

Article 8.

Derivative Actions.

**§ 57D-8-01. Member derivative actions.**

(a) Subject to the provisions of G.S. 57D-8-02 and G.S. 57D-8-03, a member may bring a derivative action if the following conditions are met:

- (1) Either (i) the member was a member of the LLC at the time of the act or omission for which the proceeding is brought or (ii) all or any portion of the member's ownership interest devolves by operation of law from an ownership interest that was owned by a member at that time.
- (2) The member made written demand on the LLC to take suitable action, and either (i) the LLC notified the member that the member's demand was rejected, (ii) 90 days have expired from the date the demand was made, or (iii) irreparable injury to the LLC would result by waiting for the expiration of the 90-day period.

(b) For purposes of this Article, a "derivative action" or a "derivative proceeding" is a proceeding brought in the superior court of this State in the right of an LLC or, to the extent provided in G.S. 57D-8-06, in the right of a foreign LLC, to recover a judgment in favor of the LLC or, if applicable, the foreign LLC. (2013-157, s. 2.)

**§ 57D-8-02. Stay of proceedings.**

If the LLC commences an inquiry into the allegations set forth in the demand or complaint, the court may stay a derivative proceeding. (2013-157, s. 2.)

**§ 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.)

#### **§ 57D-8-04. Discontinuance or settlement.**

(a) A derivative proceeding 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 LLC's members, the court shall direct that notice be given to the members who would be affected.

(b) The court shall determine the manner and form of the notice and the manner in which costs of the notice will be borne. (2013-157, s. 2.)

#### **§ 57D-8-05. Payment of expenses.**

On termination of the derivative proceeding, the court may do any of the following:

- (1) Order the LLC to pay the plaintiff's expenses, including attorneys' fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the LLC.
- (2) Order the plaintiff to pay any defendant's expenses, including attorneys' fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without cause or for an improper purpose.
- (3) Order a party to pay an opposing party's expenses, including attorneys' fees, incurred as a result of the filing of a pleading, motion, or other paper, if the court after inquiry finds that the pleading, motion, or other paper was not well grounded in fact or was not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law and that it was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (2013-157, s. 2.)

#### **§ 57D-8-06. Applicability to foreign LLCs.**

In any derivative proceeding in the right of a foreign LLC, the matters covered by this Article will be governed by the law of the jurisdiction of the foreign LLC's organization except for the matters governed by G.S. 57D-8-02, 57D-8-04, and 57D-8-05. (2013-157, s. 2.)

**§ 57D-8-07. Privileged communications.**

In any derivative proceeding, no member is entitled to obtain or have access to any communication within the scope of the LLC's attorney-client privilege that could not be obtained by, or would not be accessible to, a party in a proceeding other than on behalf of the LLC. (2013-157, s. 2.)