
Delaware Court of Chancery Holds That Demand Futility May Be Pleaded With Less “Particularity” Than a Standard Fraud Claim Under Rule 9(b)

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Delaware law is clear that a shareholder generally may not bring a derivative action on behalf of a corporation unless the shareholder pleads that: (i) it made a pre-litigation demand upon the board of directors of the corporation or (ii) such demand upon the board would have been futile. See Del. Ct. Ch. R. 23.1. Rule 23.1, which is modeled after Fed. R. Civ. P. 23.1, requires that these predicate facts must be “allege[d] with particularity,” which is a higher standard than typical notice pleading under Rule 8(a).

The Delaware Chancery Court’s recent decision in *Elburn v. Albanese*, C.A. No. 2019-0774-JRS, 2020 WL 1929169 (Del. Ch. Apr. 21, 2020), squarely addressed for the first time “what is required to plead a fact ‘with particularity’ under Rule 23.1.” *Id.* at *2. Relying primarily upon federal decisions construing the particularity requirement of Fed. R. Civ. P. 9(b) in the context of fraudulent omission cases, the Court found that Rule 23.1 does not require the pleading of classic “newspaper facts” — i.e., the “‘who, what, when, where and how’ concerning the alleged fiduciary wrongdoing” — to allege demand futility adequately. *Id.* at *8, *8 n. 95. Accordingly, the Court allowed the claim in *Elburn* to proceed, despite the fact that the plaintiff “has not identified the specific discussions that comprised the [allegedly wrongful] agreement”; the plaintiff merely “described the agreement ‘with detail sufficient to apprise the defendant of the basis for the claim,’” which the court deemed sufficient. *Id.* at *3.

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