14A:3-6.5 Conditions for dismissal of proceeding

5. (1) Subject to subsection (5) of this section, a derivative proceeding shall be dismissed by the court on motion by the corporation if the court finds that:

(a) the person or group specified in paragraph (a) or (b) of subsection (2) of this section or subsection (6) of this section has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the corporation; or

(b) the shareholders specified in paragraph (c) of subsection (2) of this section have voted to terminate the derivative proceeding.

(2) Unless a panel is appointed pursuant to subsection (6) of this section, the determination in subsection (1) of this section shall be made by:

(a) a majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum;

(b) a majority vote of a committee consisting of one or more independent directors appointed by majority vote of independent directors, or one independent director if the board consists of only one independent director, present at a meeting of the board of directors, regardless of whether those independent directors constitute a quorum of the board; or

(c) the vote of the holders of a majority of the outstanding shares entitled to vote, not including shares owned by or voted under the control of a shareholder or related person who has or had a material beneficial financial interest in the act or omission complained of or other interest therein that would reasonably be expected to exert an influence on that shareholder's or related person's judgment if called upon to vote in the determination.

(3) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing that a majority of the board of directors, or all members of a committee, which in either case determined the matter, did not consist of independent directors at the time the determination was made.

(4) If a majority of the board of directors consisted of independent directors at the time the determination in subsection (1) of this section was made or if the determination is made by shareholders, the plaintiff shall have the burden of proving that the requirements of subsection (1) of this section have not been met. If a majority of the board of directors does not consist of independent directors at the time the determination by independent directors is made, the corporation shall have the burden of proving that the requirements of subsection (1) of this section have been met.

(5) (a) If the corporation moves to dismiss the derivative proceeding, it shall make a written filing with the court setting forth, among other things, facts to show:

(i) whether or not a majority of the board of directors was independent at the time of the determination by the independent director or directors; and

(ii) that the independent director or directors made the determination in good faith after conducting a reasonable inquiry upon which the conclusions are based.

(b) Following a motion filed pursuant to paragraph (a) of this subsection, the court shall dismiss the derivative suit unless:

(i) the court finds that the requirements of subsection (1) of this section have not been met, taking into account the burden of proof under subsection (4) or (6) of this section; or

(ii) the plaintiff, in its complaint, an amended complaint, or in a written filing with the court, has alleged with particularity facts rebutting the facts contained in the corporation's filing.

(c) All discovery proceedings shall be stayed upon the filing by the corporation of its motion to dismiss and the filing required by this subsection until the notice of entry of the order ruling on the motion. Notwithstanding the foregoing stay of discovery, the court, on motion and after a hearing, may order that specified and limited discovery be conducted if plaintiffs make a good cause showing of alleged facts which evidence a lack of independence by the person or group making the determination for the corporation or a lack of a good faith determination. Limited discovery shall not include the work product, privileged communications, or testimony of attorneys who advised or assisted the person or group making the determination.

(6) Upon motion by the corporation, the court may appoint a panel of one or more individuals to make a determination whether the maintenance of the derivative proceeding is in the best interests of the corporation. The plaintiff shall have the burden of proving to the panel that the requirements of subsection (1) of this section have not been met.

(7) (a) A director shall be considered independent for the purposes of this section if the director has:

(i) no economic interest in the challenged act or transaction material to him or her, other than an economic interest that is shared by all shareholders generally; and

(ii) no material, personal, or business relationships with the defendant directors or officers who have a material interest in the act or transaction challenged.

(b) None of the following shall by itself cause a director to be considered not independent for the purposes of this section:

(i) the nomination or election of the director by a person who is a defendant in the derivative proceeding or against whom action is demanded;

(ii) the naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded; or

(iii) the approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

L.2013, c.42, s.5.