

# Derivative Plaintiffs Cannot Obtain Discovery to Plead Demand Futility, According to Chancery Court

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When a company experiences an adverse event, it and its directors and officers are often subject to multiple shareholder lawsuits and demands. These matters proceed on different timelines, creating scenarios in which discovery may have begun in one case while others remain in pre-discovery. As a result, plaintiffs in the latter cases may seek access to documents produced in the former to bolster their allegations.

This scenario occurred in a recent shareholder derivative action against Boeing's directors and officers in the Delaware Court of Chancery, where the plaintiffs sought documents produced by Boeing in related federal court actions, even though the defendants intended to file a motion to dismiss for failure to plead demand futility and failure to state a claim. The defendants filed a motion to stay discovery, which was [granted by Vice Chancellor Morgan Zurn](#) on June 26. Vice Chancellor Zurn noted that the plaintiffs had already obtained documents in a books and records demand and that discovery was not available to "aid derivative plaintiffs in pleading demand futility."

As [we discussed previously](#), the recent amendments to Section 220 narrow the scope of books and records productions to formal documents, and requests for emails and texts are generally not permitted. To increase their odds of surviving a motion to dismiss, derivative plaintiffs may try to seek documents through alternative means, including via related actions where discovery is underway. Vice Chancellor Zurn's decision provides some relief for defendants, reinforcing that, absent unusual circumstances, derivative plaintiffs are limited to books and records productions only in pleading demand futility.

## Background

On January 5, 2024, Alaska Airlines Flight 1282 made an emergency landing after a door plug detached midflight. The crew landed the plane safely, and no one was seriously injured. But the incident triggered a flurry of shareholder litigation, including a putative securities class action and a shareholder derivative action in the US District Court for the Eastern District of Virginia, several demands for books and records, a Section 220 action, and the Chancery action discussed here. After the Virginia plaintiffs received millions of pages in discovery, the Chancery plaintiffs requested those materials from the defendants, ostensibly to "substantiate" their demand futility allegations.

The defendants moved to stay discovery, arguing that under Delaware law, derivative plaintiffs are not entitled to discovery to demonstrate demand futility. They further argued that discovery is generally not permitted pending a motion to dismiss and that none of the recognized exceptions – such as the need for interim relief, risk of evidence becoming unavailable or the motion to dismiss not being dispositive – applied. The defendants noted that shareholder derivative actions are routinely filed alongside securities class actions, and allowing derivative plaintiffs access to plenary discovery in related proceedings at the pleading stage would "essentially bypass the purpose of Rule 23.1 in favor of summary judgment proceedings."

The plaintiffs responded that staying discovery would be "unfair" because their requests "impose no real burden on Defendants." They also argued that staying discovery would be "inefficient" because the requested discovery was "inevitable." They disputed the existence of a "bright-line rule" barring discovery to assist in pleading demand futility, contending it is a "general rule" with "exceptions," and that the court had discretion to permit discovery.

## The court granted discovery stay

Vice Chancellor Zurn's rationale for granting the defendants' motion to stay was threefold:

1. The plaintiffs had already obtained books and records pursuant to their Section 220 demand and tacitly admitted they had sufficient information to file their complaint.
2. The "general rule" is that "discovery is not available to aid derivative plaintiffs in pleading demand futility" because of the "presumption that the board can manage the claim."
3. A stay of discovery is "practical and warranted" when there is a motion to dismiss the entire case and none of the

exceptions apply.

Vice Chancellor Zurn rejected the plaintiffs' fairness and efficiency arguments, stating, "hat a rule is easy to break does not justify breaking it: the rule is still there for a reason."

## Key takeaways

- While Vice Chancellor Zurn stopped short of adopting a bright-line rule prohibiting derivative plaintiffs from obtaining discovery to aid in pleading demand futility, her order indicates that exceptions to the "general rule" would be narrow.
- Absent unusual circumstances, derivative plaintiffs are limited to Section 220 productions in pleading demand futility.
- Corporations should maintain comprehensive and accurate records to potentially reduce the likelihood of being required to produce emails or texts in response to Section 220 demands.

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