

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

IN RE: APPOINTMENT OF DISINTERESTED  
PERSON TO MILJOCO CORP.,

Case No. 2017-3839-CB

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OPINION AND ORDER

Miljoco Corp. ("Mijoco") has filed an ex-parte motion for the appointment of a disinterested person to investigate a shareholder derivative demand. In support of their motion, Mijoco contends that MCL 450.1495(2)(c) authorizes this Court to appoint a "disinterested person" to investigate an August 25, 2017 demand that Mijoco take action against its 51% owner/CEO/CFO/COO, etc. Mijoco maintains that MCL 450.1495(2)(c) empowers a court to appoint a disinterested person to conduct an investigation of a shareholder's demand.

MCL 450.1495 provides:

- (1) The court shall dismiss a derivative proceeding if, on motion by the corporation, the court finds that 1 of the groups specified in subsection (2) has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation. If the determination is made pursuant to subsection (2)(a) or (b), the corporation shall have the burden of proving the good faith of the group making the determination and the reasonableness of the investigation. If the determination is made pursuant to subsection (2)(c) or (d), the plaintiff shall have the burden of proving that the determination was not made in good faith or that the investigation was not reasonable.
- (2) A determination under subsection (1) may be made by any 1 of the following:

- (a) By a majority vote of the disinterested directors, if the disinterested directors constitute a quorum at a meeting of the board.
- (b) By a majority vote of a committee consisting of 2 or more disinterested directors appointed by a majority vote of disinterested directors present at a meeting of the board, whether or not the disinterested directors constitute a quorum at the meeting.
- (c) By a panel of 1 or more disinterested persons appointed by the court upon motion by the corporation.
- (d) By all disinterested independent directors.

It is well-established that when the language of a statute is unambiguous, no judicial construction is permitted and the statute must be enforced as written in accordance with the plain and ordinary meaning of its words. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005), quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

Based on the unambiguous language of the statute, the power provided the court by MCL 450.1495 is the power to dismiss a derivative action if one of the groups set forth in subsection (2) has made a good faith determination that the derivative action is not in the best interests of the company at issue. The procedure laid out in subsection (1) anticipates a case first being brought derivatively. Indeed, subsection (1) provides that the plaintiff in such a case would have an opportunity to show that the determination by one of the types of groups listed in subsection (2) was not made in good faith. The language of subsection (2) does not empower the court to appoint a disinterested person in the absence of a pending derivative action – as is the case here. Accordingly, without a case first being filed there is nothing for a court to dismiss, and no authority to appoint

under subsection (2)(c). For these reasons, the Court is convinced that Mijoco's complaint fails to state a claim upon which relief can be granted and must be dismissed pursuant to MCR 2.116(C)(8) and MCR 2.116(I)(1).

Conclusion

Based on the foregoing, Mijoco Corp.'s ex-parte motion for the appointment of a disinterested person to investigate derivative demand is DENIED. Further, this matter is DISMISSED as the complaint in this matter fails to state a claim upon which relief can be granted. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last pending claim and CLOSES the case.

IT IS SO ORDERED.

Date: OCT 18 2017

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge