

## CHAPTER 42

**AN ACT** concerning derivative proceedings and shareholder class actions, supplementing chapter 3 of Title 14A of the New Jersey Statutes, and repealing N.J.S.14A:3-6.

**BE IT ENACTED** by the Senate and General Assembly of the State of New Jersey:

C.14A:3-6.1 Definitions relative to derivative proceedings and shareholder class actions.

1. As used in this section:

“Derivative proceeding” means a civil suit in the right of a domestic corporation.

“Shareholder” includes a beneficial owner whose shares are held in a voting trust or held by a nominee on the beneficial owner’s behalf.

“Shareholder class action” means a civil suit by a shareholder against a domestic corporation or its directors or officers which alleges a breach of any duty by the directors or officers or the corporation which is imposed in whole or in part by statutory or common law of the State of New Jersey and seeks a right, remedy, or damages on behalf of a class of the domestic corporation’s shareholders.

C.14A:3-6.2 Conditions for commencing, maintaining proceeding.

2. A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(1) was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time and remains a shareholder throughout the derivative proceeding; and

(2) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

C.14A:3-6.3 Actions taken before commencing proceeding.

3. No shareholder may commence a derivative proceeding until:

(1) a written demand has been made upon the corporation to take suitable action; and

(2) 90 days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

C.14A:3-6.4 Stay of proceeding.

4. If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding as the court deems appropriate.

C.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:

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(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.

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(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.

C.14A:3-6.6 Court's approval required.

6. A derivative proceeding or a shareholder class action may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

C.14A:3-6.7 Termination of derivative proceeding, shareholder class action.

7. On termination of a derivative proceeding or a shareholder class action the court may:

(1) order the corporation to pay the plaintiff's expenses incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation;

(2) order the plaintiff to pay any defendant's expenses incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without the exercise of reasonable diligence by the plaintiff or without reasonable cause or for an improper purpose; or

(3) order a party to pay an opposing party's expenses incurred because of the filing of a pleading, motion or other paper, if it finds that the pleading, motion or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and was interposed for an improper purpose, such as to harass or cause unnecessary delay or needlessly increase the cost of litigation.

C.14A:3-6.8 Security for reasonable expenses.

8. In any derivative proceeding or shareholder class action instituted by a shareholder or shareholders holding less than 5% of the outstanding shares of any class or series of the corporation, unless the shares have a market value in excess of \$250,000, the corporation in whose right the action is brought shall be entitled at any time before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with the action or may be incurred by other parties named as defendant for which it may become legally liable. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervener, as of the date that the intervener becomes a party to the action. The corporation shall have recourse to that security in that amount which the court having jurisdiction shall determine upon the termination of the action in accordance with section 7 of P.L.2013, c.42 (C.14A:3-6.7).

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C.14A:3-6.9 Applicability.

9. In any derivative proceeding or shareholder class action, the provisions of P.L.2013, c.42 (C.14A:3-6.1 et seq.) shall apply to actions brought in state or federal court both within and outside of the State of New Jersey if the provisions of P.L.2013, c.42 (C.14A:3-6.1 et seq.) are made applicable to the corporation by the certificate of incorporation.

Repealer.

10. N.J.S.14A:3-6 is repealed.

11. This act shall take effect immediately.

Approved April 1, 2013.