

ASSEMBLY BILL

No. 2668

Introduced by Committee on Banking and Finance (Assembly Members Eng (Chair), Achadjian (Vice Chair), Fletcher, Fuentes, Gatto, Roger Hernández, Morrell, and Torres)

March 5, 2012

An act to amend Sections 5238, 7237, 9246, and 12377 of the Corporations Code, relating to corporate agents.

LEGISLATIVE COUNSEL'S DIGEST

AB 2668, as introduced, Committee on Banking and Finance. Corporate agents: indemnification.

Existing law authorizes a nonprofit public benefit corporation, mutual benefit corporation, religious corporation, and consumer cooperative corporation to indemnify its agents, as defined, in proceedings, as defined. Existing law provides that the authority of those corporations to so indemnify their agents does not apply to any proceeding against any trustee, investment manager or other fiduciary of an employee benefit plan. Existing law authorizes all corporations, and the corporations described above specifically, to indemnify and purchase and maintain insurance on behalf of a fiduciary of specified employee benefit plans, trusts, or provisions for directors, officers, employees, and persons providing services to the corporation or its affiliates.

This bill would apply the above provisions, instead, to a fiduciary of a pension, deferred compensation, saving, thrift or other retirement, incentive or benefit plan, trust or provision for any or all of the corporation's directors, officers, employees, and persons providing services to the corporation or any of its subsidiary or related or affiliated corporations. The bill would provide cross-references, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 5238 of the Corporations Code is
2 amended to read:
3 5238. (a) For the purposes of this section, “agent” means any
4 person who is or was a director, officer, employee or other agent
5 of the corporation, or is or was serving at the request of the
6 corporation as a director, officer, employee or agent of another
7 foreign or domestic corporation, partnership, joint venture, trust
8 or other enterprise, or was a director, officer, employee or agent
9 of a foreign or domestic corporation ~~which~~ *that* was a predecessor
10 corporation of the corporation or of another enterprise at the request
11 of ~~such the~~ predecessor corporation; “proceeding” means any
12 threatened, pending or completed action or proceeding, whether
13 civil, criminal, administrative or investigative; and “expenses”
14 includes without limitation attorneys’ fees and any expenses of
15 establishing a right to indemnification under subdivision (d) or
16 paragraph (3) of subdivision (e).
17 (b) A corporation shall have power to indemnify any person
18 who was or is a party or is threatened to be made a party to any
19 proceeding (other than an action by or in the right of the
20 corporation to procure a judgment in its favor, an action brought
21 under Section 5233, or an action brought by the Attorney General
22 or a person granted relator status by the Attorney General for any
23 breach of duty relating to assets held in charitable trust) by reason
24 of the fact that ~~such the~~ person is or was an agent of the
25 corporation, against expenses, judgments, fines, settlements and
26 other amounts actually and reasonably incurred in connection with
27 ~~such the~~ proceeding if ~~such the~~ person acted in good faith and in
28 a manner ~~such the~~ person reasonably believed to be in the best
29 interests of the corporation and, in the case of a criminal
30 proceeding, had no reasonable cause to believe the conduct of ~~such~~
31 *the* person was unlawful. The termination of any proceeding by
32 judgment, order, settlement, conviction or upon a plea of nolo
33 contendere or its equivalent shall not, of itself, create a presumption
34 that the person did not act in good faith and in a manner which the
35 person reasonably believed to be in the best interests of the

1 corporation or that the person had reasonable cause to believe that
2 the person's conduct was unlawful.

3 (c) A corporation shall have power to indemnify any person
4 who was or is a party or is threatened to be made a party to any
5 threatened, pending or completed action by or in the right of the
6 corporation, or brought under Section 5233, or brought by the
7 Attorney General or a person granted relator status by the Attorney
8 General for breach of duty relating to assets held in charitable trust,
9 to procure a judgment in its favor by reason of the fact that ~~such~~
10 *the* person is or was an agent of the corporation, against expenses
11 actually and reasonably incurred by ~~such~~ *the* person in connection
12 with the defense or settlement of ~~such~~ *the* action if ~~such~~ *the* person
13 acted in good faith, in a manner ~~such~~ *the* person believed to be in
14 the best interests of the corporation and with such care, including
15 reasonable inquiry, as an ordinarily prudent person in a like
16 position would use under similar circumstances. No
17 indemnification shall be made under this subdivision:

18 (1) In respect of any claim, issue or matter as to which ~~such~~ *the*
19 person shall have been adjudged to be liable to the corporation in
20 the performance of ~~such~~ *the* person's duty to the corporation, unless
21 and only to the extent that the court in which ~~such~~ *the* proceeding
22 is or was pending shall determine upon application that, in view
23 of all the circumstances of the case, ~~such~~ *the* person is fairly and
24 reasonably entitled to indemnity for the expenses which ~~such~~ *the*
25 court shall determine;

26 (2) Of amounts paid in settling or otherwise disposing of a
27 threatened or pending action, with or without court approval; or

28 (3) Of expenses incurred in defending a threatened or pending
29 action which is settled or otherwise disposed of without court
30 approval unless it is settled with the approval of the Attorney
31 General.

32 (d) To the extent that an agent of a corporation has been
33 successful on the merits in defense of any proceeding referred to
34 in subdivision (b) or (c) or in defense of any claim, issue or matter
35 therein, the agent shall be indemnified against expenses actually
36 and reasonably incurred by the agent in connection therewith.

37 (e) Except as provided in subdivision (d), any indemnification
38 under this section shall be made by the corporation only if
39 authorized in the specific case, upon a determination that
40 indemnification of the agent is proper in the circumstances because

1 the agent has met the applicable standard of conduct set forth in
2 subdivision (b) or (c), by:

3 (1) A majority vote of a quorum consisting of directors who are
4 not parties to ~~such~~ *the* proceeding;

5 (2) Approval of the members (Section 5034), with the persons
6 to be indemnified not being entitled to vote thereon; or

7 (3) The court in which ~~such~~ *the* proceeding is or was pending
8 upon application made by the corporation or the agent or the
9 attorney or other person rendering services in connection with the
10 defense, whether or not ~~such~~ *the* application by the agent, attorney,
11 or other person is opposed by the corporation.

12 (f) Expenses incurred in defending any proceeding may be
13 advanced by the corporation prior to the final disposition of ~~such~~
14 *the* proceeding upon receipt of an undertaking by or on behalf of
15 the agent to repay ~~such~~ *the* amount unless it shall be determined
16 ultimately that the agent is entitled to be indemnified as authorized
17 in this section. The provisions of subdivision (a) of Section 5236
18 do not apply to advances made pursuant to this subdivision.

19 (g) No provision made by a corporation to indemnify its or its
20 subsidiary's directors or officers for the defense of any proceeding,
21 whether contained in the articles, bylaws, a resolution of members
22 or directors, an agreement or otherwise, shall be valid unless
23 consistent with this section. Nothing contained in this section shall
24 affect any right to indemnification to which persons other than
25 ~~such~~ *the* directors and officers may be entitled by contract or
26 otherwise.

27 (h) No indemnification or advance shall be made under this
28 section, except as provided in subdivision (d) or paragraph (3) of
29 subdivision (e), in any circumstance where it appears:

30 (1) That it would be inconsistent with a provision of the articles,
31 bylaws, a resolution of the members or an agreement in effect at
32 the time of the accrual of the alleged cause of action asserted in
33 the proceeding in which the expenses were incurred or other
34 amounts were paid, which prohibits or otherwise limits
35 indemnification; or

36 (2) That it would be inconsistent with any condition expressly
37 imposed by a court in approving a settlement.

38 (i) A corporation shall have power to purchase and maintain
39 insurance on behalf of any agent of the corporation against any
40 liability asserted against or incurred by the agent in such capacity

1 or arising out of the agent's status as such whether or not the
2 corporation would have the power to indemnify the agent against
3 ~~such~~ *that* liability under the provisions of this section; provided,
4 however, that a corporation shall have no power to purchase and
5 maintain ~~such~~ *that* insurance to indemnify any agent of the
6 corporation for a violation of Section 5233.

7 (j) This section does not apply to any proceeding against any
8 trustee, investment manager, or other fiduciary of ~~an employee~~
9 ~~benefit plan~~ *a pension, deferred compensation, saving, thrift, or*
10 *other retirement, incentive, or benefit plan, trust, or provision for*
11 *any or all of the corporation's directors, officers, employees, and*
12 *persons providing services to the corporation or any of its*
13 *subsidiary or related or affiliated corporations, in* ~~such~~ *that*
14 person's capacity as such, even though ~~such~~ *the* person may also
15 be an agent as defined in subdivision (a) of the employer
16 corporation. A corporation shall have power to indemnify ~~such~~
17 *the* trustee, investment manager or other fiduciary to the extent
18 permitted by subdivision (f) of Section ~~207~~ 5140.

19 SEC. 2. Section 7237 of the Corporations Code is amended to
20 read:

21 7237. (a) For the purposes of this section, "agent" means any
22 person who is or was a director, officer, employee or other agent
23 of the corporation, or is or was serving at the request of the
24 corporation as a director, officer, employee or agent of another
25 foreign or domestic corporation, partnership, joint venture, trust
26 or other enterprise, or was a director, officer, employee or agent
27 of a foreign or domestic corporation ~~which~~ *that* was a predecessor
28 corporation of the corporation or of another enterprise at the request
29 of ~~such~~ *the* predecessor corporation; "proceeding" means any
30 threatened, pending or completed action or proceeding, whether
31 civil, criminal, administrative or investigative; and "expenses"
32 includes without limitation attorneys' fees and any expenses of
33 establishing a right to indemnification under subdivision (d) or
34 paragraph (3) of subdivision (e).

35 (b) A corporation shall have power to indemnify any person
36 who was or is a party or is threatened to be made a party to any
37 proceeding (other than an action by or in the right of the
38 corporation to procure a judgment in its favor, an action brought
39 under Section 5233 of Part 2 (commencing with Section 5110)
40 made applicable pursuant to Section 7238, or an action brought

1 by the Attorney General or a person granted relator status by the
2 Attorney General for any breach of duty relating to assets held in
3 charitable trust) by reason of the fact that ~~such~~ *the* person is or was
4 an agent of the corporation, against expenses, judgments, fines,
5 settlements and other amounts actually and reasonably incurred
6 in connection with ~~such~~ *the* proceeding if ~~such~~ *the* person acted
7 in good faith and in a manner ~~such~~ *the* person reasonably believed
8 to be in the best interests of the corporation and, in the case of a
9 criminal proceeding, had no reasonable cause to believe the conduct
10 of ~~such~~ *the* person was unlawful. The termination of any
11 proceeding by judgment, order, settlement, conviction or upon a
12 plea of nolo contendere or its equivalent shall not, of itself, create
13 a presumption that the person did not act in good faith and in a
14 manner which the person reasonably believed to be in the best
15 interests of the corporation or that the person had reasonable cause
16 to believe that the person's conduct was unlawful.

17 (c) A corporation shall have power to indemnify any person
18 who was or is a party or is threatened to be made a party to any
19 threatened, pending or completed action by or in the right of the
20 corporation, or brought under Section 5233 of Part 2 (commencing
21 with Section 5110) made applicable pursuant to Section 7238, or
22 brought by the Attorney General or a person granted relator status
23 by the Attorney General for breach of duty relating to assets held
24 in charitable trust, to procure a judgment in its favor by reason of
25 the fact that ~~such~~ *the* person is or was an agent of the corporation,
26 against expenses actually and reasonably incurred by ~~such~~ *the*
27 person in connection with the defense or settlement of ~~such~~ *the*
28 action if ~~such~~ *the* person acted in good faith, in a manner ~~such~~ *the*
29 person believed to be in the best interests of the corporation and
30 with such care, including reasonable inquiry, as an ordinarily
31 prudent person in a like position would use under similar
32 circumstances. No indemnification shall be made under this
33 subdivision:

34 (1) In respect of any claim, issue or matter as to which ~~such~~ *the*
35 person shall have been adjudged to be liable to the corporation in
36 the performance of ~~such~~ *the* person's duty to the corporation, unless
37 and only to the extent that the court in which ~~such~~ *the* proceeding
38 is or was pending shall determine upon application that, in view
39 of all the circumstances of the case, ~~such~~ *the* person is fairly and

1 reasonably entitled to indemnity for the expenses which ~~such~~ *the*
2 court shall determine;

3 (2) Of amounts paid in settling or otherwise disposing of a
4 threatened or pending action, with or without court approval; or

5 (3) Of expenses incurred in defending a threatened or pending
6 action ~~which~~ *that* is settled or otherwise disposed of without court
7 approval unless ~~such~~ *the* action concerns assets held in charitable
8 trust and is settled with the approval of the Attorney General.

9 (d) To the extent that an agent of a corporation has been
10 successful on the merits in defense of any proceeding referred to
11 in subdivision (b) or (c) or in defense of any claim, issue or matter
12 therein, the agent shall be indemnified against expenses actually
13 and reasonably incurred by the agent in connection therewith.

14 (e) Except as provided in subdivision (d), any indemnification
15 under this section shall be made by the corporation only if
16 authorized in the specific case, upon a determination that
17 indemnification of the agent is proper in the circumstances because
18 the agent has met the applicable standard of conduct set forth in
19 subdivision (b) or (c), by:

20 (1) A majority vote of a quorum consisting of directors who are
21 not parties to ~~such~~ *the* proceeding;

22 (2) Approval of the members (Section 5034), with the persons
23 to be indemnified not being entitled to vote thereon; or

24 (3) The court in which ~~such~~ *the* proceeding is or was pending
25 upon application made by the corporation or the agent or the
26 attorney or other person rendering services in connection with the
27 defense, whether or not ~~such~~ *the* application by the agent, attorney
28 or other person is opposed by the corporation.

29 (f) Expenses incurred in defending any proceeding may be
30 advanced by the corporation prior to the final disposition of ~~such~~
31 *the* proceeding upon receipt of an undertaking by or on behalf of
32 the agent to repay ~~such~~ *the* amount unless it shall be determined
33 ultimately that the agent is entitled to be indemnified as authorized
34 in this section. The provisions of subdivision (a) of Section 7235
35 do not apply to advances made pursuant to this subdivision.

36 (g) No provision made by a corporation to indemnify its or its
37 subsidiary's directors or officers for the defense of any proceeding,
38 whether contained in the articles, bylaws, a resolution of members
39 or directors, an agreement or otherwise, shall be valid unless
40 consistent with this section. Nothing contained in this section shall

1 affect any right to indemnification to which persons other than
 2 ~~such~~ *the* directors and officers may be entitled by contract or
 3 otherwise.

4 (h) No indemnification or advance shall be made under this
 5 section, except as provided in subdivision (d) or paragraph (3) of
 6 subdivision (e), in any circumstance where it appears:

7 (1) That it would be inconsistent with a provision of the articles,
 8 bylaws, a resolution of the members or an agreement in effect at
 9 the time of the accrual of the alleged cause of action asserted in
 10 the proceeding in which the expenses were incurred or other
 11 amounts were paid, which prohibits or otherwise limits
 12 indemnification; or

13 (2) That it would be inconsistent with any condition expressly
 14 imposed by a court in approving a settlement.

15 (i) A corporation shall have power to purchase and maintain
 16 insurance on behalf of any agent of the corporation against any
 17 liability asserted against or incurred by the agent in ~~such~~ *that*
 18 capacity or arising out of the agent’s status as such whether or not
 19 the corporation would have the power to indemnify the agent
 20 against ~~such~~ *that* liability under the provisions of this section.

21 (j) This section does not apply to any proceeding against any
 22 trustee, investment manager, or other fiduciary of ~~an employee~~
 23 ~~benefit plan~~ *a pension, deferred compensation, saving, thrift, or*
 24 *other retirement, incentive, or benefit plan, trust, or provision for*
 25 *any or all of the corporation’s directors, officers, employees, and*
 26 *persons providing services to the corporation or any of its*
 27 *subsidiary or related or affiliated corporations, in ~~such~~ that*
 28 *person’s capacity as such, even though ~~such~~ the person may also*
 29 *be an agent as defined in subdivision (a) of the employer*
 30 *corporation. A corporation shall have power to indemnify ~~such~~*
 31 *the trustee, investment manager or other fiduciary to the extent*
 32 *permitted by subdivision ~~(f)~~ (e) of Section 207 7140.*

33 SEC. 3. Section 9246 of the Corporations Code is amended to
 34 read:

35 9246. (a) For the purposes of this section, “agent” means any
 36 person who is or was a director, officer, employee or other agent
 37 of the corporation, or is or was serving at the request of the
 38 corporation as a director, officer, employee, or agent of another
 39 foreign or domestic corporation, partnership, joint venture, trust,
 40 or other enterprise, or was a director, officer, employee, or agent

1 of a foreign or domestic corporation which was a predecessor
2 corporation of the corporation or of another enterprise at the request
3 of ~~such predecessor~~ *that predecessor* corporation; “proceeding”
4 means any threatened, pending, or completed action or proceeding,
5 whether civil, criminal, administrative or investigative; and
6 “expenses” includes without limitation attorneys’ fees and any
7 expenses of establishing a right to indemnification under
8 subdivision (d) or paragraph (3) of subdivision (e).

9 (b) A corporation shall have power to indemnify any person
10 who was or is a party or is threatened to be made a party to any
11 proceeding (other than an action by or in the right of the
12 corporation to procure a judgment in its favor, an action brought
13 under Section 9243, or an action brought by the Attorney General
14 pursuant to Section 9230) by reason of the fact that ~~such~~ *the* person
15 is or was an agent of the corporation, against expenses, judgments,
16 fines, settlements and other amounts actually and reasonably
17 incurred in connection with ~~such~~ *the* proceeding if ~~such~~ *the* person
18 acted in good faith and in a manner ~~such~~ *the* person believed to be
19 in the best interests of the corporation and, in the case of a criminal
20 proceeding, had no reasonable cause to believe the conduct of ~~such~~
21 *the* person was unlawful. The termination of any proceeding by
22 judgment, order, settlement, conviction or upon a plea of nolo
23 contendere or its equivalent shall not, of itself, create a presumption
24 that the person did not act in good faith and in a manner which the
25 person believed to be in the best interests of the corporation or that
26 the person had reasonable cause to believe that the person’s conduct
27 was unlawful.

28 (c) A corporation shall have power to indemnify any person
29 who was or is a party or is threatened to be made a party to any
30 threatened, pending or completed action by or in the right of the
31 corporation, or brought under Section 9243, or brought by the
32 Attorney General pursuant to Section 9230, to procure a judgment
33 in its favor by reason of the fact that ~~such~~ *the* person is or was an
34 agent of the corporation, against expenses actually and reasonably
35 incurred by ~~such~~ *the* person in connection with the defense or
36 settlement of ~~such~~ *the* action if the person acted in good faith, in
37 a manner in which ~~such~~ *the* person believed to be in the best
38 interests of the corporation and with ~~such~~ *that* care, including
39 reasonable inquiry, as an ordinary prudent person in a like position

1 would use under similar circumstances. No ~~indemnification~~
2 ~~indemnification~~ shall be made under this subdivision:

3 (1) In respect of any claim, issue, or matter as to which ~~such~~
4 ~~the~~ person shall have been adjudged to be liable to the corporation
5 in the performance of ~~such the~~ person's duty to the corporation,
6 unless and only to the extent that the court in which ~~such the~~
7 proceeding is or was pending shall determine upon application
8 that, in view of all the circumstances of the case, ~~such the~~ person
9 is fairly and reasonably entitled to indemnity for the expenses
10 which ~~such the~~ court shall determine;

11 (2) Of amounts paid in settling or otherwise disposing of a
12 threatened or pending action, with or without court approval; or

13 (3) Of expenses incurred in defending a threatened or pending
14 action which is settled or otherwise disposed of without court
15 approval unless it is settled with the approval of the Attorney
16 General.

17 (d) To the extent that an agent of a corporation has been
18 successful on the merits in defense of any proceeding referred to
19 in subdivision (b) or (c) or in defense of any claim, issue or matter
20 therein, the agent shall be indemnified against expenses actually
21 and reasonably incurred by the agent in connection therewith.

22 (e) Except as provided in subdivision (d), any indemnification
23 under this section shall be made by the corporation only if
24 authorized in the specific case, upon a determination that
25 indemnification of the agent is proper in the circumstances because
26 the agent has met the applicable standard of conduct set forth in
27 either subdivision (b) or (c) by:

28 (1) A majority vote of a quorum consisting of directors who are
29 not parties to ~~such the~~ proceeding;

30 (2) Approval of the members (Section 5034), with the persons
31 to be indemnified not being entitled to vote thereon; or

32 (3) The court in which ~~such the~~ proceeding is or was pending
33 upon application made by the corporation or the agent or the
34 attorney or other person rendering services in connection with the
35 defense, whether or not ~~such the~~ application by the agent, attorney,
36 or other person is opposed by the corporation.

37 (f) Expenses incurred in defending any proceeding may be
38 advanced by the corporation prior to the final disposition of ~~such~~
39 ~~the~~ proceeding upon receipt of an undertaking by or on behalf of
40 the agent to repay ~~such the~~ amount unless it shall be determined

1 ultimately that the agent is entitled to be indemnified as authorized
2 in this section.

3 (g) No provision made by a corporation to indemnify its or its
4 ~~subsidiary's~~ *subsidiary's* directors or officers for the defense of any
5 proceeding, whether contained in the articles, bylaws, a resolution
6 of members or directors, an agreement or otherwise, shall be valid
7 unless consistent with this section. Nothing contained in this section
8 shall affect any right to indemnification to which persons other
9 than ~~such~~ *the* directors and officers may be entitled by contract or
10 otherwise.

11 (h) No indemnification or advance shall be made under this
12 section, except as provided in subdivision (d) or paragraph (3) of
13 subdivision (e), in any circumstance where it appears that:

14 (1) It would be inconsistent with a provision of the articles,
15 bylaws, a resolution of the members or an agreement in effect at
16 the time of the accrual of the alleged cause of action asserted in
17 the proceeding in which the expenses were incurred or other
18 amounts were paid, which prohibits or otherwise limits
19 indemnification; or

20 (2) It would be inconsistent with any condition expressly
21 imposed by a court in approving a settlement.

22 (i) A corporation shall have power to purchase and maintain
23 insurance on behalf of any agent of the corporation against any
24 liability asserted against or incurred by the agent in ~~such~~ *that*
25 capacity or arising out of the agent's status as such whether or not
26 the corporation would have the power to indemnify the agent
27 against ~~such~~ *that* liability under the provisions of this section;
28 provided, however, that a corporation shall have no power to
29 purchase and maintain ~~such~~ insurance to indemnify any agent of
30 the corporation for a violation of Section 9243.

31 (j) This section does not apply to any proceeding against any
32 trustee, investment manager, or other fiduciary of ~~an employee~~
33 ~~benefit plan~~ *a pension, deferred compensation, saving, thrift, or*
34 *other retirement, incentive, or benefit plan, trust, or provision for*
35 *any or all of the corporation's directors, officers, employees, and*
36 *persons providing services to the corporation or any of its*
37 *subsidiary or related or affiliated corporations, in ~~such~~ the person's*
38 *capacity as such, even though ~~such~~ the person may also be an agent*
39 *as defined in subdivision (a) of the employer corporation. A*
40 *corporation shall have power to indemnify ~~such~~ the trustee,*

1 investment manager or other fiduciary to the extent permitted by
2 subdivision (f) of Section ~~207~~ 9140.

3 SEC. 4. Section 12377 of the Corporations Code is amended
4 to read:

5 12377. (a) For the purposes of this section, “agent” means any
6 person who is or was a director, officer, employee or other agent
7 of the corporation, or is or was serving at the request of the
8 corporation as a director, officer, employee or agent of another
9 foreign or domestic corporation, partnership, joint venture, trust
10 or other enterprise, or was a director, officer, employee or agent
11 of a foreign or domestic corporation which was a predecessor
12 corporation of the corporation or of another enterprise at the request
13 of ~~such~~ *the* predecessor corporation; “proceeding” means any
14 threatened, pending or completed action or proceeding, whether
15 civil, criminal, administrative or investigative; and “expenses”
16 includes without limitation attorneys’ fees and any expenses of
17 establishing a right to indemnification under subdivision (d) or
18 paragraph (3) of subdivision (e).

19 (b) A corporation shall have power to indemnify any person
20 who was or is a party or is threatened to be made a party to any
21 proceeding (other than an action by or in the right of the
22 corporation to procure a judgment in its favor) by reason of the
23 fact that ~~such~~ *the* person is or was an agent of the corporation,
24 against expenses, judgments, fines, settlements and other amounts
25 actually and reasonably incurred in connection with ~~such~~ *the*
26 proceeding if ~~such~~ *the* person acted in good faith and in a manner
27 ~~such~~ *the* person reasonably believed to be in the best interests of
28 the corporation and, in the case of a criminal proceeding, had no
29 reasonable cause to believe the conduct of ~~such~~ *the* person was
30 unlawful. The termination of any proceeding by judgment, order,
31 settlement, conviction or upon a plea of nolo contendere or its
32 equivalent shall not, of itself, create a presumption that the person
33 did not act in good faith and in a manner ~~which~~ *that* the person
34 reasonably believed to be in the best interests of the corporation
35 or that the person had reasonable cause to believe that the person’s
36 conduct was unlawful.

37 (c) A corporation shall have power to indemnify any person
38 who was or is a party or is threatened to be made a party to any
39 threatened, pending or completed action by or in the right of the
40 corporation, to procure a judgment in its favor by reason of the

1 fact that ~~such~~ *the* person is or was an agent of the corporation,
2 against expenses actually and reasonably incurred by ~~such~~ *the*
3 person in connection with the defense or settlement of ~~such~~ *the*
4 action if ~~such~~ *the* person acted in good faith, in a manner ~~such~~ *the*
5 person believed to be in the best interests of the corporation and
6 with ~~such~~ *that* care, including reasonable inquiry, as an ordinarily
7 prudent person in a like position would use under similar
8 circumstances. No indemnification shall be made under this
9 subdivision:

10 (1) In respect of any claim, issue or matter as to which ~~such~~ *the*
11 person shall have been adjudged to be liable to the corporation in
12 the performance of ~~such~~ *the* person's duty to the corporation, unless
13 and only to the extent that the court in which ~~such~~ *the* proceeding
14 is or was pending shall determine upon application that, in view
15 of all the circumstances of the case, ~~such~~ *the* person is fairly and
16 reasonably entitled to indemnity for the expenses which ~~such~~ *the*
17 court shall determine;

18 (2) Of amounts paid in settling or otherwise disposing of a
19 threatened or pending action, with or without court approval; or

20 (3) Of expenses incurred in defending a threatened or pending
21 action which is settled or otherwise disposed of without court
22 approval.

23 (d) To the extent that an agent of a corporation has been
24 successful on the merits in defense of any proceeding referred to
25 in subdivision (b) or (c) or in defense of any claim, issue, or matter
26 therein, the agent shall be indemnified against expenses actually
27 and reasonably incurred by the agent in connection therewith.

28 (e) Except as provided in subdivision (d), any indemnification
29 under this section shall be made by the corporation only if
30 authorized in the specific case, upon a determination that
31 indemnification of the agent is proper in the circumstances because
32 the agent has met the applicable standard of conduct set forth in
33 subdivision (b) or (c), by:

34 (1) A majority vote of a quorum consisting of directors who are
35 not parties to ~~such~~ *the* proceeding;

36 (2) Approval of the members (Section 12224), with the persons
37 to be indemnified not being entitled to vote thereon; or

38 (3) The court in which ~~such~~ *the* proceeding is or was pending
39 upon application made by the corporation or the agent or the
40 attorney or other person rendering services in connection with the

1 defense, whether or not ~~such~~ *the* application by the agent, attorney
2 or other person is opposed by the corporation.

3 (f) Expenses incurred in defending any proceeding may be
4 advanced by the corporation prior to the final disposition of ~~such~~
5 *the* proceeding upon receipt of an undertaking by or on behalf of
6 the agent to repay ~~such~~ *the* amount unless it shall be determined
7 ultimately that the agent is entitled to be indemnified as authorized
8 in this section.

9 (g) No provision made by a corporation to indemnify its or its
10 subsidiary's directors or officers for the defense of any proceeding,
11 whether contained in the articles, bylaws, a resolution of members
12 or directors, an agreement or otherwise, shall be valid unless
13 consistent with this section. Nothing contained in this section shall
14 affect any right to indemnification to which persons other than
15 ~~such~~ *the* directors and officers may be entitled by contract or
16 otherwise.

17 (h) No indemnification or advance shall be made under this
18 section, except as provided in subdivision (d) or paragraph (3) of
19 subdivision (e), in any circumstance where it appears:

20 (1) That it would be inconsistent with a provision of the articles,
21 bylaws, a resolution of the members or an agreement in effect at
22 the time of the accrual of the alleged cause of action asserted in
23 the proceeding in which the expenses were incurred or other
24 amounts were paid, which prohibits or otherwise limits
25 indemnification; or

26 (2) That it would be inconsistent with any condition expressly
27 imposed by a court in approving a settlement.

28 (i) A corporation shall have power to purchase and maintain
29 insurance on behalf of any agent of the corporation against any
30 liability asserted against or incurred by the agent in ~~such~~ *that*
31 capacity or arising out of the agent's status as such whether or not
32 the corporation would have the power to indemnify the agent
33 against ~~such~~ *that* liability under the provisions of this section.

34 (j) This section does not apply to any proceeding against any
35 trustee, investment manager, or other fiduciary of ~~an employee~~
36 ~~benefit plan~~ *a pension, deferred compensation, saving, thrift, or*
37 *other retirement, incentive, or benefit plan, trust, or provision for*
38 *any or all of the corporation's directors, officers, employees, and*
39 *persons providing services to the corporation or any of its*
40 *subsidiary or related or affiliated corporations, in ~~such~~ *the* person's*

1 capacity as such, even though ~~such~~ *the* person may also be an agent
2 as defined in subdivision (a) of the employer corporation. A
3 corporation shall have power to indemnify ~~such~~ *the* trustee,
4 investment manager or other fiduciary to the extent permitted by
5 subdivision ~~(f)~~ *(e)* of Section ~~207 12320~~.

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