

Testimony of Ken Merritt

Representative Bill Botzow, Chair

House Committee on Commerce and Economic Development

Dear Representative Botzow,

As Andrea Cohen alerted you, I and other members of the Vermont bar have serious concerns about the proposed amendment to S. 263 that would trigger dissenters' rights if an existing Vermont corporation elected to become a benefit corporation under S. 263. Before detailing those concerns, I wanted to give you a brief summary of my background so you will better understand the basis of my concern. I have been practicing law in Vermont for over 20 years and our firm represents many of the leaders in corporate social responsibility (and job creation), including Green Mountain Coffee Roasters, Inc., Seventh Generation and scores of small companies. I am a member of the Vermont Bar Association Business Associations Committee (Tom Moody, Chair, testified on behalf of S. 263 in front of your Committee) and have been deeply involved in the drafting and revision of S. 263. I have been practicing corporate law for over 30 years and was a member of the Vermont Bar Committee that shepherded the corporate law revision in 1993 through the legislature. Recently, I testified on behalf of S. 263 in front of the Senate Economic Development Committee and fully support S. 263 as passed by the Senate.

As you are aware under S. 263, any existing corporation would need to obtain an affirmative vote of 2/3 of the outstanding shares to opt-in or opt-out as a benefit corporation. It is important to emphasize that this is a very high threshold. When we were working on the revision to the corporate statute in the early 1990s we debated what the correct threshold was for amendment of the Articles of Incorporation and concluded that a simple majority, 11A V.S.A. Section 10.03, was sufficient. To increase the threshold above 2/3 makes it un-necessarily difficult for companies to opt-in to the benefit corporation which will severely limit the bill's effectiveness.

The addition of a provision to 11 V.S.A., Chapter 13 that would provide that dissenters' rights would be triggered if a corporation opted in as a benefit corporation or terminated its status as a benefit corporation is highly inappropriate and will effectively nullify the effectiveness of the bill. As a practical matter, if this provision is added to S. 263 no corporation will opt in as a benefit corporation or terminate its status as a benefit corporation unless it has unanimous shareholder approval, effectively making the opt-in and opt out thresholds 100%. Chapter 13 (Dissenters' Rights) appropriately provides protection for minority shareholders in the event of major corporate changes, i.e. merger (13.02 (a)(1), share exchange (13.02(a)(2), sale of assets (13.02(a)(3), amendment of articles that materially and adversely affects rights of dissenters' shares (13.02(a)(4). As a practical matter, the dissenters' rights provision allows minority shareholder to obtain cash for their shares when the fundamental corporate structure is being changed and the

shareholders are receiving consideration for the shares, e.g., shares of another corporation in a merger. In this instance, the minority shareholder who did not want to receive shares of the acquiring corporation could receive cash instead and the acquiring corporation would be required to “cash out” the minority. Dissenters’ rights are feasible in a merger as this is a “liquidity event” and the acquiring corporation would not undertake the transaction unless it has sufficient resources to “cash out” the minority. Opting in or opting out as a benefit corporation is not a fundamental change in the corporate structure nor is it a liquidity event that provides a pool of cash to satisfy minority shareholders. In an opt-in or opt-out scenario involving an existing corporation any cash to be paid to minority shareholders would have to come from the financial resources of the existing corporation. The existing corporation may not have those financial resources and even if it did those funds are better deployed in growing the business than in cashing out minority shareholders.

Thank you very much for your consideration. Please let me know if you have any questions. I will be discussing this matter with legislative counsel on Monday. I would welcome the opportunity to meet with you and/or other members of the Committee and would welcome the opportunity to testify before the Committee.

Best regards.

Ken Merritt