

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RANDALL KING NELSON in his capacity as
a security-holder representative of the
shareholders of Kerberos Proximal Solutions,
Inc.,

No. C 10-03668 WHA

Plaintiff,

v.

EV3, INC., FOXHOLLOW
TECHNOLOGIES, INC., COVIDIEN, PLC,
COVIDIEN GROUP S.A.R.L., a Luxembourg
Company, and COV DELAWARE, a Dublin,
Ireland Corporation,

Defendants.

**ORDER REGARDING
STIPULATED FORM OF
SHAREHOLDER NOTICE
AND VACATING TRIAL
ON STANDING**

The parties have filed a stipulated form of notice to be sent to the 99 shareholders who will then have an opportunity to authorize plaintiff Nelson to act as their representative in this action. A serious question was raised regarding Mr. Nelson’s standing to act as the shareholder representative, but the Court does not have to reach this issue given the stipulated procedure for obtaining shareholder authorization. The parties’ proposed form of notice will be **APPROVED WITH THE FOLLOWING CHANGES:**

NOTICE

1. The notice states that a shareholder who does not opt-in shall have the right to bring his or her own, separate lawsuit, but the parties must add that a shareholder who does not opt-in shall also have the right to intervene in the instant lawsuit.

- 1 2. The proposed notice does not explain how any liability (for costs, sanctions, counter-
2 judgments) would be apportioned among the shareholders who opt-in. Would liability
3 be joint and several or would it be by pro rata share? This order determines that liability
4 and entitlement to any award shall be apportioned by pro rata share (not joint and
5 several), depending, *first*, on how many shareholders opt-in and, *second*, on the
6 percentage of each shareholder's holdings. This should be made clear in the notice. If
7 the parties disagree with this approach they must file a statement to that effect, stating
8 why and requesting an alternative approach, by November 15, 2010, at noon.
- 9 3. The parties must add to the notice that this procedure is *not* pursuant to Federal Rule of
10 Civil Procedure 23, and that the Court has not done a Rule 23 vetting of Mr. Nelson. It
11 should specify that those shareholders who opt to authorize Mr. Nelson to act on their
12 behalf should first, on their own, investigate Mr. Nelson and his ability to represent
13 them.
- 14 4. The notice should state that Mr. Nelson has filed a declaration with this Court (as
15 discussed below), how to access it, that before they sign the authorization form they can
16 read the declaration, and that, again, the Court has not vetted Mr. Nelson's qualifications
17 to act as a representative.
- 18 5. The parties must add that after the deadline for return of the authorization form has
19 passed, shareholders will not be allowed to opt in.

20 AUTHORIZATION FORM

- 21 1. The authorization form must be more explicit that the responding shareholder agrees to
22 be bound by all orders and judgments in the case.
- 23 2. The responding shareholder must list the following information so that it is clear who is
24 providing authorization:
 - 25 • His or her full, complete name
 - 26 • The shares sold or held by unit number
 - 27 • His or her address and phone number

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1 In the status report discussed below, the attorneys should file this information in two
2 forms. The shareholders' names and cities of residence should be filed publicly, with
3 the remaining information redacted. To protect identifying information, the full list of
4 information should be filed under seal.

5 SIGNED STATEMENTS FROM THE DEFENDANTS

6 The defendants must submit statements from an authorized officer that they agree to be
7 bound by this procedure and agree to pay out any liability against them, if there is such liability,
8 to the authorizing shareholders.

9 DECLARATION FROM MR. NELSON

10 Although the notice out of caution will warn the shareholders that the Court has not
11 done a Rule 23 vetting of Mr. Nelson, the Court feels it is prudent to investigate the bona fides
12 of Mr. Nelson and his ability to represent the shareholders who opt-in. To that end, Mr. Nelson
13 must submit a declaration in which he swears to the following:

- 14 • That he will faithfully represent the shareholders who authorize him to represent them
15 and that he will be devoted to this litigation;
- 16 • What his qualifications are to manage this type of litigation on behalf of many others;
- 17 • Intended management of the litigation, not just a rubber-stamp for the lawyers; and
- 18 • That he has no conflicts or undisclosed agreements with counsel or any party.

19 This must be filed by November 17, 2010, at noon, so that shareholders can access it and read
20 it.

21 * * *

22 The parties must submit the new form of notice, authorization form, defendants'
23 statements, and declaration from Mr. Nelson for approval by **NOVEMBER 17, 2010, AT NOON.**

24 The parties shall propose a new schedule for the following: (1) a deadline by which they must
25 send the notice certified mail, return receipt requested, to the current known address for each
26 shareholder; (2) a deadline for receipt of the response from the shareholders, to be 45 days from
27 the date of mailing; (3) a deadline by which they must file a status report on the receipt of notice
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1 by each shareholder and a list of the shareholders who have authorized Mr. Nelson to represent
2 them.

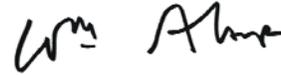
3 The one-day trial on December 13, 2010, is **VACATED**. Defendants' motion to dismiss
4 based on lack of standing is **DENIED AS MOOT**.

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6 **IT IS SO ORDERED.**

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8 Dated: November 10, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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