

1-1 By: Hancock S.B. No. 1972
1-2 (In the Senate - Filed March 7, 2019; March 19, 2019, read
1-3 first time and referred to Committee on Business & Commerce;
1-4 April 24, 2019, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 9, Nays 0; April 24, 2019,
1-6 sent to printer.)

1-7 COMMITTEE VOTE

| | Yea | Nay | Absent | PNV |
|------|-----|-----|--------|-----|
| 1-8 | | | | |
| 1-9 | X | | | |
| 1-10 | X | | | |
| 1-11 | X | | | |
| 1-12 | X | | | |
| 1-13 | X | | | |
| 1-14 | X | | | |
| 1-15 | X | | | |
| 1-16 | X | | | |
| 1-17 | X | | | |

1-18 COMMITTEE SUBSTITUTE FOR S.B. No. 1972 By: Hancock

1-19 A BILL TO BE ENTITLED
1-20 AN ACT

1-21 relating to derivative proceedings on behalf of for-profit
1-22 corporations, limited liability companies, and limited
1-23 partnerships.

1-24 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-25 SECTION 1. Section 21.551(2), Business Organizations Code,
1-26 is amended to read as follows:

1-27 (2) "Shareholder" means a shareholder as defined by
1-28 Section 1.002 or ~~[includes]~~ a beneficial owner whose shares are
1-29 held in a voting trust or by a nominee on the beneficial owner's
1-30 behalf.

1-31 SECTION 2. Section 21.552, Business Organizations Code, is
1-32 amended to read as follows:

1-33 Sec. 21.552. STANDING TO BRING PROCEEDING. (a) Subject to
1-34 Subsection (b), a [A] shareholder may not institute or maintain a
1-35 derivative proceeding unless:

1-36 (1) the shareholder:

1-37 (A) was a shareholder of the corporation at the
1-38 time of the act or omission complained of; or

1-39 (B) became a shareholder by operation of law
1-40 originating from a person that was a shareholder at the time of the
1-41 act or omission complained of; and

1-42 (2) the shareholder fairly and adequately represents
1-43 the interests of the corporation in enforcing the right of the
1-44 corporation.

1-45 (b) If the converted entity in a conversion is a
1-46 corporation, a shareholder of that corporation may not institute or
1-47 maintain a derivative proceeding based on an act or omission that
1-48 occurred with respect to the converting entity before the date of
1-49 the conversion unless:

1-50 (1) the shareholder was an equity owner of the
1-51 converting entity at the time of the act or omission; and

1-52 (2) the shareholder fairly and adequately represents
1-53 the interests of the corporation in enforcing the right of the
1-54 corporation.

1-55 SECTION 3. Section 21.553(b), Business Organizations Code,
1-56 is amended to read as follows:

1-57 (b) The waiting period required by Subsection (a) before a
1-58 derivative proceeding may be instituted is not required or, if
1-59 applicable, shall terminate if:

1-60 (1) the shareholder has been ~~[previously]~~ notified

2-1 that the demand has been rejected by the corporation;

2-2 (2) the corporation is suffering irreparable injury;
2-3 or

2-4 (3) irreparable injury to the corporation would result
2-5 by waiting for the expiration of the 90-day period.

2-6 SECTION 4. Section 21.554, Business Organizations Code, is
2-7 amended to read as follows:

2-8 Sec. 21.554. DETERMINATION BY DIRECTORS OR INDEPENDENT
2-9 PERSONS. (a) A determination of how to proceed on allegations
2-10 made in a demand or petition relating to a derivative proceeding
2-11 must be made by an affirmative vote of the majority of:

2-12 (1) all [the] independent and disinterested directors
2-13 of the corporation, regardless of whether [present at a meeting of
2-14 the board of directors of the corporation at which interested
2-15 directors are not present at the time of the vote if] the
2-16 independent and disinterested directors constitute a quorum of the
2-17 board of directors;

2-18 (2) a committee consisting of one [two] or more
2-19 independent and disinterested directors appointed by an
2-20 affirmative vote of the majority of one or more independent and
2-21 disinterested directors [~~present at a meeting of the board of~~
2-22 ~~directors~~], regardless of whether the independent and
2-23 disinterested directors constitute a quorum of the board of
2-24 directors; or

2-25 (3) a panel of one or more independent and
2-26 disinterested individuals [persons] appointed by the court on a
2-27 motion by the corporation listing the names of the individuals
2-28 [~~persons~~] to be appointed and stating that, to the best of the
2-29 corporation's knowledge, the individuals [persons] to be appointed
2-30 are disinterested and qualified to make the determinations
2-31 contemplated by Section 21.558.

2-32 (b) The court shall appoint a panel under Subsection (a)(3)
2-33 if the court finds that the individuals [persons] recommended by
2-34 the corporation are independent and disinterested and are otherwise
2-35 qualified with respect to expertise, experience, independent
2-36 judgment, and other factors considered appropriate by the court
2-37 under the circumstances to make the determinations. An individual
2-38 [~~A person~~] appointed by the court to a panel under this section may
2-39 not be held liable to the corporation or the corporation's
2-40 shareholders for an action taken or omission made by the individual
2-41 [~~person~~] in that capacity, except for an act or omission
2-42 constituting fraud or wilful misconduct.

2-43 SECTION 5. Section 21.555, Business Organizations Code, is
2-44 amended to read as follows:

2-45 Sec. 21.555. STAY OF PROCEEDING. (a) If the [~~domestic or~~
2-46 ~~foreign~~] corporation that is the subject of a derivative proceeding
2-47 commences an inquiry into the allegations made in a demand or
2-48 petition and the person or group of persons described by Section
2-49 21.554 is conducting an active review of the allegations in good
2-50 faith, the court shall stay a derivative proceeding for not more
2-51 than 60 days until the review is completed and a determination is
2-52 made by the person or group regarding what further action, if any,
2-53 should be taken.

2-54 (b) To obtain a stay, the [~~domestic or foreign~~] corporation
2-55 must [shall] provide the court with a written statement agreeing to
2-56 advise the court and the shareholder making the demand of the
2-57 determination promptly on the completion of the review of the
2-58 matter.

2-59 (c) A stay, on motion [application], may be reviewed every
2-60 60 days for continuation [the continued necessity] of the stay if
2-61 the corporation provides the court and the shareholder with a
2-62 written statement of the status of the review and the reasons why an
2-63 extension for a period not to exceed 60 additional days is
2-64 appropriate. An extension shall be granted for a period not to
2-65 exceed 60 days if the court determines that the continuation is
2-66 appropriate in the interests of the corporation.

2-67 [~~(c) If the review and determination made by the person or~~
2-68 ~~group is not completed before the 61st day after the stay is ordered~~
2-69 ~~by the court, the stay may be renewed for one or more additional~~

3-1 ~~60-day periods if the domestic or foreign corporation provides the~~
3-2 ~~court and the shareholder with a written statement of the status of~~
3-3 ~~the review and the reasons why a continued extension of the stay is~~
3-4 ~~necessary.]~~

3-5 SECTION 6. Section 21.556, Business Organizations Code, is
3-6 amended to read as follows:

3-7 Sec. 21.556. DISCOVERY. (a) If a [~~domestic or foreign~~]
3-8 corporation proposes to dismiss a derivative proceeding under
3-9 Section 21.558, discovery by a shareholder after the filing of the
3-10 derivative proceeding in accordance with this subchapter shall be
3-11 limited to:

3-12 (1) facts relating to whether the person or [~~group of~~]
3-13 persons described by Section 21.554 are [~~21.558 is~~] independent and
3-14 disinterested;

3-15 (2) the good faith of the inquiry and review by the
3-16 person or group; and

3-17 (3) the reasonableness of the procedures followed by
3-18 the person or group in conducting the review.

3-19 (b) Discovery described by Subsection (a) may not be
3-20 expanded to include a fact or substantive matter regarding the act,
3-21 omission, or other matter that is the subject matter of the
3-22 derivative proceeding, but the scope of discovery shall not be so
3-23 limited[. ~~The scope of discovery may be expanded~~] if the court
3-24 determines after notice and hearing that a good faith review of the
3-25 allegations [~~for purposes of Section 21.558~~] has not been made by an
3-26 independent and disinterested person or group in accordance with
3-27 Sections 21.554 and 21.558 [~~that section~~].

3-28 SECTION 7. Section 21.557, Business Organizations Code, is
3-29 amended to read as follows:

3-30 Sec. 21.557. TOLLING OF STATUTE OF LIMITATIONS. A written
3-31 demand filed with the corporation under Section 21.553 tolls the
3-32 statute of limitations on the claim on which demand is made until
3-33 the later [~~earlier~~] of:

3-34 (1) the 31st [~~91st~~] day after the expiration of any
3-35 waiting period under Section 21.553 [~~date of the demand~~]; or

3-36 (2) the 31st day after the expiration of any stay
3-37 granted under Section 21.555, including all continuations of the
3-38 stay [~~date the corporation advises the shareholder that the demand~~
3-39 ~~has been rejected or the review has been completed~~].

3-40 SECTION 8. Section 21.558, Business Organizations Code, is
3-41 amended to read as follows:

3-42 Sec. 21.558. DISMISSAL OF DERIVATIVE PROCEEDING. (a) A
3-43 court, sitting in equity as the finder of fact, shall dismiss a
3-44 derivative proceeding on a motion by the corporation if the person
3-45 or group of persons described by Section 21.554 determines in good
3-46 faith, after conducting a reasonable inquiry and based on factors
3-47 the person or group considers appropriate under the circumstances,
3-48 that continuation of the derivative proceeding is not in the best
3-49 interests of the corporation.

3-50 (b) In determining whether the requirements of Subsection
3-51 (a) have been met, the burden of proof shall be on:

3-52 (1) the plaintiff shareholder if:

3-53 (A) the majority of the board of directors
3-54 consists of independent and disinterested directors at the time the
3-55 determination is made;

3-56 (B) the determination is made by a panel of one or
3-57 more independent and disinterested persons appointed under Section
3-58 21.554(a)(3); or

3-59 (C) the corporation presents prima facie
3-60 evidence that demonstrates that the applicable person or persons
3-61 making the determination [~~directors appointed~~] under Section
3-62 21.554(a) [~~21.554(a)(2)~~] are independent and disinterested; or

3-63 (2) the corporation in any other circumstance.

3-64 SECTION 9. Section 21.559, Business Organizations Code, is
3-65 amended to read as follows:

3-66 Sec. 21.559. ALLEGATIONS [~~PROCEEDING INSTITUTED~~] AFTER
3-67 DEMAND REJECTED. If a derivative proceeding is instituted after a
3-68 demand is rejected, the petition must allege with particularity
3-69 facts that establish that the rejection was not made in accordance

4-1 with the requirements and standards under ~~[of]~~ Sections 21.554 and
4-2 21.558.

4-3 SECTION 10. Section 21.561, Business Organizations Code, is
4-4 amended to read as follows:

4-5 Sec. 21.561. PAYMENT OF EXPENSES. (a) In this section,
4-6 "expenses" means reasonable expenses incurred by a party in a
4-7 derivative proceeding, including:

4-8 (1) attorney's fees;
4-9 (2) costs in pursuing an investigation of the matter
4-10 that was the subject of the derivative proceeding; or

4-11 (3) expenses for which the ~~[domestic or foreign]~~
4-12 corporation ~~[or a corporate defendant]~~ may be required to indemnify
4-13 another person.

4-14 (b) On termination of a derivative proceeding, the court may
4-15 order:

4-16 (1) the ~~[domestic or foreign]~~ corporation to pay ~~[the]~~
4-17 expenses the plaintiff incurred in the proceeding if the court
4-18 finds the proceeding has resulted in a substantial benefit to the
4-19 ~~[domestic or foreign]~~ corporation;

4-20 (2) the plaintiff to pay ~~[the]~~ expenses the ~~[domestic~~
4-21 ~~or foreign]~~ corporation or other defendant incurred in
4-22 investigating and defending the proceeding if the court finds the
4-23 proceeding has been instituted or maintained without reasonable
4-24 cause or for an improper purpose; or

4-25 (3) a party to pay ~~[the]~~ expenses incurred by another
4-26 party relating to the filing of a pleading, motion, or other paper
4-27 if the court finds the pleading, motion, or other paper:

4-28 (A) was not well grounded in fact after
4-29 reasonable inquiry;

4-30 (B) was not warranted by existing law or a good
4-31 faith argument for the application, extension, modification, or
4-32 reversal of existing law; or

4-33 (C) was interposed for an improper purpose, such
4-34 as to harass, cause unnecessary delay, or cause a needless increase
4-35 in the cost of litigation.

4-36 SECTION 11. Section 21.562, Business Organizations Code, is
4-37 amended to read as follows:

4-38 Sec. 21.562. APPLICATION TO FOREIGN CORPORATIONS. (a) In
4-39 a derivative proceeding brought in the right of a foreign
4-40 corporation, the matters covered by this subchapter are governed by
4-41 the laws of the jurisdiction of formation ~~[incorporation]~~ of the
4-42 foreign corporation, except for Sections 21.555, 21.560, and
4-43 21.561, which are procedural provisions and do not relate to the
4-44 internal affairs of the foreign corporation, unless applying the
4-45 laws of the jurisdiction of formation of the foreign corporation
4-46 requires otherwise with respect to Section 21.555.

4-47 (b) In the case of matters relating to a foreign corporation
4-48 under Section 21.555 ~~[21.554]~~, a reference to a person or group of
4-49 persons described by Section 21.554 ~~[that section]~~ refers to a
4-50 person or group entitled under the laws of the jurisdiction of
4-51 formation ~~[incorporation]~~ of the foreign corporation to make the
4-52 determination described by Section 21.554(a) ~~[review and dispose of~~
4-53 ~~a derivative proceeding]~~. The standard of review of a
4-54 determination ~~[decision]~~ made by the person or group ~~[to dismiss~~
4-55 ~~the derivative proceeding]~~ shall be governed by the laws of the
4-56 jurisdiction of formation ~~[incorporation]~~ of the foreign
4-57 corporation.

4-58 SECTION 12. Section 21.563, Business Organizations Code, is
4-59 amended to read as follows:

4-60 Sec. 21.563. CLOSELY HELD CORPORATION. (a) In this
4-61 section, "closely held corporation" means a corporation that has:

4-62 (1) fewer than 35 shareholders; and

4-63 (2) no shares listed on a national securities exchange
4-64 or regularly quoted in an over-the-counter market by one or more
4-65 members of a national securities association.

4-66 (b) Sections 21.552-21.560 ~~[21.552-21.559]~~ do not apply to
4-67 a claim or a derivative proceeding by a shareholder of a closely
4-68 held corporation against a director, officer, or shareholder of the
4-69 corporation. In the event the claim or derivative proceeding is

5-1 also made against a person who is not that director, officer, or
5-2 shareholder, this subsection applies only to the claim or
5-3 derivative proceeding against the director, officer, or
5-4 shareholder.

5-5 (c) If Sections 21.552-21.560 do not apply because of
5-6 Subsection (b) and if justice requires:

5-7 (1) a derivative proceeding brought by a shareholder
5-8 of a closely held corporation may be treated by a court as a direct
5-9 action brought by the shareholder for the shareholder's own
5-10 benefit; and

5-11 (2) a recovery in a direct or derivative proceeding by
5-12 a shareholder may be paid directly to the plaintiff or to the
5-13 corporation if necessary to protect the interests of creditors or
5-14 other shareholders of the corporation.

5-15 (d) Other provisions of state law govern whether a
5-16 shareholder has a direct cause of action or right to sue a director,
5-17 officer, or shareholder, and this section may not be construed to
5-18 create that direct cause of action or right to sue.

5-19 SECTION 13. Section 101.451, Business Organizations Code,
5-20 is amended by amending Subdivision (2) and adding Subdivision (3)
5-21 to read as follows:

5-22 (2) "Managing entity" means an entity that is either:
5-23 (A) a manager of a limited liability company that
5-24 is managed by managers; or

5-25 (B) a member of a limited liability company that
5-26 is managed by members who are entitled to manage the company.

5-27 (3) "Member" means ~~includes~~ a person who is a member
5-28 or is an assignee of a membership interest or a person who
5-29 beneficially owns a membership interest through a voting trust or a
5-30 nominee on the person's behalf.

5-31 SECTION 14. Section 101.452, Business Organizations Code,
5-32 is amended to read as follows:

5-33 Sec. 101.452. STANDING TO BRING PROCEEDING. (a) Subject
5-34 to Subsection (b), a ~~A~~ member may not institute or maintain a
5-35 derivative proceeding unless:

5-36 (1) the member:
5-37 (A) was a member of the limited liability company
5-38 at the time of the act or omission complained of; or

5-39 (B) became a member by operation of law
5-40 originating from a person that was a member at the time of the act or
5-41 omission complained of; and

5-42 (2) the member fairly and adequately represents the
5-43 interests of the limited liability company in enforcing the right
5-44 of the limited liability company.

5-45 (b) If the converted entity in a conversion is a limited
5-46 liability company, a member of that limited liability company may
5-47 not institute or maintain a derivative proceeding based on an act or
5-48 omission that occurred with respect to the converting entity before
5-49 the date of the conversion unless:

5-50 (1) the member was an equity owner of the converting
5-51 entity at the time of the act or omission; and

5-52 (2) the member fairly and adequately represents the
5-53 interests of the limited liability company in enforcing the right
5-54 of the limited liability company.

5-55 SECTION 15. Section 101.453(b), Business Organizations
5-56 Code, is amended to read as follows:

5-57 (b) The waiting period required by Subsection (a) before a
5-58 derivative proceeding may be instituted is not required or, if
5-59 applicable, shall terminate if:

5-60 (1) the member has been ~~previously~~ notified that the
5-61 demand has been rejected by the limited liability company;

5-62 (2) the limited liability company is suffering
5-63 irreparable injury; or

5-64 (3) irreparable injury to the limited liability
5-65 company would result by waiting for the expiration of the 90-day
5-66 period.

5-67 SECTION 16. Section 101.454, Business Organizations Code,
5-68 is amended to read as follows:

5-69 Sec. 101.454. DETERMINATION BY GOVERNING OR INDEPENDENT

6-1 PERSONS. (a) The determination of how to proceed on allegations
6-2 made in a demand or petition relating to a derivative proceeding
6-3 must be made by an affirmative vote of the majority of:

6-4 (1) the independent and disinterested governing
6-5 persons of the limited liability company, whether one or more, even
6-6 if the independent and disinterested governing persons are not a
6-7 majority of the governing persons of the limited liability company
6-8 [present at a meeting of the governing authority at which
6-9 interested governing persons are not present at the time of the vote
6-10 if the independent and disinterested governing persons constitute a
6-11 quorum of the governing authority];

6-12 (2) a committee consisting of one [~~two~~] or more
6-13 independent and disinterested governing persons appointed by the
6-14 majority of one or more independent and disinterested governing
6-15 persons of the limited liability company, even if the appointing
6-16 independent and disinterested governing persons are not a majority
6-17 of the governing persons of the limited liability company [~~present~~
6-18 ~~at a meeting of the governing authority, regardless of whether the~~
6-19 ~~independent and disinterested governing persons constitute a~~
6-20 ~~quorum of the governing authority]; or~~

6-21 (3) a panel of one or more independent and
6-22 disinterested individuals [~~persons~~] appointed by the court on a
6-23 motion by the limited liability company listing the names of the
6-24 individuals [~~persons~~] to be appointed and stating that, to the best
6-25 of the limited liability company's knowledge, the individuals
6-26 [~~persons~~] to be appointed are disinterested and qualified to make
6-27 the determinations contemplated by Section 101.458.

6-28 (b) An entity to which this subsection applies is
6-29 independent and disinterested under this section only if its
6-30 decision with respect to the limited liability company's derivative
6-31 proceeding is made by a majority of its governing persons who are
6-32 independent and disinterested with respect to that derivative
6-33 proceeding, even if those governing persons are not a majority of
6-34 its governing persons. This subsection applies to an entity that
6-35 is:

6-36 (1) a managing entity of the limited liability
6-37 company; or

6-38 (2) directly, or indirectly through one or more other
6-39 entities, a governing person of that managing entity.

6-40 (c) The court shall appoint a panel under Subsection (a)(3)
6-41 if the court finds that the individuals [~~persons~~] recommended by
6-42 the limited liability company are independent and disinterested and
6-43 are otherwise qualified with respect to expertise, experience,
6-44 independent judgment, and other factors considered appropriate by
6-45 the court under the circumstances to make the determinations. An
6-46 individual [~~A person~~] appointed by the court to a panel under this
6-47 section may not be held liable to the limited liability company or
6-48 the limited liability company's members for an action taken or
6-49 omission made by the individual [~~person~~] in that capacity, except
6-50 for acts or omissions constituting fraud or wilful misconduct.

6-51 SECTION 17. Section 101.455, Business Organizations Code,
6-52 is amended to read as follows:

6-53 Sec. 101.455. STAY OF PROCEEDING. (a) If the [~~domestic or~~
6-54 ~~foreign~~] limited liability company that is the subject of a
6-55 derivative proceeding commences an inquiry into the allegations
6-56 made in a demand or petition and the person or group of persons
6-57 described by Section 101.454 is conducting an active review of the
6-58 allegations in good faith, the court shall stay a derivative
6-59 proceeding for not more than 60 days until the review is completed
6-60 and a determination is made by the person or group regarding what
6-61 further action, if any, should be taken.

6-62 (b) To obtain a stay, the [~~domestic or foreign~~] limited
6-63 liability company must [~~shall~~] provide the court with a written
6-64 statement agreeing to advise the court and the member making the
6-65 demand of the determination promptly on the completion of the
6-66 review of the matter.

6-67 (c) A stay, on motion, may be reviewed every 60 days for
6-68 continuation [~~the continued necessity~~] of the stay if the limited
6-69 liability company provides the court and the member with a written

7-1 statement of the status of the review and the reasons why an
 7-2 extension for a period not to exceed 60 additional days is
 7-3 appropriate. An extension shall be granted for a period not to
 7-4 exceed 60 days if the court determines that the continuation is
 7-5 appropriate in the interests of the limited liability company.

7-6 ~~[(c) If the review and determination made by the person or~~
 7-7 ~~group is not completed before the 61st day after the date on which~~
 7-8 ~~the court orders the stay, the stay may be renewed for one or more~~
 7-9 ~~additional 60-day periods if the domestic or foreign limited~~
 7-10 ~~liability company provides the court and the member with a written~~
 7-11 ~~statement of the status of the review and the reasons why a~~
 7-12 ~~continued extension of the stay is necessary.]~~

7-13 SECTION 18. Section 101.456, Business Organizations Code,
 7-14 is amended to read as follows:

7-15 Sec. 101.456. DISCOVERY. (a) If a ~~[domestic or foreign]~~
 7-16 limited liability company proposes to dismiss a derivative
 7-17 proceeding under Section 101.458, discovery by a member after the
 7-18 filing of the derivative proceeding in accordance with this
 7-19 subchapter shall be limited to:

7-20 (1) facts relating to whether the person or ~~[group of]~~
 7-21 persons described by Section 101.454 are ~~[101.458 is]~~ independent
 7-22 and disinterested;

7-23 (2) the good faith of the inquiry and review by the
 7-24 person or group; and

7-25 (3) the reasonableness of the procedures followed by
 7-26 the person or group in conducting the review.

7-27 (b) Discovery described by Subsection (a) may not be
 7-28 expanded to include a fact or substantive matter regarding the act,
 7-29 omission, or other matter that is the subject matter of the
 7-30 derivative proceeding, but the scope of discovery shall not be so
 7-31 limited~~[- The scope of discovery may be expanded]~~ if the court
 7-32 determines after notice and hearing that a good faith review of the
 7-33 allegations ~~[for purposes of Section 101.458]~~ has not been made by
 7-34 an independent and disinterested person or group in accordance with
 7-35 Sections 101.454 and 101.458 ~~[that section]~~.

7-36 SECTION 19. Section 101.457, Business Organizations Code,
 7-37 is amended to read as follows:

7-38 Sec. 101.457. TOLLING OF STATUTE OF LIMITATIONS. A written
 7-39 demand filed with the limited liability company under Section
 7-40 101.453 tolls the statute of limitations on the claim on which
 7-41 demand is made until the later ~~[earlier]~~ of:

7-42 (1) the 31st ~~[91st]~~ day after the expiration of any
 7-43 waiting period under Section 153.403 ~~[date of the demand]~~; or

7-44 (2) the 31st day after the expiration of any stay
 7-45 granted under Section 153.405, including all continuations of the
 7-46 stay ~~[date the limited liability company advises the member that~~
 7-47 ~~the demand has been rejected or the review has been completed]~~.

7-48 SECTION 20. Section 101.458, Business Organizations Code,
 7-49 is amended to read as follows:

7-50 Sec. 101.458. DISMISSAL OF DERIVATIVE PROCEEDING. (a) A
 7-51 court, sitting in equity as the finder of fact, shall dismiss a
 7-52 derivative proceeding on a motion by the limited liability company
 7-53 if the person or group of persons described by Section 101.454
 7-54 determines in good faith, after conducting a reasonable inquiry and
 7-55 based on factors the person or group considers appropriate under
 7-56 the circumstances, that continuation of the derivative proceeding
 7-57 is not in the best interests of the limited liability company.

7-58 (b) In determining whether the requirements of Subsection
 7-59 (a) have been met, the burden of proof shall be on:

7-60 (1) the plaintiff member if:

7-61 (A) the applicable person or persons making the
 7-62 determination under Section 101.454(a)(1) or (2) are ~~[majority of~~
 7-63 ~~the governing authority consists of]~~ independent and disinterested
 7-64 ~~[persons]~~ at the time the determination is made;

7-65 (B) the determination is made by a panel of one or
 7-66 more independent and disinterested persons appointed under Section
 7-67 101.454(a)(3); or

7-68 (C) the limited liability company presents prima
 7-69 facie evidence that demonstrates that the applicable person or

8-1 persons making the determination [~~appointed~~] under Section
8-2 101.454(a) [~~101.454(a)(2)~~] are independent and disinterested; or
8-3 (2) the limited liability company in any other
8-4 circumstance.

8-5 SECTION 21. Section 101.459, Business Organizations Code,
8-6 is amended to read as follows:

8-7 Sec. 101.459. ALLEGATIONS AFTER [~~IF~~] DEMAND REJECTED. If a
8-8 derivative proceeding is instituted after a demand is rejected, the
8-9 petition must allege with particularity facts that establish that
8-10 the rejection was not made in accordance with the requirements and
8-11 standards under [~~of~~] Sections 101.454 and 101.458.

8-12 SECTION 22. Section 101.461, Business Organizations Code,
8-13 is amended to read as follows:

8-14 Sec. 101.461. PAYMENT OF EXPENSES. (a) In this section,
8-15 "expenses" means reasonable expenses incurred by a party in a
8-16 derivative proceeding, including:

- 8-17 (1) attorney's fees;
- 8-18 (2) costs in [~~of~~] pursuing an investigation of the
8-19 matter that was the subject of the derivative proceeding; or
- 8-20 (3) expenses for which the [~~domestic or foreign~~]
8-21 limited liability company may be required to indemnify another
8-22 person.

8-23 (b) On termination of a derivative proceeding, the court may
8-24 order:

8-25 (1) the [~~domestic or foreign~~] limited liability
8-26 company to pay [~~the~~] expenses the plaintiff incurred in the
8-27 proceeding if the court finds the proceeding has resulted in a
8-28 substantial benefit to the [~~domestic or foreign~~] limited liability
8-29 company;

8-30 (2) the plaintiff to pay [~~the~~] expenses the [~~domestic~~
8-31 ~~or foreign~~] limited liability company or other defendant incurred
8-32 in investigating and defending the proceeding if the court finds
8-33 the proceeding has been instituted or maintained without reasonable
8-34 cause or for an improper purpose; or

8-35 (3) a party to pay [~~the~~] expenses incurred by another
8-36 party relating to the filing of a pleading, motion, or other paper
8-37 if the court finds the pleading, motion, or other paper:

8-38 (A) was not well grounded in fact after
8-39 reasonable inquiry;

8-40 (B) was not warranted by existing law or a good
8-41 faith argument for the application, extension, modification, or
8-42 reversal of existing law; or

8-43 (C) was interposed for an improper purpose, such
8-44 as to harass, cause unnecessary delay, or cause a needless increase
8-45 in the cost of litigation.

8-46 SECTION 23. Section 101.462, Business Organizations Code,
8-47 is amended to read as follows:

8-48 Sec. 101.462. APPLICATION TO FOREIGN LIMITED LIABILITY
8-49 COMPANIES. (a) In a derivative proceeding brought in the right of
8-50 a foreign limited liability company, the matters covered by this
8-51 subchapter are governed by the laws of the jurisdiction of
8-52 formation [~~organization~~] of the foreign limited liability company,
8-53 except for Sections 101.455, 101.460, and 101.461, which are
8-54 procedural provisions and do not relate to the internal affairs of
8-55 the foreign limited liability company, unless applying the laws of
8-56 the jurisdiction of formation of the foreign limited liability
8-57 company requires otherwise with respect to Section 101.455.

8-58 (b) In the case of matters relating to a foreign limited
8-59 liability company under Section 101.455 [~~101.454~~], a reference to a
8-60 person or group of persons described by Section 101.454 [~~that~~
8-61 ~~section~~] refers to a person or group entitled under the laws of the
8-62 jurisdiction of formation [~~organization~~] of the foreign limited
8-63 liability company to make the determination described by Section
8-64 101.454(a) [~~review and dispose of a derivative proceeding~~]. The
8-65 standard of review of a determination [~~decision~~] made by the person
8-66 or group [~~to dismiss the derivative proceeding~~] shall be governed
8-67 by the laws of the jurisdiction of formation [~~organization~~] of the
8-68 foreign limited liability company.

8-69 SECTION 24. Section 101.463, Business Organizations Code,

9-1 is amended to read as follows:

9-2 Sec. 101.463. CLOSELY HELD LIMITED LIABILITY COMPANY.

9-3 (a) In this section, "closely held limited liability company"
9-4 means a limited liability company that has:

9-5 (1) fewer than 35 members; and

9-6 (2) no membership interests listed on a national
9-7 securities exchange or regularly quoted in an over-the-counter
9-8 market by one or more members of a national securities association.

9-9 (b) Sections 101.452-101.460 [~~101.452-101.459~~] do not apply
9-10 to a claim or a derivative proceeding by a member of a closely held
9-11 limited liability company against a governing person, member, or
9-12 officer of the limited liability company. In the event the claim or
9-13 derivative proceeding is also made against a person who is not that
9-14 governing person, member, or officer, this subsection applies only
9-15 to the claim or derivative proceeding against the governing person,
9-16 member, or officer.

9-17 (c) If Sections 101.452-101.460 do not apply because of
9-18 Subsection (b) and if justice requires:

9-19 (1) a derivative proceeding brought by a member of a
9-20 closely held limited liability company may be treated by a court as
9-21 a direct action brought by the member for the member's own benefit;
9-22 and

9-23 (2) a recovery in a direct or derivative proceeding by
9-24 a member may be paid directly to the plaintiff or to the limited
9-25 liability company if necessary to protect the interests of
9-26 creditors or other members of the limited liability company.

9-27 (d) Other provisions of state law govern whether a member
9-28 has a direct cause of action or right to sue a governing person,
9-29 member, or officer, and this section may not be construed to create
9-30 that direct cause of action or right to sue.

9-31 SECTION 25. Section 153.401, Business Organizations Code,
9-32 is amended to read as follows:

9-33 Sec. 153.401. DEFINITIONS [~~RIGHT TO BRING ACTION~~]. In this
9-34 subchapter:

9-35 (1) "Derivative proceeding" means a civil suit in the
9-36 right of a domestic limited partnership or, to the extent provided
9-37 by Section 153.412, in the right of a foreign limited partnership.

9-38 (2) "Limited partner" means a person who is a limited
9-39 partner or is an assignee of a partnership interest, including the
9-40 partnership interest of a general partner [~~A limited partner may~~
9-41 ~~bring an action in a court on behalf of the limited partnership to~~
9-42 ~~recover a judgment in the limited partnership's favor if:~~

9-43 [~~(1) all general partners with authority to bring the~~
9-44 ~~action have refused to bring the action; or~~

9-45 [~~(2) an effort to cause those general partners to~~
9-46 ~~bring the action is not likely to succeed].~~

9-47 SECTION 26. Section 153.402, Business Organizations Code,
9-48 is amended to read as follows:

9-49 Sec. 153.402. STANDING TO BRING PROCEEDING [~~PROPER~~
9-50 ~~PLAINTIFF~~]. (a) Subject to Subsection (b), a limited partner may
9-51 not institute or maintain a derivative proceeding unless:

9-52 (1) the limited partner:

9-53 (A) was a limited partner of the limited
9-54 partnership at the time of the act or omission complained of; or

9-55 (B) became a limited partner by operation of law
9-56 originating from a person that was a limited partner or general
9-57 partner at the time of the act or omission complained of; and

9-58 (2) the limited partner fairly and adequately
9-59 represents the interests of the limited partnership in enforcing
9-60 the right of the limited partnership.

9-61 (b) If the converted entity in a conversion is a limited
9-62 partnership, a limited partner of that limited partnership may not
9-63 institute or maintain a derivative proceeding based on an act or
9-64 omission that occurred with respect to the converting entity before
9-65 the date of the conversion unless:

9-66 (1) the limited partner was an equity owner of the
9-67 converting entity at the time of the act or omission; and

9-68 (2) the limited partner fairly and adequately
9-69 represents the interests of the limited partnership in enforcing

10-1 ~~the right of the limited partnership [In a derivative action, the~~
 10-2 ~~plaintiff must be a limited partner when the action is brought and:~~
 10-3 ~~(1) the person must have been a limited partner at the~~
 10-4 ~~time of the transaction that is the subject of the action; or~~
 10-5 ~~(2) the person's status as a limited partner must have~~
 10-6 ~~arisen by operation of law or under the terms of the partnership~~
 10-7 ~~agreement from a person who was a limited partner at the time of the~~
 10-8 ~~transaction].~~

10-9 SECTION 27. Section 153.403, Business Organizations Code,
 10-10 is amended to read as follows:

10-11 Sec. 153.403. DEMAND [PLEADING]. (a) A limited partner
 10-12 may not institute a derivative proceeding until the 91st day after
 10-13 the date a written demand is filed with the limited partnership
 10-14 stating with particularity the act, omission, or other matter that
 10-15 is the subject of the claim or challenge and requesting that the
 10-16 limited partnership take suitable action.

10-17 (b) The waiting period required by Subsection (a) before a
 10-18 derivative proceeding may be instituted is not required or, if
 10-19 applicable, shall terminate if:

10-20 (1) the limited partner has been notified that the
 10-21 demand has been rejected by the limited partnership;

10-22 (2) the limited partnership is suffering irreparable
 10-23 injury; or

10-24 (3) irreparable injury to the limited partnership
 10-25 would result by waiting for the expiration of the 90-day period [~~In~~
 10-26 ~~a derivative action, the complaint must contain with particularity:~~

10-27 ~~(1) the effort, if any, of the plaintiff to secure~~
 10-28 ~~initiation of the action by a general partner; or~~

10-29 ~~(2) the reasons for not making the effort].~~

10-30 SECTION 28. Section 153.404, Business Organizations Code,
 10-31 is amended to read as follows:

10-32 Sec. 153.404. DETERMINATION BY INDEPENDENT PERSONS
 10-33 [~~SECURITY FOR EXPENSES OF DEFENDANTS~~]. (a) A determination of how
 10-34 to proceed on allegations made in a demand or petition relating to a
 10-35 derivative proceeding must be made by an affirmative vote of the
 10-36 majority of:

10-37 (1) the independent and disinterested general
 10-38 partners of the limited partnership, whether one or more, even if
 10-39 the independent and disinterested general partners are not a
 10-40 majority of the general partners of the limited partnership;

10-41 (2) a committee consisting of one or more independent
 10-42 and disinterested general partners appointed by a majority of one
 10-43 or more independent and disinterested general partners of the
 10-44 limited partnership, even if the appointing independent and
 10-45 disinterested general partners are not a majority of the general
 10-46 partners of the limited partnership; or

10-47 (3) a panel of one or more independent and
 10-48 disinterested individuals appointed by the court on a motion by the
 10-49 limited partnership listing the names of the individuals to be
 10-50 appointed and stating that, to the best of the limited
 10-51 partnership's knowledge, the individuals to be appointed are
 10-52 disinterested and qualified to make the determinations
 10-53 contemplated by Section 153.408 [~~In a derivative action, the court~~
 10-54 ~~may require the plaintiff to give security for the reasonable~~
 10-55 ~~expenses incurred or expected to be incurred by a defendant in the~~
 10-56 ~~action, including reasonable attorney's fees].~~

10-57 (b) An entity to which this subsection applies is
 10-58 independent and disinterested under this section only if its
 10-59 decision with respect to the limited partnership's derivative
 10-60 proceeding is made by a majority of its governing persons who are
 10-61 independent and disinterested with respect to that derivative
 10-62 proceeding, even if those governing persons are not a majority of
 10-63 its governing persons. This subsection applies to an entity that
 10-64 is:

10-65 (1) a general partner of the limited partnership; or

10-66 (2) directly, or indirectly through one or more other
 10-67 entities, a governing person of that general partner [~~The court may~~
 10-68 ~~increase or decrease at any time the amount of the security on a~~
 10-69 ~~showing that the security provided is inadequate or excessive].~~

11-1 (c) The court shall appoint a panel under Subsection (a)(3)
 11-2 if the court finds that the individuals recommended by the limited
 11-3 partnership are independent and disinterested and are otherwise
 11-4 qualified with respect to expertise, experience, independent
 11-5 judgment, and other factors considered appropriate by the court
 11-6 under the circumstances to make the determinations. An individual
 11-7 appointed by the court to a panel under this section may not be held
 11-8 liable to the limited partnership or the limited partnership's
 11-9 partners for an action taken or omission made by the individual in
 11-10 that capacity, except for an act or omission constituting fraud or
 11-11 wilful misconduct [If a plaintiff is unable to give security, the
 11-12 plaintiff may file an affidavit in accordance with the Texas Rules
 11-13 of Civil Procedure].

11-14 ~~[(d) Except as provided by Subsection (c), if a plaintiff~~
 11-15 ~~fails to give the security within a reasonable time set by the~~
 11-16 ~~court, the court shall dismiss the suit without prejudice.~~

11-17 ~~[(e) The court, on final judgment for a defendant and on a~~
 11-18 ~~finding that suit was brought without reasonable cause against the~~
 11-19 ~~defendant, may require the plaintiff to pay reasonable expenses,~~
 11-20 ~~including reasonable attorney's fees, to the defendant, regardless~~
 11-21 ~~of whether security has been required.]~~

11-22 SECTION 29. Section 153.405, Business Organizations Code,
 11-23 is amended to read as follows:

11-24 Sec. 153.405. STAY OF PROCEEDING [~~EXPENSES OF PLAINTIFF~~].

11-25 (a) If the limited partnership that is the subject of a derivative
 11-26 proceeding commences an inquiry into the allegations made in a
 11-27 demand or petition and the person or group of persons described by
 11-28 Section 153.404 is conducting an active review of the allegations
 11-29 in good faith, the court shall stay a derivative proceeding for not
 11-30 more than 60 days until the review is completed and a determination
 11-31 is made by the person or group regarding what further action, if
 11-32 any, should be taken.

11-33 (b) To obtain a stay, the limited partnership must provide
 11-34 the court with a written statement agreeing to advise the court and
 11-35 the limited partner making the demand of the determination promptly
 11-36 on the completion of the review of the matter.

11-37 (c) A stay, on motion, may be reviewed every 60 days for
 11-38 continuation of the stay if the limited partnership provides the
 11-39 court and the limited partner with a written statement of the status
 11-40 of the review and the reasons why an extension for a period not to
 11-41 exceed 60 additional days is appropriate. An extension shall be
 11-42 granted for a period not to exceed 60 days if the court determines
 11-43 that the continuation is appropriate in the interests of the
 11-44 partnership [If a derivative action is successful, wholly or
 11-45 partly, or if anything is received by the plaintiff because of a
 11-46 judgment, compromise, or settlement of the action or claim
 11-47 constituting a part of the action, the court may award the plaintiff
 11-48 reasonable expenses, including reasonable attorney's fees, and
 11-49 shall direct the plaintiff to remit to a party identified by the
 11-50 court the remainder of the proceeds received by the plaintiff].

11-51 SECTION 30. Subchapter I, Chapter 153, Business
 11-52 Organizations Code, is amended by adding Sections 153.406, 153.407,
 11-53 153.408, 153.409, 153.410, 153.411, 153.412, and 153.413 to read as
 11-54 follows:

11-55 Sec. 153.406. DISCOVERY. (a) If a limited partnership
 11-56 proposes to dismiss a derivative proceeding under Section 153.408,
 11-57 discovery by a limited partner after the filing of the derivative
 11-58 proceeding in accordance with this subchapter shall be limited to:

11-59 (1) facts relating to whether the person or persons
 11-60 described by Section 153.404 are independent and disinterested;

11-61 (2) the good faith of the inquiry and review by the
 11-62 person or group; and

11-63 (3) the reasonableness of the procedures followed by
 11-64 the person or group in conducting the review.

11-65 (b) Discovery described by Subsection (a) may not be
 11-66 expanded to include a fact or substantive matter regarding the act,
 11-67 omission, or other matter that is the subject matter of the
 11-68 derivative proceeding, but the scope of discovery shall not be so
 11-69 limited if the court determines after notice and hearing that a good

12-1 faith review of the allegations has not been made by an independent
 12-2 and disinterested person or group in accordance with Sections
 12-3 153.404 and 153.408.

12-4 Sec. 153.407. TOLLING OF STATUTE OF LIMITATIONS. A written
 12-5 demand filed with the limited partnership under Section 153.403
 12-6 tolls the statute of limitations on the claim on which demand is
 12-7 made until the later of:

12-8 (1) the 31st day after the expiration of any waiting
 12-9 period under Section 153.403; or

12-10 (2) the 31st day after the expiration of any stay
 12-11 granted under Section 153.405, including all continuations of the
 12-12 stay.

12-13 Sec. 153.408. DISMISSAL OF DERIVATIVE PROCEEDING. (a) A
 12-14 court, sitting in equity as the finder of fact, shall dismiss a
 12-15 derivative proceeding on a motion by the limited partnership if the
 12-16 person or group of persons described by Section 153.404 determines
 12-17 in good faith, after conducting a reasonable inquiry and based on
 12-18 factors the person or group considers appropriate under the
 12-19 circumstances, that continuation of the derivative proceeding is
 12-20 not in the best interests of the limited partnership.

12-21 (b) In determining whether the requirements of Subsection
 12-22 (a) have been met, the burden of proof shall be on:

12-23 (1) the plaintiff limited partner if:

12-24 (A) the applicable person or persons making the
 12-25 determination under Section 153.404(a)(1) or (2) are independent
 12-26 and disinterested at the time the determination is made;

12-27 (B) the determination is made by a panel of one or
 12-28 more independent and disinterested individuals appointed under
 12-29 Section 153.404(a)(3); or

12-30 (C) the limited partnership presents prima facie
 12-31 evidence that demonstrates that the applicable person or persons
 12-32 making the determination under Section 153.404(a) are independent
 12-33 and disinterested; or

12-34 (2) the limited partnership in any other circumstance.

12-35 Sec. 153.409. ALLEGATIONS AFTER DEMAND REJECTED. If a
 12-36 derivative proceeding is instituted after a demand is rejected, the
 12-37 petition must allege with particularity facts that establish that
 12-38 the rejection was not made in accordance with the requirements and
 12-39 standards under Sections 153.404 and 153.408.

12-40 Sec. 153.410. DISCONTINUANCE OR SETTLEMENT. (a) A
 12-41 derivative proceeding may not be discontinued or settled without
 12-42 court approval.

12-43 (b) The court shall direct that notice be given to the
 12-44 affected partners if the court determines that a proposed
 12-45 discontinuance or settlement may substantially affect the
 12-46 interests of other partners.

12-47 Sec. 153.411. PAYMENT OF EXPENSES. (a) In this section,
 12-48 "expenses" means reasonable expenses incurred by a party in a
 12-49 derivative proceeding, including:

12-50 (1) attorney's fees;

12-51 (2) costs in pursuing an investigation of the matter
 12-52 that was the subject of the derivative proceeding; or

12-53 (3) expenses for which the limited partnership may be
 12-54 required to indemnify another person.

12-55 (b) On termination of a derivative proceeding, the court may
 12-56 order:

12-57 (1) the limited partnership to pay expenses the
 12-58 plaintiff incurred in the proceeding if the court finds the
 12-59 proceeding has resulted in a substantial benefit to the limited
 12-60 partnership;

12-61 (2) the plaintiff to pay expenses the limited
 12-62 partnership or other defendant incurred in investigating and
 12-63 defending the proceeding if the court finds the proceeding has been
 12-64 instituted or maintained without reasonable cause or for an
 12-65 improper purpose; or

12-66 (3) a party to pay expenses incurred by another party
 12-67 relating to the filing of a pleading, motion, or other paper if the
 12-68 court finds the pleading, motion, or other paper:

12-69 (A) was not well grounded in fact after

13-1 reasonable inquiry;

13-2 (B) was not warranted by existing law or a good
 13-3 faith argument for the application, extension, modification, or
 13-4 reversal of existing law; or

13-5 (C) was interposed for an improper purpose, such
 13-6 as to harass, cause unnecessary delay, or cause a needless increase
 13-7 in the cost of litigation.

13-8 Sec. 153.412. APPLICATION TO FOREIGN LIMITED PARTNERSHIPS.

13-9 (a) In a derivative proceeding brought in the right of a foreign
 13-10 limited partnership, the matters covered by this subchapter are
 13-11 governed by the laws of the jurisdiction of formation of the foreign
 13-12 limited partnership, except for Sections 153.405, 153.410, and
 13-13 153.411, which are procedural provisions and do not relate to the
 13-14 internal affairs of the foreign limited partnership, unless
 13-15 applying the laws of the jurisdiction of formation of the foreign
 13-16 limited partnership requires otherwise with respect to Section
 13-17 153.405.

13-18 (b) In the case of matters relating to a foreign limited
 13-19 partnership under Section 153.405, a reference to a person or group
 13-20 of persons described by Section 153.404 refers to a person or group
 13-21 entitled under the laws of the jurisdiction of formation of the
 13-22 foreign limited partnership to make the determination described by
 13-23 Section 153.404(a). The standard of review of a determination made
 13-24 by the person or group shall be governed by the laws of the
 13-25 jurisdiction of formation of the foreign limited partnership.

13-26 Sec. 153.413. CLOSELY HELD LIMITED PARTNERSHIP. (a) In
 13-27 this section, "closely held limited partnership" means a limited
 13-28 partnership that has:

13-29 (1) fewer than 35 limited partners; and

13-30 (2) no partnership interests listed on a national
 13-31 securities exchange or regularly quoted in an over-the-counter
 13-32 market by one or more members of a national securities association.

13-33 (b) Sections 153.402-153.410 do not apply to a claim or a
 13-34 derivative proceeding by a limited partner of a closely held
 13-35 limited partnership against a general partner, limited partner, or
 13-36 officer of the limited partnership. In the event the claim or
 13-37 derivative proceeding is also made against a person who is not that
 13-38 general partner, limited partner, or officer, this subsection shall
 13-39 apply only to the claim or derivative proceeding against the
 13-40 general partner, limited partner, or officer.

13-41 (c) If Sections 153.402-153.410 do not apply because of
 13-42 Subsection (b) and if justice requires:

13-43 (1) a derivative proceeding brought by a limited
 13-44 partner of a closely held limited partnership may be treated by a
 13-45 court as a direct action brought by the limited partner for the
 13-46 limited partner's own benefit; and

13-47 (2) a recovery in a direct or derivative proceeding by
 13-48 a limited partner may be paid directly to the plaintiff or to the
 13-49 limited partnership if necessary to protect the interests of
 13-50 creditors or other partners of the limited partnership.

13-51 (d) Other provisions of state law govern whether a limited
 13-52 partner has a direct cause of action or right to sue a general
 13-53 partner, limited partner, or officer, and this section may not be
 13-54 construed to create that direct cause of action or right to sue.

13-55 SECTION 31. The changes in law made by this Act apply only
 13-56 to a derivative proceeding instituted on or after the effective
 13-57 date of this Act. A derivative proceeding instituted before the
 13-58 effective date of this Act is governed by the law in effect on the
 13-59 date the proceeding was instituted, and the former law is continued
 13-60 in effect for that purpose.

13-61 SECTION 32. This Act takes effect September 1, 2019.

13-62

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