

§ 57D-8-03. Dismissal.

(a) The court shall dismiss a derivative proceeding on motion of the LLC if one of the groups specified in subsection (b) or (f) of this section determines after conducting an inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interest of the LLC.

(b) The inquiry and determination with respect to the demanded action is to be made either (i) pursuant to subsection (f) of this section or (ii) by either of the following:

- (1) A majority vote or other approval of those persons who have the authority individually or collectively to cause the LLC to bring an action in the superior court of this State for the recovery or other remedy sought in the derivative action and are independent.
- (2) A majority vote of a committee composed of two or more independent persons appointed by a majority vote or other approval of those persons described in subdivision (b)(1) of this section.

(c) For purposes of this section, none of the following factors by itself will necessarily preclude a person from being considered to be independent:

- (1) The nomination or election of the person by persons who are defendants in the derivative proceeding or against whom action is demanded.
- (2) The naming of the person as a defendant in the derivative proceeding or as a person against whom action is demanded.
- (3) The approval by the person of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the person.

(d) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a member, the complaint must allege particular facts that if proved would preclude the court from dismissing the derivative proceeding under subsection (a) of this section. Defendants may make a motion to dismiss a complaint under subsection (a) of this section for failure to comply with this subsection. Prior to the court's ruling on such a motion to dismiss, the plaintiff may engage in discovery only to the extent it is germane and necessary to develop facts that establish that the dismissal of the derivative proceeding under subsection (a) of this section is unwarranted.

(e) If a majority of the persons having the authority to cause the LLC to bring a proceeding in the superior court of this State for the recovery or other remedy sought in the derivative action are independent, then the plaintiff will have the burden of proving that the requirements of subsection (a) of this section have not been met, but if a majority of such persons are not independent, then the LLC has the burden of proving that the requirements of subsection (a) of this section have been met.

(f) The court may appoint a panel composed of one or more independent persons on motion of the LLC to make a determination whether the maintenance of the derivative proceeding is in the best interest of the LLC. The plaintiff has the burden of proving that the requirements of subsection (a) of this section have not been met. (2013-157, s. 2.)