

SENATE No. 898

The Commonwealth of Massachusetts

PRESENTED BY:

Joan B. Lovely, (BY REQUEST)

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to receivership.

PETITION OF:

NAME:

DISTRICT/ADDRESS:

Zbigniew Kicinski

SENATE No. 898

By Ms. Lovely (by request), a petition (accompanied by bill, Senate, No. 898) of Zbigniew Kicinski for legislation relative to receivership. The Judiciary.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act relative to receivership.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Massachusetts General Law Chapter 156C, Section 45 is hereby amended by inserting, in
2 line 22, after the word "trustee." the following language:-

3 (c) The Court shall only appoint a Liquidating Trustee as contemplated by subsection (a)
4 who is free of any conflicts of interest. Any proposed or considered Liquidating Trustee shall
5 provide a complete listing of his previous dealings with the parties and their counsel prior to an
6 appointment becoming effective. The parties in the litigation shall have the opportunity to
7 question the proposed Liquidating Trustee at a hearing and to object to any proposed Liquidating
8 Trustee on the grounds of any actual or apparent conflict of interest. If any party to the litigation
9 later learns of an actual or apparent conflict of interest that was not disclosed by the Liquidating
10 Trustee, it shall have grounds to move the Court to remove the Liquidating Trustee.

11 Prior to the appointment of a Liquidating Trustee, the Court must determine which of the
12 parties' claims are derivative and belong to the Limited Liability Company. Derivative claims

13 and choses in action shall be assigned to the Liquidating Trustee, who shall have the exclusive
14 authority to litigate, prosecute and/or settle such claims and choses in action, or shall have the
15 discretion to choose to not pursue such claims, subject to the provisions set forth below. Should
16 the Liquidating Trustee choose to not pursue any derivative claims, such claims will be forever
17 barred and the Members of the LLC will have no right to pursue such claims. To the extent that
18 claims are partly derivative and partly belong to a Member, the Court shall consider such claims
19 to be completely derivative if the alleged payment due or the damages would have been paid
20 from or to the Limited Liability Company. Questions of doubt should be resolved in favor of a
21 finding that claims or choses in action are derivative.

22 The Liquidating Trustee shall present a plan to prosecute any such claims or choses in
23 action that he deems worthy of pursuing, considering the costs, chances of success, and the
24 amount and collectability of such claims or choses in action. The Liquidating Trustee must
25 obtain Court approval prior of such a plan, after notice to the parties and an opportunity to be
26 heard.

27 The Liquidating Trustee shall have a fiduciary duty to the Limited Liability Company
28 and the Court to act in the best interest of the Limited Liability Company and in a manner to
29 preserve and maximize its assets for creditors and Members. The Liquidating Trustee shall
30 provide the parties with advance notice of any action or intended action affecting the finances of
31 the Limited Liability Company, including any potential settlements of any claims, and any sale
32 or encumbrance of any assets. Any party to the litigation may propose a course of action to the
33 Liquidating Trustee. Any party may file a motion with the Court if they disagree with the
34 Liquidating Trustee's proposed actions or failures to act. If the Court shall enter such orders that
35 are in the best interests of the Limited Liability Company and that do not unduly impact or

36 prejudice one or more Members of the Limited Liability Company. The Court may order the
37 Liquidating Trustee that any action be taken or not taken and may make such other order as
38 justice requires.

39 The Liquidating Trustee will not hire any other attorney, accountant or other professional
40 without permission of the Court. The Liquidating Trustee will disclose to the parties and the
41 Court his relationship with such other attorney, accountant or other professional, including any
42 previous dealings, as well as the professional's relationship and prior dealings with all parties and
43 attorneys in the litigation. The parties in the case shall have the opportunity to question the
44 proposed Liquidating Trustee and any proposed attorney, accountant or other professional at a
45 hearing and to object to their appointment on the grounds of any actual or apparent conflict of
46 interest. If any party to the litigation later learns of an actual or apparent conflict of interest that
47 was not disclosed by the Liquidating Trustee, it shall have grounds to move the Court to remove
48 such person.

49 The Liquidating Trustee will follow all applicable laws and codes pertaining to the
50 business of the Limited Liability Company, especially if the Liquidating Trustee operates it as a
51 going concern. The Court should give special consideration as to whether the operation of the
52 Limited Liability Company requires a special license and whether one of the Members should
53 continue to be involved in the operation of the business, if they so desire, with due
54 compensation. The Liquidating Trustee shall not act in a way that violates any contractual rights
55 of any creditor or third-party, including a Member or an entity owned or operating as a Member
56 without specific Court approval, subject to the Parties and such creditor or third-party's right to
57 be heard.

58 Within 30 days of accepting an appointment, the Liquidating Trustee shall provide notice
59 to any creditor or potential creditor of the Limited Liability Company of the liquidation. Any
60 person or entity who claims to be a creditor of the Limited Liability Company may file a claim in
61 the proceeding and will be considered a Party to the action.

62 On motion by the Liquidating Trustee, and after notice to all Parties and all Members of
63 the LLC and a hearing, the court may approve a compromise or settlement of claims or choses in
64 action by the Liquidating Trustee. In deciding whether to approve any proposed settlement or
65 compromise of controversies, the court shall consider:

66 (i) The probability of the Liquidating Trustee's success in the litigation to be settled,

67 (ii) The difficulties, if any, in collecting a judgment in favor of the Limited Liability
68 Company,

69 (ii) The complexity of the litigation, including the expense, inconvenience, and delay
70 attendant to

71 further proceedings,

72 and

73 (iv) The paramount interests of creditors and Members, with appropriate deference to
74 their reasonable view.

75 A Liquidating Trustee has the following duties in addition to those specifically conferred
76 by this section or otherwise by statute or court rule:

77 (i) The duty to notify all federal and state taxing and applicable regulatory agencies of the
78 Liquidating Trustee's appointment in accordance with any applicable laws imposing this duty,
79 including but not limited to 26 U.S.C. Sec. 6036, or any successor statutes;

80 (ii) The duty to comply with state law;

81 (iii) Other duties as the Liquidating Trustee may be directed to perform by the court or as
82 may be provided for by statute or rule.

83 A Liquidating Trustee shall file with the court a monthly report of the Liquidating
84 Trustee's operations and financial affairs unless otherwise ordered by the court. Except as
85 otherwise ordered by the court, each report of a Liquidating Trustee shall be due by the last day
86 of the subsequent month and shall include the following:

87 (i) A balance sheet;

88 (ii) A statement of income and expenses;

89 (iii) A statement of cash receipts and disbursements;

90 (iv) A statement of accrued accounts receivable. The statement shall disclose amounts
91 considered to be uncollectable;

92 (v) A statement of accounts payable of the Liquidating Trustee, including professional
93 fees. The statement shall list the name of each creditor and the amounts owing and remaining
94 unpaid over thirty days; and

95 (vi) A tax disclosure statement, which shall list post filing taxes due or tax deposits
96 required, the name of the taxing agency, the amount due, the date due, and an explanation for
97 any failure to make payments or deposits.

98 Except as otherwise ordered by the court, the entry of an order appointing a Liquidating
99 Trustee shall operate for sixty days as a stay, applicable to all persons, of: (a) The
100 commencement or continuation, including the issuance or employment of process, of a judicial,
101 administrative, or other action or proceeding against the person over whose property the
102 Liquidating Trustee is appointed that was or could have been commenced before the entry of the
103 order of appointment, or to recover a claim against the person that arose before the entry of the
104 order of appointment; (b) The enforcement, against the person over whose property the
105 Liquidating Trustee is appointed or any estate property, of a judgment obtained before the order
106 of appointment; (c) Any act to obtain possession of estate property from the Liquidating Trustee,
107 or to interfere with, or exercise control over, estate property; (d) Any act to create, perfect, or
108 enforce any lien or claim against estate property except by exercise of a right of setoff, to the
109 extent that the lien secures a claim against the person that arose before the entry of the order of
110 appointment; or (e) Any act to collect, assess, or recover a claim against the person that arose
111 before the entry of the order of appointment.