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JURISDICTION AND PROCEDURE

Shareholder Demands and Parallel Proceedings: Practical and Strategic Implications, Part II



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The authors wish to thank former Sidley Austin LLP associate Catharine DeJulio and summer associate Abigail Molitor for their invaluable assistance with both articles in this series. The views expressed herein are those of the authors and do not necessarily represent the views of Sidley Austin LLP or its clients

I. Introduction

As discussed in the first article in this two-part series,¹ a number of court decisions address the circumstances under which a stay of a stockholder derivative litigation is appropriate in the face of parallel proceedings. But what about when a board receives a stockholder demand for board action in connection with events that are the subject of ongoing litigation or investigations? Such demands typically set forth a litany of purported harms suffered by the corporation, and request that the board investigate the allegations described therein and commence litigation against the company's directors, officers, and/or others. Under Delaware law, a board cannot simply ignore the demand. But taking the action demanded while in the midst of parallel proceedings can raise similar concerns to those posed by simultaneous derivative litigation. Moreover, corporations may face the anomalous situation of a demand from one stockholder (which, under Delaware law, is a concession that a majority of the board is capable of considering a demand, *i.e.*, demand is *not* futile) while simultaneously litigating a derivative

¹ See generally "Shareholder Derivative Litigation and Parallel Proceedings: Practical and Strategic Implications, Part I" (hereinafter, "Part I"), *BNA Securities Regulation & Law Report* (August 25, 2014) (46 SRLR 1677, 8/25/14).

case brought by a different stockholder taking the opposite position – *i.e.*, that demand is futile. Unfortunately, there is far less judicial guidance on how boards and companies can and should navigate these shoals.

This article will examine a board's obligations in responding to a stockholder demand while a company is subject to parallel proceedings, including derivative litigation brought by other stockholders. We provide an overview of the factors that a board should take into account when determining how to respond and the practical and strategic problems that these situations may present. We then review the few cases that have squarely addressed these issues. These cases suggest that in many instances, the interests of the company and its stockholders may be best served by deferring action until the parallel proceedings are completed or at least further advanced – a conclusion consistent with the case law addressing simultaneous derivative litigation and parallel proceedings discussed in Part I of our article.

II. Practical and Strategic Considerations Relating to Stockholder Demands, Parallel Proceedings, and Board Response

Under Delaware law, upon receipt of a stockholder demand, a corporation's board of directors must take a position with respect to a stockholder demand by determining whether to take or refuse to take the actions sought.² The Delaware Supreme Court has held that a "position of neutrality must be viewed as tacit approval for the continuation of the litigation [demanded to be brought]."³ However, boards are entitled to adequate time before responding to demands in order to determine whether to take the actions sought,⁴ and courts have stayed or dismissed derivative actions filed before the board was allowed sufficient opportunity to respond to the demand.⁵

Although the appropriate amount of time for board consideration of a demand is fact-dependent,⁶ few courts have had occasion to address whether a board may make a reasoned decision to defer investigation of the merits of a demand – or focus the investigation on monitoring parallel litigation – until such litigation is resolved or has further progressed. As set forth below, notwithstanding the limited authority on this subject, there are numerous practical and strategic reasons to support such an approach.

² *Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990) (quoting *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 731 (Del. 1988)); *Scattered Corp. v. Chi. Stock Exch., Inc.*, 701 A.2d 70, 78 (Del. 1997); *Grimes v. Donald*, 673 A.2d 1207, 1218 (Del. 1996).

³ *Kaplan*, 540 A.2d at 731.

⁴ *Locals 302 & 612 of the Int'l Union of Operating Eng'rs-Employers Constr. Indus. Ret. Trust v. Blanchard*, 2005 BL 70344, at *7 (S.D.N.Y. Aug. 25, 2005); *Charal Inv. Co., Inc., v. Rockefeller*, 1995 BL 1082, at *3 (Del. Ch. Nov. 7, 1995).

⁵ *E.g. Charal*, 1995 BL 1082, at *2; *Mozes v. Welch*, 638 F. Supp. 215, 220 (D. Conn. 1986) ("[T]he time limit in a particular situation is one of reasonableness under the circumstances.").

⁶ *Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 BL 25883, at *12 (Del. Ch. Feb. 22, 2006); *Charal*, 1995 BL 1082, at *3.

Prejudice. One consideration is whether the filing of the litigation demanded may be "deemed an admission [in the parallel] case and in other proceedings."⁷ Given that a board, in acting upon a demand, is tasked with determining the course of action that would be in the corporation's best interest, a board might well conclude that the interest of stockholders would be better served by undertaking an internal investigation only after parallel proceedings have further progressed or concluded so as to avoid such adverse consequences.⁸ Moreover, even an investigation requested by the stockholder may create evidence that adversely impacts the corporation's defenses in parallel litigation. For example, if a board appoints a special committee that, in turn, generates a written report at the conclusion of its investigation, the report itself is likely to become a matter of public record to the extent that it is used to support the dismissal of derivative litigation.⁹ Thus, to the extent that the report contains adverse factual findings regarding the corporation, its directors, or its employees, there is a risk that the report may be used as an admission against the corporation in a parallel proceeding.

In addition, to the extent that the stockholder does not allege facts to support *ongoing* corporate wrongdoing, there would be no apparent urgency in pursuing the actions sought on the demand. And there are ways to ensure that the benefits of deferral outweigh the risk of any prejudice to stockholders as a result of a delay in the pursuit of the actions sought in the demand. For example, statute of limitations concerns can be addressed by ensuring that all relevant directors and officers execute tolling agreements that correspond to the demand deferral period.¹⁰ Likewise, evidence can be preserved by enacting document retention policies and requiring any executives who depart the corporation to agree to cooperate in a subsequent special committee investigation as a condition of receiving severance payments or other benefits.

Prematurity of Undertaking Actions Sought in Demand. Another reason to delay a response to a stockholder demand is that the harms that are the basis for the demand may still be developing. For example, if a stockholder demands an investigation and board action in connection with potential corporate losses suffered because of a parallel proceeding, it would make sense to wait until the full scope of the losses is known. If the board did otherwise, it would risk having to re-open its investigation at a later point once additional facts have developed. Moreover, to the extent that a corporation ultimately is found *not* to be liable in parallel proceedings, the board may very quickly be able to conclude that the demand on its face is meritless, without having to invest any additional corporate resources into undertaking an additional investigation.

One particularly thorny example of the issue of timing and prejudice is presented by a simultaneous presentation of a demand by one stockholder and derivative litigation by a different stockholder. The dilemma is

⁷ *Furman v. Walton*, 2007 BL 2186, at *5 (N.D. Cal. 2007), *aff'd* 320 Fed. App'x 638 (9th Cir. 2009).

⁸ *In re Merrill Lynch & Co., Inc., Securities, Derivative & ERISA Litigation*, 773 F. Supp. 2d 330, 348 (S.D.N.Y. 2011), *aff'd* *Lambrech v. O'Neal*, 504 Fed. App'x 23 (2d Cir. 2012).

⁹ See Part I at 2 n.8.

¹⁰ See, *e.g.*, *Furman*, 2007 BL 2186, at *5.

as follows: in a derivative case, a stockholder will typically allege that a demand is not required, because a majority of the board is not disinterested and independent *i.e.*, that demand is futile. However, under Delaware law, if a stockholder actually makes a demand, that is deemed to be a concession by that stockholder that a majority of the board is disinterested and independent with respect to the subject matter of the demand – *i.e.*, that demand is *not* futile.¹¹ Thus, when facing both a demand and a derivative case based on demand futility, different stockholders are, in essence, taking different positions on the issue of demand futility. And if the board immediately undertakes an investigation into the merits of the demand, notwithstanding the lack of a judicial decision as to whether demand was required – it may subject the corporation to incurring the expense of investigating the same claims twice.

Here's why: courts have held that under certain circumstances, a decision by a board to appoint a special litigation committee to which the board has fully delegated the authority to make a determination with respect to the demand (*i.e.*, a so-called “*Zapata* committee”)¹² may be deemed an admission by the corporation of demand futility – *i.e.*, the very issue the corporation is litigating in the derivative lawsuit.¹³ For example, the Delaware Supreme Court has held that timing of the appointment of a special litigation committee is an important consideration. The surrender of exclusive control to a special litigation committee *before* the board has filed a motion to dismiss on the theory that demand was required may, under certain circumstances, operate as a concession of demand futility.¹⁴ And the appointment of new independent directors to serve on a special litigation committee may also be interpreted as a concession of demand futility.¹⁵

As a result, a board may run a risk in appointing a *Zapata* committee (as opposed to a committee that is merely granted the authority to make a recommendation to the full board) to respond to a stockholder demand while simultaneously contesting the issue of demand futility in a parallel derivative action. And if the board elects to create a committee to investigate that does *not* have full authority, and a court ultimately concludes that demand is futile in the parallel derivative action, the work of that committee may be insufficient, since there is a risk that it will not meet the rigorous standards of independence and disinterestedness for a *Zapata* committee for purposes of taking control of the

existing litigation.¹⁶ Put another way, the corporation could very well expend resources on a committee investigation, only to then be required to undertake *another* investigation by a committee formed with a different mandate and/or that is comprised of different board members. The only possible beneficiary from such duplication of efforts would appear to be the single stockholder who made the demand, who would receive a response from the board slightly more quickly.

As discussed below, courts have affirmed the appropriateness of deferring a response regarding the merits of a demand until resolution of the issue of whether demand was futile in parallel derivative actions, although not articulating these issues at this level of detail.¹⁷ A deferral appropriately conserves corporate resources, without unduly harming the interests of stockholders, because a determination that demand was futile would entirely do away with a cause of action premised on the theory that demand was wrongfully refused.¹⁸

Other Considerations. Finally, as a practical matter, undertaking an investigation in response to a stockholder demand may be disruptive and distracting to the corporation's board of directors and senior management. A special committee investigation may be costly and result in a significant imposition of time, both on the members of the special committee, as well as on the part of the individuals who the special committee chooses to interview or from whom it determines to collect documents. In addition to conserving costs, a board could very well determine that stockholders are better served by going through the exercise of investigating a demand once – after all relevant facts are known, and after the demand futility issue has been settled – in order to minimize distraction of the corporation's leadership.

III. Review of Case Law

As noted, few courts have had occasion to consider whether and when it may be appropriate for a board to defer an investigation into the substance of a stockholder demand. As discussed below, in two cases – *Furman v. Walton* and *In re Merrill Lynch & Co. Securities, Derivative, & ERISA Litigation*¹⁹ – courts upheld the business judgment of boards that were deemed to have

¹¹ *Scattered Corp.*, 701 A.2d at 74; *Rales v. Blasband*, 634 A.2d 927, 935 n.12 (Del. 1993).

¹² See generally *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981).

¹³ See, e.g., *Abbey v. Computer & Commc'ns Tech. Corp.*, 457 A.2d 368, 373 (Del. Ch. 1983); see also *Stoner v. Walsh*, 772 F. Supp. 790, 800 (S.D.N.Y. 1991) (noting that “[b]oards often are reluctant to create special litigation committees with full power to determine the company's response, because there is a risk that such action might be deemed an admission of demand futility.”).

¹⁴ *Spiegel*, 571 A.2d at 767.

¹⁵ *Seminaris v. Landa*, 662 A.2d 1350, 1353 (Del. Ch. 1995); see also *Sutherland v. Sutherland*, 2008 BL 165126, at n.1 (Del. Ch. Aug. 5, 2008) (decision “to appoint a new director and designate him as a one-man special litigation committee with full powers to investigate and act with respect to the matters alleged in the complaint clearly evidence[d] an intent to concede the issue of demand futility”).

¹⁶ *Zapata*, 430 A.2d at 788 (on a motion to dismiss filed by a special litigation committee, “[t]he corporation should have the burden of proving independence, good faith, and a reasonable investigation, rather than presuming independence, good faith and reasonableness”); see also *Biondi v. Scrushy*, 820 A.2d 1148, 1156 (Del. Ch. 2003) (“Critical to the accomplishment of these objectives [of fairness and objectivity], however, is the proper composition and empowerment of the committee. If a special litigation committee is comprised of directors with compromising ties to the key officials who are suspected of malfeasance, if the committee is not fully empowered to act for the company without approval by the full board, or if the committee behaves in a manner inconsistent with the duty to carefully and open-mindedly investigate the alleged wrongdoing, its ability to instill confidence is, at best, compromised and, at worst, inutile.”).

¹⁷ See pp. 13-16, *infra* (discussing *MacCumber v. Austin*, 2004 WL 1745751 (N.D. Ill. Aug. 2, 2004), and *Piven v. Ryan*, 2006 BL 41311 (N.D. Ill. Mar. 23, 2006)).

¹⁸ *MacCumber*, 2004 WL 1745751, at *6; *Piven*, 2006 BL 41311, at *3.

¹⁹ See n. 8, 9, *supra*.

rejected stockholder demands, based in part on the potential prejudice to the corporation's position in parallel proceedings. Although neither of these cases addressed a situation in which a board argued that it had merely *deferred* a response to a demand, each sets forth important considerations regarding the impact of parallel proceedings in defining the appropriate scope of a response to a stockholder demand.

In addition, as discussed below, in two other cases, *MacCumber v. Austin* and *Piven v. Ryan*,²⁰ a court affirmed the decision by a board of directors to defer consideration of the merits of a demand until a motion to dismiss had been adjudicated in parallel stockholder derivative litigation in which demand was alleged to be futile. These decisions advanced an additional rationale for limiting the scope of a board response to a stockholder demand in light of parallel proceedings: that the expenditure of company resources on a full-fledged investigation would not be a prudent until the parallel proceedings had further advanced, given that a holding that demand was futile in the parallel actions would eliminate a cause of action by stockholders alleging that their demands were wrongfully refused.²¹

A. Rejection of Demands Due to Pendency of Parallel Proceedings.

1. *Furman v. Walton*.

The Northern District of California, applying Delaware law, addressed the deferral of a response to a stockholder demand in *Furman v. Walton*, a decision that was subsequently affirmed by the Ninth Circuit.²² *Furman* was a derivative lawsuit filed by a stockholder who alleged that the defendants, directors of Wal-Mart Stores, Inc., had breached their fiduciary duties by “ ‘authorizing and encouraging the systematic violation of federal and state civil rights, employment, and labor laws with respect to the unlawful discrimination of Wal-Mart’s female workforce and other unlawful or otherwise improper labor and related practices.’ ”²³ The plaintiff alleged that the damage to Wal-Mart included lawsuits, market losses, loss of goodwill, and a worsened public image.²⁴

Before filing the lawsuit, the plaintiff had made a demand upon Wal-Mart’s board of directors. The audit committee of the board responded by informing the plaintiff that it had considered the demand and determined that pursuit of the litigation would not serve the best interests of Wal-Mart and its stockholders, and that it would defer final action on the demand until resolution of the litigation in a pending class action employment discrimination case and other proceedings alleging the same theories as the demand.²⁵ The board expressed its concern that commencing derivative litigation “ ‘likely would be deemed an admission of the allegations in the [employment discrimination] case and in other proceedings,’ ”²⁶ and concluded that pursuing a derivative claim would not be in the best interest of Wal-Mart and its stockholders. The plaintiff thereaf-

ter filed suit, claiming that the demand had been wrongfully refused.

The defendants moved to dismiss, arguing that the plaintiff lacked standing to bring the action because she had not adequately alleged that the board’s conduct was not entitled to the protection of the business judgment rule.²⁷ Importantly, in undertaking its analysis, the court noted that *both* parties “ ‘effectively construed this deferral as being a rejection.’ ”²⁸ Therefore, rather than considering whether the board appropriately deferred its final determination in connection with the demand, the court instead examined whether the demand was wrongfully refused – that is, whether the board’s refusal of the demand “ ‘was not made in an informed manner, with due care, and in a good faith belief that refusing to pursue the litigation demanded was in the best interest of the corporation.’ ”²⁹

In her opposition to the motion to dismiss, the plaintiff made three arguments to support the contention that the demand was wrongfully refused.³⁰ First, she argued that the board limited its consideration to the allegations in the employment class action litigation and therefore did not consider all the claims contained in her demand, which included additional purported violations of federal and state law.³¹ Second, the plaintiff argued that waiting until the resolution of the specifically-named litigation would risk running the statute of limitations on claims against the board of directors. Third, the plaintiff argued that because the Ninth Circuit had ruled on class certification for the specifically-named action, the board’s stated reason for not acting on the demand was moot.³²

The court rejected each argument. As to the first, the court noted that the board’s response letter was not limited to the specifically-named litigation, and, in fact, referred to that litigation “ ‘and other proceedings’ ” six times throughout the letter. The court also noted that the board specifically wrote in its response that even if it believed the allegations in the demand had merit, “ ‘[t]he remedial action that the Audit Committee would recommend at this time . . . would not include commencing a public litigation because that action likely would be deemed an admission of the allegations in the [employment class action] case and in other proceedings.’ ”³³ As to the second argument, the court held that expiration of claims against the defendants was no longer a relevant consideration because in their briefing, the defendants represented that “ ‘for one year following the Wal-Mart Board’s final determination concerning plaintiff’s demand, they will not assert any statute of limitations defense that did not exist on the date this action was filed in any action asserting the claims stated in plaintiff’s demand.’ ”³⁴ As to the plaintiff’s third argument, the court observed that appellate review of the class certification decision in the specifically-named action was not over because Wal-Mart had filed a petition for a rehearing *en banc* and also planned to seek Su-

²⁰ See n.19, *supra*.

²¹ *MacCumber*, 2004 WL 1745751, at *6; *Piven*, 2006 BL 41311, at *3-4.

²² 2007 BL 2186.

²³ *Id.* at *1 (quoting complaint).

²⁴ *Id.*

²⁵ *Id.* at *1, 4-5.

²⁶ *Id.* at *5.

²⁷ *Id.* at *6.

²⁸ *Id.* at *2.

²⁹ *Id.* at *3.

³⁰ *Id.* at *4.

³¹ *Id.* at *4.

³² *Id.* at *5.

³³ *Id.* at *5 (quoting complaint).

³⁴ *Id.* at *5 (quoting defendants’ reply memorandum in support of the motion to dismiss).

preme Court review if it did not receive a favorable decision. Furthermore, the court noted the audit committee and board's concern that pursuing a derivative claim against the directors would effectively be an admission in other actions besides the employment class action, which would create significant liabilities for Wal-Mart and would not be in its best interest.³⁵ The court concluded that none of the plaintiff's arguments did "anything to ameliorate the lack of facts supporting her contention that the board's decision to reject her demand was not a rational business decision" and therefore granted the motion to dismiss.³⁶

The Ninth Circuit affirmed the dismissal of the action without leave to amend, noting that "[t]he board asserted that bringing suit as per [the plaintiff's] demand might have constituted a harmful admission in litigation pending against Wal-Mart" and that the plaintiff "cannot refute this compelling business purpose."³⁷

2. In re Merrill Lynch & Co. Securities, Derivative, & ERISA Litigation.

The Southern District of New York, construing Delaware law, addressed a related issue in dismissing two derivative actions arising from the losses experienced by Merrill Lynch & Co., Inc. as a result of its extensive investments in mortgage-backed securities.³⁸ In one action, which is not relevant to this discussion, the plaintiffs alleged demand futility; in the other, the plaintiffs made demands upon the Bank of America board, as well as the pre-merger and post-merger Merrill boards.³⁹ Bank of America informed the plaintiff that it would not force the Merrill subsidiary to pursue the claims against senior executives and present and former directors.⁴⁰ The plaintiff argued that the board's refusal was wrongful because the board "did not give serious consideration to her demands, as evidenced by the fact that its consideration of the demands (if any) was commenced, and concluded, at a single meeting, and the response was nothing more than an essentially boilerplate rejection letter."⁴¹

The court disagreed with the plaintiff's assertion that the rejection letter from the board was inadequate boilerplate, noting that the "letter itself . . . belies plaintiff's assertions."⁴² The court then quoted directly from the board's rejection letter, which extensively discussed ongoing proceedings and the effect that a derivative suit would have: Bank of America's board and audit committee had both "considered the potential adverse effect of pursuing the claims outlined in [the plaintiff's] letters on the defenses. . . in certain pending litigation and governmental inquiries and weighed that against the likelihood of recovering the amounts sought in those proceedings . . ." ⁴³ The board's letter specifically mentioned three parallel proceedings involving Merrill:

two class actions – one involving federal securities claims and the other involving ERISA – and ongoing governmental inquiries that the board noted could result in various penalties.⁴⁴ As described by the board, although Merrill had entered into preliminary settlement agreements in the class actions, each settlement remained subject to court approval and objections, and numerous stockholders had opted out of the proposed classes. The letter then stated that the board and audit committee had determined that acting on the demand would harm Merrill's defenses in the class actions and position in the governmental inquiries.⁴⁵

In addition, the court noted that the letter described a cost-benefit analysis performed by the audit committee and board regarding the plaintiff's demands, as well as their consideration of the amount of damages in the pending class actions and the likelihood of recovering from the officers and directors. In undertaking this analysis, the letter reflected that the audit committee and board had considered the exculpation provision in Merrill's certificate of incorporation and the difficulty of prevailing upon a claim alleging a legal theory of "mismanagement" against officers and directors. The letter noted that the audit committee would monitor the proceedings.⁴⁶ The court also rejected the argument that the board did not take enough time to sufficiently consider the demand. In its letter, the board did not detail its process or the time it took to consider the plaintiff's demand. Instead, the letter stated simply that the board had considered the letters "at its June 25, 2009 meeting[.]" ⁴⁷ The court also noted that the board "had already considered and rejected a similar demand by the plaintiff" and that the board was likely to be very familiar with the allegations in the plaintiff's letter due to its consideration of the other proceedings referenced in the letters.⁴⁸

Based on all of these reasons, the court held that the plaintiff alleged nothing more than conclusory assertions to support that the investigation and analysis described in the Bank of America letter was unreasonable or conducted in bad faith.⁴⁹ The Second Circuit affirmed the district court's decision, noting that the audit committee "cited [i] the possible compromise of pending litigation and ongoing government inquiries involving BofA; and [ii] the low probability of recovery against Merrill's former directors and officers in light of an exculpatory clause in Merrill's certificate of incorporation and the difficulty of prevailing on a *Caremark* claim under Delaware law."⁵⁰

3. Related Authority.

Other courts, in the context of demand refusals, have highlighted the importance of considering the effect that derivative litigation would have on parallel proceedings.⁵¹ For example, in *Morefield v. Bailey*,⁵² the

³⁵ *Id.* at *5.

³⁶ *Id.* at **5-6.

³⁷ 320 Fed. App'x at 640.

³⁸ The actions were "double derivative" actions, meaning that the plaintiffs sought to compel the board of directors of Bank of America, which subsequently became the 100% owner of Merrill Lynch, to make its Merrill subsidiary bring claims against Merrill officers and directors. *Merrill Lynch*, 773 F. Supp. 2d at 332-33.

³⁹ *Id.* at 333.

⁴⁰ *Id.* at 345.

⁴¹ *Id.* (quoting complaint).

⁴² *Id.*

⁴³ *Id.* at 348.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 349.

⁴⁷ *Id.* (quoting complaint).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Lambrecht*, 504 Fed. App'x at 27-28.

⁵¹ This same rationale has also been highlighted in decisions addressing demand futility. See *In re E.F. Hutton Banking Practices Litig.*, 634 F. Supp. 265, 270 (S.D.N.Y. 1986) ("[T]here are presently pending in this Court some 14 suits against the Corporation itself based upon, among other things, the conduct claimed to have been approved of by the directors

Eastern District of Virginia granted a motion to dismiss a stockholder derivative suit for failure to comply with Rule 23.1's pre-suit demand requirement.⁵³ The court held that the plaintiff had not sufficiently alleged that the refusal was not protected by the business judgment rule.⁵⁴ The board, in its refusal, noted that it had considered, among other factors, the effect that a derivative suit would have on an ongoing SEC investigation and a pending securities fraud action.⁵⁵ The court favorably compared the letter to that of the board in *Merrill Lynch*.⁵⁶ The Southern District of New York reached a similar conclusion under New York law in *Teamsters Allied Benefit Funds v. McGraw Hill Cos.*⁵⁷ The board in that case also cited the effect that a derivative action would have on nine related actions, investigations conducted by two state attorneys general, and oversight by the SEC.⁵⁸ In its response to the demand, the board wrote: "the Board has concluded that proceeding in the manner your letter indicates, while these actions and investigations remain pending, would be harmful to the interests of the Company in its defense of those litigations: it would be disruptive to the defense of those matters; and it could be harmful to the Company's interest in preserving all applicable privileges and protections."⁵⁹ The court found that the plaintiff had not adequately pled a basis for overturning the board's rejection of the demand.⁶⁰

Similarly, in *Mozes v. Welch*,⁶¹ the U.S. District Court for the District of Connecticut recognized that a board may be prudent to defer its decision with respect to the demand until parallel proceedings that are also addressed in the demand have fully developed. The plaintiff in that case sent a demand to the board in connection with criminal charges against a number of employees.⁶² The general counsel of the company, after a board meeting, notified the plaintiff's counsel that the board had appointed a special litigation committee to determine the appropriate course of action.⁶³ After the company had entered guilty pleas, the plaintiff's counsel requested an estimate for when the SLC would make a determination and was informed by the general counsel that the company had retained an outside law firm and that at the present time he was unable to estimate a date for the SLC to report to the board, although

that plaintiffs now seek to have the Corporation sue, while the complaint alleges that the Securities and Exchange Commission is contemplating litigation which might threaten the ability of the Corporation to conduct its business. It seems obvious that the directors whom plaintiffs wish to sue would be important witnesses for the Corporation in all of this existing and threatened litigation, and that a disinterested board might well—upon the advice of counsel retained to defend the Corporation in this litigation—conclude it to be unwise to subject them to further litigation clearly calculated to undercut their veracity and general effectiveness as witnesses.”)

⁵² 959 F. Supp. 2d 887 (E.D. Va. 2013), appeal dismissed (Nov. 8, 2013).

⁵³ *Id.* at 907.

⁵⁴ *Id.*

⁵⁵ *Id.* at 899.

⁵⁶ *Id.*

⁵⁷ 2010 BL 52751 (S.D.N.Y. Mar. 11, 2010).

⁵⁸ *Id.* at **2-3.

⁵⁹ *Id.* at *4.

⁶⁰ *Id.* at **6-7.

⁶¹ 638 F. Supp. 215 (D. Conn. 1986).

⁶² *Id.* at 217.

⁶³ *Id.*

he assured the plaintiff's counsel that he would provide an estimate when he was able.⁶⁴

The plaintiff subsequently filed a derivative action and defendants moved to dismiss for a variety of reasons, including most significantly the plaintiff's failure to conform to the requirements of Rule 23.1.⁶⁵ The crucial question for the court to address was "whether the eight month interim [between the initial demand and the filing of the derivative suit] was of sufficient duration for the Board to respond to the demand. If it was not, then the present suit is untimely."⁶⁶ The court held that the board and SLC "were not afforded adequate time under the circumstances of this complex case to complete their investigation."⁶⁷ In an affidavit submitted in a previous derivative action, an outside director who chaired the SLC gave additional details regarding the investigation and the difficulty posed by a grand jury investigation and criminal proceedings and stated that the SLC expected to give its final report two months after all of the criminal proceedings had concluded.⁶⁸ The court observed: "Given the enormity and complexity of the task before it the Board and its Special Committee responded with as much precision as was possible under the circumstances."⁶⁹

B. Parallel Stockholder Demands and Derivative Litigation.

1. *MacCumber v. Austin*.

MacCumber is the first of two cases, both decided by the U.S. District Court for the Northern District of Illinois, that specifically address the issue of deferring a response to a stockholder demand until a decision has been rendered on a motion to dismiss a derivative action premised on the theory that demand was excused. In *MacCumber*, the plaintiff brought a derivative suit against the board of directors for Abbott Laboratories.⁷⁰ The plaintiff's allegations arose out of an Abbott subsidiary's alleged fraudulent overcharges of Medicare, which, in turn led to a \$600 million fine.

The plaintiff made a written demand on the Abbott board. Rather than accepting or rejecting the demand immediately, the board instead responded that it would "monitor the progress of the Litigation and will consider your Letter at a later point in time, as circumstances warrant."⁷¹ The board noted that three derivative actions were pending in Illinois state court raising the same claims as the demand and that those suits alleged that demand on the board would be futile.⁷² The board indicated that, although it disagreed with the contention that demand was futile, it nevertheless determined that it would not be a "prudent expenditure of resources" to initiate an inquiry into the allegations of the demand, because it was simultaneously expending resources in the state court derivative litigation to defend against the claim that demand was futile.⁷³ The board wrote that it would "advise [the plaintiff] promptly if, depending on the resolution of the demand

⁶⁴ *Id.*

⁶⁵ *Id.* at 218-19.

⁶⁶ *Id.* at 220.

⁶⁷ *Id.* at 221.

⁶⁸ *Id.*

⁶⁹ *Id.* at 221.

⁷⁰ *MacCumber*, 2004 WL 1745751, at *1.

⁷¹ *Id.* at *2.

⁷² *Id.* (quoting board's response to demand).

⁷³ *Id.* (quoting board's response to demand).

futility issue in the Litigation, it determines that your demand is ripe for its consideration.’ ”⁷⁴

The plaintiff filed a derivative lawsuit, which the board moved to dismiss.⁷⁵ The board argued that the action was premature because it had not refused the plaintiff’s demand and that even if its response were considered a refusal, it fell within the protection of the business judgment rule.⁷⁶ In the alternative, the board moved to stay the proceedings under the *Colorado River*⁷⁷ abstention doctrine until a decision was rendered in the Illinois state court derivative actions.⁷⁸

The court held that the Abbott board should have been permitted time to investigate and give a definitive response to the plaintiff’s demand and that the plaintiff’s decision to file suit a little more than three months after sending the demand was premature.⁷⁹ The court disagreed with the plaintiff’s characterization of the board’s response to the demand as a refusal. Rather than viewing the board’s response as a decision to postpone its investigation “indefinitely” or as a “brush-off,” the court found that the board had responded as precisely as it could at the time.⁸⁰ The court held that it was reasonable for the board to postpone the investigation since it was litigating the issue of whether demand was required in state court, and if the state court plaintiffs prevailed, then a stockholder demand and investigation of the demand would be unnecessary.⁸¹ If, on the other hand, Abbott prevailed in the state court action, the board would be required to undertake an investigation in response to the demand. Thus, given that the resolution of the state court litigation could also resolve MacCumber’s action, the court held that “it would be unreasonable to require the Board to expend Abbott’s resources unnecessarily,” and the postponement of an investigation was not an unreasonable or untimely delay. The court therefore dismissed the action without prejudice.⁸²

2. *Piven v. Ryan*.

In another Northern District of Illinois decision (issued by the same judge), *Piven v. Ryan*⁸³, the court again addressed the issue of deferring an investigation in response to a stockholder demand. *Piven* involved a demand made pursuant to Delaware law. The demand pertained to Aon Corporation’s alleged practices with respect to contingent commissions from underwriters. Shortly after the *Wall Street Journal* reported that Aon was the subject of an investigation by the New York Attorney General, the plaintiff sent a demand letter to Aon seeking relief for damages resulting from alleged breaches of fiduciary duty, mismanagement, and corporate waste.⁸⁴ Aon’s board considered the demand and responded by indicating that it had engaged outside law firms to investigate issues including those in the plaintiff’s letter.

⁷⁴ *Id.* (quoting board’s response to demand).

⁷⁵ *Id.*

⁷⁶ *Id.* at *3.

⁷⁷ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

⁷⁸ *MacCumber*, 2004 WL 1745751, at *1.

⁷⁹ *Id.* at *5.

⁸⁰ *Id.* at *6.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 2006 BL 41311.

⁸⁴ *Id.* at *1.

Not long after the board responded to the plaintiff’s demand, two suits were filed against Aon. One was a derivative suit that asserted claims similar to those in the plaintiff’s demand. The other was filed by the New York Attorney General and other state attorneys general, which Aon settled for \$190 million and an agreement to implement related reforms.⁸⁵ The board sent a second response to the plaintiff’s demand letter and informed the plaintiff that it would devote its resources to defending against the derivative litigation, monitor the litigation, and “ ‘consider [the plaintiff’s] letter at a later point in time, as circumstances warrant.’ ”⁸⁶

The plaintiff then filed a derivative action, which the defendants moved to dismiss or, in the alternative, to stay under *Colorado River*.⁸⁷ The court held that the plaintiff had filed the derivative suit prematurely. Although the board had responded that it would investigate the claims raised in the plaintiff’s letter, the court did not agree with the characterization of the board’s action as “dropping” the investigation. The court emphasized that the board had written that it “ ‘will consider [the plaintiff’s] letter at a later point in time, as circumstances warrant.’ ”⁸⁸ Nor did the court agree with the plaintiff that Aon was obligated to investigate the claims in the demand immediately, holding that “[a] board’s decision to delay responding to a demand in order to focus on related litigation is reasonable.”⁸⁹ The court granted the motion to dismiss without prejudice and granted the plaintiff leave to refile an amended complaint within two months of a decision in the previously-filed derivative suit.⁹⁰

IV. Support from Delaware Case Law Regarding Stays of Derivative Actions

Given the limited case law on the subject of whether and when it is appropriate for a board to defer a response to a stockholder’s demand letter, we suggest it is appropriate to look to additional sources for guidance as to how courts should respond to derivative suits alleging that demand was wrongfully denied in cases in which the board responded and informed the stockholder that it would defer a decision regarding the demand until the conclusion of parallel proceedings. The first article in this two-article series addressed derivative litigation and parallel proceedings. Importantly, the rationale set forth by the courts in *Furman*, *Merrill Lynch*, *MacCumber*, and *Piven*, has been echoed by Delaware courts in the context of granting stays of derivative actions in the face of related parallel proceedings.

First, whether seeking a stay of a derivative action or deferring a response to a stockholder demand, one of the key considerations is that the parallel proceedings involve ongoing development of facts and that the ultimate liability relevant to the demand may be uncertain. For example, in *Brudno v. Wise*,⁹¹ the Delaware Court of Chancery observed that “to a great extent, the plain-

⁸⁵ *Id.*

⁸⁶ *Id.* at *2.

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting board response; emphasis added by the court).

⁸⁹ *Id.* at *3.

⁹⁰ *Id.* at *4.

⁹¹ 2003 BL 1596 (Del. Ch. April 1, 2003).

tiffs here expressly hinge [the company's] right to relief on the outcome in the Federal Securities Action. As a result, it makes little sense for this Action to proceed until the bases for the plaintiffs' indemnity claims are settled, or at the very least, closer to that point."⁹² Similarly, in *In re Massey Energy Company*,⁹³ the court observed that "[o]ne cannot even rationally determine what the potential derivative liability is until the direct liability Massey faces is determined."⁹⁴ These considerations are equally relevant to a board deciding how to respond to a stockholder demand. The board, acting in the best interests of the corporation, may appropriately choose to conserve corporate resources by waiting to undertake an investigation in response to a demand until all relevant facts have fully developed, including the underlying liability in parallel proceedings.

Second, derivative litigation may adversely impact the company's position parallel proceedings. In *Brenner v. Albrecht*, the defendant argued that allegations in the derivative suit overlapped with those in the parallel securities class action, which would prejudice the corporation's defense of the class action.⁹⁵ The Delaware Court of Chancery observed that the company, if it were to pursue a derivative action, would be forced to take positions inconsistent with its defense of the officers and directors of the company in a parallel securities fraud case.⁹⁶ This concurrent role in the derivative suit and class action, the court observed, would be "unduly complicated, inefficient, and unnecessary" and risked significant prejudice to the company in the class action.⁹⁷ Again, while the court made these observations in the context of determining whether to stay a previously-filed derivative action, they are equally ap-

plicable to a board's decision regarding whether and when to investigate the merits of and/or pursue a derivative claim. It is appropriate for a board to consider the best interests of the corporation in defending against parallel litigation while deciding to defer action on a demand letter until the parallel proceedings have concluded. At that point, the board's assessment of what is in the best interests of the corporation may change, since it would no longer be subject to the specter of prejudicing its defense of parallel proceedings.

As other courts contend with the appropriateness of board deferral of a final decision with respect to the merits of a stockholder's demand in light of parallel proceedings, these Delaware cases, as well as the other decisions discussed in this article, provide helpful guidance. In many cases, the considerations set forth in these decisions would support a board's decision to defer its investigation of and final decision on a stockholder demand until the conclusion of the parallel proceedings.

V. Conclusion

As corporations are increasingly faced with parallel proceedings, both litigation and investigations, they are faced with complex strategic issues. Determining how to respond to a stockholder demand in the midst of other related proceedings requires an assessment of what is in the best interest of the corporation. As the cases discussed above indicate, in many instances, a board may act in the best interest of the corporation by deferring action on a stockholder demand until the underlying related proceedings have concluded or further advanced. Such deferral has the advantages of allowing the board to conserve the corporation's resources, fully assess the likelihood and benefit of prevailing on a derivative claim against the costs of pursuing such a claim, and avoid prejudicing its defense of the parallel proceedings.

⁹² *Id.* at *1.

⁹³ 2011 BL 149645 (Del. Ch. May 31, 2011).

⁹⁴ *Id.* at *30.

⁹⁵ 2012 BL 24018 (Del. Ch. Jan. 27, 2012).

⁹⁶ *Id.* at *5.

⁹⁷ *Id.* at *6.