Approved March 4, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on March 2, 1988 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter and Yost.

Committee staff present:
Gordon Self, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislaitve Research Department

Conferees appearing before the committee:
Senator Wint Winter, Jr.
Doug Mays, Kansas Securities Commissioner
Merlin Wheeler, Kansas Bar Association Corporation
Lloyd Culbertson, First National Bank of Phillipsburg
Gerhard Metz, Kansas Chamber of Commerce and Industry
Wayne Maichel, Kansas AFL-CIO
Mike Jennings, Sedgwick County District Attorney
Kyle Smith, Assistant Attorney General assigned to the KBI
Jim Clark, Kansas County and District Attorneys Association

Senate Bill 586 - Corporation control share acquisition act.

Senator Winter, prime sponsor of the bill, stated he supports the concept of the bill. He explained this has been worked on and studied very hard. It gives businesses an option that they may choose to use or ignore. It is of benefit to workers in Kansas.

Doug Mays, Kansas Securities Commissioner, presented background to the bill. He explained the bill provides a level playing field upon which the battle for control can take place. It forces the two opposing parties to set forth their plans for the future of the target corporation. This bill is a fair, moderate, effective and constitutional act. A copy of his handout is attached (See Attachment I). During committee discussion, a committee member inquired if this doesn't deprive someone of their ownership rights? Commissioner Mays replied government is not saying we can control. We are setting up a mechanism where shareholders can make a decision.

Ron Smith, Kansas Bar Association, stated the bar has no position on this bill, but they want to present some information to the committee. He introduced Merlin Wheeler, President, Kansas Bar Association Corporation, Business and Banking Law Section.

Mr. Wheeler testified the number of corporations which might fall under this Act is really unknown, but it is generally conceded to be a very small number. The enactment of legislation patterned after the Indiana statute which was approved in the case of CTS Corp. v. Dynamics Corp. of America, 55 U.S.L.W. 4478 (1987) may have the advantage of Court approval, but may not be the best alternative statutory pattern available. A copy of his statement is attached (See Attachment II). He said, don't take this legislation lightly; action should be taken in

Senate Bill 586 continued

some form. A committee member inquired, what would you think of an automatic opt in. Mr. Wheeler replied I am not against this. There is one other problem with companies in determining how many shareholders have stock.

Lloyd Culbertson, First National Bank of Phillipsburg, testified I am here in support of the bill, but do hope the committee can eliminate or at least greatly reduce the 18 months waiting period for the bil to become effective. He recommended striking 5(b) from the bill. A copy of his statement is attached (See Attachment III).

Gerhard Metz, Kansas Chamber of Commerce and Industry, appeared in support of the bill. He testified it should be stressed at the outset that the objective of this legislation is not to prevent all hostile takeovers, nor is it intended to protect inefficient, entrenched management. We believe the adoption of this bill would restore the balance in merger and acquisition procedures, and provide the kind of predictability that businesses need in order to move forward for a more productive economy. A copy of his statement is attached (See Attachment IV).

Wayne Maichel, Kansas AFL-CIO, testified they are in support of the concept of this legislation. He said in terms of the real world, devastation is heaped on workers by a takeover. He used Goodyear as an example and reported 2,000 workers lost their jobs as a result of the attempted takeover. He said we hope this bill will curtail this type of thing happening.

A committee member inquired of Commissioner Mays, if we strike 5(b) do we in any way affect the constitutionality of the act? Commissioner Mays replied, no.

The chairman announced before action is taken on this bill a subcommittee will be appointed to review the bill and make recommendations to the bull committee. The chairman appointed Senator Winter, Senator Langworthy and himself.

Senate Bill 691 - Interception of wire, oral and electronic communications.

Mike Jennings, Sedgwick County District Attorney, appeared in favor of the bill. He testified we are needing some guidelines from the legislature in order to have pen register. At the present time it is not required to have a court order to monitor a beeper. From my experience in investigating drug offenses, monitoring is essential. He said all enabling legislation provided to law enforcement in the community will be appreciated. The expense of a pen register is not like a wire tap or a monitor. In matters of phraseology concerning the triggering provision, he asked the committee to move away from that. The thirty day period is problematical. He referred to page 15, 2(b), line 554, and suggested different language that he will submit in writing. He explained the pen register device picks up signals on a calling line, and it will tell you the number that is being called. Traffic trace picks up from incoming calls. Under the circumstances pen register can be obtained, there will be a judicial review of the certification by the applicant. If that language is left as it is right now, the law enforcement agencies

Senate Bill 691 continued

may not possess sufficient information to meet that requirement. He said the word likely is akin to probable cause.

Kyle Smith, Assistant Attorney General assigned to the KBI, testified, I do spend a lot of time with wire taps. He said, we have to come up with a provision to comply with the federal statute to update and deal with electronic communications. The main change in the bill is procedural. The procedural matters allow recording foreign language, allow specific phone or specific location, allow for roving tap, allow 10 day grace period and allow for pen registers. He stated phone companies won't put one up unless they have a court order because of liability. He suggested one change, the definition of law enforcement officer be broadened. Man power is biggest problem in wire tap. When going after organized crime, you have to have it.

Jim Clark, Kansas County and District Attorneys Association, testified his association is in favor of the bill. He pointed out an error in line 173.

The meeting adjourned.

A copy of the guest list is attached (See Attachment V).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-2-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Lloyd Culbertson	Phillipsburg KS.	First National Bank
Merlin G. Wheeler	Emporia, KS	Kansas Bar Ass'n
Norton Rice		SOS
Elizabeth Fast	Overland Park, KS	Brown Koralchik
Gene Mayer		SOS
Roger Walter	Topeka, Ks.	Securities Com. Office
Gerhard Metz	"	KECI
Jeff Rosell	TOPEKA	UNITED TEL.
Terry L. Harley	Westwood, KS	United Telecom
Jack Glaves	Wichita, Kansas	KN Energy
Ron Smith	Topeka	KSA
Michael Ottaman	Marion, Kansas	Marion High School
Kyle G. Smith	Topeka	KBI
Rick Kready	"	KPL Gas Service
Jim Clark	Topeka	KCDAA
Anne Smith	Topeka	KPL
F. Hagaman	Topeka	Budget
Joe D. Morris	TOPEKA	KCSI
Ron Wurtz	Topeka	Mesa
Rebecca Rice	Topeka	Amoco
Doug Mays	Topeka	Kansas Securities Commissioner
Gary Reser	Topeka	Kan. Telecomm. Assn
Barb Reinert	"	KPOA
Wayne Maichel	Top	B.A.K.C.T.U
Stuart Wheeler	Hastings NE	KNEBEC
Jim Wehrhoff	Topeka	KS AFL-CIO

(over)

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name	address	company
Bob Crawford	Topeka	KTLA
David E. Johnson	Topeka	KTSW
Ed Schaut	Topeka	SWB Mobile Systems

3-2-88

REMARKS REGARDING PROPOSAL SB 586 -- CONTROL SHARE ACQUISITIONS

Kansas Securities Commissioner
M. Douglas Mays

Before the Senate Committee on Judiciary

March 2, 1988

HISTORY

Federal regulation of tender offers commenced with passage of the Williams Act in 1968, in response to the increasing presence of hostile tender offers. Prior to this, existing federal securities laws were thought to inadequately regulate this activity. Public shareholders were subjected to a variety of abuses.

The Williams Act comprises a series of amendments to the 1934 Securities Exchange Act. Except for the anti-fraud provisions the Act applies only to '34 Act reporting companies, i.e., companies which have securities registered on a national exchange, or "over-the-counter" companies which have assets greater than $5 million and more than 500 shareholders.

The Williams Act requires any party who acquires more than 5 percent of the securities of a reporting company to file disclosure documents. The Act also imposes procedural ground rules to govern tender offers. For example, stockholders who tender their shares pursuant to the tender offer may withdraw them during the first 15 days. The offer itself must remain open for at least 20 days. If more shares are tendered than the offeror sought to purchase, purchases must be made from all tendering shareholders on a pro rata basis. The offeror must also pay the same price for all purchases. If the offering price is increased before the end of the offer, all tendering shareholders must receive the benefit of the increased price.

After the federal government moved to substantively regulate tender offers, most states followed suit and enacted some form of regulation. Kansas enacted a take-over bid act which was fairly representative of what was done in other states, K.S.A. 17-1276 Generally these state acts followed a pattern of requiring that a pre-commencement notification and disclosure be filed with a state official, usually the securities administrator. They also typically provided the target company the opportunity for an administrative hearing on either the fairness of the tender offer or the adequacy of the disclosure. Enforcement of the various state acts afforded a target company a procedural mechanism to halt or delay a hostile take-over bid.

Att. I

CONSTITUTIONALLY

These state acts potentially raised two constitutional questions. The first was a question of a violation of the "supremacy clause." If Congress exercises legitimate authority to regulate conduct and manifest an intention to do so to the exclusion of state regulation, it is said to pre-empt the field of regulation. In such circumstances any state regulation is constitutionally impermissible as a violation of the supremacy clause. However, even in the absence of an express intention to pre-empt, attempted state regulation will violate the supremacy clause if compliance with both state and federal regulation is impossible or if the state act frustrates the purpose of a federal act.

The second constitutional issue concerned a question of whether the state acts violated the Commerce Clause of the U.S. Constitution. The Commerce Clause is nothing more than a grant to Congress the power to "regulate commerce. . .among the several states." If a state act directly burdens interstate commerce it is unconstitutional. However, if a state act indirectly burdens interstate commerce, the courts have engaged in a balancing test weighing the local interests promoted by state regulation versus the burden it imposes. In such circumstances, a state act is unconstitutional if the court decides the burdens outweigh local benefits and is therefore excessive. State acts have also been held to be an impermissible burden if they subjected interstate commercial activities to the risk of multiple, inconsistent state regulation.

The U.S. Supreme Court first addressed these questions in the context of the Illinois Take-Over Bid Act in Edgar v. Mite, 457 U.S. 624 (1982). The Mite court could reach no consensus on the supremacy clause issue, although a plurality of 3 justices found the act violated the supremacy clause. Since this portion of the opinion had less than a majority (5 out of 9), it is not binding precedent. Also there was less than a majority on the question of a direct burden on interstate commerce. However, a majority of the justices in Mite held that the Illinois Act was an impermissible indirect burden on interstate commerce.

Mite was followed by a rash of U.S. Circuit Court of Appeals decision declaring other state acts unconstitutional. Most notable of these for our purposes is Mesa Petroleum Co. v. Cities Service Co. Mesa declared the Oklahoma statute unconstitutional. It was virtually identical to the Kansas Act.

In the wake of Mite, many states attempted to amend or adopt new take-over legislation which would pass constitutional muster. This generation of legislation is referred to as post-Mite. Because of the variety of concurring and dissenting opinions in Mite much confusion existed over the import of the decision. These endeavors generally met with little success at the circuit court level. Most considered were found unconstitutional.

The Indiana "Control Share Acquisition Act"

In early March of this year, my office received an inquiry concerning the Kansas Act. After examining the statute and applicable case law, we concluded that K.S.A. 17-1276 was probably unconstitutional for the above stated reasons. On March 30, 1987, my office requested an opinion from the Attorney General. That opinion, rendered on June 1, 1987, confirmed our ascertations. At the time of our opinion request, there remained a serious question as to what, if any, legislation could replace the existing statute and be constitutionally permissible. This speculation came to an end when the U.S. Supreme Court considered the Indiana Control Share Acquisitions Act in CTS v. Dynamics Corp. of America, 55 U.S.L.W. 4478 (1987).

Among post-Mite approaches the Indiana Act is unique. It regulates tender-offers indirectly through the substantive law of corporate governance. The acquisition of a certain level of shares automatically severs the voting rights from the shares until and unless approved by a majority of disinterested shareholders. There is no external state administrative review of the tender offer process. Rather it becomes a matter of internal governance of the corporation by its shareholders.

Essentially, the majority decision on CTS held that such an act is not a violation of the supremacy clause, not a direct burden on interstate commerce, nor is it an impermissible indirect burden. The local interest served (regulation of domestic corporations, the definition of powers, and definition of rights acquired by purchasing shares) outweighes any effect on interstate commercial transactions. It is important to note, however, the Indiana Act applies only to domestic corporations, corporations organized under Indiana law. The decision notes that any risk of inconsistent state regulation (often a grounds for a finding of an unconstitutional indirect burden) is eliminated if each state regulates only corporations it has created. Since the CTS decision, several states have passed new statutes patterned after the Indiana Act. Many, including Missouri, Massachusetts, Oklahoma and Arizona follow that act closely.

Senate Bill No. 586

The bill before you is the culmination of nearly a years efforts. After the Attorney General's opinion of June 1, 1987 declared the existing Takeovers Act unconstitutional, I, with the Governor's blessing, approached the Legislative Coordinating Council to ask that an interim study be conducted. The issue of corporate takeover legislation was referred to the Special Committee on the Judiciary. For various reasons the committee, while not opposing efforts designed to deal with hostile takeovers, made no specific recommendation.

The committee did, however, encourage the Securities Commissioner

to "...meet and consult with various business leaders as well as other interested parties on the matter of hostile corporate takeovers in Kansas." The report concluded with the hope that such meeting would result in "...specific proposals for consideration during the next session."

With this charge in mind, I convened a meeting at the Capitol on November 19, 1987. Invited to attend were the representatives of many of the publicly held corporations in Kansas, the KCCI, the Department of Commerce, Kansas, Inc.; the State House and Senate, my office, and virtually anyone that had expressed an interest. The meeting was attended by thirteen individuals with additional comment received later by many of those not in attendance.

Resulting from this meeting were the following conclusions:

1. Corporate Takeover Legislation is necessary to protect Kansas businesses and shareholder interests.

2. That legislation should closely follow the Indiana Control Share Acquisition Act.

3. That differences concerning the various detailed provisions of the Act did not appear to be insurmountable.

4. That the Securities Commissioner was to work with the various interested parties to attempt to form a consensus around a specific bill.

5. That the bill should be introduced in the next session of the Kansas Legislature.

A mini-committee of five was formed to draft specific legislation. The preliminary version was mailed to interested parties for comment in December, 1987, and was received throughout January. A final draft was submitted on February 1 and, with minor changes by the revisor, is the bill before you.

CONCLUSION

I believe that SB 586 fulfills the charge of the report of the Special Committee on Judiciary. While there may be some who are not, due to their own particular situation, enthusiastic about some specific provisions of this bill, overall as solid a consensus as can be expected concerning legislation as complex as this, currently exists.

While this act is not perfect,it is constitutional and it deals with the difficulties and abuses that arise many times during hostile takeover attempts. It can be argued that not all takeovers are necessarily bad. In some cases, the management of a corporation may be so inept, that the shareholders may welcome a complete change in the boardroom. The key lies in the motives of those initiating the takeover attempt. In some instances,

this amounts to little more than outright extortion, popularly known as "greenmail."

SB 586 provides a level playing field upon which the battle for control can take place. It forces the two opposing parties to set forth their plans for the future of the target corporation. It allows the shareholders, who have not as yet sold out, time to consider these proposals and to rationally decide who will manage and direct the corporation.

This bill is, in my opinion, a fair, moderate, effective and constitutional act. It is therefore the opinion of the Kansas Securities Commissioner that Senate Bill No. 586 be adopted.

3-2-88

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MEMO

TO: SENATE JUDICIARY COMMITTEE
FROM: MERLIN G. WHEELER, PRESIDENT, KANSAS BAR ASSOCIATION CORPORATION, BUSINESS AND BANKING LAW SECTION
DATE: MARCH 2, 1988
RE: SB 586

In light of recent significant United States Supreme Court cases the Attorney General of Kansas rendered an opinion on June 1, 1987, concluding the Kansas Take-Over Bids Act was unconstitutional (A.G. Op. 87-87). This opinion is generally regarded as correct and, while the statutory objective was admirable, our present statute, K.S.A. 17-1276, et seq., would not be considered to be of significant assistance at this time.

With regard to the enactment of legislation designed to provide some measure of protection to Kansas investors while meeting federally-mandated neutrality standards, I would offer the following general comments:

1. The number of corporations which might fall under this Act is really unknown, but it is generally conceded to be a very small number. While this Act may have a very limited application it is important because of the magnitude of investments involved in these transactions. It is also important to act because having a conceded unconstitutional statute is only a guarantee of litigation which will benefit no one and likely result in a need to act in a rash manner at some later date.

2. Enactment of legislation patterned after the Indiana statute which was approved in the case of CTS Corp. v. Dynamics Corp. of America, 55 U.S.L.W. 4478 (1987) may have the advantage of Court approval, but may not be the best alternative statutory pattern available. Hence, I urge a more complete review of the statutory patterns available with reasoned consideration given to the degree and method of protection sought. The dilemma of enacting meaningful legislation versus tested legislation should not be considered lightly.

With regard to the specific legislation now being considered, I would offer the following suggestions and comments:

1. The definition of "interested shares" contained in Section 3 of SB 586 fails to address shares which are owned by entities such as an ESOP or Section 401(k) Salary Reduction Plan and managed by employees of the target company who may or may not be directors or officers as well. These types of plans theoretically will continue to increase the percentage of employee ownership of a target corporation and I would suggest that it

Att. II

would be extremely inequitable to neutralize these shares in any vote under the proposed Act merely because of the position of the managing trustee.

2. Frequently, non-employee directors of publicly-held corporations own large blocks of stock in the corporation which they direct. Sections 3(a) and (b) of the legislation would seem not to neutralize the voting power of shares thus held, but if it is not the intent of this Committee to neutralize these shares, the definition of "interested shares" should so specifically read.

3. The opt-out and opt-in provision of Section 5(a) and (b), respectively, are extremely important to the passage of legislation of this type and should not be deleted under any circumstances.

4. There appears to be a technical drafting error in Section 10 of SB 586 appearing at lines 0190 and 0191. I believe it is the intention to require the redemption of all of the acquired shares if the public corporation exercises its right to redeem, and if so, this phrase should be corrected to read:

> "...issuing public corporation may call for redemption of not less than all shares acquired in a control share acquisition at a ..."

3-2-88

TESTIMONY TO
SENATE JUDICIARY COMMITTEE
Senate Bill 586
March 2, 1988

I am Lloyd Culbertson and I am a Senior Vice president with the First National Bank of Phillipsburg, Kansas. I've lived in Phillipsburg all my life.

I am here in support of Senate Bill 586, but do hope the committee can eliminate or at least greatly reduce the 18 months waiting period for the Bill to become effective. My interest in this bill arises from my concern over the economic importance of the offices of KN Energy in Phillipsburg. KN employs 115 people in Phillipsburg, representing about 34% of KN's total employment in Kansas, with an annual payroll of $2,757,000.00. They paid property taxes in Phillips county for 1987 of $94,000.00.

Not only Phillips County, but all of North Central and Northwestern Kansas is fighting to survive. In a comprehensive plan developed by Bucher & Willis for the City of Phillipsburg, in 1978, very startling figures are revealed. From 1910 to 1960 the population of Phillips County has decreased from approximately 14,000 people to 8,000 people. They projected that if this trend continues, by the year 2000, the population for Phillips County will be 5,500 people. The way to counter this projection is with maintaining existing industry and attracting new industry. We have to have a good reason to keep our existing

Att. III

people and attract new ones.

The State of Kansas is developing new methods to attract industry and spending large sums of money to do so. I think it is equally important to keep our current industry.

KN Energy qualifies for coverage by this bill as more than 10% of its stockholders are Kansas residents. As you are probably aware, KN has been and now is the subject of take over attempts by non-Kansas interests.

We are concerned in Phillipsburg about the result of a change in management and ownership of Kansas operations in general and our community in particular. We know and trust the present management, it is stable and predictable. The continued operation in Phillipsburg is certainly a management decision that could change with new control. I mentioned that I hope the opt in provision of section 5b can be eliminated. The requirements that the Board of Directors or the Shareholders must take action by amending the Articles of Incorporation or the by-laws, in order for this law to apply, for the first 18 months after its enactment renders the bill of lessened value in the instance of KN.

I'm advised that action by the board of directors would surely result in a lawsuit contending that the board is unreasonably interfering with stockholders rights. The annual KN shareholders meeting is scheduled this month and of course will

not be held for another year. So from a practical standpoint this bill wouldn't be available for KN's benefit for another year. This is a lifetime in todays world of corporate raiders.

I strongly urge the committee to make this Bill applicable to protect our Kansas Companies as soon as it receives approval of the legislature and the Governor. This can be accomplished by striking 5b from the current proposal.

I do not see who would be hurt by doing that in as much as the bill provides for a corporation to opt out of it in section 5a. If they do not want it applicable the board or stockholders can so provide by amending the articles of incorporation or the by-laws. This bill is a good concept and should be adopted and made effective from its enactment, giving the right to opt out if a particular corporation desires.

3-2-88

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

SB 586

March 2, 1988

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Judiciary Committee

by

Gerhard Metz
Director of Taxation

Mr. Chairman and members of the Committee, on behalf of KCCI I should like to thank you for this opportunity to express our support for SB 586.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

During its Fall, 1987 meeting, the Board of Directors of KCCI adopted a policy position supporting the adoption of a statute that would result in more orderly procedures for the acquisition of controlling shares of domestic corporations. Such a

Att. IV

statute "should provide for equitable offers as between shareholders, tightening disclosure provisions, and providing a longer period for informed choice."

Later last Fall, in meetings with legislators, concerned businesses, and the Securities Commissioner, it was decided that KCCI would coordinate an effort to develop a consensus of the business community which would result in a bill acceptable to most concerned Kansas businesses. After a meeting with Commissioner Mays, Prof. Fred Lovitch of the University of Kansas law faculty, and Sen. Wint Winter, a draft proposal was worked out, and a copy was forwarded to our offices to be circulated for comments by KCCI members. The bill before you now is the outcome of these consultations and careful review of the issues of constitutionality, fairness, and creation of a stable business environment, where informed choices can be made by shareholders and management in a hostile takeover situation.

It should be stressed at the outset that the objective of this legislation is <u>not</u> to prevent all hostile takeovers, nor is it intended to protect inefficient, entrenched management. We readily acknowledge that in some instances a change in ownership, and subsequent management changes may be required for a corporation's economic health. This, however, is not the case in all instances. When acquisition techniques are so manipulated as to coerce shareholders into making hasty decisions for fear of losing their investments, the only beneficiary is the "raider;" the fiscal situation of the acquiring company may even be adversely affected by ill-advised acquisitions. What SB 586 does is to give the requisite time for an informed choice by all shareholders. There is built-in protection in the form of a bifurcated vote, whereby the interests of both the acquiring party and the opponents of acquisition are balanced with those of purely disinterested shareholders. In order to prevent any corporation's being included in the protections of this law, during the initial eighteen months of this law's application, companies would have to "opt in" by an affirmative act. Those corporations for which the provisions of the law appear to be undesirable need not be included.

We believe that adoption of SB 586 would restore the balance in merger and acquisition procedures, and provide the kind of predictability that businesses need in order to move forward for a more productive economy.

Thank you once again for the opportunity to speak. I will be happy to stand for questions.