

MINDBODY, Inc.
Form S-8
April 12, 2018

As filed with the Securities and Exchange Commission on April 12, 2018

Registration No. 333-

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-8
REGISTRATION STATEMENT

Under
The Securities Act of 1933

MINDBODY, Inc.
(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

4051 Broad Street, Suite 220

20-1898451
(I.R.S. Employer
Identification No.)

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San Luis Obispo, California 93401

(Address of Principal Executive Offices)(Zip Code)

Booker Software, Inc. 2015 Stock Plan

Third Amended and Restated Booker Software, Inc. 2011 Equity Incentive Plan, as amended

(Full title of the plan)

Richard Stollmeyer

Chief Executive Officer

MINDBODY, Inc.

4051 Broad Street, Suite 220

San Luis Obispo, California 93401

(877) 755-4279

(Name, address and telephone number, including area code, of agent for service)

Copy to:

Kimberly Lytikainen

Chief Legal Officer and Secretary

MINDBODY, Inc.

4051 Broad Street, Suite 220

San Luis Obispo, California 93401

(877) 755-4279

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, smaller reporting company, or an emerging growth company. See the definitions of large accelerated filer, accelerated filer, smaller reporting company, and emerging growth company in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer (Do not check if a smaller reporting company)

Smaller reporting company

Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act.

CALCULATION OF REGISTRATION FEE

Title of Securities to be Registered	Amount to be Registered ⁽¹⁾	Proposed Maximum Offering Price Per Share	Proposed Maximum Offering Price Aggregate	Amount of Registration Fee
Class A common stock, \$0.000004 par value per share, reserved for issuance pursuant to the Booker Software, Inc. 2015 Stock Plan	68,958	\$20.44 ⁽²⁾	\$1,409,501.52	\$175.49
Class A common stock, \$0.000004 par value per share, reserved for issuance pursuant to the Third Amended and Restated Booker Software, Inc. 2011 Equity Incentive Plan, as amended	4,950	\$20.44 ⁽²⁾	\$101,178.00	\$12.60
TOTAL:	73,908		\$1,510,679.52	\$188.09

- (1) Pursuant to Rule 416(a) of the Securities Act of 1933, as amended (the **Securities Act**), this Registration Statement shall also cover any additional shares of the Registrant's Class A common stock (**Class A common stock**) that become issuable under the Booker Software, Inc. 2015 Stock Plan (the **2015 Plan**) and the Third Amended and Restated Booker Software, Inc. 2011 Equity Incentive Plan, as amended (the **2011 Plan**) by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without receipt of consideration that increases the number of the Registrant's outstanding shares of Class A common stock.
- (2) Estimated solely for the purpose of calculating the registration fee pursuant to Rule 457(h) under the Securities Act on the basis of the weighted average exercise price of options outstanding under the 2015 Plan and 2011 Plan and assumed by the Registrant.

EXPLANATORY NOTE

Pursuant to the Agreement and Plan of Merger dated as of March 12, 2018 (the **Merger Agreement**), by and among the Registrant, Booker Software, Inc. (**Booker**), Harley Merger Sub, Inc. (**Merger Sub**) and Shareholder Representative Services, LLC, Merger Sub merged with and into Booker (the **Merger**). As a result of the Merger, Booker became a wholly-owned subsidiary of the Registrant. In accordance with the Merger Agreement, the Registrant assumed each outstanding and unexercised unvested option to purchase Booker common stock (the **Assumed Options**) under each of the 2015 Plan and the 2011 Plan, as amended and restated (collectively, the **Plans**). Each Assumed Option was converted into an option to purchase a number of Registrant's Class A common stock, subject to adjustment to the number of shares and exercise price of each Assumed Option pursuant to the exchange ratio set forth in the Merger Agreement.

The Registrant is filing this Registration Statement on Form S-8 (the **Registration Statement**) for the purpose of registering up to 73,908 of its shares of Class A common stock issuable upon the exercise of the Assumed Options. These additional shares of Class A common stock are securities of the same class as other securities for which registration statements on Form S-8 were filed with the Securities and Exchange Commission (the **Commission**) on June 19, 2015 (File No. 333-205125), March 4, 2016 (File No. 333-209957), March 1, 2017 (File No. 333-216348), and March 2, 2018 (File No. 333-223386).

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The Registrant hereby incorporates by reference in this Registration Statement the following documents and information previously filed with the Securities and Exchange Commission (the **Commission**):

- (1) The Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2017, filed with the Commission on March 1, 2018 (the **Annual Report**);
- (2) All other reports filed pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended (the **Exchange Act**) since the end of the fiscal year covered by the Annual Report (other than the portions of these documents not deemed to be filed); and
- (3) The description of the Registrant's Class A common stock contained in the Registrant's Registration Statement on Form 8-A (File No. 001-37453) filed with the Commission on June 16, 2015, pursuant to Section 12(b) of the Exchange Act, including any amendment or report filed for the purpose of updating such description.

All documents filed by the Registrant pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act on or after the date of this Registration Statement and prior to the filing of a post-effective amendment to this Registration Statement that indicates that all securities offered have been sold or that deregisters all securities then remaining unsold shall be deemed to be incorporated by reference in this Registration Statement and to be part hereof from the date of filing of such documents; *provided, however*, that documents or information deemed to have been furnished and not filed in accordance with the rules of the Commission shall not be deemed incorporated by reference into this

Registration Statement.

Any statement contained in a document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained herein or in any subsequently filed document which also is deemed to be incorporated by reference herein modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

Item 4. Description of Securities.

Not applicable.

Item 5. Interests of Named Experts and Counsel.

Not applicable.

Item 6. Indemnification of Directors and Officers.

Section 145 of the Delaware General Corporation Law authorizes a corporation's board of directors to grant, and authorizes a court to award, indemnity to officers, directors and other corporate agents.

The Registrant's amended and restated certificate of incorporation contains provisions that limit the liability of its directors for monetary damages to the fullest extent permitted by Delaware law. Consequently, the Registrant's directors will not be personally liable to the Registrant or its stockholders for monetary damages for any breach of fiduciary duties as directors, except liability for the following:

any breach of their duty of loyalty to the Registrant or its stockholders;

any act or omission not in good faith or that involves intentional misconduct or a knowing violation of law;

unlawful payments of dividends or unlawful stock repurchases or redemptions as provided in Section 174 of the Delaware General Corporation Law; or

any transaction from which they derived an improper personal benefit.

Any amendment to, or repeal of, these provisions will not eliminate or reduce the effect of these provisions in respect of any act, omission or claim that occurred or arose prior to that amendment or repeal. If the Delaware General Corporation Law is amended to provide for further limitations on the personal liability of directors of corporations, then the personal liability of the Registrant's directors will be further limited to the greatest extent permitted by the Delaware General Corporation Law.

In addition, the Registrant's amended and restated bylaws provide that the Registrant will indemnify, to the fullest extent permitted by law, any person who is or was a party or is threatened to be made a party to any action, suit or proceeding by reason of the fact that he or she is or was one of the Registrant's directors or officers or is or was serving at the Registrant's request as a director or officer of another corporation, partnership, joint venture, trust or other enterprise. The Registrant's amended and restated bylaws provide that the Registrant may indemnify to the fullest extent permitted by law any person who is or was a party or is threatened to be made a party to any action, suit or proceeding by reason of the fact that he or she is or was one of the Registrant's employees or agents or is or was serving at the Registrant's request as an employee or agent of another corporation, partnership, joint venture, trust or other enterprise. The Registrant's amended and restated bylaws also provide that the Registrant must advance expenses incurred by or on behalf of a director or officer in advance of the final disposition of any action or proceeding, subject to limited exceptions.

Further, the Registrant has entered into or will enter into indemnification agreements with each of its directors and executive officers that may be broader than the specific indemnification provisions contained in the Delaware General Corporation Law. These indemnification agreements require the Registrant, among other things, to indemnify its directors and executive officers against liabilities that may arise by reason of their status or service. These indemnification agreements also require the Registrant to advance all expenses incurred by the directors and executive officers in investigating or defending any such action, suit or proceeding. The Registrant believes that these agreements are necessary to attract and retain qualified individuals to serve as directors and executive officers.

The limitation of liability and indemnification provisions that are included in the Registrant's amended and restated certificate of incorporation, amended and restated bylaws and the indemnification agreements that the Registrant has

entered into or will enter into with its directors and executive officers may discourage stockholders from bringing a lawsuit against the Registrant's directors and executive officers for breach of their fiduciary duties. They may also reduce the likelihood of derivative litigation against the Registrant's directors and executive officers, even though an action, if successful, might benefit the Registrant and other stockholders. Further, a stockholder's investment may be adversely affected to the extent that the Registrant pays the costs of settlement and damage awards against directors and executive officers as required by these indemnification provisions. At present, the Registrant is not aware of any pending litigation or proceeding involving any person who is or was one of the Registrant's directors, officers, employees or other agents or is or was serving at the Registrant's request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, for which indemnification is sought, and the Registrant is not aware of any threatened litigation that may result in claims for indemnification.

The Registrant has obtained insurance policies under which, subject to the limitations of the policies, coverage is provided to the Registrant's directors and executive officers against loss arising from claims made by reason of breach of fiduciary duty or other wrongful acts as a director or executive officer, including claims relating to public securities matters, and to the Registrant with respect to payments that may be made by the Registrant to these directors and executive officers pursuant to the Registrant's indemnification obligations or otherwise as a matter of law.

Certain of the Registrant's non-employee directors may, through their relationships with their employers, be insured and/or indemnified against certain liabilities incurred in their capacity as members of the Registrant's board of directors.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

Exhibit

Number	Description
4.1 ⁽¹⁾	<u>Form of common stock certificate of Registrant.</u>
5.1	<u>Opinion of Cooley LLP.</u>
23.1	<u>Consent of Independent Registered Public Accounting Firm.</u>
23.2	<u>Consent of Cooley LLP (contained in Exhibit 5.1 hereto).</u>
24.1	<u>Power of Attorney (contained on signature page hereto).</u>
99.1	<u>Booker Software, Inc. 2015 Stock Plan and related form agreements.</u>
99.2	<u>Third Amended and Restated Booker Software, Inc. 2011 Equity Incentive Plan, as amended, and related form agreements.</u>

(1) Incorporated by reference from Exhibit 4.1 filed with Amendment No. 2 to the Registrant's Registration Statement on Form S-1 (Registration No. 333-204068), filed with the Commission on June 8, 2015.

Item 9. Undertakings.

A. The undersigned Registrant hereby undertakes that:

(1) It will file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

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- (i) To include any prospectus required by Section 10(a)(3) of the Securities Act;

- (ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective registration statement; and

- (iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement.

Provided, however, that paragraphs (A)(1)(i) and (A)(1)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference in this Registration Statement.

- (2) For the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.
 - (3) It will remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.
- B. The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the Registrant's annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Exchange Act) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.
- C. Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of San Luis Obispo, State of California, on April 12, 2018.

MINDBODY, INC.

By: /s/ Richard Stollmeyer
 Richard Stollmeyer
 Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below hereby constitutes and appoints Richard Stollmeyer and Brett White, and each of them, as his or her true and lawful attorney-in-fact and agent with full power of substitution, for him or her in any and all capacities, to sign any and all amendments to this registration statement (including post-effective amendments), and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney-in-fact, proxy, and agent full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection therewith, as fully for all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorney-in-fact, proxy and agent, or his substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

Name	Title	Date
/s/ Richard Stollmeyer Richard Stollmeyer	Chief Executive Officer and Director (Principal Executive Officer)	April 12, 2018
/s/ Brett White Brett White	Chief Financial Officer and Chief Operating Officer (Principal Financial Officer and Principal Accounting Officer)	April 12, 2018
/s/ Katherine Blair Christie Katherine Blair Christie	Director	April 12, 2018
/s/ Court Cunningham Court Cunningham	Director	April 12, 2018
/s/ Gail Goodman Gail Goodman	Director	April 12, 2018

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/s/ Cipora Herman Cipora Herman	Director	April 12, 2018
/s/ Eric Liaw Eric Liaw	Director	April 12, 2018
/s/ Adam Miller Adam Miller	Director	April 12, 2018
/s/ Graham Smith Graham Smith	Director	April 12, 2018