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DELAWARE STATE SENATE
153rd GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 21

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend § 144, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 144. Interested ~~directors~~; directors and officers; controlling stockholder transactions; quorum.

(a) ~~No contract~~ Except for a controlling stockholder transaction under subsection (b) or (c) of this section, an act or transaction involving or between a corporation corporation, or 1 or more of the corporation's subsidiaries, on the one hand, and 1 or more of ~~its~~ the corporation's directors or officers, on the other hand, or involving or between a corporation corporation or 1 or more of the corporation's subsidiaries, on the one hand, and any other corporation, partnership (general or limited), limited liability company, statutory trust, association, or any other entity or organization in which 1 or more of its directors or ~~officers~~; officers are directors, stockholders, partners, managers, members, or officers, or have a financial interest, ~~shall be void or voidable solely for this reason, or solely because~~ on the other hand, may not be the subject of equitable relief, or give rise to an award of damages, against a director or officer of the corporation because of the foregoing circumstances or the receipt of any benefit by any such director, officer, entity, or organization or because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract act or transaction, ~~or solely because any such~~ or was involved in the initiation, negotiation, or approval of the act or transaction (including by virtue of a director's or officer's votes are vote being counted for such purpose, purpose), if:

(1) The material facts as to the director's or officer's relationship or interest and as to the ~~contract act~~ or transaction transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction, are disclosed or are known to all members of the board of directors or the committee, a committee of the board of directors, and the board or committee in good faith and without gross negligence authorizes the ~~contract act~~ or

transaction by the affirmative votes of a majority of the disinterested ~~directors~~, directors then serving on the board of directors or such committee (as applicable), even though the disinterested directors be less than a quorum; provided that if a majority of the directors are not disinterested directors with respect to the act or transaction, such act or transaction shall be approved (or recommended for approval) by a committee of the board of directors that consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the act or transaction; or

(2) ~~The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract~~ act or transaction is specifically approved or ratified in good faith by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders; or

(3) ~~The contract~~ act or transaction is fair as to the corporation as of the time it is authorized, approved or ratified by the board of directors, a committee or the stockholders; corporation and the corporation's stockholders.

(b) A controlling stockholder transaction (other than any going private transaction) may not be the subject of equitable relief, or give rise to an award of damages, against a director or officer of the corporation or any controlling stockholder or member of a control group, by reason of a claim based on a breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group, if:

(1) The material facts as to such controlling stockholder transaction (including the controlling stockholder's or control group's interest therein) are disclosed or are known to all members of a committee of the board of directors to which the board of directors has expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject such controlling stockholder transaction, and such controlling stockholder transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested directors then serving on the committee; provided that the committee consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the controlling stockholder transaction; or

(2) Such controlling stockholder transaction is conditioned, by its terms, as in effect at the time it is submitted to stockholders for their approval or ratification, on the approval of or ratification by disinterested stockholders, and such controlling stockholder transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders; or

(3) Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

(c) A controlling stockholder transaction constituting a going private transaction may not be the subject of equitable relief, or give rise to an award of damages, against a director or officer of the corporation or any controlling

stockholder or member of a control group by reason of a claim based on breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group, if:

(1) Such controlling stockholder transaction is approved (or recommended for approval) in accordance with paragraph (b)(1) of this section and approved in accordance with paragraph (b)(2) of this section; or

(2) Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

~~(b)(d)(1)~~ Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the ~~contract~~ act or transaction.

(2) Any director of a corporation that has a class of stock listed on a national securities exchange shall be presumed to be a disinterested director with respect to an act or transaction to which such director is not a party if the board of directors shall have determined that such director satisfies the applicable criteria for determining director independence from the corporation and, if applicable with respect to the act or transaction, the controlling stockholder or control group, under the rules (and interpretations thereof) promulgated by such exchange (treating the applicable controlling stockholder and control group as if the controlling stockholder and control group were the corporation for purposes of applying such criteria to determine independence from a controlling stockholder or control group), which presumption shall be heightened and may only be rebutted by substantial and particularized facts that such director has a material interest in such act or transaction or has a material relationship with a person with a material interest in such act or transaction.

(3) The designation, nomination, or vote in the election of the director to the board of directors by any person that has a material interest in an act or transaction shall not, of itself, be evidence that a director is not a disinterested director with respect to an act or transaction to which such director is not a party.

(4) No person shall be deemed a controlling stockholder unless such person satisfies the criteria in paragraph (e)(2) of this section. No 2 or more persons that are not controlling stockholders shall be a control group unless they satisfy the criteria in paragraph (e)(1) of this section.

(5) No person who is a controlling stockholder or member of a control group shall be liable in such capacity to the corporation or its stockholders for monetary damages for breach of fiduciary duty other than for:

a. A breach of the duty of loyalty to the corporation or the other stockholders;

b. Acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or

c. Any transaction from which the person derived an improper personal benefit.

(6) Nothing in subsections (a), (b), or (c) of this section shall:

80 a. Limit or eliminate the right of any person to seek equitable relief on the grounds that an act or
81 transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the
82 procedures set forth in this chapter, was not authorized or approved in compliance with the certificate of
83 incorporation or bylaws of the corporation, or is in violation of any plan, agreement, or order of any governmental
84 authority to which the corporation is a party or subject; or

85 b. Limit judicial review for purposes of injunctive relief of provisions or devices designed or intended to
86 deter, delay, or preclude a change of control or other transaction involving the corporation or a change in the
87 composition of the board of directors; or

88 c. Limit or eliminate the right of any person to seek relief on the grounds that a stockholder or other
89 person knowingly aided and abetted a breach of fiduciary duty by one or more of the directors of the corporation.

90 (7) Shares irrevocably accepted for purchase or exchange pursuant to an offer contemplated by § 251(h) of
91 this title shall be deemed voted in favor of the act or transaction and shares owned or controlled by disinterested
92 stockholders that have not been irrevocably accepted for purchase or exchange pursuant to such an offer shall be
93 deemed voted against the act or transaction for purposes of determining whether the act or transaction has been
94 approved for purposes of paragraphs (a)(2), (b)(2), and (c)(1) of this section.

95 (e) For purposes of this section:

96 (1) “Control group” means 2 or more persons that are not controlling stockholders that, by virtue of an
97 agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder.

98 (2) “Controlling stockholder” means any person that, together with such person’s affiliates and associates:

99 a. Owens or controls a majority in voting power of the outstanding stock of the corporation entitled to vote
100 generally in the election of directors or in the election of directors who have a majority in voting power of the
101 votes of all directors on the board of directors; or

102 b. Has the right, by contract or otherwise, to cause the election of nominees who are selected at the
103 discretion of such person and who constitute either a majority of the members of the board of directors or directors
104 entitled to cast a majority in voting power of the votes of all directors on the board of directors; or

105 c. Has the power functionally equivalent to that of a stockholder that owns or controls a majority in
106 voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by
107 virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation
108 entitled to vote generally in the election of directors or in the election of directors who have a majority in voting

power of the votes of all directors on the board of directors and power to exercise managerial authority over the business and affairs of the corporation.

(3) "Controlling stockholder transaction" means an act or transaction between the corporation or 1 or more of its subsidiaries, on the one hand, and a controlling stockholder or a control group, on the other hand, or an act or transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with the corporation's stockholders generally.

(4) "Disinterested director" means a director who is not a party to the act or transaction and does not have a material interest in the act or transaction or a material relationship with a person that has a material interest in the act or transaction.

(5) "Disinterested stockholder" means any stockholder that does not have a material interest in the act or transaction at issue or, if applicable, a material relationship with the controlling stockholder or other member of the control group, or any other person that has a material interest in the act or transaction.

(6) "Going private transaction" means:

a. For a corporation with a class of equity securities subject to § 12(g) or 15(d) of the Securities Exchange Act of 1934 or listed on a national securities exchange, a Rule 13e-3 transaction (as defined in 17 CFR § 240.13e-3(a)(3) or any successor provision); and

b. For any other corporation to which paragraph (e)(6)a. of this section does not apply, any controlling stockholder transaction, including a merger, recapitalization, share purchase, consolidation, amendment to the certificate of incorporation, tender or exchange offer, conversion, transfer, domestication or continuance, pursuant to which all or substantially all of the shares of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled, converted, purchased, or otherwise acquired or cease to be outstanding.

(7) "Material interest" means an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally, that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder or any other person (other than a director), would be material to such stockholder or such other person.

(8) "Material relationship" means a familial, financial, professional, employment, or other relationship that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when

participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder, would be material to such stockholder.

Section 2. Amend § 220, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 220. Inspection of books and records.

(a) As used in this section:

(1) “Books and records” means all of the following:

a. The certificate of incorporation, as defined in § 104 of this title, including a copy of any agreement or other instrument incorporated by reference in the certificate of incorporation.

b. The bylaws then in effect, including a copy of any agreement or other instrument incorporated by reference in the bylaws.

c. Minutes of all meetings of stockholders and the signed consents evidencing all action taken by stockholders without a meeting, in each case for the 3 years preceding the date of the demand under subsection (b) of this section.

d. All communications in writing or by electronic transmission to stockholders generally within the past 3 years preceding the date of the demand under subsection (b) of this section.

e. Minutes of any meeting of the board of directors or any committee of the board of directors and records of any action of the board of directors or any such committee.

f. Materials provided to the board of directors or any committee of the board of directors in connection with actions taken by the board of directors or any such committee.

g. Annual financial statements of the corporation for the 3 years preceding the date of the demand under subsection (b) of this section.

h. Any agreement entered into under § 122(18) of this title.

i. Director and officer independence questionnaires.

(2) “Proper purpose” means a purpose reasonably related to a stockholder’s interest as a stockholder.

~~(4)~~(3) “Stockholder” means a person who is a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person.

~~(2)~~(4) “Subsidiary” means any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises

control, and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, statutory trusts and/or joint ventures.

~~(3)~~(5) "Under oath" includes statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state.

~~(b)(1)~~ Any Subject to paragraph (b)(2) of this section, any stockholder, in person or by attorney or other agent, shall, upon written demand under oath ~~stating the purpose thereof~~, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

~~(1)~~a. The corporation's stock ledger, a list of its stockholders, and its other books and records; and

~~(2)~~b. A subsidiary's books and records, to the extent that:

~~a.1.~~ The corporation has actual possession and control of such records of such subsidiary; or

~~b.2.~~ The corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand:

~~1-A.~~ The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation; and

~~2-B.~~ The subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.

(2) A stockholder may inspect and copy the corporation's books and records only if all of the following apply:

a. The stockholder's demand is made in good faith and for a proper purpose.

b. The stockholder's demand describes with reasonable particularity the stockholder's purpose and the books and records the stockholder seeks to inspect.

c. The books and records sought are specifically related to the stockholder's purpose.

(3) The corporation may impose reasonable restrictions on the confidentiality, use, or distribution of books and records and may require, as a condition to producing books and records to a stockholder under any demand under this subsection, that the stockholder agree that any information included in the corporation's books and records is deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter referenced in the demand. The corporation may redact portions of any books and records produced to such stockholder under this subsection to the extent the portions so redacted are not specifically related to the stockholder's purpose.

(4) This section does not affect:

198 a. The right of a stockholder to seek discovery of books and records if the stockholder is in litigation with
199 the corporation, to the same extent as any other litigant; or

200 b. The power of a court, independently of this chapter, to compel the production of corporate records for
201 inspection and to impose reasonable restrictions as provided in paragraph (b)(3) of this section, provided that, in
202 the case of production of books and records defined in paragraph (a)(1) of this section at the request of a
203 stockholder, the stockholder has met the requirements of this subsection.

204 (5) In every instance where the stockholder is other than a record holder of stock in a stock corporation, or a
205 member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be
206 accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence
207 is a true and correct copy of what it purports to be. ~~A proper purpose shall mean a purpose reasonably related to such~~
208 ~~person's interest as a stockholder.~~

209 (6) In every instance where an attorney or other agent shall be the person who seeks the right to inspection,
210 the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the
211 attorney or other agent to so act on behalf of the stockholder.

212 (7) The demand under oath shall be directed to the corporation at its registered office in this State or at its
213 principal place of business.

214 (d) Any director shall have the right to examine the corporation's stock ledger, a list of its ~~stockholders and~~
215 ~~stockholders, its other books and records~~ records, and other corporate records for a purpose reasonably related to the
216 director's position as a director. The Court of Chancery is hereby vested with the exclusive jurisdiction to determine
217 whether a director is entitled to the inspection sought. The Court may summarily order the corporation to permit the
218 director to inspect ~~any and all books and records, the stock ledger and ledger, the list of stockholders~~ stockholders, the
219 books and records, and other corporate records and to make copies or extracts therefrom. The burden of proof shall be upon
220 the corporation to establish that the inspection such director seeks is for an improper purpose. The Court may, in its
221 discretion, prescribe any limitations or conditions with reference to the inspection, or award such other and further relief as
222 the Court may deem just and proper.

223 (e) Except as otherwise expressly provided in subsection (f) or subsection (g) of this section, in any proceeding
224 brought by a stockholder under subsection (c) of this section to compel the inspection of books and records, the Court of
225 Chancery may not order the corporation to produce any records of the corporation other than the books and records set forth
226 in paragraph (a)(1) of this section.

227 (f) If the corporation does not have any of the books and records described in paragraphs (a)(1)c., (a)(1)e., or
228 (a)(1)g. of this section or, in the case of a corporation that has a class of stock listed on a national securities exchange,
229 paragraph (a)(1)i. of this section, the Court of Chancery may order the corporation to produce additional records of the
230 corporation constituting the functional equivalent of any such books and records in response to a demand for inspection
231 brought by a stockholder under subsection (b) of this section only if and to the extent the stockholder has met the
232 requirements of subsection (b) of this section, and only to the extent necessary and essential to fulfill the stockholder's
233 proper purpose.

234 (g) In any proceeding brought by a stockholder under subsection (c) of this section to compel the inspection of
235 books and records, the Court of Chancery may order the corporation to produce, in addition to any books and records or
236 other records ordered to be produced under subsection (e) of this section, other specific records of the corporation only if
237 and to the extent:

238 (1) Such stockholder has met the requirements of subsection (b) of this section;

239 (2) Such stockholder has made a showing of a compelling need for an inspection of such records to further the
240 stockholder's proper purpose; and

241 (3) Such stockholder has demonstrated by clear and convincing evidence that such specific records are
242 necessary and essential to further such purpose.

243 (h) The Court of Chancery may impose reasonable restrictions as provided in paragraph (b)(3) of this section to
244 any records of the corporation produced under subsection (f) or subsection (g) of this section.

245 Section 3. Sections 1 and 2 of this Act take effect on the enactment of this Act and apply to all acts and
246 transactions, whether occurring before, on, or after the enactment of this Act, except that Sections 1 and 2 of this Act do not
247 apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or pending, or
248 any demand to inspect books and records made, on or before February 17, 2025.

SYNOPSIS

Section 1 of this Act amends § 144 of Title 8 to provide safe harbor procedures for acts or transactions in which one or more directors or officers as well as controlling stockholders and members of control groups have interests or relationships that might render them interested or not independent with respect to the act or transaction. Under revised § 144(a), certain acts or transactions involving such directors or officers will be protected if approved or recommended by a majority of the disinterested directors, either serving on a board of directors or a committee of the board of directors, or approved or ratified by a majority of the votes cast by the disinterested stockholders entitled to vote thereon, in each case upon disclosure or in full knowledge of the material facts giving rise to the conflict or potential conflict. If a majority of the directors are not disinterested directors with respect to the act or transaction, any such disinterested director approval or recommendation must be provided through a disinterested director committee. In addition, the amendments define what parties constitute a controlling stockholder or control group and provide safe harbor procedures that can be followed to insulate from challenge specified acts or transactions from which a controlling stockholder or control group receives a unique benefit. Under new § 144(b), a controlling stockholder transaction that does not constitute a "going private transaction" may be entitled to the statutory safe harbor protection if it is negotiated and approved or recommended, as

applicable, by a majority of the disinterested directors then serving on the committee, or is conditioned on the approval or ratification by disinterested stockholders and is approved or ratified by a majority of the votes cast by the disinterested stockholders. Under new § 144(c), a controlling stockholder transaction that constitutes a “going private transaction” may be entitled to the statutory safe harbor protection if it is negotiated and approved or recommended, as applicable, by a majority of the disinterested directors then serving on the committee and is conditioned on the approval of or ratification by disinterested stockholders and is approved or ratified by a vote of a majority of the votes cast by the disinterested stockholders. With respect to any approval or recommendation by a committee, the safe harbor only applies if the act or transaction or controlling stockholder transaction, as applicable, was approved by a committee consisting of at least 2 directors, all of whom, in the first instance, have been determined by the board of directors to be disinterested directors. Revised § 144 provides that any approval or recommendation, as applicable, of disinterested directors or a disinterested director committee must be made in good faith and without gross negligence, making clear that the statute does not displace the common law requirements regarding core fiduciary conduct as contemplated by cases such as *Flood v. Synutra International, Inc.*, 195 A.3d 754 (Del. 2018), and *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013), *aff’d sub nom.*, *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). Revised § 144 does not limit the right of any person to seek relief on the grounds that a stockholder or other person aided and abetted a breach of fiduciary duty by one or more directors. Consistent with existing case law, the stockholder or other person must have knowingly participated in a breach of fiduciary duty to establish an aiding and abetting claim. In *re Mindbody, Inc.*, 2024 WL 4926910 (Del. Dec. 2, 2024). The amendments to § 144 also set forth criteria for determining the independence and disinterestedness of directors and stockholders. The amendments provide that controlling stockholders and control groups, in their capacity as such, cannot be liable for monetary damages for breach of the duty of care.

Section 144 is intended to provide a comprehensive liability exculpation scheme with respect to the fiduciary duties owed by stockholders and with respect to when the safe harbors in § 144(b) and (c) apply. Section 144 does not provide for the elimination of liability or safe harbors for stockholders who are not controlling stockholders or part of a control group because those stockholders do not owe fiduciary duties to the corporation or other stockholders. The amendments do not displace any safe harbor procedures or other protections available at common law, including processes and procedures that comply with the pre-amendment common law but do not conform to the § 144 safe harbors. The references in § 144 to an act or transaction being “fair as to the corporation and the corporation’s stockholders”, which would apply if the applicable disinterested director and disinterested stockholder safe harbors are not used, is intended to be consistent with the entire fairness doctrine developed in the common law.

Section 2 of this Act amends § 220 of Title 8 to define the materials that a stockholder may demand to inspect pursuant to a request for books and records of the corporation. The amendments also set forth certain conditions that a stockholder must satisfy in order to make an inspection of books and records. The amendments make clear that information from books and records obtained by a stockholder from a production under § 220 will be deemed to be incorporated by reference into any complaint filed by or at the direction of a stockholder on the basis of information obtained through a demand for books and records. New § 220(b)(4) preserves whatever independent rights of inspection exist under the referenced sources and does not create any rights, either expressly or by implication. New § 220(f) provides that if the corporation does not have specified books and records, including minutes of board and committee meetings, actions of board or any committee, financial statements and director and officer independence questionnaires, the Court of Chancery may order the production of additional corporate records necessary and essential for the stockholder’s proper purpose. New § 220(g) provides that a stockholder may obtain additional specific records if the stockholder has made a showing of a compelling need to further a proper purpose for the inspection and has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose.

Section 3 of this Act provides that Sections 1 and 2 of this Act take effect on the enactment of this Act and apply to all acts and transactions, whether occurring before, on, or after the enactment date of this Act, except that Sections 1 and 2 of this Act do not apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or pending, or any demand to inspect books and records made, on or before February 17, 2025.

This Act requires a greater than majority vote for passage because § 1 of Article IX of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to amend the general corporation law.

Author: Senator Townsend