes across as jargon;
- it seems odd to have the signatories assert in the concluding clause that they have signed the consent, given that the signature blocks do not precede that assertion, but follow it. Instead of the present perfect (*has been signed*), I prefer the present progressive (*is being signed*);
- a consent is not enhanced by having signatories affirm that they are *duly* signing it (in other words, signing it in accordance with legal requirements), as opposed to simply signing it;
- there is no need to reiterate that the consent is unanimous and written. And there is no need to use a capital “C” in *consent*, since it constitutes a reference to a category of document rather than the title of a work;
- the format *the 3rd day of May, 2002* is a long-winded and old-fashioned way to express dates.

Given these objections, I use the following form of concluding clause: *This consent is being signed on May 3, 2002.*

It is often the case that by design or happenstance one or more signatories do not sign a consent on the date stated in the introductory clause. When that happens, it is conventional to have the concluding clause state that the consent

is being signed *as of* that date, the purpose being to flag that the date given is not the signing date but rather a convenient legal fiction. In the case of consents of shareholders of a Delaware corporation or members of a Delaware nonstock corporation, this practice would seem to be inconsistent with section 228(c) of the Delaware General Corporation Law, which requires that every written consent "bear the date of signature of each stockholder or member who signs the consent." This inconsistency could have ramifications. The 60-day period specified in section 228(c) for delivering a sufficient number of shareholder consents to take the corporate action in question runs from the date of "the earliest dated consent" delivered to the corporation. If the earliest dated consent bears an *as of* date and was actually signed on an earlier date, a court would likely consider that earlier date to be the starting point of the 60-day period. I have not, however, found any case law on this issue.

Many consents include, as part of the concluding clause or as a separate paragraph preceding it, a statement to the effect that the consent may be signed in two or more counterparts that together constitute "one and the same" consent. Such statements are unnecessary, since even absent such a statement a consent with counterpart signatures would be effective, unless for some reason the entity's organizational documents prohibit counterpart signatures. There is nothing in, for instance, the Delaware General Corporate Law that brings into question the effectiveness of counterpart signatures to written consents. Stating that one can validly deliver counterpart signature pages by facsimile is also unnecessary, given that section 228(d)(2) of the Delaware General Corporation Law provides that a facsimile copy of a consent is as effective as an original.

THE SIGNATURE BLOCKS • Each signature block consists of a signatory's name accompa-

nied by a signature line. The conventions are essentially those used for contract signature blocks (I describe them in *LUDCA*), except that when all signatories are individuals, I state each signatory's name in initial capitals rather than all capitals. When some signatories are entities and some are individuals, I state the signatory names in all capitals but use initial capitals for the name of any individual signing on behalf of an entity signatory.

Signature blocks are usually aligned one above the other on the right-hand side of the page, but you should not hesitate to place them side by side if it doing so would usefully save space.

ATTACHMENTS • When in a consent a governing body authorizes or directs an entity to enter into an agreement, or ratifies entry into an agreement, more often than not a copy of the agreement is attached to the consent as an exhibit. If the consent authorizes or directs entry into the agreement, the exhibit could be the final form of the agreement, but often it is a draft, in which case the consent will usually authorize entry into the agreement in the form attached together with such changes are acceptable to the officers or to one or more named officers.

Whenever I can, I avoid attaching contracts to consents, as doing so generally results in an unnecessarily cluttered minute book. Instead, if the document that would have been attached is a draft, I identify it by referring to the date that it was distributed to the governing body in question (whether by e-mail, overnight carrier, or otherwise), and I retain, or make sure the company retains, a set of those drafts.

When a consent authorizes officers to negotiate such changes to an approved draft as are acceptable to them, the consent will often state that execution and delivery of the agreement containing any such changes will constitute conclusive evidence that those changes were acceptable to

the officers. Presumably the intention is to prevent any after-the-fact debate as to whether a particular change was in fact accepted by the officers, as opposed to representing an oversight on their part. Sometimes consents refer to execution and delivery constituting conclusive evidence of approval of those changes by the governing body adopting the consent. That is a mistake, as the consent does not require the governing body to approve any changes.

A CLOSING THOUGHT • In writing *LUDCA*, I did my best to be pragmatic. Before recommending an unorthodox approach to a given drafting issue, I weighed the benefits of that approach against the resistance it was likely to encounter. Some usages—for instance, the many misuses of *shall*—were sufficiently pernicious that I was willing to recommend wholesale change, no matter how firmly entrenched the current practice. Other flawed usages were sufficiently harmless and sufficiently widespread that I was willing to leave well enough alone.

In this article, in addition to my other recommendations, I suggest that you change the standard form of consent in several significant ways: By eliminating *whereas* from the recitals and

moving them to before the lead-in; by moving the verb *resolve* from the resolutions to the lead-in; and by formatting the resolutions as bullet-pointed *that*-clauses. Given that these changes do not affect meaning, and given that the current format has long been universally accepted, these suggestions might seem rash on my part.

I cannot, however, bring myself suggest that you perpetuate the current format. Like *witneseth, whereas, now therefore* and their ilk in the realm of contract drafting, the standard format of corporate resolutions is a relic from four hundred years ago or more. By contrast, standard English usage has inexorably continued to evolve, and it would seem timid, mule-headed, or mindless to insist that legal usage, either generally or as it relates to corporate resolutions, remain unchanged. This could only result in an unhelpful disjunct between the constantly innovating business world and the legal profession that serves it. That the format I recommend would not affect meaning should, instead of being an impediment to change, make it easier for corporate lawyers to adopt that format, safe in the knowledge that the resulting improvements in style and readability would not come at the client's expense.

APPENDIX

A Sample Written Consent, "Before" and "After"

To give a sense of the overall effect of the approaches I recommend in this article, I have included below two versions of a simple written consent of the board of directors of a Delaware corporation. The "before" version incorporates many widely accepted usages; the "after" version reflects how I would revise the "before" version. I have annotated, by means of footnotes, both versions (principally the "before" version) to indicate what changes I made or did not make. A fuller discussion of any issue raised in the footnotes can be found in this article, unless the change is not one that relates exclusively to corporate resolutions, in which case the footnote refers you to *LUDCA*.

"Before" Version of Sample Written Consent

UNANIMOUS WRITTEN CONSENT

OF

THE BOARD OF DIRECTORS

OF

ACME TECHNOLOGIES, INC.¹**Pursuant to Section 141(f) of the General
Corporation Law of the State of Delaware²**

³The undersigned, constituting all the members of the Board of Directors⁴ of Acme Technologies, Inc., a Delaware corporation (the "Company"), acting by written consent in lieu of a meeting pursuant to Section 141(f) of the General Corporation Law of the State of Delaware, hereby consent to the adoption of the following resolutions⁵ as though adopted at a meeting duly called and held with a quorum being present and acting throughout:⁶

WHEREAS,⁷ on March 18, 2002, the Company entered into a letter of intent with Dynamic Research, Inc. ("Dynamic"), a company developing global-positioning-satellite technologies, to purchase preferred stock representing a 35% ownership interest in Dynamic; and

¹ Reformat the title so that it takes up less space, and do not use boldface.

² Refer to the applicable state statute only in the lead-in.

³ Use single-spaced rather than double-spaced lines.

⁴ Do not use initial capital letters for "board of directors." See *LUDCA* at 126.

⁵ Instead of having the signatories *hereby consent to the adoption of the following resolutions*, have them *resolve as follows*.

⁶ The last part of the lead-in is unnecessary.

WHEREAS,⁷ the Company has investigated Dynamic's operations, technologies and corporate governance and has not uncovered any information to indicate that the Company should not consummate this transaction;

NOW, THEREFORE, IT IS RESOLVED,⁸ that the Company's execution of the letter of intent be, and it hereby is,⁹ ratified;

RESOLVED,⁸ the Company be, and hereby is,⁹ authorized and directed¹⁰ to enter into and to perform its obligations under the Preferred Stock Purchase Agreement¹¹ between the Company and Dynamic substantially in the form attached hereto as Appendix A,¹² and those ancillary agreements provided for therein to which the Company is a party, each with such changes, if any, as shall be¹³ acceptable to the officers of the Company in their sole discretion, execution and delivery of those documents by the Company to be conclusive evidence of the approval of Board of Directors⁴ of the Company,¹⁴ and

RESOLVED,⁸ that the officers of the Company be, and each of them hereby is, hereby authorized to execute and deliver on behalf of the Company all such further documents, certificates, or instruments, to take on behalf of the Company all such further actions, and to pay on behalf of the Company all such expenses as the officers of the Company shall¹⁵ determine to be necessary or desirable in order to carry out the foregoing resolutions, the execution and delivery of any such documents, certificates, or instruments, the taking of any such actions, and the payment of any such expenses to be conclusive evidence of the approval of the Board of Directors⁴ of the Company.¹⁶

This Unanimous Written Consent may be executed in two or more counterparts, each of which shall be deemed an original instrument, but all such counterparts shall together constitute for all purposes one and the same instrument.¹⁷

⁷ Move all recitals to before the lead-in, and do not use *WHEREAS*.

⁸ Phrase all resolutions as bullet-pointed *that*-clauses.

⁹ Do not use *resolve* as a factual and a suasive verb simultaneously. In this context, use only *hereby is*.

¹⁰ Use only *directed* rather than *authorized and directed*; if a governing body directs someone to take a particular action, by definition it also authorizes that person to take that action.

¹¹ While it is standard practice among corporate lawyers to use initial capitals when referring to a particular contract, doing so serves no purpose and is contrary to standard usage. I prefer to use lowercase letters. See *LUDCA* at 2–3.

¹² Whenever possible, avoid attaching draft contracts to board consents and instead identify the drafts by reference to when, and how, they were distributed to the governing body.

¹³ Do not use *shall be*, as no duty is being imposed, and do not use *will be*, as the future tense is inappropriate. Instead use *are*.

¹⁴ The resolution should refer not to evidence of board approval but to evidence that the officers accepted any changes that were made.

¹⁵ Do not use *shall*, as no duty is being imposed, and do not use *will*, as the future tense is inappropriate. Use the present tense instead.

¹⁶ The resolution should refer not to evidence of board approval but to evidence that the officers determined that any instruments executed and delivered, any actions taken, and any payments made were necessary or desirable.

¹⁷ This paragraph is unnecessary, as even without it a consent with counterpart signatures is effective under state law.

IN WITNESS WHEREOF,¹⁸ the undersigned¹⁹ have duly²⁰ executed²¹ this Unanimous Written Consent²² on the 17th day of May, 2002.²³

John Doe

Robert Roe

Jane Doe

“After” Version of Sample Written Consent

UNANIMOUS WRITTEN CONSENT OF
THE BOARD OF DIRECTORS OF
ACME TECHNOLOGIES, INC.

On March 18, 2002, Acme Technologies, Inc., a Delaware corporation (the “Company”), entered into a letter of intent with Dynamic Research, Inc. (“Dynamic”), a company developing global-positioning-satellite technologies, to purchase preferred stock representing a 35% ownership interest in Dynamic.

The Company has investigated Dynamic’s operations, technologies, and corporate governance and has not uncovered any information to indicate that the Company should not consummate this transaction.

The undersigned, constituting all the members of the Company’s board of directors and acting by written consent in lieu of a meeting in accordance with Section 141(f) of the Delaware General Corporation Law, therefore resolve as follows:

- that the Company’s execution and delivery of the letter of intent is hereby ratified;

¹⁸ *IN WITNESS WHEREOF* is archaic.

¹⁹ Use the passive voice and omit *the undersigned*.

²⁰ The *duly* is unnecessary.

²¹ Use the verb *signed* rather than *execute*, and instead of the present perfect use the present progressive (*are signing* or, in the passive voice, *is being signed*)

²² There is no need to repeat that the consent is unanimous and written, and *consent* should have a small “c,” since it refers to a category of document rather than the title of a work.

²³ This format for dates is old-fashioned and long-winded.

- that the Company enter into¹ and perform its obligations under the preferred stock purchase agreement between the Company and Dynamic substantially in the form distributed to Company board members by e-mail on March 12, 2002, and those ancillary agreements provided for therein to which the Company is a party, each with such changes, if any, as are acceptable to the officers of the Company in their sole discretion, execution and delivery of those documents by the Company to be conclusive evidence of that acceptability; and
- that each of the officers of the Company is hereby authorized to execute and deliver on behalf of the Company all such further documents, certificates, or instruments, to take on behalf of the Company all such further actions, and to pay on behalf of the Company all such expenses that the officers of the Company determine to be necessary or desirable in order to carry out the foregoing resolutions, the execution and delivery of any such documents, certificates, or instruments, the taking of any such actions, and the payment of any such expenses to be conclusive evidence of that determination.

This consent is being signed on May 17, 2002.

John Doe

Robert Roe

Jane Doe

¹ This resolution is in the form of a suasive resolution. An equally acceptable alternative would be to phrase it as a factual resolution, more specifically a performative resolution, using *is directed to enter into*.

