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Delaware Court of Chancery Reaffirms Bar Against Discovery to Plead Demand Futility

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On June 26, 2025, in *In re The Boeing Co. Deriv. Litig.*,[1] Vice Chancellor Morgan Zurn of the Delaware Court of Chancery ordered a stay of all discovery pending the Court's resolution of Defendants' motion to dismiss Plaintiffs' derivative claims. Notably, in granting the stay, the Court disallowed Plaintiffs from obtaining and using readily accessible discovery already exchanged in a parallel federal derivative securities action involving similar issues. The decision reaffirms long-standing Delaware precedent barring discovery to plead demand futility, leaving pre-suit books and records demands as the principal means for plaintiffs to develop factual support for their claims.

In March 2022, the Delaware Court of Chancery approved the settlement of derivative litigation resulting from the crashes of two Boeing 737 MAX 8 aircraft. This action arose from an emergency landing by an Alaska Airlines Flight on January 5, 2024. The episode precipitated stockholder litigation, including this action brought by Boeing stockholders who sued Boeing's directors and employees derivatively "for purported failures of oversight" under *Caremark*.[2] After the Alaska Airlines incident, stockholders issued a books and records demand and brought a securities class action in the Eastern District of Virginia ("EDVA"). While Boeing's productions in response to the demands were ongoing, Plaintiffs filed a Section 220 action in Delaware for additional documents, which was later voluntarily dismissed. A derivative action was also brought in the EDVA.[3] In late 2024, the EDVA dismissed the *Caremark* claims in the derivative action without prejudice so those claims could be heard in Delaware. The parties proceeded to discovery on the derivative securities claims. Meanwhile, Plaintiffs in Delaware represented that they had sufficient information from their books and records demand to bring an action. Defendants and Boeing moved to dismiss, arguing, among other things, that Plaintiffs inadequately alleged demand futility. In the meantime, Plaintiffs requested all of the discovery exchanged in the EDVA action, which was subject to a confidentiality order barring its use outside of the action. According to Plaintiffs, discovery was needed to "substantiate Plaintiffs' well-pled demand futility allegations."[4]

After learning of the discovery requests and while their motion to dismiss was pending, the Defendants in the Court of Chancery action moved to stay discovery. Defendants invoked Delaware Supreme Court precedent that "derivative plaintiffs . . . are not entitled to discovery to assist their compliance with Rule 23.1"[5] In addition, Defendants explained that, "in stockholder derivative cases where a parallel action has proceeded to discovery, Delaware courts consistently assess demand futility on the basis of the complaint and the incorporated Delaware General Corporation Law ("DGCL") Section 220 record—not on the universe of discovery that may have already been produced in the related case."[6] Finally, Defendants drew the Court's attention to the fact that Plaintiffs had already exercised their statutory inspection rights—Plaintiffs not only brought a Section 220 demand, but also Section 220 litigation. Defendants noted that Plaintiffs even dismissed their Section 220 action, expressly conceding that Boeing's Section 220 document productions supplied "more than enough information" for Plaintiffs to put together their complaint.[7]

In opposing the stay request, Plaintiffs argued that, "[u]nder the circumstances of this case, a stay would not offer any efficiency and could increase inefficiency, due to the prospect of future amendments."[8] Further, Plaintiffs contended that "[n]o practical reasons prevent Plaintiffs from using discovery that Defendants have already produced in connection with related derivative claims, and permitting Plaintiffs to do so will impose only negligible burden on Defendants."[9] And, according to Plaintiffs, producing the requested discovery here would "merely require Defendants to give Plaintiffs permission to use the already produced documents and testimony in Delaware[.]"[10]

The Court of Chancery's Order

The Court of Chancery sided with defendants and granted the stay. The Court characterized what had transpired in the Delaware derivative action as the "typical path"—*i.e.*, Plaintiffs sought and received documents pursuant to Section 220, concluded they had sufficient information to file a complaint and "are now preparing to justify why they should control the claim rather than the corporation on defendants' Rule 23.1 motion to dismiss."[11] That path, the Court noted, does "not contemplate discovery to aid demand futility[.]"[12]

The Court, meanwhile, rejected Plaintiffs' contention that the Court should alter its typical approach and allow discovery, because "extensive discovery has been taken in a related securities action, which plaintiffs can access but cannot use unless reproduced in this action."[13] Although that discovery was "available" and "relatively easy to produce," the Court nonetheless held fast to three doctrines prohibiting its use:

(1) Plaintiffs' implicit concession that they received enough information through their books and records demand to file their complaint;

(2) the general rule that discovery is not available "to aid derivative plaintiffs in pleading demand futility, which together with Rule 23.1's particularity requirement implements the presumption that the board can manage the claim"; and

(3) a stay is "practical and warranted" where a motion might dispose of the case, no interim relief is being sought and plaintiffs will not suffer prejudice from loss of evidence.[14]

In the Court's view, "[t]hat a rule is easy to break does not justify breaking it[.]"[15]

Takeaways

The Court's decision reaffirms long-standing Delaware precedent prohibiting discovery to plead the requirements of a derivative claim, including demand futility. Importantly, *In re The Boeing Co.* shuts down a novel argument advanced by Plaintiffs—that the availability and accessibility of relevant discovery in a parallel proceeding somehow warrants deviation from standard practice and opens the door to its use in bolstering Plaintiffs' derivative allegations in Delaware.[16] In so ruling, the Court endorsed Defendants' argument that derivative Plaintiffs ought not to be entitled to discovery to help with their compliance with Rule 23.1, as any rule to the contrary—allowing discovery before a derivative plaintiff demonstrated "standing to assert a corporation's claim"[17]—"would be a complete abrogation of the principles underlying the pleading requirements of Rule 23.1."[18]

The decision further establishes that, except in exceptional circumstances—(i) where granting the motion to dismiss would not avoid further litigation, (ii) where the plaintiff seeks interim relief, or (iii) where information may be unavailable—Delaware plaintiffs may only derive allegations through the use of a books and records demand under Section 220 of the DGCL. That limitation is notable because of the strict requirements for entitlement to Section 220 books and records under Delaware law, including the requesting party's status as a continuous and contemporaneous stockholder, the establishment of a proper purpose and a demonstration that the requested documents are necessary and essential to the accomplishment of that proper purpose.[19]

As previously reported in Cadwalader Quorum, the bar for a stockholder to attain books and records under Section 220 was raised even higher earlier this year, after Delaware Governor Matthew Meyer signed into law Senate Bill 21, which amended, *inter alia*, Section 220 of the DGCL. In particular, Senate Bill 21, which became effective on March 25, 2025, limited the scope of books and records subject to production in response to a Section 220 request. Now, a corporation need only produce a defined set of corporate documents, including board minutes and materials; text and email communications among directors and officers are not listed as "books and records" within the scope of Section 220. One response to Senate Bill 21 is that derivative plaintiffs, to increase the likelihood a court will deny a motion to dismiss, attempt to get their hands on any other relevant documents, including, as here, in parallel actions wherein discovery is in progress.

[1] Order Granting Defendants' Motion to Stay Discovery, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 26, 2025), Dkt. No. BL-125.

[2] Defendants' Motion to Stay Discovery, at 1, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. May 2, 2025), Dkt. No. BL-107.

[3] Referencing the overlap between the alleged misstatements in the securities class action and the derivative securities claims, the EDVA partially lifted the stay of discovery in the latter to permit the derivative plaintiffs to get documents that were being produced in the securities class action.

[4] Plaintiffs' Opp. to Defendants' Motion to Stay Discovery, at 3, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 6, 2025), Dkt. No. BL-114.

[5] *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993) (citing *Levine v. Smith*, 591 A.2d 194, 208-10 (Del. 1991), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

[6] Defendants' Motion to Stay Discovery, at 9, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. May 2, 2025), Dkt. No. BL-107.

[7] *Id.* at 10 (internal citations omitted).

[8] Plaintiffs' Opp. to Defendants' Motion to Stay Discovery, at 9, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 6, 2025), Dkt. No. BL-114.

[9] *Id.* at 1.

[10] *Id.* at 12.

[11] Order Granting Defendants' Motion to Stay Discovery, at 3, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 26, 2025), Dkt. No. BL-125.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Defendants' Reply in Support of Their Motion to Stay Discovery, at 7, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 12, 2025), Dkt. No. BL-115.

[17] Defendants' Motion to Stay Discovery, at 7, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. May 2, 2025), Dkt. No. BL-107.

[18] *Levine v. Smith*, 591 A.2d 194, 210 (Del. 1991); *see also Brehm*, 764 A.2d at 255.

[19] *See, e.g.*, *Pettry v. Gilead Sciences, Inc.*, 2020 WL 6870461, at *9 (Del. Ch. 2020) ("To inspect books and records under Section 220, a plaintiff must establish by a preponderance of the evidence that the plaintiff is a stockholder, has complied with the statutory form and manner requirements for making a demand, and has a proper purpose for conducting the inspection."); *id.* at *27 ("These documents are therefore necessary and essential to Plaintiffs' proper purposes.").