ARTICLE

REVIVING SHAREHOLDER VOICE BY REDEFINING PRE-SUIT DEMAND

Wendy Gerwick Couture[*]

This Article diagnoses, and seeks to cure, an undertheorized dynamic relationship between two levers of shareholder influence in the modern public corporation: suit and voice. This Article demonstrates that, under current Delaware law, a shareholder must stifle its voice in order to retain the ability to pursue a viable derivative claim, thus inhibiting the shareholder's monitoring and information-sharing roles. In particular, the onerous "demand made" litigation pathway disincentivizes pre-suit demand, and the expansive definition of pre-suit demand captures shareholder communications to the board seeking corrective action other than litigation. To avoid this collision between suit and voice, this Article proposes a narrowed definition of pre-suit demand, which furthers the policy rationales underlying the pre-suit demand requirement without stifling shareholder voice.

---

[*] Wendy Gerwick Couture is the James E. Wilson Distinguished Professor of Law and University Distinguished Professor at the University of Idaho College of Law, where she teaches Business Associations and Securities Regulation. She thanks Emeritus Professor of Law Mark D. Anderson for the invaluable feedback on earlier drafts of this Article; the attendees at the 2025 Law & Society Association Annual Conference for the helpful suggestions; and Xavier Suarez, J.D. expected in May 2026, for the excellent research assistance.

INTRODUCTION

In this Article, I discuss an undertheorized dynamic relationship between two levers of shareholder influence in the modern public corporation: suit and voice. To demonstrate, imagine that a sophisticated institutional shareholder of a Delaware public corporation has determined that the board of directors approved a transaction that violated export control laws, risking harm to the corporation. The shareholder has several traditional options: it could file a lawsuit, which seems drastic at this stage. It could vote against the board nominees in the next election, which seems ineffectual, or it could sell its shares, which seems premature. Instead, the shareholder elects a more modern approach, at least as an initial strategic step: to exercise its voice. The shareholder sends a letter to the board identifying the issue and requesting corrective action. In the letter, the shareholder is careful not to request that the board institute litigation on behalf of the corporation; rather, the shareholder requests that the board bring the transaction into legal compliance for the benefit of the corporation. After several months, the board sends a perfunctory refusal. The shareholder elects to now file a derivative suit, alleging that the board violated the fiduciary duties it owes to the corporation and its shareholders by approving the unlawful transaction. The defendants move to dismiss the suit, arguing that the shareholder's communication constituted a "pre-suit demand" and that the derivative complaint must be dismissed under the onerous "wrongful refusal" standard that applies in "demand made" cases. The Court of Chancery dismisses the suit on this basis. The shareholder has learned a valuable lesson: if it wishes to retain the option to pursue a viable derivative action on behalf of a corporation, it must stifle its voice.

It is this collision between Delaware's pre-suit demand definition and shareholder voice that I seek to correct in this Article. I argue that, contrary to Delaware's current approach, shareholders' pre-suit communications—which request that the board take corrective action, other than litigation, for the benefit of the corporation—should not be classified as pre-suit demands in subsequent derivative litigation. Redefining pre-suit demand as I propose would revive shareholder voice as a lever of shareholder influence, furthering shareholders' important monitoring and information-sharing roles in the modern public corporation.

In Part I, I demonstrate the modern importance of shareholder voice among the traditional levers of shareholder influence. I trace the evolution of shareholders' role within the firm from traditional passivity to the modern era of shareholder engagement, whereby shareholders increasingly serve as monitors of, and sharers of information with, firm management. I analyze shareholders' four levers of influence when serving in these dual roles: (1) voting; (2) divestment; (3) litigation; and (4) voice. It is this voice, I argue, that is inhibited by Delaware's current interpretation of the pre-suit demand requirement for derivative suits.

In Part II, I discuss the pre-suit demand requirement, which creates two mutually exclusive pathways in derivative litigation: the demand futility pathway and the demand made pathway. I explain how these pathways seek to balance the competing policy rationales implicated by derivative suits, and I trace the litigation under each option, focusing on the less understood demand made pathway, including its stringent wrongful refusal standard.

In Part III, I demonstrate how the pre-suit demand requirement, as currently applied in Delaware, stifles shareholder voice. Drawing from the divergent litigation pathways mapped out in Part II, I show that, because the demand made pathway is more onerous than the demand futility pathway, the shareholder almost always rationally elects to forego demand and instead attempts to plead demand futility. I support this assessment with hand-compiled statistics about the higher dismissal rates in demand made cases than in demand futility cases. Demand itself is, of course, a species of voice, which is stifled by these differential standards. I argue, however, that this effect is compounded by courts' expansive definition of pre-suit demand to include shareholder communications that, rather than asking the board to institute litigation on behalf of the corporation, instead seek corrective action to benefit the corporation and its shareholders. As a result, shareholders' communications seeking corrective action are disincentivized, depriving shareholders of the lever of voice to further their monitoring and information-sharing roles. In short, as currently interpreted, the pre-suit demand requirement and shareholder voice collide.

Finally, in Part IV, I seek to revive shareholder voice by redefining pre-suit demand more narrowly. In particular, I propose that, in order for a shareholder's communication to constitute a pre-suit demand and thus channel the shareholder into the more onerous demand made pathway in subsequent derivative litigation, the communication must specifically state the *litigation* the shareholder wants the board to pursue on the corporation's behalf. Under this definition of pre-suit demand, a shareholder communication that merely demands that the board take corrective action to benefit the corporation would not constitute a pre-suit demand. Under this revised definition, the hypothetical shareholder communication described above would not constitute a pre-suit demand. In sum, Delaware courts should adopt this revised definition of pre-suit demand in order to encourage shareholders to exercise their voice, both as monitors and sharers of information, without requiring shareholders who do so to foreclose the potential to exercise the suit lever of influence.

I. THE ROLE OF SHAREHOLDER VOICE

Among the stakeholders[1] in a public corporation are its shareholders, who "own the residual claim on the corporation's assets and earnings."[2] Public shareholders' role with the firm has evolved, from a traditionally passive role to the modern era of shareholder engagement. Shareholders increasingly serve as monitors of, and sharers of information with, firm management. When serving in these dual roles, shareholders' levers of influence include pursuing derivative litigation and exercising their voice. This section demonstrates the modern importance of shareholder voice within the public firm. It is this voice, I argue, that is inhibited by Delaware's current interpretation of the pre-suit demand requirement for derivative suits.

A. Shareholders' Role Within the Firm

Under the traditional conception of the public corporation, the shareholders' role is limited.[3] Public corporations are governed by the board of directors, which delegates key managerial functions to the officers.[4] This "hierarchical decisionmaking structure"[5] allows for "efficient decisionmaking"[6] and is "well-suited to the problem of operating a large business enterprise with numerous employees, managers, shareholders, creditors, and other inputs."[7] Shareholders, each of whom "owns

---

1. *See* John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 GEO. L.J. 1495, 1499 (1990) ("'Stakeholder' is a deliberately ambiguous term, which includes a variety of subgroups whose interests can often conflict. The two largest constituents in this amorphous category are creditors and employees.").

2. *See* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 604 (2006).

3. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 277 (1934) ("[W]e have reached a condition in which the individual interest of the shareholder is definitely made subservient to the will of a controlling group of managers even though the capital of the enterprise is made up out of the aggregated contributions of perhaps many thousands of individuals.").

4. *See* DEL. CODE ANN. tit. 8, §§ 141(a), 142 (2025).

5. *See* Bainbridge, *supra* note 2, at 626.

6. *See id.* at 622.

7. *See id.* at 626.

a small fraction of a company's stock,"[8] are "generally too diversified across the securities of many firms to take much direct interest in a particular firm."[9] Moreover, within the firm, "shareholders then face severe collective action problems in monitoring corporate managers."[10] Further, shareholders possess no specialized knowledge or decision-making expertise.[11] As a consequence, under this traditional conception, "shareholder passivity is inevitable,"[12] reflecting a "division of labor, with those who have money but not managerial skills joining forces with those who have managerial skills but not capital."[13]

The underpinnings of this traditional conception of the public corporation have weakened, however, leading to a modern conception of the public corporation that envisions an active role for shareholders.[14] First, institutional investors—which range "from passive mutual funds that select stocks according to a broad market index to hedge funds whose business model is predicated on identifying companies that they believe underperform industry peers and forcing changes from the inside that can improve corporate performance"[15]—increasingly hold larger

8. *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 813 (1992).

9. *See* Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. OF POL. ECON. 188, 293 (1980).

10. *See* Black, *supra* note 8, at 813; John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 15 (1987) (explaining that "the separation of ownership and control in the modern corporation had left shareholders effectively powerless" because they "were widely dispersed, and therefor incapable of coordinated action").

11. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 312 (1983) ("[S]ince decision skills are not a necessary consequence of wealth or willingness to bear risk, the specialization of decision management and residual risk bearing allowed by unrestricted common stock enhances the adaptability of a complex organization to changes in the economic environment.").

12. *See* Black, *supra* note 8, at 813.

13. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 401 (1983).

14. *See* Black, *supra* note 8, at 813 ("[T]he dominant corporate law paradigm of the last sixty years—the Berle and Means model in which professional managers control large public corporations—is under attack.").

15. *See* Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863, 878 (2020).

positions in public companies,[16] leading to greater shareholder interest in the management of those companies[17] and reducing collective action barriers.[18] Second, these shareholders increasingly possess knowledge and expertise that enable them to meaningfully assess, and engage with, the management of companies.[19] The result is a modern era of shareholder engagement.[20]

Shareholders' active role within the modern public corporation falls into two distinct but not mutually exclusive

16. *See* John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 650 n.62 (2022) (citing authority) ("[I]f we look at the market value of all outstanding, publicly traded equity securities in the United States, institutions have owned over 62% for a number of years"); Fisch & Sepe, *supra* note 15, at 878 ("Modern shareholders no longer fit Berle and Means's account. They have instead become empowered, largely because of the reconcentration of equity ownership, which has increased since the 1990s. Institutional investors now own over two-thirds of the outstanding shares of the thousand largest U.S. public companies."); Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Institutional Investors: Power and Responsibility Remarks at Georgia State University (Apr. 19, 2013), https://www.sec.gov/newsroom/speeches-statements/2013-spch041913laahtm#P18_1663 [https://perma.cc/HE2T-JYNZ] ("Institutional investor ownership is an even more significant factor in the largest corporations: In 2009, institutional investors owned in the aggregate 73% of the outstanding equity in the 1,000 largest U.S. corporations.").

17. *See* Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. FIN. ECON. 275, 279 (2000) ("The investor with a larger stake in the firm has stronger incentives to undertake monitoring activities, as it is more likely that the large shareholder's increased return from monitoring is sufficient to cover the associated monitoring costs."); Easterbrook & Fischel, *supra* note 13, at 403 ("As the residual claimants, the shareholders are the group with the appropriate incentives (collective choice problems to one side) to make discretionary decisions.").

18. *See* Coffee, *supra* note 1, at 1547 (1990) (discussing the increase in institutional investor ownership) ("The great irony here is that the problem of collective action, upon which all pessimistic estimates of the future of corporate governance have rested since the time of Berle and Means a half-century ago, may be quietly fading in significance.").

19. *See* Fisch & Sepe, *supra* note 15, 878 ("[I]nstitutional investors of all types have grown increasingly informed as well as increasingly engaged in their portfolio companies.").

20. *See* Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55, 56 (2007 (tracing the history of activist investors from individual "gadfly" investors from the 1940s until the mid-1980s, to the rise of institutional investors like pension funds and union funds in the mid-1980s, to the emergence of hedge funds in the 2000s).

categories: shareholder monitoring and shareholder information-sharing. When engaging in these monitoring and information-sharing roles, shareholders focus on performance by "advocating for significant changes in corporate strategy to increase the market price of a company's stock" and on corporate governance by "focus[ing] on changes in a public company's governance arrangements, executive compensation, and social policy."[21]

1. Shareholder Monitoring

Shareholder monitoring seeks to maintain the benefits of centralized management while reducing the agency costs associated therewith. Agency costs arise "when decision making in a firm is the province of managers who are not the firm's security holders"[22] because managers' and shareholders' interests might diverge. Managers' divergent interests potentially include a desire for self-enrichment,[23] greater risk aversion,[24] and lesser concern about systemic risk.[25] Managers' "private interests might provide them with an incentive to engage in empire-building, take excessive compensation, enjoy excessive perks, pursue pet projects, elevate cronies, refuse to accept beneficial acquisition

---

21. *See* Paul Rose & Bernard S. Sharfman, *Shareholder Activism as a Corrective Mechanism in Corporate Governance*, 2014 B.Y.U. L. REV. 1015, 1018 (2014).

22. *See* Fama, *supra* note 9, at 188; *see also* BERLE & MEANS, *supra* note 3, at 6 ("The separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear.").

23. *See* Coffee, *supra* note 10, at 16 ("Shareholders and managers can potentially have many conflicts: salary, dividends, self-dealing transactions, etc.").

24. *See id.* at 13 ("Put simply, the rational manager has good reason to be risk averse, while the fully diversified shareholder has every reason to be risk neutral."); Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327, 329–30 (1983) ("[B]ecause the human capital of agents is generally employed in a single organization, risk aversion tends to cause them to charge more for any risk than security holders who can diversify risk across many organizations.").

25. *See* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 290 (2016) ("[D]iversified investors are interested not only in enhancing the value of a particular firm, but also in establishing rules that reduce the costs of gain-producing transactions across all firms. Corporate managers, however, are incentivized to adopt whatever practices will maximize their own firm's value.").

offers, remain in power too long, and so forth."[26] The risk of agency costs is most acute when decision initiation and monitoring—what Eugene F. Fama and Michael C. Jensen collectively call "decision management"—are separated from "residual risk bearing."[27]

Shareholder monitoring is not the sole check on agency costs.[28] The market for corporate control operates as a constraint because "[t]he lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently."[29] However, "[a] company must be badly managed indeed to justify the typical 50% takeover premium," and "hostile takeovers today face heavy legal obstacles, notably poison pills and strict antitakeover laws."[30] The stock market itself also operates as a constraint on management, even if the stock price is not so low as to generate takeover interest, because "[s]tock prices are visible signals that summarize the implications of internal decisions for current and future net cash flows," thus "exert[ing] pressure to orient a corporation's decision process toward the interests of residual claimants."[31] However, "[c]apital market constraints are weak for firms that can service their debt and rarely sell new equity."[32] Moreover, "because management inherently has access to nonpublic

26. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 657, 679 (2007).

27. *See* Fama & Jensen, *supra* note 11, at 303–04, 307.

28. *See* Black, *supra* note 8, at 831 ("Other strands include the corporate control market, the product market, the capital market, the labor market for corporate managers, incentive compensation arrangements, creditor monitoring, the risk of bankruptcy of a company can't service its debt, fiduciary duties, and cultural norms of behavior.").

29. *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965) ("[T]he take-over scheme provides some assurance of competitive efficiency among corporate managers and thereby affords strong protection to the interests of vast numbers of small, non-controlling shareholders."); *see also* Michael S. Kang, *Shareholder Voting as Veto*, 88 IND. L.J. 1299, 1308 (2013) ("On the extreme end, company underperformance that leads to depressed share price attracts hostile bidders who might buy control of the company and fire the incumbent management when they do.").

30. *See* Black, *supra* note 8, at 832.

31. *See* Fama & Jensen, *supra* note 11, at 313.

32. *See* Black, *supra* note 8, at 832.

information that the market lacks, it is impossible to conclude that the market's judgment will always be superior."[33] The labor market also operates as a constraint on mismanagement,[34] unless the manager need not fear removal, either because directors will decline to act or because the manager need not seek future employment.[35] In addition, the independent directors on the board help to minimize agency costs imposed by officers and inside directors;[36] and private ordering, "such as pay for performance compensation agreements," helps to constrain agency costs.[37] Finally, public enforcement, such as by the Securities and Exchange Commission and the Department of Justice, can deter agency costs.[38]

Thus, as argued by Bernard S. Black, "[s]hareholder monitoring is one strand in a web of imperfect constraints on corporate managers."[39] Moreover, to some degree, these other constraints depend on shareholder monitoring. For example, the market for corporate control "is predicated on the existence of shareholder voting."[40] A low stock price, whether merely as a

---

33. *See* John C. Coffee, Jr., *Liquidity versus Control: The Institutional Investor as Corporate Monitor,* 91 COLUM. L. REV. 1277, 1330 (1991).

34. *See* Fama, *supra* note 9, at 295 ("The viability of the large corporation with diffuse security ownership is better explained in terms of a model where the primary disciplining of managers comes through managerial labor markets, both within and outside of the firm …").

35. *See* Black, *supra* note 8, at 832 ("If a company is mismanaged, it doesn't help to know that the CEO may have trouble finding another job if the board won't fire him.").

36. *See* Bebchuk, *supra* note 26, at 679 ("Such agency problems are supposed to be addressed by the board."); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits,* 57 VAND. L. REV. 1747, 1755 (2004) ("In fact, the board itself is a monitoring mechanism, revealing the hazy line separating legal controls and market or private ordering."); Fama & Jensen, *supra* note 11, at 315 ("Effective separation of top-level decision management and control means that outside directors have incentives to carry out their tasks and do not collude with managers to expropriate residual claimants.").

37. *See* Thompson & Thomas, *supra* note 36, at 1755 ("Private ordering has also provided a variety of monitoring mechanisms including auditors, analysts, and attorneys.").

38. *See* Kenneth B. Davis, Jr., *The Forgotten Derivative Suit,* 61 VAND. L. REV. 387, 416 (2008) ("Whatever the climate at the time, the criminal or administrative sanction is rooted in the corporate consciousness as a viable deterrent to serious wrongdoing.").

39. Black, *supra* note 8, at 831.

40. Richard M. Buxbaum, *The Internal Division of Powers in Corporate Governance,* 73 CALIF. L. REV. 1671, 1672 (1985).

signal of mismanagement or as an invitation for a takeover, results from "a significant number of information traders voting with their feet."[41] In addition, "[s]hareholder monitoring can also strengthen other strands in the web," including by "limit[ing] manager-sponsored antitakeover devices" and by ensuring that "poor managers are more likely to be fired."[42]

2. Shareholder Information Sharing

Shareholder information sharing seeks to combine "the partial information that insiders and shareholders possess in a world of complex investments and reconcentrated equity ownership" for the benefit of the corporation.[43] Insiders possess greater "firm-specific information,"[44] but institutional investors may also possess relevant information that the insiders lack.[45] Indeed, Jill E. Fisch and Simone M. Sepe argue that "today's institutional investors bring their knowledge of the market rather than just capital to firms"[46] and that "the partial information supplied by shareholders and insiders is likely to be 'complementary' in nature."[47] For example, "[a]sset managers like BlackRock, Vanguard, and State Street—whose combined holdings make them the largest shareholder in 40% of all U.S. listed companies—have both the resources and the incentives to develop governance sophistication and expertise."[48] Institutional investors, via their common ownership, may have "a comparative

41. *See* Bernard S. Sharfman, *A Theory of Shareholder Activism and Its Place in Corporate Law*, 82 TENN. L. REV. 791, 799 (2015); *see also* Gillan & Starks, *supra* note 20, at 58 ("Precisely because investors can sell their shares to the highest bidder, there is a market for corporate takeovers—of, in academic parlance, a 'market for corporate control,'—that gives competing management teams, as well as unaffiliated active investors, the ability to gain control of companies, thereby circumventing ineffective managers and boards.").

42. *See* Black, *supra* note 8, at 833-34.

43. *See* Fisch & Sepe, *supra* note 15, at 893.

44. *See* Rose & Sharfman, *supra* note 21, at 1038.

45. *See* Fisch & Sepe, *supra* note 15, at 879 ("Large institutional investors such as mutual funds are also increasingly engaged in information production and no longer just as 'reticent' supporters of initiatives undertaken by activist hedge funds.").

46. *Id.* at 878.

47. *Id.* at 893.

48. *See id.* at 879.

advantage relative to firm management in acquiring information that may be of value to several of their portfolio companies—such as information about macroeconomic trends, evolving legal risks, and developing market norms."[49] Hedge funds "may possess, on a discrete basis, decision-making skills, superior information about competitors, or other important decision-making inputs that erode or even eclipse the overall informational advantages of the board and managers."[50] This "transmission of information, from the activist to the board, . . . can enhance public company decision making."[51]

In sum, with the rise of institutional investors, the era of public company shareholder passivity is over. Shareholders are now active, whether as monitors, sharers of information, or both.

B. Shareholders' Levers of Influence

Shareholders have four levers to use when seeking to influence corporate policy,[52] whether they seek to monitor management in order to reduce agency costs, to share information with corporate decisionmakers, or both: (1) voting; (2) divestment; (3) litigation; and (4) voice.[53] Shareholders make

---

49. *See id.* at 891.

50. *See* Rose & Sharfman, *supra* note 21, at 1038; *see also* Fisch & Sepe, *supra* note 15, at 878–79 ("Hedge funds specialize in developing firm-specific information that they then deploy by providing governance and strategic inputs to the firms they target. In selecting targets and devising future investment strategies, the funds employ teams of dedicated analysts who pore over financial documents, engage with both the company's existing investors and competitors, and often visit potential targets to gather as much information as possible. Hedge funds also tend to specialize in certain industries or sectors of an industry, around which they build a strong expertise and develop network contacts.").

51. *See* Rose & Sharfman, *supra* note 21, at 1020.

52. *See id.* at 1021 ("[T]he debate on corporate governance has now shifted to a focus on the market for corporate influence."); Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 58 (2011) ("It is helpful at this stage to distinguish between attempts to use a sizeable minority stake in a public company as a platform to press for change and bids to obtain full voting control. The latter is a key element of the market for corporate control .... The former—offensive shareholder activism—can be thought of as underpinning what can be termed a market for corporate influence.").

53. *See* FRANK PARTNOY & ELIZABETH POLLMAN, BUSINESS ORGANIZATIONS: A CONTEMPORARY APPROACH 557 (4th ed. 2023) ("One of us refers to a shareholder rights poem of 'vote, sue, sell, and yell,' adding 'yell' . . . because of the increasing importance

strategic decisions about how best to "employ a variety of stewardship tools to improve corporate governance and disclosure at the companies they own."[54] For example, the Council of Institutional Investors' Policies on Corporate Governance explain that these "tools include casting well-informed proxy votes; engaging in dialogue with portfolio companies (including with board members, as appropriate), external managers and policymakers; filing shareholder resolutions; nominating board candidates; litigating meritorious claims; and retaining or dismissing third parties charged with assisting in carrying out these activities."[55]

These tools "encompass[] a continuum of possible responses to corporate performance and activities,"[56] both with respect to degree of shareholder activity and degree of hostility to management. With respect to degree of activity, one "could view shareholders who simply trade a company's shares as being

of shareholder voice and shareholder activism. . ."); Robert C. Bird & Stephen Kim Park, *Organic Corporate Governance*, 59 B.C. L. REV. 21, 34–35 (2018) ("For the most part, shareholders have three ways to ensure the value of their investment in the corporation: they can vote, sell, or sue. As a result of these limitations, corporate governance remains an imperfect system of reinforcing and aligning incentives of parties that have economic interests in the firm."); Gillan & Starks, *supra* note 20, at 68 ("While the hedge funds use some of the same strategies as those employed by traditional institutional activists—including shareholder proposals, direct negotiations, and use of the media—they also use other means such as proxy contests, litigation, or outright takeover."); Thompson & Thomas, *supra* note 36, at 1751–52 ("Shareholders by statute are permitted to do two things in very limited doses: voting and suing. They also have a third action that they can take: selling their shares as permitted under the general rules of property law that provide the foundation on which the corporations codes rest."); Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000) ("In the absence of a legislative mandate, that determination is not for the courts. That decision is for the stockholders to make in voting for directors, urging other stockholders to reform or oust the board, or in making individual buy-sell decisions involving Disney securities."); Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 L. & CONTEMP. PROBS. 215, 217 (1999) ("Shareholders have only a limited role: They can vote, sell, or sue."); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) ("The machinery of corporate democracy and the derivative suit are potent tools to redress the conduct of a torpid or unfaithful management.").

54. *See Policies on Corporate Governance*, COUNCIL OF INSTITUTIONAL INVS. (Mar. 11, 2025), www.cii.org/corp_gov_policies [https://perma.cc/JAS5-75QH].

55. *Id.*

56. *See* Gillan & Starks, *supra* note 20, at 55–56.

'active,'"[57] while "[a]t the other end of the continuum is the market for corporate control."[58] The middle ground includes "blockholders who purchase minority stakes with the intent of influencing managerial decision-making."[59] With respect to degree of hostility, "a threatened or actual proxy contest, takeover, lawsuit, or public campaign that is openly confrontational"[60] is at one end of the spectrum,[61] while "collaboration with corporate insiders"[62] is at the other.[63]

These tools can also be wielded either defensively or offensively. As explained by Brian R. Cheffins and John Armour, "[d]efensive shareholder activism occurs when an investor with a pre-existing stake in a company becomes dissatisfied with corporate performance or corporate governance and reacts by lobbying for changes."[64] Pension funds and mutual funds typically engage in defensive activism as so defined.[65] Offensive shareholder activism occurs when "an investor lacking a meaningful stake in a company builds up one 'offensively' on the presumption that the company is not currently maximizing shareholder returns and with the intention of agitating for change

57. *See id.* at 56.

58. *See id.*

59. *See id.*

60. *See* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1732 (2008).

61. *See id.* at 1745 (classifying the following tactics as "hostile": "mak[ing] formal shareholder proposals" with a "stated hostile intention (such as to oust the CEO)"; "publicly criticiz[ing] the company and demand[ing] change" with a "stated hostile intention"; "threaten[ing] to wage a proxy fight in order to gain board representation"; "threaten[ing] . . . . to sue the company for breach of fiduciary duty" "launch[ing] a proxy contest in order to replace the board"; "su[ing] the company;" and "intend[ing] to take control of the company, for example, with a takeover bid").

62. *See* Fisch & Sepe, *supra* note 15, at 881.

63. *See* Brav, Jiang, Partnoy & Thomas, *supra* note 60, at 1745 (classifying the following tactics as "non-hostile": "communicat[ing] with the board/management on a regular basis with the goal of enhancing shareholder value;" "seek[ing] board representation without a proxy contest or confrontation with the existing management/board;" "mak[ing] formal shareholder proposals" without a "stated hostile intention;" and "publicly criticiz[ing] the company and demand[ing] change" without a "stated hostile intention").

64. Cheffins & Armour, *supra* note 52, at 56.

65. *See id.*

to unlock shareholder value should this be necessary."[66] Hedge funds typically engage in this type of activism.[67]

These tools also differ with respect to whether they are wielded *ex ante* or *ex post*. The levers of shareholder voting, divestment, and litigation are often exercised after a management decision with which a shareholder disagrees,[68] while shareholder voice can be exercised either beforehand to influence the decision or after-the-fact to express displeasure about that decision.[69] Importantly, however, managers' anticipation of potential *ex post* usage of these shareholder engagement levers can have *ex ante* impacts on managers' behavior. As explained by Lucian Arye Bebchuk, "[a] well-designed regime would commonly induce value-enhancing changes without shareholders exercising their power to intervene. The existence of such power in the background would provide management with incentives not to adopt or maintain arrangements that serve management's interests but not shareholder value."[70]

Each of these levers of shareholder influence is summarized below, as well as the dynamic relationship among levers.

1. Shareholder Voting

The lever of shareholder voting has historically operated as a rather weak "negative veto."[71] Stephen M. Bainbridge has argued

66. *See id.*

67. *See id.* at 57.

68. *See* George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 610 (2016) ("Between managers and shareholders, much of this power struggle plays out in three key dimensions: the vote, the lawsuit, and the sale. The common feature of these strategies is that they involve an ex-post response to a perceived slight.").

69. *See id.* at 613 ("Historically, much of the governance interplay between managers and shareholders has been retrospective. . . . Yet this is changing: corporate governance tactics are increasingly shifting from the ex-post to the ex-ante. As this Part will discuss, both shareholders and directors are turning to strategies that might shape the future balance of power instead of just reacting to historical concerns.").

70. Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 839 (2005)

71. *See* Kang, *supra* note 29, at 1324; *see also* Bebchuk, *supra* note 70, at 863 ("The power to veto rule changes is very different from the power to initiate rule changes. Shareholders' veto power prevents the adoption of changes that would make shareholders worse off than they would be under the status quo. Veto power is thus a

that "[s]hareholders essentially have no power to initiate corporate action and, moreover, are entitled to approve or disapprove only a very few board actions."[72] Shareholders vote on the election of directors and fundamental corporate changes,[73] and they cast advisory say-on-pay votes to approve or disapprove the compensation of the company's executive officers.[74] However, absent an expensive and onerous proxy contest,[75] directors generally set the agenda[76] by nominating the slate of directors and proposing the corporate changes.[77] Moreover, because of disperse ownership and the limited power of each vote, shareholders may lack "the appropriate incentive at the margin to study the firm's affairs and vote intelligently"[78] and face collective action barriers. In addition, what Bebchuk calls a "bundling problem" could inhibit shareholders from voting for new directors, even those promising to "initiate a value-enhancing change," because the

---

'negative' power that precludes any worsening of the shareholders' situation. This power, however, cannot ensure that rule changes that could increase shareholder value will take place. In particular, when management disfavors a value-increasing change for self-interested reasons, shareholders' veto power will not enable them to obtain this change.").

72. Bainbridge, *supra* note 2, at 616.

73. *See* Thompson, *supra* note 53, at 216 ("The shareholder franchise is a key part of corporate law, but that does not mean that shareholders vote on very many things. Most business decisions are left entirely to the board of directors or those to whom they delegate such authority. Shareholders participate only infrequently in a limited set of decisions, including the election of directors, fundamental corporate changes, and ratification."); Easterbrook & Fischel, *supra* note 13, at 415 ("Shareholders' voting is not limited to the election of directors. State law typically requires that certain actions such as fundamental corporate changes (i.e., mergers, liquidations, sales of assets) and charter amendments be approved by a specified percentage of outstanding shares.").

74. *See* 17 C.F.R. § 240.14a-21 (2025).

75. *See* Bebchuk, *supra* note 70, at 837 ("Because challengers considering launching a contest face considerable impediments, however, contests are rare even against underperforming incumbents.").

76. *See id.* at 838 (2005) ("[S]hareholders' power to veto changes in governance arrangements cannot eliminate the distortion that results from management's monopoly over initiating such changes.").

77. *See* Kang, *supra* note 29, at 1323 ("The limited category of questions presented for a vote to shareholders, at least for publicly traded companies, effectively binds the range of issues that shareholders need to consider. Most of these decisions are presented to shareholders for a vote as a binary choice—shareholders either vote for or against candidates for the board, for or against shareholder proposals or corporate transactions, for or against the appointment of auditors, and so on.").

78. *See* Easterbrook & Fischel, *supra* note 13, at 402.

new team might be "viewed as inferior to the existing team with respect to other aspects of the firm's management."[79]

In certain circumstances, however, the shareholder vote can be more impactful. First, the aforementioned rise of institutional ownership operates to overcome the informational and collective action barriers.[80] Second, the SEC's recent universal proxy rule[81]—which requires the inclusion of dissidents' director nominees on a universal proxy if the "dissidents solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting"[82] and enables "shareholders to choose their preferred mix of directors" among candidates from different slates[83]—has begun to "encourage 'split decisions.'"[84] In addition, as explained by Michael S. Kang, "[t]his negative, retrospective model of voting" can "ease problems of collective action among voters" because it enables shareholders to express their veto based on an overlapping negative consensus rather than requiring shareholders "to identify a single affirmative preference."[85] Further, because shareholders can "use company performance as a proxy for management performance and punish management accordingly,"[86] disperse shareholders can "overcome the cost of information for important questions of negative preference."[87] Finally, the shareholder proposal process,[88] which entitles shareholders satisfying a holding requirement to include certain

79. *See* Bebchuk, *supra* note 70, at 838.

80. *See, supra* notes 14–19 and accompanying text.

81. 17 C.F.R. § 240.14a-19 (2025).

82. Universal Proxy, Exchange Act Release No. 34-93596, Investment Company Act Release No. IC-34419, 2021 WL 5545055 (Nov. 17, 2021).

83. *See id.* at 20.

84. *See* Kai Liekefett, Derek Zaba & Leonard Wood*, Fewer Campaigns, but Much to Observe from the 2025 Proxy Season,* HARV. L. SCH. F. ON CORP. GOVERNANCE (June 18, 2025), https://corpgov.law.harvard.edu/2025/06/18/fewer-campaigns-but-much-to-observe-from-the-2025-proxy-season/ [https://perma.cc/3KNT-V5XV].

85. Kang, *supra* note 29, at 1319.

86. *See id.* at 1318.

87. *See id.* at 1319.

88. 17 C.F.R. § 240.14a-8 (2025).

proposals on the proxy, "gives the body of shareholders the power to ratify that suggestion with a vote."[89]

2. Shareholder Divestment

The lever of shareholder divestment, colloquially known as the "Wall Street walk," recognizes that a shareholder who is displeased with management's decisions or whose attempts to share information with management are rebuffed has the power to simply sell its shares.[90] Shareholder divestment is a "cheaper and easier alternative than seeking to change management or reform governance," providing a "fast solution" to a "disgruntled institutional holder."[91] As a consequence, as explained by Henry G. Manne, there is presumably "a high positive correlation between corporate managerial efficiency and the market price of shares of that company."[92] At the extreme, if a sufficient block of shareholders exercises this lever, the company's stock price will be driven low enough to trigger the risk of a corporate takeover, thus facilitating the market for corporate control's check on agency costs.[93]

---

89. *See* Haan, *supra* note 25, at 290; *see also* Thompson, *supra* note 53, at 236 ("[E]very year, because of those rules, shareholders vote on hundreds of issues, from seeking annual election of all directors to not force-feeding geese.").

90. Thompson, *supra* note 53, at 217 ("The ability to sell one's shares is a core right for shareholders and one that corporate law has, for the most part, left to the market.").

91. *See* Michael Useem, Edward H. Bowman, Jennifer Myatt & Craig Irvine, *US Institutional Investors Look at Corporate Governance in the 1990s*, 11 EUR. MGMT. J. 175, 185 (1993) (reporting on interviews conducted with 100 institutional investors).

92. *See* Manne, *supra* note 29, at 112.

93. *See* Gopalan, Radhakrishnan, Institutional Stock Sales and Takeovers: The Disciplinary Role of Voting with Your Feet 35 (July 1, 2008) (unpublished manuscript), https://ssrn.com/abstract=891515 [https://perma.cc/L6B5-MTVW] ("This paper highlights the governance role of block holder stock sales and provides supportive evidence. Selling by a privately informed institutional block holder can impact the probability of takeovers. This happens because selling depressed stock prices by providing negative information about firm prospects and also disperses shareholding and increases stock liquidity."); Gillan & Starks, *supra* note 20, at 58 ("Precisely because investors can sell their shares to the highest bidder, there is a market for corporate takeovers—of, in academic parlance, a 'market for corporate control,'—that gives competing management teams, as well as unaffiliated active investors, the ability to gain control of companies, thereby circumventing ineffective managers and boards.").

Even absent this extreme, however, the exercise of the divestment lever—or a shareholder's implicit or explicit threat to do so[94]—has the potential to reduce agency costs and to share information with management. As explained by Fama and Jensen, the "unrestricted alienability of the residual claims of open corporations gives rise to an external monitoring device unique to these organizations—a stock market that specializes in pricing common stocks and transferring them at low cost."[95] If the company's stock price is affected by a shareholder's divestment, it communicates information about shareholder dissatisfaction to management and "exerts pressure to orient a corporation's decision process toward the interests of residual claimants."[96]

This lever is not always effective, however, even for shareholders of public companies whose stock is freely transferable.[97] First, in order to serve these functions, a sufficient number of shareholders must divest in order to impact the market price.[98] Second, some shareholders—most notably index funds—cannot sell their shares.[99] Third, some shareholders' holdings are

94. Kang, *supra* note 29, at 1308 ("The fear of shareholders selling off their stakes, and therefore depressing the company's value in the capital markets, motivates the board to perform well for fear of losing access to capital or even a potential takeover."); Anat R. Admati & Paul Pfleiderer, *The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2645, 2646 (2009) ("[T]he threat of exit itself can be a form of shareholder activism.").

95. Fama & Jensen, *supra* note 11, at 313.

96. *Id.*; *see also* Gillan & Starks, *supra* note 20, at 58 ("[S]tock market performance serves an inherent monitoring function that exerts pressure on managers and boards to make decisions that serve the interests of shareholders.").

97. *See* Thompson, *supra* note 53, at 217 ("Ordinarily, under corporate norms, a shareholder must obtain liquidity not from the corporation but from the market, if there is one.").

98. *See* Admati & Pfleiderer, *supra* note 94, at 2646 ("[I]f the exit of a large shareholder has a negative price impact, then the presence of a large shareholder who is potentially able to trade on private information may help discipline management and improve corporate governance.").

99. MORROW SODALI, INSTITUTIONAL INVESTOR SURVEY 2021 8 (2021), https://sodali.com/resources/insights/institutional-investor-survey-2021 [https://perma.cc/G2YG-9PB4] (reporting the results of a survey of 42 global institutional investors, managing approximately $29 trillion in assets under management) ("[T]he three largest index funds—BlackRock, Vanguard and State Street Global Advisors—now collectively cast on average about 25% of all the votes for S&P 500 companies. In fact, because index funds cannot dispose of their shares, they heavily rely on engagement with companies on ESG

"so large that the shares cannot be sold without driving the price down and suffering further losses."[100] Fourth, shareholders' exercise of the exit lever may undercut the diversification of their portfolios.[101] Finally, as modeled by Anat R. Admati and Paul Pfleiderer, the "threat of exit by an informed large shareholder" may succeed in "discouraging the manager from taking a 'bad' action" but be ineffective, or even counter-productive, if "the agency problem is one of motivating the manager to take a 'good' action."[102]

3. Shareholder Suit

A third lever of shareholder influence is the shareholder suit.[103] Under certain circumstances, shareholders can pursue direct claims under state law or the federal securities laws, asserted individually or as class actions, grounded on allegations of corporate mismanagement.[104] However, the most likely avenue

---

matters and have a fiduciary duty to exercise their votes."); Gillan & Starks, *supra* note 17, at 278 ("More importantly, for many pension funds, the fact that they index a large portion of their portfolios precludes selling underperformers.").

100. Gillan & Starks, *supra* note 17, at 278; *see also* Useem, Bowman, Myatt & Irvine, *supra* note 91, at 185 (reporting on interviews conducted with 100 institutional investors) ("Some investors argued that they are too big to sell easily and there are few companies in which they are not already invested.").

101. DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER 177 (2018) ("[D]iversified investors can't easily do the Wall Street Walk . . . it may undermine their diversification and can cause them harm as they disinvest.").

102. Admati & Pfleiderer, *supra* note 94, at 2647.

103. Thompson, *supra* note 53, at 217–18 ("In addition to voting and selling, a shareholder's ability to sue serves as a constraint on the actions of managers and is a regular part of the governance matrix.").

104. *See* Rose & Sharfman, *supra* note 21, at 1028 ("Shareholders may also legally challenge board decisions on both a derivative and direct basis, seeking either to enjoin the board decision or to obtain an award of damages for decisions already made."); Davis, *supra* note 38, at 389 & 412 (2008) (defining "Corporate Impropriety" cases as "suits seeking to impose personal liability on the board for a discrete act of corporate wrongdoing") ("For Corporate Impropriety cases, . . . the evidence suggests that securities and other class actions now perform many of the functions previously associated with the derivative suit."); Robert B. Thompson & Hillary A. Sale, *Securities Fraud As Corporate Governance: Reflections Upon Federalism*, 56 VAND. L. REV. 859, 904 (2003) ("As the federal disclosure obligations have increased, they have begun to provide the basis to enforce duty of care obligations that in the past might have been enforced under state law."); Thompson, *supra*

of redress for managers' wrongdoing is a derivative suit asserting that directors breached the fiduciary duties[105] they owe to the corporation by virtue of the "quasi-trustee and agency relationship directors have to the corporation and stockholders that they serve."[106]

The derivative suit is a "creature of equity"[107] created "solely for the purpose of preventing injustice, where it is apparent that material corporate rights would not otherwise be protected."[108] Ordinarily, if a corporation has been injured, the corporation itself is the proper party to seek redress.[109] However, "[t]he derivative action developed in equity to enable shareholders to sue in the corporation's name where those in control of the company refused to assert a claim belonging to it."[110] If certain prerequisites have been satisfied,[111] including the pre-suit demand requirement discussed below,[112] a shareholder has derivative standing to assert a claim belonging to the corporation on the corporation's behalf, with any recovery inuring to the corporation itself.[113] If a shareholder cannot "prevail without

note 53, at 218 ("Litigation rights of shareholders include derivative suits, direct suits and class actions, and inspection and other ancillary rights.").

105. Thompson, *supra* note 53, at 239 ("A claim that directors have breached their fiduciary duty in the management of the corporation usually must be brought as a derivative action.").

106. Schoon v. Smith, 953 A.2d 196, 206 (Del. 2008).

107. El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff, 152 A.3d 1248, 1256 (Del. 2016).

108. Sohland v. Baker, 141 A. 277, 282 (Del. 1927); *see also* Bert S. Prunty, Jr., *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980, 994 (1957) (tracing the history of the derivative action and concluding that "it was born and nurtured as a corrective for managerial abuse in economic units which by their nature deprived some participants of an effective voice in their administration").

109. *Id.* at 281 ("As a general rule, a cause of action belonging to a corporation can be asserted only by such corporation by a suit in the corporate name.").

110. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

111. *See Schoon*, 953 A.2d at 204 (discussing DEL. CODE ANN. tit. 8, § 327 (2008)) ("The equitable standing of a stockholder to bring a derivative action was judicially created but later restricted by a statutory requirement that a stockholder plaintiff must either have been a stockholder at the time of the transaction of which she complains or her stock must have devolved upon her thereafter by operation of law.").

112. *See infra* Part II.

113. *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981) (quoting Tooley v. Donaldson, Lufkin & Jennette, Inc., 845 A.2d 1031 (Del. 2004)) ("Derivative suits enforce corporate rights and any recovery obtained goes to the corporation.").

showing an injury to the corporation,"[114] as is often the case when a shareholder claims that the managers have breached their fiduciary duties, the suit must proceed derivatively rather than directly.[115] Derivative suits against managers are often asserted after the complained-of conduct, thus serving both a monitoring and an expressive function; however, the potential for a derivative suit may have *ex ante* impacts on managers' decisions, limiting agency costs.[116]

Not all investors have the incentive to bring even meritorious derivative claims, however. For example, a mutual fund trying to "get on, or stay on, a company's platform of funds offered to its employees" may think twice before suing the company's managers.[117]

4. Shareholder Voice

The final lever of influence, shareholder voice,[118] is used by a shareholder to share specific information or preferences with management—formally or informally, prospectively or retroactively, hostilely or collaboratively, publicly or privately. Certainly, shareholders' voting, divestment, and suit are

114. Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1266 (Del. 2021).

115. MARC I. STEINBERG, CORPORATE DIRECTOR AND OFFICER LIABLITY 84 (Oxford 2025) ("Significantly, the vast majority of shareholder lawsuits that allege duty of care and loyalty breaches must be brought as derivative, rather than direct, actions. Hence, proceedings instituted against corporate directors and officers alleging misconduct for interested director transactions, usurpation of corporate opportunities, excessive management compensation, failure to implement adequate law compliance policies, improperly competing against their companies, and the making of irrational business decisions . . . ordinarily are derivative suits.").

116. *See* Thompson & Thomas, *supra* note 36, at 1774–75 ("There are two main benefits that result from derivative suits: (1) the deterrence of corporate wrongdoing provided by their very existence, and (2) the possibility that the suits yield a positive net recovery for shareholders.").

117. WEBBER, *supra* note 101, at 169; *id.* at 171 (arguing that "[t]he only investors in the marketplace who lack these conflicts of interest are working-class shareholders: public pension and labor union funds").

118. *See* Black, *supra* note 8, at 816 ("We can see institutional power as lying along a rough continuum with passivity at one end, voice in the middle, and control at the other end.").

expressive acts,[119] but shareholder voice differs because its essence is communication from the shareholder to the managers in an effort to influence the managers' decisions. As noted by Black, shareholder voice "can reduce both shareholder and manager myopia[.]" He added: "Managers who talk to their large shareholders can worry less about shareholder impatience. And when managers talk long-term performance but don't deliver, managerial change will be more likely."[120] In addition, corporations benefit when a shareholder possessing "superior information and/or strategies" is able to speak directly to management.[121]

Shareholders express their voice via three primary means: (1) submission of shareholder proposals; (2) media publication of communications to management; and (3) dialogue with management.[122] Shareholder proposals are the most formal, while dialogue is the least formal. All three types of communication can be *ex ante*, while media publications and dialogue can also be *ex post*. Dialogue can be collaborative or hostile, while shareholder proposals and media publications are more confrontational. Shareholder proposals and media publications are public, while dialogue is private. All three types of voice, despite these different attributes, permit shareholders to share specific information or preferences with management.

Shareholder proposals are a formal mechanism whereby a shareholder can force a shareholder vote on future corporate action, often because the company is underperforming.[123] The

119. *See, e.g.*, Gillan & Starks, note 20, at 56 ("Through their initial purchases and subsequent decisions to hold or sell, shareholders are expressing their views of the corporation's performance.").

120. Black, *supra* note 8, at 833.

121. *See* Rose & Sharfman, *supra* note 21, at 1015.

122. *See* Useem, Bowman, Myatt & Irvine, *supra* note 91, at 181, 182 (reporting on interviews conducted with 100 institutional investors) ("More institutions are presently attempting to influence companies than a decade ago, whether through proxy initiatives, media campaigns, or quiet negotiations.").

123. *See* Kang, *supra* note 29, at 1328 (citing authority) ("Shareholders also sensibly submit more shareholder proposals to underperforming companies. When the company performs poorly, not only are shareholders more likely to vote for shareholder proposals, management tends to be challenged by a greater number of proposals as well, usually from shareholders who hope to change the company's direction.").

process of submitting a shareholder proposal is regulated by the Securities Exchange Act,[124] which provides a limited right to shareholders satisfying a holding requirement to include certain topics on the corporation's proxy for shareholders' up-or-down vote.[125] The act of submitting a shareholder proposal is an expression of voice;[126] and if the proposal is included on the proxy, it affords all shareholders the opportunity to influence corporate action via vote.[127] As described by Sarah C. Haan, "the shareholder proposal mechanism gives a shareholder the power to suggest course-correction to the board in a public forum, and it gives the body of shareholders the power to ratify that suggestion with a vote. This is a potentially powerful warning shot in the board's direction."[128] Although "most proposals are precatory, the mere possibility of strong shareholder support may pressure the board to respond or to negotiate an accommodation."[129]

Shareholders can also express their voice publicly in an unregulated manner by publicizing their communications to management. Examples include press releases, open letters, slide shows, or "even white papers in which they unveil their targets' shortcomings and argue for the need for corporate change."[130]

Shareholder dialogue with management is an informal means for a shareholder "to monitor corporate managers or to express a desire for change in a company's management or policies."[131] Increasingly, shareholders prefer to engage in this dialogue with

124. 17 C.F.R. § 240.14a-8 (2025).

125. *See* Haan, *supra* note 25, at 291 ("The shareholder proposal mechanism gives shareholders what amounts to a *right* to weigh in and influence management."); *see also* Kang, *supra* note 29, at 1308 ("[T]he shareholder proposal process by design offers a narrow window for shareholder-initiated action.").

126. *See* Bird & Park, *supra* note 53, at 39–40 ("The shareholder proposal mechanism is the most widely recognized and formal method for shareholders to exercise their voice in corporate decision-making. This mechanism is the primary procedural vehicle with which shareholders can shape corporate governance practices ex ante, rather than relying on their right to vote, sue, or sell their shares.").

127. *See* Haan, *supra* note 25, at 291 ("This right is exercised first by the shareholder who makes the proposal, and then by the body of shareholders who vote on it.").

128. *Id.* at 290.

129. Bird & Park, *supra* note 53, at 40.

130. THE CONFERENCE BOARD, HEDGE FUND ACTIVISM: FINDINGS AND RECOMMENDATIONS FOR CORPORATIONS AND INVESTORS 32 (2008).

131. Black, *supra* note 8, at 817.

the board itself rather than the company's executives.[132] This dialogue is usually behind-the-scenes[133] and "can take a wide range of forms, from private 'one-on-one' meetings to periodic investor days, investor relations contacts, industry conference presentations, a variety of online communication tools, as well as letters and phone calls."[134]

Of these three species of voice, investors increasingly prefer informal, private dialogue with the board, at least at the outset.[135] For example, in 2021, Morrow Sodali surveyed 42 global institutional investors managing approximately $29 trillion in

---

132. *See* MORROW SODALI, INSTITUTIONAL INVESTOR SURVEY 2021 5 (2021), https://sodali.com/resources/insights/institutional-investor-survey-2021 (reporting the results of a survey of 42 global institutional investors, managing approximately $29 trillion in assets under management) ("Investors prefer to influence boards by engaging with directors, followed by direct engagement with management. Although ranking lower, collaboration with other investors and voting against directors are also viable influencers.").

133. *See* Gillan & Starks, *supra* note 20, at 60 ("[W]hen activists negotiate behind the scenes, there may be no external sign of the activity.").

134. Fisch & Sepe, *supra* note 15, at 888; *see also* Cheffins & Armour, *supra* note 52, at 15 ("Hedge fund activists, when they opt to be proactive, will typically begin by sounding out management with a telephone call, letter, or e-mail pressing the incumbent board to make changes designed to increase shareholder value."); *see also* Useem, Bowman, Myatt & Irvine, *supra* note 91, at 177 (reporting on interviews conducted with 100 institutional investors) ("Contact with management occurs through various media, including frequent telephone conversations, visits to headquarters, and quarterly and annual company meetings for analysts and investors.").

135. *See* Joseph A. McCahery, Zacharias Sautner & Laura Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 J. OF FIN. 2905, 2911–12 (2016) (reporting results of a survey of 143 international institutional investors where 63% of respondents engaged in "discussions with top management" within the past five years and 45% engaged in "discussions with boards of directors *outside* of management"); *see also* THE CONFERENCE BOARD, *supra* note 130, at 28 ("After an initial accumulation of the firm's securities, hedge funds usually first attempt to engage management in discussions on their expectations for corporate change."); *see also* Gillan & Starks, *supra* note 20, at 57 ("[P]ublic pension funds changed their approach to activism in the early 1990s. One important change was to submit fewer proxy proposals while trying harder to initiate a dialogue with targeted companies' managements and boards."); *see also* Useem, Bowman, Myatt & Irvine, *supra* note 91, at 186 (reporting on interviews conducted with 100 institutional investors) ("The revised strategy now begins with identification of the poorest performers, followed by private contact with company executives to begin an exchange of views. The new goal has been described as 'constructive input into management decision making'.").

assets and found that engagement with the board was the investors' preferred means of exercising their influence.[136] Dialogue has several benefits over other forms of voice, including that it is unregulated, private, potentially collaborative, and potentially successful without the need to build a coalition of investors.[137]

Investors are willing, however, to resort to shareholder proposals and media campaigns in order to increase the pressure on management to engage in productive dialogue. As explained by Stuart L. Gillan and Laura T. Starks, "institutional investor activists usually first try to negotiate with management and submit a shareholder proposal only if management is not sufficiently responsive."[138] As a consequence, the submission of a shareholder proposal may provide negative information to other shareholders about "managers' reluctance to respond to the shareholder's concern."[139] Once the proposal is submitted, there is a second window for negotiation that, if successful, will be reflected in the shareholder's withdrawal of the proposal.[140] If the proposal is not withdrawn and instead proceeds to a shareholder vote, "it could provide negative information regarding management's quality, as it would indicate management's non-

---

136. MORROW SODALI, *supra* note 99, at 27.

137. *See* Useem, Bowman, Myatt & Irvine, *supra* note 91, at 186 (reporting on interviews conducted with 100 institutional investors) ("Constructive dialogue with management allows an activist institution to by-pass other institutions entirely. Unhindered by the other investors' agendas, SEC rules, or proxy policies, these funds seek to persuade rather than force management to heed its concerns."); *see also* Bainbridge, *supra* note 2, at 630 ("Once a problem firm is identified, the activist institution must take steps to address the problem. In some cases, it may suffice for the activist institution to raise the problem with management.").

138. Gillan & Starks, *supra* note 17, at 280.

139. *Id.*

140. *See* Haan, *supra* note 25, at 280 ("Settlement negotiations take place during the window of time before the proxy statement is published, typically over several months, through correspondence and phone conferences in which the shareholder proponent and the target firm haggle over details of a firm policy change. Participation is generally limited to representatives of the investor and representatives of the firm."); *see also* Gillan & Starks, *supra* note 17, at 296 ("The use of these proposals in the direct negotiation process may be reflected in the increased number of negotiated removals of such proposals from shareholder ballots, perhaps indicating the influence that activist investors have.").

responsiveness to shareholder concerns, or low quality."[141] Similarly, publicizing a communication via the media can be "a potent ally in nudging companies into work."[142]

5. Dynamic Relationship Among Levers

Each of these shareholder levers—voting, divestment, litigation, and voice—operates independently to facilitate shareholder influence. In addition, in certain circumstances, the levers interact dynamically, with the importance, strength, or exercise of one lever affecting the importance, strength, or exercise of other levers.

First, as one lever weakens in strength, the importance of the other levers increases. Most acutely, there is a trade-off between divestment on the one hand and voting and voice on the other hand.[143] If divestment is not a viable option, either because the shareholder uses an indexing strategy or because the holding is too large to do so without compounding the shareholder's losses,[144] then the shareholder will more greatly value the ability to influence corporate management through voting and voice.[145]

---

141. Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REGUL. 174, 214 (2001).

142. Useem, Bowman, Myatt & Irvine, *supra* note 91, at 186 (citing a public fund director); *see also* Cheffins & Armour, *supra* note 52, at 15 ("If a quiet approach fails to yield the desired results, an activist hedge fund can step up the pressure, perhaps by criticizing management in public or by threatening a lawsuit against the company's directors."); *see also* THE CONFERENCE BOARD, *supra* note 130, at 32 ("[H]edge funds that decide to raise their voice can catalyze the attention of the press and other market players and add pressure on targets."); *see also* Gillan & Starks, *supra* note 20, at 57 ("Besides submitting shareholder proposals, the unions have pursued innovative forms of activism, not only in terms of developing new proposals, but also by using the media to pressure management . . .").

143. *See* Coffee, *supra* note 33, at 1281 ("[A] trade-off exists and must be recognized between liquidity and control."); *see also* McCahery, Sautner & Starks, *supra* note 134, at 2915 (reporting results of a survey of 143 international institutional investors) ("[V]oice intensity is significantly negatively related to institutions' preferences for liquidity, which suggests that investors who care more about stock liquidity, and who arguably hold more liquid stocks, engage less.").

144. *See* Gillan & Starks, *supra* note 17, at 278.

145. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 33 (1970) ("The voice option is the only way in which dissatisfied customers or members can react whenever the exit option is unavailable.");

As recognized by Gillan and Starks, "[t]he constraints on selling under-performers imposed by the indexing strategy have provided an important motivation for shareholder activism by public pension funds."[146] For example, Morrow Sodali's Institutional Investor Survey 2021 finds: "[B]ecause index funds cannot dispose of their shares, they heavily rely on engagement with companies on ESG matters and have a fiduciary duty to exercise their votes."[147] If, on the other hand, "an easy, low-cost 'exit' is possible (such as that provided by the securities markets), the members will rationally have little interest in exercising a more costly 'voice.'"[148]

Second, the prospect that a shareholder might exercise the levers of voting, divestment, and litigation buttresses the strength of the shareholder's voice, making it more likely that management will be influenced by that voice. The potential that a shareholder with a significant ownership stake might vote against management on a shareholder proposal, vote against a slate of directors, or even engage in a proxy solicitation contest incentivizes management to seek to compromise with shareholders.[149] Indeed, "[c]ompanies can be very candid and

---

see also Thompson, *supra* note 53, at 222 ("Political scientist Albert Hirschman noted the relationship between exit and voice: If investors are denied market remedies, voice via voting or other political access will become more important."); Coffee, *supra* note 33, at 1288–89 ("[T]he new activism of American institutional investors can be explained as the product of 'voice' becoming less costly, because of the growth of institutional ownership of securities and the resulting increased capacity for collective action, while 'exit' has become more difficult, because institutional investors, who increasingly own large unmarketable blocks, must accept substantial price discounts in order to liquidate these blocks.").

146. Gillan & Starks, *supra* note 17, at 278.

147. MORROW SODALI, *supra* note 99, at 8.

148. Coffee, *supra* note 33, at 1288.

149. *See* Jill Fisch, Assag Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 48 (2019) ("[P]assive investors increasingly use their voting power to gain an audience with managers and directors at their portfolio companies to communicate their views and encourage changes."); *see also* THE CONFERENCE BOARD, *supra* note 142, at 32 ("The conclusion is that the most potent tool in the hands of these activists is the widespread perception by the marketplace that hedge funds do have the resources to engage in a costly proxy solicitation contest or launch a tender offer regardless of whether they will actually do it."); *see also* Black, *supra* note 8, at 848 ("Despite the importance of informal action, formal shareholder power is still essential. Compromises, after all, developed only after managers realized that they might lose if they pushed matters to a vote.").

helpful when they want your vote."[150] Likewise, as recognized by Admati and Pfleiderer, "the threat of exit may be important in making 'jawboning' activities and behind-the-scenes negotiation with management effective."[151] Finally, the prospect that a dissatisfied shareholder will file a lawsuit, likely a derivative suit, increases the likelihood that the shareholder's voice will be heard. Importantly, however, pursuant to recent SEC staff interpretations,[152] shareholders who go too far in exercising their leverage to amplify their voices risk being deemed to have the purpose or effect of "changing or influencing the control of the issuer," thus losing eligibility to report their beneficial ownership on Schedule 13G and instead being forced to comply with the more onerous Schedule 13D.[153] In particular, as interpreted by the SEC staff, it is permissible for a Schedule 13G filer to "discuss[] with

150. Useem, Bowman, Myatt & Irvine, *supra* note 91, at 177 (quoting a private pension fund manager).

151. *Supra* note 94, at 2446; *see also* McCahery, Sautner & Starks, *supra* note 134, at 2918 (reporting that "42% of the respondents believe that the threat of selling shares causes management to change behavior"); *see also* HIRSCHMAN, *supra* note 145, at 82 ("The chances for voice to function effectively as a recuperation mechanism are appreciably strengthened if voice is backed up by the *threat of exit*, whether it is made openly or whether the possibility of exit is merely well understood to be an element in the situation by all concerned.") (emphasis in original).

152. *See Consolidated Compliance & Disclosure Interpretations, Interpretations of Rule 13d-1, Questions 103.11 & 103.12*, U.S. SEC. & EXCH. COMM'N (Feb. 11, 2025), https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/consolidated-cdi#Securities_Act_Sections [https://perma.cc/88RD-KGGG].

153. 17 C.F.R. § 240.13d-1(a)-(b) (2025); *see also* THOMAS LEE HAZEN, 3 LAW SEC. REG. § 11:7 (2025) ("Filing Requirements for Acquisition of More than Five Percent of Equity Securities of an Exchange Act Reporting Company") ("Section 13(d) of the 1934 Act was enacted as part of the Williams Act to give investors and the public markets an early warning of a major stock acquisition that could be a first step in acquiring control of the target company. . . .[S]ome large investors who would otherwise be required to make a Schedule 13D filing may qualify for a shorter form Schedule 13G. . . .[Q]ualifying institutional investors, and other 'passive investors' whose intent is not to acquire or influence the control of the target company qualify to use Schedule 13G."); Arthur B. Crozier, Gabrielle E. Wolf & Jonathan L. Kovacs, *2025 Proxy Season Trends: The Pendulum Swings Toward Management,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 14, 2025), https://corpgov.law.harvard.edu/2025/03/14/2025-proxy-season-trends-the-pendulum-swings-toward-management/ [https://perma.cc/9NUU-WLUT] ("Reporting ownership positions at multiple portfolio companies on a Schedule 13D would be a logistical nightmare for index funds and other passive investors. . .").

management its views on a particular topic and 'how its views may inform its voting decisions, without more.'"[154] However, if a shareholder "explicitly or implicitly conditions its support of one or more of the issuer's director nominees at the next director election on the issuer's adoption of its recommendation," the shareholder risks losing its Schedule 13G eligibility.[155]

Third, on occasion, the exercise of one lever may decrease the strength of another lever. In particular, under Delaware precedent, shareholder approval of certain transactions via vote operates as a cleansing mechanism, thus undercutting the potential for a subsequent lawsuit to be successful.[156] For example, under *Kahn v. M & F Worldwide Corp.*, defendants can avoid the burden of proving the "entire fairness" of a cash-out merger with a controlling stockholder if the transaction "was approved by an informed vote of a majority of the minority stockholders."[157] Under *Corwin v. KKR Financial Holdings LLC*,[158] "so long as a transaction does not involve a conflicted controlling stockholder, the uncoerced, fully informed vote of disinterested stockholders will cleanse a breach of fiduciary duty by corporate directors in the event of a subsequent shareholder lawsuit,"[159] even if the vote is statutorily required.[160] The overall rationale is

154. *Consolidated Compliance & Disclosure Interpretations*, *supra* note 152 (quoting the new C&DI).

155. *Id.*

156. Easterbrook & Fischel, *supra* note 13, at 417 ("Managers submit issues for approval because legal rules encourage them to do so. Under established common law rules, shareholders' approval of a transaction decreases the probability of a successful judicial attack.").

157. 88 A.3d 635, 642–44 (Del. 2014) ("[I]n 'entire fairness' cases, the defendants may shift the burden of persuasion to the plaintiff if either (1) they show that the transaction was approved by a well-functioning committee of independent directors; or (2) they show that the transaction was approved by an informed vote of a majority of the minority stockholders. . . . We hold that business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned ab initio upon both the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders.).

158. 125 A.3d 304 (Del. 2015).

159. Ann M. Lipton, *After* Corwin*: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1979 (2019).

160. Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 210 (2019).

that "[w]hen the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them."[161] In other words, in this context, the additional shareholder lever of suit is arguably unnecessary, imposing additional costs without strengthening shareholders' monitoring and information-sharing functions.

In this Article, I discuss an undertheorized additional dynamic relationship between two levers of shareholder influence: suit and voice. In particular, I argue that, as a consequence of Delaware's interpretation of the pre-suit demand requirement for derivative suits, a shareholder's exercise of its voice weakens the potency of the shareholder's litigation lever. I argue that this prospect stifles shareholder voice, lest the shareholder lose the ability to assert a viable derivative suit if the shareholder's voice is unheeded, undercutting shareholder monitoring and information-sharing.

II. PRE-SUIT DEMAND

A shareholder who seeks to assert a derivative suit on behalf of a corporation has two mutually exclusive options at the outset: (1) make a pre-suit demand on the board and then plead with particularity that the demand was wrongfully refused or (2) plead with particularity that demand should be excused because it would have been futile.[162] These options seek to balance the competing policy rationales implicated by derivative suits. In this section, I trace the litigation path under each option, focusing on the less understood demand made pathway, as a preview to my argument in the next section that, in practice, shareholders are disincentivized from making pre-suit demand.

161. Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 313 (Del. 2015).

162. *See* DEL. CH. CT. R. 23.1(a); Drachman *ex rel.* BioDelivery Scis. Int'l, Inc. v. Cukier, C.A. No. 2019-0728-LWW, 2021 WL 5045265, at *6 (Del. Ch. Oct. 29, 2021).

A. Rationales for Pre-Suit Demand and Demand Futility

The pre-suit demand requirement is a "substantive principle of corporation law," procedurally implemented at the pleading stage by Delaware Chancery Court Rule 23.1.[163] In order to have standing to bring a derivative suit on behalf of the corporation, a stockholder must either (1) make a pre-suit demand on the board and then plead with particularity that the demand was wrongfully refused or (2) plead with particularity that demand should be excused because it would have been futile.[164] This bifurcated approach to the pre-suit demand requirement seeks to achieve a delicate balance among competing policy rationales.

On the one hand, in support of requiring pre-suit demand on the board, a shareholder's assertion of a derivative suit on behalf of the corporation conflicts with "[a] cardinal precept of the General Corporation Law of the State of Delaware," which is "that directors, rather than shareholders, manage the business and affairs of the corporation."[165] Ordinarily, "[i]f a claim belongs to the corporation, it is the corporation, acting through its board of directors, which must make the decision whether or not to assert the claim."[166] And the decision whether it is in the best interests of the corporation to pursue litigation is a complex one, involving not only the likelihood of the claim's success, but also "a balance

163. Rales v. Blasband, 634 A.2d 927, 932 (Del. 1993) ("Fed.R.Civ.P. 23.1, like Chancery Court Rule 23.1, constitutes the procedural embodiment of this substantive principle of corporation law."); *see also* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1048 (Del. 2021) ("Court of Chancery Rule 23.1 implements the substantive demand requirement at the pleading stage . . ."); *see also* Kamen v. Kemper Fin. Servs., Inc. 500 U.S. 90, 101 (1991) ("Because the contours of the demand requirement—when it is required, and when it is excused—determine *who* has the power to control corporate litigation, we have little trouble concluding that this aspect of state law relates to the allocation of governing powers within the corporation.").

164. DEL. CH. CT. R. 23.1(a); *Drachman*, 2021 WL 5045265, at *6 ("Stockholders must show adequacy, contemporaneous and continuous stock ownership, and fulfill the demand requirement—either by pleading demand futility or wrongful refusal—to have standing."); *United Food*, 262 A.3d at 1048 ("To comply with Rule 23.1, the plaintiff must meet "stringent requirements of factual particularity that differ substantially from . . . permissive notice pleadings."").

165. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (citing DEL. CODE ANN. tit. 8 § 141(a) (1984)).

166. Grimes v. Donald, 673 A.2d 1207, 1215 (Del. 1996).

of many factors ethical, commercial, promotional, public relations, employee relations, fiscal as well as legal."[167] Indeed, "[i]t is entirely possible that an independent and disinterested board, exercising its impartial business judgment, could decide that it is not in the corporation's best interest to spend the time and money to pursue a claim that is likely to succeed."[168] Thus, "[b]y its very nature the derivative action impinges on the managerial freedom of directors."[169]

In addition, requiring a shareholder to make a pre-suit demand "affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur."[170] Thus, the pre-suit demand requirement "invokes a species of alternative dispute resolution procedure which might avoid litigation altogether."[171]

Finally, the pre-suit demand requirement can operate to filter out frivolous litigation.[172] Otherwise, the derivative action, which was "created to benefit the corporation," could instead "produce the opposite, unintended result,"[173] by taxing the corporation's resources. In addition, even if the suit results in a monetary recovery for the corporation, "a circularity problem arises when, as is often the case, the corporation's D&O insurer pays the recovery. Increases to the corporation's premium rates may offset a substantial portion of the recovery."[174]

On the other hand, in support of excusing pre-suit demand on the basis of futility, the circumstances may be "such that the directors, whether by reason of hostile interest, or guilty participation in the wrongs complained of, cannot be expected to institute a corporate suit, or where even if they did institute such a suit, it is apparent that they would not be the proper persons to

167. Zapata Corp. v. Maldonado, 430 A.2d 779, 788 (Del. 1981).

168. *United Food*, 262 A.3d at 1056.

169. *Aronson*, 473 A.2d at 812.

170. Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 730 (Del. 1988).

171. *Grimes*, 673 A.2d at 1216.

172. Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993) ("The *Aronson* test was designed, in part, with the objective of preventing strike suits by requiring derivative plaintiffs to make a threshold showing, through the allegation of particularized facts, that their claims have some merit.").

173. *Zapata*, 430 A.2d at 787.

174. Davis, *supra* note 38, at 412.

conduct the litigation incident thereto."[175] Indeed, "[d]erivative suits have been used most frequently as a means of redressing harm to a corporation allegedly resulting from misconduct by its directors,"[176] suggesting that the directors may not be best-suited to decide whether the corporation should bring the suit. Moreover, even if the directors receiving the demand are not targets of the litigation,[177] they may be "subject to potentially subtle influences and pressures"[178] and a "'there but for the grace of God go I' empathy."[179]

Derivative suits also arguably deter corporate misconduct, not only at the corporations on whose behalf the suits are brought but also at other corporations.[180] Although the deterrent effect of derivative litigation is difficult to quantify,[181] "the probability of detection of corporate wrongdoing is greater when private plaintiffs are able to pursue such actions."[182] In addition, derivative suits often result in nonmonetary relief for the benefit of the corporation,[183] thus limiting the circularity problem.

---

175. Sohland v. Baker, 141 A. 277, 281–82 (Del. 1927).

176. *Rales*, 634 A.2d at 933.

177. *See* Aronson v. Lewis, 473 A.2d 805, 815 n.8 (Del. 1984) (recognizing "the structural bias common to corporate boards throughout America, as well as the other unseen socialization processes cutting against independent discussion and decisionmaking in the boardroom").

178. La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co., C.A. No.5682-VCL, 2011 WL 773316, at *7 (Del. Ch. Mar. 4, 2011).

179. Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981).

180. John C. Coffee, Jr., *New Myths and Old Realities: The American Law Institute Faces the Derivative Action*, 48 BUS. L. 1407, 1428 (1993) ("[A] successful derivative action is likely to produce a positive externality: it will deter misconduct at other corporations.").

181. Davis, *supra* note 38, at 444 ("Attempts to measure directly the deterrent effects of derivative suits necessarily will be speculative. It is the classic challenge of proving a negative.").

182. Thompson & Thomas, *supra* note 36, at 1775.

183. *Id.* at 1779 (Table 14) (reviewing all Court of Chancery cases filed in 1999 and 2000) (identifying nonmonetary relief granted in individual derivative cases as including rescission of a purchase agreement, cancellation of $23 million in executive compensation, a corporate governance chance, additional disclosure, and inspection); Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1754 (2010) ("[C]orporate governance reform has moved into the courtroom. . . . In these settlements, corporations agree to reform their corporate governance practices, from the number of independent directors on their boards to the method by which they compensate their top executives.").

Finally, in support of excusing pre-suit demand, derivative suits can provide a public benefit by affording clarity on applicable legal standards.[184] As suggested by Kenneth B. Davis, Jr., "[t]here is no field manual, code of conduct, formal training, or licensing body to spell out what directors ought to do in a particular situation."[185] Rather, derivative suits serve this function because "the courts are (subject to the legislature) the definitive author of the director's formal legal obligations."[186]

The bifurcated options of pre-suit demand and demand futility seek to balance these competing policies. As explained by the Delaware Supreme Court, these two pathways "are designed to strike a balance between a shareholder's claim of right to assert a derivative claim and a board of directors' duty to decide whether to invest the resources of the corporation in pursuit of the shareholder's claim of corporate wrong."[187]

B. *Delaware's Approach to Pre-Suit Demand and Demand Futility*

A shareholder seeking to assert a derivative suit on behalf of the corporation has two "mutually exclusive" options at the outset.[188] First, the shareholder can forego pre-suit demand and attempt to plead with particularity that demand would have been

---

184. Davis, *supra* note 38, at 436 ("[D]erivative suits grounded on corporate impropriety continue to be a fundamental source of governing legal principles.").

185. *Id.* at 437.

186. *Id.*

187. Levine v. Smith, 591 A.2d 194, 200 (Del. 1991); *see also* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1049 (Del. 2021) ("Thus, the demand-futility analysis provides an important doctrinal check that ensures the board is not improperly deprived of its decision-making authority, while at the same time leaving a path for stockholders to file a derivative action where there is reason to doubt that the board could bring its impartial business judgment to bear on a litigation demand."); Brehm v. Eisner, 746 A.2d 244, 255 (Del. 2000) ("The rationale of Rule 23.1 is two-fold. On the one hand, it would allow a plaintiff to proceed with discovery and trial if the plaintiff complies with this rule and can articulate a reasonable basis to be entrusted with a claim that belongs to the corporation. On the other hand, the rule does not permit a stockholder to cause the corporation to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinions or speculation.").

188. Solak *ex rel.* Ultragenyx Pharm. Inc. v. Welch, No. CV 2018-0810-KSJM, 2019 WL 5588877, at *1 (Del. Ch. Oct. 30, 2019), *aff'd*, 228 A.3d 690 (Del. 2020).

futile.[189] Second, the shareholder can make a pre-suit demand, and if the demand is rejected, attempt to plead with particularity that the demand was wrongfully refused.[190] If the shareholder elects to make a pre-suit demand, any potential claim of demand futility is "moot."[191] Thus, at the outset, the shareholder must make a "strategic decision" about which of these two pathways to follow.[192] In other words, "a stockholder is not permitted to have his cake and litigate it, too."[193]

Regardless of the pathway that a shareholder elects, "the business judgment rule is of paramount significance."[194] As explained by the Delaware Supreme Court, "[i]t comes into play in several ways—in addressing a demand, in the determination of demand futility, in efforts by independent disinterested directors to dismiss the action as inimical to the corporation's best interests, and generally, as a defense to the merits of the suit."[195] The business judgment rule, which "operates as a judicial acknowledgement of a board of directors' managerial prerogatives,"[196] is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[197] In order to invoke the presumption, the directors must have made a business decision, even if it was a decision to refrain from acting.[198] If the business

189. *See supra* note 164.

190. *Id.*

191. Spiegel v. Buntrock, 571 A.2d 767, 775 (Del. 1990); Stotland v. GAF Corp., 469 A.2d 421, 422 (Del. 1983).

192. FLI Deep Marine LLC v. McKim, C.A. No. 4138-VCN, 2009 WL 1204363, at *3 (Del. Ch. Apr. 21, 2009) ("The Plaintiffs ask the Court to undo the consequences of their demand; this Court will not part ways with established Delaware law to grant the Plaintiffs relief from a strategic decision they now regret."); *see also Spiegel*, 571 A.2d at 775 n.17 (discussing *Stotland*, 469 A.2d 421) ("We recognize this reaffirmation of our decision in *Stotland* requires a shareholder to make an election between filing a demand and filing a derivative action without a demand.").

193. Dahle *ex rel.* R.R. Donnelley & Sons Co. v. Pope, C.A No. 2019-0136-SG, 2020 WL 504982, at *6 (Del. Ch. Jan. 31, 2020).

194. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

195. *Id.*

196. *Spiegel*, 571 A.2d at 774.

197. *Aronson*, 473 A.2d at 812.

198. *Id.* at 813 ("[I]t should be noted that the business judgment rule operates only in the context of director action. Technically speaking, it has no role where directors have

judgment rule is invoked, then the challenged decision will be insulated from second-guessing unless the directors were "interested or lack[ed] independence relative to the decision;" did "not act in good faith;" "act[ed] in a manner that cannot be attributed to a rational business purpose;" or "reach[ed] their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available."[199] "[W]here a stockholder rebuts the business judgment standard—for example, by establishing that at least half of the directors who approved a business decision are not independent or disinterested—the Court reviews the directors' decision under the entire fairness standard."[200]

Below, I review each of these pathways, including the role of the business judgment rule therein. Because the demand futility pathway is oft-litigated, while the demand made pathway is less understood, I provide a more expansive review of the demand made pathway.[201]

1. Demand Futility Pathway

When a shareholder elects to forego demand, the "litigation follows a familiar path."[202] First, the shareholder's complaint attempts to plead with particularity that pre-suit demand would have been futile.[203] Notably, the plaintiff must meet this pleading standard without the benefit of discovery, although a books and

either abdicated their functions, or absent a conscious decision, failed to act. But it also follows that a conscious decision to refrain from acting may nonetheless be a valid exercise of business judgment and enjoy the protections of the rule.").

199. Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000).

200. Calma *ex rel.* Citrix Sys., Inc. v. Templeton, 114 A.3d 563, 577 (Del. Ch. 2015).

201. Note that most of the Delaware Supreme Court cases cited in this section were overruled, in part, on other grounds. *See Brehm*, 746 A.2d at 254 ("To the extent *Aronson* and its progeny contain dicta expressing or suggesting an abuse of discretion scope of review, that language is overruled. We now proceed to decide *de novo* whether the Complaint was properly dismissed for failure to set forth particularized facts to support the plaintiffs' claim that demand is excused."). That overruling does not affect the authority of these cases for the propositions cited herein, and thus that subsequent history is omitted hereinafter.

202. Collins J. Seitz, Jr. & S. Michael Sirkin, *The Demand Review Committee: How It Works, and How It Could Work Better*, 73 BUS. L. 305, 305 (2018).

203. *See* DEL. CH. CT. R. 23.1(a).

records request under Section 220 of the Delaware General Corporation Law may enable the shareholder to gather facts to support demand futility.[204]

Second, the defendants move to dismiss the suit under Court of Chancery Rule 23.1 for failure to make a pre-suit demand.[205] The corporation on whose behalf the suit is asserted,[206] as well as any defendant,[207] has standing to file a motion to dismiss on this basis.

Next, the court assesses whether the plaintiff has pleaded with particularity that demand should be excused as futile.[208] As explained by the Delaware Supreme Court, "[t]he purpose of the demand-futility analysis is to assess whether the board should be deprived of its decision-making authority because there is reason to doubt that the directors would be able to bring their impartial business judgment to bear on a litigation demand."[209] When scrutinizing the complaint to determine whether the plaintiff has pleaded demand futility with particularity, the court asks "the following three questions on a director-by-director basis:[210]

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;

204. Rales v. Blasband, 634 A.2d 927, 934 n.10 (Del. 1993) ("Although derivative plaintiffs may believe it is difficult to meet the particularization requirement of *Aronson* because they are not entitled to discovery to assist their compliance with Rule 23.1, . . . they have many avenues available to obtain information bearing on the subject of their claims. . . . In addition, a stockholder who has met the procedural requirements and has shown a specific proper purpose may use the summary procedure embodied in 8 Del.C. § 220 to investigate the possibility of corporate wrongdoing.") (citation omitted).

205. *See* Seitz & Sirkin, *supra* note 202, at 305.

206. Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 732 (Del. 1988) ("[T]he procedural settings in *Aronson* and its progeny involve motions to dismiss for failure to make demand brought by the corporations on whose behalf the derivative actions were asserted.").

207. *Id.* at 727 ("[T]hird parties [other than the corporation on whose behalf the derivative action is asserted] do have standing to assert demand related defenses.").

208. *E.g.*, United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021).

209. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021).

210. *Id.*

> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.[211]

When answering each question, the court assesses whether the complaint raises at least "reasonable doubt" in support of demand futility.[212] This "reasonable doubt standard in conjunction with the particularity requirement of Rule 23.1 strikes the essential balance between avoiding abuse of the derivative action and forcing a plaintiff to plead evidence without the benefit of discovery."[213]

"If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile."[214] If the board members have differential voting power, or if the corporation's charter appoints a standing demand review committee, that mathematical formula is likely revised from half of the "members of the demand board" to half of the "voting power"[215] of the decisions makers on demand.[216]

---

211. *Id.*

212. *Id.* ("Finally, because the three-part test is consistent with and enhances *Aronson*, *Rales*, and their progeny, the Court need not overrule *Aronson* to adopt this refined test, and cases properly construing *Aronson*, *Rales*, and their progeny remain good law."); *id.* at 1061 ("Like the Court of Chancery below, we hold that Tri-State failed to raise a reasonable doubt that either Thiel, Hastings, or Bowles was beholden to Zuckerberg.").

213. Pogostin v. Rice, 480 A.2d 619, 625 (Del. 1984).

214. *United Food*, 262 A.3d at 1059.

215. *See* Robert B. Greco, *A Corporate Governance Solution to the Inefficiencies of Entire Fairness*, 79 BUS. L. 993, 1025 (2024) ("Despite the novelty of the question, *Marchand*'s analysis of demand futility based on director voting power is unsurprising and consistent with the DGCL."); *id.* (noting "the unusual structure of Blue Bell's board" and stating that "the complaint needed to allege particularized facts raising a reasonable doubt that directors holding eight of the 15 votes could have impartially considered a demand." (discussing Marchand v. Barnhill, 212 A.3d 805, 816 (Del. 2019))).

216. *See* Greco, *supra* note 215, at 1028–29 (advocating that corporations adopt "Derivative Authority Provisions" in their charters to "create a standing demand review committee") ("Where only specified directors are vested with authority over derivative

When answering the first question, the court considers whether, as pleaded with particularity, the director received "a personal financial benefit from the challenged transaction which is not equally shared by the stockholders."[217] The Delaware Supreme Court has said that, "[i]n such circumstances, a director cannot be expected to exercise his or her independent business judgment without being influenced by the adverse personal consequences resulting from the decision."[218]

When answering the second question, the court considers whether, as pleaded with particularity, the director faces a substantial likelihood of liability. As a result, a merits inquiry is front-loaded into the demand futility analysis, albeit based on the allegations pleaded with particularity in the complaint and examined through the prism of "reasonable doubt."[219] Claims protected by the business judgment rule and "[e]xculpated claims do not satisfy that standard because they do not expose directors to a substantial likelihood of liability."[220]

When answering the third question, the court considers whether, as pleaded with particularity, a director lacks independence from someone whose decision-making ability would be cast into doubt under the first or second question. The inquiry focuses on whether, in light of the director's ties to this other person, the director can nonetheless "make an impartial decision."[221] A shareholder seeking to plead that a director is "not independent must satisfy a materiality standard,"[222] pleading with particularity that the director is "beholden" or so under this other person's "influence that their discretion would be sterilized."[223] In other words, "[t]he plaintiff must plead that 'the director in question had ties to the person whose proposal or actions he or

litigation demands, it follows that only the directors so empowered should be considered for purposes of demand futility.").

217. *Pogostin*, 480 A.2d at 624.

218. Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993).

219. *See United Food*, 262 A.3d at 1057 ("[T]he second prong requires particularized allegations raising a reasonable doubt that a majority of the demand board is subject to a sterilizing influence because directors face a substantial likelihood of liability for engaging in the conduct that the derivative claim challenges.").

220. *Id.* at 1040.

221. *Rales*, 634 A.2d at 936.

222. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 649 (Del. 2014).

223. *Rales*, 634 A.2d at 936.

she is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties.'"[224]

After performing this director-by-director inquiry, if the court determines that the plaintiff has failed to plead with particularity that demand would have been futile, the court dismisses the complaint for failure to comply with the pre-suit demand requirement.[225] At that point, the shareholder could make a demand and seek to proceed via the demand made pathway.[226] However, because the likelihood of success via the onerous demand made pathway is remote,[227] shareholders may be less inclined to pursue the litigation further.

If the litigation instead proceeds, the board often elects to appoint a "special litigation committee" (SLC)[228] to determine whether the derivative suit is in the "best interests" of the corporation.[229] If the SLC determines that the suit is not in the best interests of the corporation, the "committee may cause its corporation to file a pretrial motion to dismiss in the Court of Chancery."[230] Although the common wisdom "is that the SLC nearly always recommends dismissal,"[231] Minor Myers has compiled data showing that "[o]ver forty percent of the time the SLC either settled or pursued one or more claims against one or more defendants."[232] If such a motion to dismiss is filed, the court

224. *United Food*, 262 A.3d at 1060–61 (quoting *Kahn*, 88 A.3d at 649).

225. DEL. CH. CT. R. 23.1(a).

226. La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co. Inc., C.A. No. 5682-VCL, 2011 WL 773316, at *4 (Del. Ch. Mar. 4, 2011) ("Delaware precedents establish that a stockholder plaintiff who filed a demand-excused case and had its complaint dismissed under Rule 23.1 can subsequently make a litigation demand, then use Section 220 to explore whether the demand was wrongfully refused.").

227. *See infra* Part II.B.2.

228. Erickson, *supra* note 183, at 1785 (analyzing federal derivative litigation) ("My study found that a relatively high number of plaintiff corporations formed an SLC, but that few of these SLCs issued a report and even fewer cases were dismissed on the basis of such a report.").

229. *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 788 (Del. 1981).

230. *Id.*

231. Davis, *supra* note 38, at 402.

232. Minor Myers, *The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation*, 84 IND. L.J. 1309, 1320 (2009) (compiling data on 106 SLCs formed to manage derivative litigation from 1993 until 2006, with the data drawn from SEC

proceeds to the two-step inquiry detailed in *Zapata Corp. v. Maldonado*.[233] Of note, unlike in the context of Rule 23.1 motions to dismiss, discovery is available during the litigation of motions to dismiss on the basis of a SLC recommendation.[234]

Under the first step of the *Zapata* analysis, the court examines "the independence and good faith of the committee and the bases supporting its conclusions."[235] The corporation bears the "burden of proving independence, good faith and a reasonable investigation, rather than presuming independence, good faith and reasonableness."[236] If, after this examination, "the Court determines either that the committee is not independent or has not shown reasonable bases for its conclusions, or, if the Court is not satisfied for other reasons relating to the process, including but not limited to the good faith of the committee,"[237] then the court denies the corporation's motion to dismiss. Otherwise, the court proceeds to the second step.

Under the second step of the *Zapata* analysis, "[t]he Court should determine, applying its own independent business judgment, whether the motion should be granted."[238] As explained by the Delaware Supreme Court, this step is "the essential key in striking the balance between legitimate corporate claims as expressed in a derivative stockholder suit and a corporation's best interests as expressed by an independent investigating committee."[239] If the court agrees with the SLC, the court dismisses the suit. If not, the court denies the motion to dismiss, and the litigation proceeds.

---

disclosures) ("As the data show, SLCs do not invariably move to dismiss derivative litigation.").

233. *See Zapata*, 430 A.2d at 788–89.

234. Levine v. Smith, 591 A.2d 194, 209 (Del. 1991) ("The rationale for allowing discovery in a demand excused-*Zapata* context has no application in the case of either demand refused or demand excused, absent the *Zapata* context.").

235. *Zapata*, 430 A.2d at 788.

236. *Id.*

237. *Id.* at 789.

238. *Id.*

239. *Id.*

2. Demand Made Pathway

When a shareholder elects to make a pre-suit demand on the board, the pathway is less familiar than the demand futility pathway. Indeed, the parties themselves are sometimes confused, attempting to apply the inapplicable demand futility standard.[240] The board (or a board committee to whom the decision is delegated) has three options upon receipt of the pre-suit demand: (1) accept the demand; (2) reject the demand; or (3) ignore the demand. Usually, the board rejects the demand.[241] Below, I discuss the implications of each of these options in a subsequent suit. In addition, I discuss a unique scenario whereby the board's conduct in response to the pre-suit demand can support a separate liability claim (other than the one demanded).

The Board Accepts the Demand. If the board accepts the pre-suit demand, then the directors, on behalf of the corporation, "take over the litigation"[242] and "control the proceedings."[243] The board's decision to do so "ends the shareholder's control of the suit."[244]

The Board Rejects the Demand. If the board rejects the demand, then that decision is subject to the business judgment rule analysis.[245] Accordingly, in order for the shareholder to proceed with the derivative suit, the shareholder must plead with

240. *E.g.*, Drachman *ex rel.* BioDelivery Scis. Int'l, Inc. v. Cukier, C.A. No. 2019-0728-LWW, 2021 WL 5045265, at *3 (Del. Ch. Oct. 29, 2021) ("Because neither party addressed the wrongful refusal standard in their briefing despite the plaintiffs' Demand, I requested supplemental briefing on the topic.").

241. *See* La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co. Inc., C.A. No. 5682-VCL, 2011 WL 773316, at *7 (Del. Ch. Mar. 4, 2011) ("It is only if the directors refuse the litigation demand, as typically happens, that the subsequent litigation paths diverge.").

242. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 101 (1991).

243. Grimes v. Donald, 673 A.2d 1207, 1216 (Del. 1996) ("[I]f litigation is beneficial, the corporation can control the proceedings.").

244. *Kamen*, 500 U.S. at 101.

245. Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) ("[W]here demand on a board has been made and refused, we apply the business judgment rule in reviewing the board's refusal to act pursuant to a stockholder's demand. Unless the business judgment rule does not protect the refusal to sue, the shareholder lacks the legal managerial power to continue the derivative action, since that power is terminated by the refusal."); Zapata Corp. v. Maldonado, 430 A.2d 779, 784 n.10 (Del. 1981).

particularity "reasonable doubt"[246] that the board's rejection of the demand was "wrongful" so as to overcome the business judgment rule's protection.[247] Moreover, the Delaware Supreme Court held in *Spiegel v. Buntrock* that, "[b]y making a demand, a stockholder tacitly acknowledges the absence of facts to support a finding of futility."[248] In particular, "[b]y electing to make a demand, a shareholder tacitly concedes the independence of a majority of the board to respond."[249] Thus, when analyzing whether the board's refusal qualified as wrongful, "the only issues to be examined are the good faith and reasonableness of its investigation."[250] There is a narrow caveat to the plaintiff's concession of independence, however: it only applies to the board's composition at the time of the demand.[251] The plaintiff, by making the demand, does not prospectively concede that the board "in fact acted independently, disinterestedly or with due care in response to the demand."[252]

In sum, based on *Spiegel* and its progeny, to prevail against a motion to dismiss in a post-demand refusal case, the shareholder must plead with particularity sufficient facts to raise reasonable doubt that the board's refusal was wrongful. The shareholder has three options to do so: (1) the board's investigation was not reasonable; (2) the board's investigation was not performed in good faith; or (3) the board did not, in fact, act independently when considering the demand, despite the shareholder's tacit concession that a majority of the demand board was independent.

Notably, the shareholder must satisfy this pleading burden without the benefit of discovery,[253] although the shareholder may

246. Levine v. Smith, 591 A.2d 194, 211 (Del. 1991) (reaffirming the "requirement of well-pleaded allegations of fact which create a reasonable doubt that a board of directors' decision is protected by the business judgment rule.").

247. *Zapata Corp.*, 430 A.2d at 784 ("Consistent with the purpose of requiring a demand, a board decision to cause a derivative suit to be dismissed as detrimental to the company, after demand has been made and refused, will be respected unless it was wrongful.").

248. Spiegel v. Buntrock, 571 A.2d 767, 775 (Del. 1990).

249. *Id.* at 777.

250. *Id.*

251. *See* Grimes v. Donald, 673 A.2d 1207, 1219 (Del. 1996).

252. *Id.* at 1219.

253. *See* Scattered Corp. v. Chi. Stock Exch., 701 A.2d 70, 77 (Del. 1997), *as modified on denial of reh'g* (Oct. 22, 1997) ("The law in Delaware is settled that plaintiffs in a derivative suit are not entitled to discovery to assist their compliance with the particularized

use a Section 220 books and records request to gather information in support of the board's wrongful refusal.[254] In addition, the contents of demand refusal letter itself are given weight by courts. Occasionally, wrongfulness "may be clear on the face of the refusal,"[255] such as a refusal letter than disclaims any investigation into the contents of the shareholder's demand. More often, however, the board's self-serving statements about its investigation in the demand refusal letter benefit the defendants because the court presumes the statements therein "to be true absent a particularized allegation rebutting" them.[256]

In order to plead that the board's investigation was not reasonable and thus that the demand refusal was wrongful, the plaintiff must plead that the board acted with "gross negligence."[257] The focus of the inquiry is "business judgment rule's requirement of procedural due care."[258] There is "no prescribed procedure that a board must follow[.]"[259] Rather, "the demand-refusal analysis examines whether the Board was well-informed when it considered the litigation demand."[260] Accordingly, "a stockholder's criticisms regarding the types of

pleading requirement of Rule 23.1 in a case of demand refusal. A plaintiff's standing to sue in a derivative suit, whether based on demand-refused or demand-excused, must be determined on the basis of the well-pleaded allegations of the complaint.").

254. *See* La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co., C.A. No. 5682-VCL, 2011 WL 773316, at *7 (Del. Ch. Mar. 4, 2011) ("The highly deferential standard for reviewing a demand-refusal decision makes it critical that an accountability mechanism exist in the form of a limited right to information under Section 220."); Grimes v. DSC Commc'ns Corp., 724 A.2d 561, 566 (Del. Ch. 1998) (holding that it is a "proper purpose" to seek "record of the activities of the Special Committee in order to assess whether that committee acted independently and with due care in rejecting his demand").

255. *Grimes*, 673 A.2d at 1219 n.27 (Del. 1996).

256. *Scattered Corp.*, 701 A.2d at 76 n.24 (Del. 1997); *see, e.g.*, Mount Moriah Cemetery *ex rel.* Dun & Bradstreet Corp. v. Moritz, Civ.A. No. 11431, 1991 WL 50149, at *4 (Del. Ch. Apr. 4, 1991), *aff'd*, 1991 WL 165558 (Del. Aug. 12, 1991) ("[T]he letter from counsel to the Special Committee that was attached to the complaint states that there was a 'full discussion' of the Special Committee's Report. . . . Although plaintiff may not agree with this description, there is nothing in its complaint to contradict it.").

257. Espinoza *ex rel.* JPMorgan Chase & Co. v. Dimon, 124 A.3d 33, 36 (Del. 2015).

258. Levine v. Smith, 591 A.2d 194, 213 (Del. 1991).

259. *Id.* at 214.

260. City of Tamarac Firefighters' Pension Tr. Fund v. Corvi, C.A. No. 2017-0341-KSJM, 2019 WL 549938, at *10 (Del. Ch. Feb. 12, 2019); *see also* Friedman v. Maffei, C.A. No. 11105-VCMR, 2016 WL 1555331, at *10 (Del. Ch. Apr. 13, 2016).

documents reviewed or the persons interviewed in connection with an investigation do not rise to the level of gross negligence, because those choices are ones on which reasonable minds may differ."[261] Rather, "[t]he court considers whether the plaintiff has pleaded with particularity that the board failed to investigate or pursued a process so inadequate that it may reasonably infer gross negligence."[262] In addition, under Section 141(e) of the Delaware General Corporation Law,[263] the board is entitled to rely on counsel "to conduct the investigation and provide its advice."[264]

In order to plead that the board's investigation was not performed in good faith and thus that the demand refusal was wrongful, the shareholder must plead that "the directors must have acted with scienter, *i.e.*, with a motive to harm, or with indifference to harm that will necessarily result from the challenged decision—here, that decision being rejection of the Plaintiff's demand."[265] One means of doing so is to "plead facts that show a board decision so inexplicable that a court may reasonably infer that the directors must have been acting for a purpose unaligned with the best interest of the corporation; that is, in bad

261. Belendiuk v. Carrión, Civil Action No. 9026-ML, 2014 WL 3589500, at *6 (Del. Ch. July 22, 2014); *see also* Halpert Enters., Inc. v. Harrison, No. 07-1144-cv, 2008 WL 4585466, at *2 (2d Cir. Oct. 15, 2008) (applying Delaware law) ("An investigating board generally is under no obligation to make use of any particular investigative technique. . . . This principle is derived from the underlying norm of the business judgment rule—when making a business decision, such as whether to pursue litigation in response to a shareholder demand, a board must be free to exercise its broad discretion without excessive judicial fetters." (citation omitted)) .

262. *In re* Kraft Heinz Demand Refused Derivative S'holder Litig., C.A. No. 2022-0398-LWW, 2024 WL 3493957, at *8 (Del. Ch. July 19, 2024).

263. DEL. CODE ANN. tit. 8, § 141(e) (West 2025) ("A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.").

264. *Belendiuk*, 2014 WL 3589500, at *6; *see also In re Kraft Heinz*, 2024 WL 3493957, at *14 n.164 ("The Working Group and Board were entitled to rely on Simpson Thacher. See 8 § 141(e).").

265. Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti, C.A. No. 9714-VCG, 2015 WL 2270673, at *27 (Del. Ch. May 8, 2015), *aff'd sub nom.* Ironworkers Dist. Council of Phila. v. Andreotti, 132 A.3d 748 (Del. 2016).

faith."[266] For example, where the demand "pointed out a straightforward violation" of the vote tabulation rules and yet "the Board rejected the Demand and waited nearly a year to remedy the mistake," the court found that "the particularized allegations of the Complaint raise a reasonable doubt that the Demand was refused in good faith and satisfy Rule 23.1."[267]

In order to plead that the demand refusal was wrongful because the board did not act independently when considering the demand, the shareholder must plead facts that are not conceded by the shareholder's making of the demand.[268] These are typically facts that occur after the demand was made. The Court of Chancery provided an "extreme" hypothetical example of this scenario:

> Consider a board comprising nine independent directors and the CEO. A stockholder sends a demand that the board claw back the CEO's compensation. The board establishes a one-person special committee consisting of the CEO and empowers the committee to respond to the demand. The CEO refuses the demand. In this hypothetical, it is easy to understand why the

266. *Id.* at *26; *see also* Friedman v. Maffei, C.A. No. 11105-VCMR, 2016 WL 1555331, at *11 (Del. Ch. Apr. 13, 2016) ("The Court only considers a complaint's underlying claims for a narrow purpose—to determine whether the merits of those claims are so overwhelmingly obvious that the board's decision not to pursue them must have been made in bad faith.").

267. Drachman *ex rel.* BioDelivery Scis. Int'l, Inc. v. Cukier, C.A. No. 2019-0728-LWW, 2021 WL 5045265, at *8 (Del. Ch. Oct. 29, 2021); *see also* Thorpe v. CERBCO, Inc., 611 A.2d 5, 11 (Del. Ch. 1991) ("Even if one is required to presume the independence of a majority of the board and if one assumes that the special committee operated in good faith and reasonably, nevertheless, the circumstances alleged (the failure of the board to act on the report, the failure to disclose it to stockholders after request and the resignation of the committee members from the board), if considered to be true, do raise a reasonable doubt concerning the whole board's good faith and justify my conclusion that the requisites of Rule 23.1 have been satisfied here.").

268. *See* Bresalier *ex rel.* Duke Energy Corp. v. Good, 246 F. Supp. 3d 1044, 1053–54 (D. Del. 2017) (applying Delaware law) ("Bresalier is correct that his demand does not amount to a concession that the Board in fact acted independently. It is, however, a concession that the Board was capable of evaluating his demand in a disinterested, independent manner. Yet, inconsistent with that concession, Bresalier now contends that the same Board members' personal exposure to potential liability helps him meet his burden to show wrongful refusal of his Demand. . . . To the extent that this argument is aimed at the Board as a whole, it lacks merit, as Bresalier waived it by serving a demand on the Board." (quotation and citation omitted)).

> board's decision to delegate the litigation demand to the CEO could be grossly negligent or evidence of bad faith. A court can only reach this conclusion, however, by analyzing whether the CEO is conflicted.[269]

More likely scenarios are that the board membership changed and became conflicted between the time of making the demand and the decision on demand,[270] or that the board delegated the demand decision to a conflicted committee, whose membership was not known to the shareholder at the time that demand was made.[271]

The Board Ignores the Demand. The "shareholder must allow the board a reasonable time to investigate and respond to the claim,"[272] but the shareholder is not required to wait indefinitely if the board is ignoring the demand. Indeed, the Delaware Supreme Court has stated: "In no event may a corporation assume a position of neutrality and take no position in response to the demand."[273] Rather, the shareholder may proceed with the derivative suit if the shareholder pleads with particularity reasonable doubt that "the failure to act [was] wrongful."[274] Notably, because of the board's "abdication of its duty to investigate the demand," "the protections of the business judgment rule do not apply" to the board's ignoring of the

269. City of Tamarac Firefighters' Pension Tr. Fund v. Corvi, C.A. No. 2017-0341-KSJM, 2019 WL 549938, at *8 (Del. Ch. Feb. 12, 2019).

270. *See In re* Kraft Heinz Demand Refused Derivative S'holder Litig., C.A. No. 2022-0398-LWW, 2024 WL 3493957, at *9 (Del. Ch. July 19, 2024) ("The plaintiffs have acknowledged that the Board was qualified to respond to the demands and have not sufficiently pleaded that the Board became conflicted when its membership changed.").

271. *See Tamarac Firefighters' Pension Tr. Fund*, 2019 WL 549938, at *9 ("Accordingly, Spiegel's tacit concession rule applies only to a majority of the Board. Under *Grimes* and *Scattered III*, the Court may evaluate Plaintiff's allegations that the Special Committee and the Subcommittee members were incapable of acting disinterestedly in responding to the demands."); *see also Bresalier*, 246 F. Supp. 3d at 1054 n.7 (applying Delaware law) ("While the potential personal liability of the Board as a whole may not be asserted as a basis for finding demand was wrongfully refused, Bresalier's Demand did not waive his opportunity to contend that the members of the Committee might face potential liability. Bresalier did not know which directors were on the Committee at the time he filed his Demand.").

272. Charal Inv. Co. v. Rockefeller, Civ.A. No. 14397, 1995 WL 684869, at *3 (Del. Ch. Nov. 7, 1995).

273. Grimes v. Donald, 673 A.2d 1207, 1218 (Del. 1996).

274. Rich *ex rel.* Fuqi Int'l, Inc. v. Yu Kwai Chong, 66 A.3d 963, 976 (Del. Ch. 2013).

demand.[275] Thus, for example, where the plaintiff pleaded facts showing that he made a demand, the board had taken "at least three years" to consider it, the board "defunded the audit committee," the "audit committee resigned in protest," and there was "no foreseeable end to the investigation," the court found that the requirements of Rule 23.1 had been met and that the derivative suit could proceed.[276]

Potential for a Separate Liability Claim. On occasion, a shareholder has attempted to assert a separate claim for breach of fiduciary duty based on the directors' alleged wrongful refusal of the shareholder's demand letter.[277] However, "[w]rongful refusal is not an independent cause of action."[278] Rather, it is a means of demonstrating compliance with the pre-suit demand requirement and thus permitting the demanded suit to proceed derivatively.[279]

However, the Court of Chancery recently held that the board's receipt of a demand letter—and alleged conscious disregard of the allegations therein—may support a *Caremark* claim against the board.[280] A *Caremark* claim imposes liability on directors for, in bad faith, either "utterly fail[ing] to implement any reporting or information system or controls" or "having implemented such a system or controls, consciously fail[ing] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[281] As explained by the court, "if a plaintiff brings a clear violation to the directors' attention and they do not act, then it is reasonably conceivable that the directors' conscious inaction constitutes a breach of duty."[282] The court conceded that "[i]t would be easier to analyze

275. *See id.* at 979.

276. *See* Rich v. Chong, Civil Action No. 7616-VCG, 2013 WL 3353965, at *4 (Del. Ch. July 2, 2013) (denying Defendants' motion for reargument).

277. *E.g.*, Baron v. Siff, No. 15152, 1997 WL 666973, at *1 (Del. Ch. Oct. 17, 1997) ("Count III alleges that all six Directors purposefully and knowingly breached their fiduciary duties of care and loyalty by rejecting plaintiff's demand.").

278. *Id.* at *1 n.4.

279. *See id.* ("Plaintiff should have alleged that a demand was made and was wrongfully refused as part of the 'substantive' claims raised in Counts I and II.").

280. Garfield *ex rel.* ODP Corp. v. Allen, 277 A.3d 296 (Del. Ch. 2022).

281. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (discussing *In re* Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)).

282. *Garfield*, 277 A.3d at 305–06 (Del. Ch. 2022).

the claim if the notification came from a whistleblower, or if there were red flags internal to the corporation that put the directors on notice and resulted in their failure to act;"[283] but the court concluded that, "from an analytical perspective, . . . the source of the director's knowledge should not make a difference."[284] However, the court recognized the potential for a plaintiff to use a demand letter for strategic reasons, including the revival of a claim where the limitations period had already elapsed[285] and the expansion of potential defendants beyond those who made the original decision to the entire board.[286] Thus, the court cautioned: "In light of the policy implications that claims of this sort present, future decisions must consider carefully any attempts by plaintiffs to follow a similar path."[287]

III. COLLISION BETWEEN PRE-SUIT DEMAND REQUIREMENT AND SHAREHOLDER VOICE

As the divergent litigation pathways mapped out above demonstrate, although a shareholder theoretically faces a strategic decision about whether to make a demand on the board, the shareholder almost always rationally elects to forego demand and instead attempts to plead demand futility. Demand itself is, of course, a species of voice, which is thus stifled. I argue, however, that this effect is compounded by courts' expansive definition of pre-suit demand to include shareholder communications that, rather than asking the board to institute litigation on behalf of the corporation, instead seek corrective action to benefit the corporation and its shareholders. As a result, shareholders' communications seeking corrective action are disincentivized, depriving shareholders of the lever of voice to further their monitoring and information-sharing roles. In short, the pre-suit demand requirement and shareholder voice collide.

283. *Id.* at 340.

284. *Id.*

285. *See id.* at 338 ("A plaintiff might send a letter identifying the original wrong and demanding that the board fix it, then attempt to take advantage of that new claim to support a timely filing.").

286. *Id.* at 338–39 ("By sending a letter identifying the problem and demanding that the board fix it, the plaintiff could bring additional defendants into the mix.").

287. *Id.* at 306.

A. Disincentivizing Pre-Suit Demand

Although shareholders have the option to either plead demand futility or make a pre-suit demand, shareholders rarely elect to make a pre-suit demand[288] because the shareholder's pleading burden in demand futility cases is less onerous than the pleading burden in wrongful refusal cases. "[T]he litigation consequences of a stockholder demand—a binding concession of the board's ability to impartially consider a demand—are so harsh in the ensuing litigation that stockholders rarely choose that path."[289] In addition, although the board's decision to reject a demand resembles the SLC process in demand futility cases, they are "discrete and quite different processes not [to] be confused."[290] In a demand refusal case, the board's independence is conceded, the plaintiff bears the burden of pleading and proof, the plaintiff is denied discovery, and the court does not exercise its own business judgment about whether the suit is in the best interests of the corporation.[291] In a demand futility case where a SLC has recommended dismissal, the corporation bears the burden of proving the SLC's independence, the plaintiff is entitled to discovery, and the court exercises its own business judgment about whether the suit is in the best interests of the corporation.[292]

Consistent with shareholders' preference for the demand futility pathway, the Delaware courts have repeatedly characterized the demand made pathway as more onerous than the demand futility pathway. For example, the demand made

---

288. Erickson, *supra* note 183, at 1783 (analyzing derivative suits filed in federal court) ("Of the 149 cases not subject to a universal demand requirement, the derivative plaintiff made a demand in only 23 of the cases, or 15.4 percent."); Thompson & Thomas, *supra* note 36, at 1759 ("As a practical matter, plaintiffs never make such a demand on the board, but rather plead that a demand would be futile."); Coffee, *supra* note 180, at 1413–14 ("[T]here is a sufficient disincentive in the Delaware 'waiver' rule as to produce an entirely predictable consequence: Plaintiffs today seldom make demand in Delaware, but instead litigate the issue of whether demand was excused.").

289. Seitz & Sirkin, *supra* note 202, at 305; *see also* Dahle *ex rel.* R.R. Donnelley & Sons Co. v. Pope, C.A. No. 2019-0136-SG, 2020 WL 504982, at *1 (Del. Ch. Jan. 31, 2020) ("Because this is a daunting, often disabling, pleading burden, potential stockholder litigants often eschew demands in order to facilitate a pleading that demand should be excused.").

290. Grimes v. Donald, 673 A.2d 1207, 1216 n.13 (Del. 1996).

291. *See supra* Part II.B.2.

292. *See supra* Part II.B.1.

pathway has been described as "steeper yet"[293] than the demand futility pathway and as "the more difficult claim."[294] The decision to make a demand has been characterized as "inexplicabl[e]" and "improvident."[295] Courts have acknowledged that "[m]aking a pre-suit demand . . . carries significant downsides affecting the viability of a derivative claim."[296] Indeed, when staging litigation, courts prefer to allow "demand-futility claims to proceed ahead of demand-refused claims" in order "to allow the complaint that has the best chance of being vetted on the merits, after discovery, to proceed ahead of, and perhaps instead of, the complaint that has the best chance of never leaving the starting gate."[297]

The statistics are consistent with the shareholders' and courts' assessment that demand made cases are more likely to be dismissed under Court of Chancery Rule 23.1 than demand futility cases. In my study of the 23 cases in which the Delaware courts have reached final dispositions on the issue of wrongful refusal of demand since 1990, when the Delaware Supreme Court decided *Spiegel*,[298] 87% of demand made cases were dismissed for failure to plead wrongful refusal.[299] In other scholars' studies of Delaware courts' rulings on demand futility, between 61% and 62.5% of cases were dismissed for failure to plead demand futility.[300]

---

293. Zucker v. Hassell, C.A. No. 11625-VCG, 2016 WL 7011351, at *1 (Del. Ch. Nov. 30, 2016), *aff'd*, 165 A.3d 288 (Del. 2017).

294. Solak *ex rel.* Ultragenyx Pharm. Inc. v. Welch, C.A No. 2018-0810-KSJM, 2019 WL 5588877, at *1 (Del. Ch. Oct. 30, 2019), *aff'd*, 228 A.3d 690 (Del. 2020).

295. FLI Deep Marine LLC v. McKim, No. CIV.A. 4138-VCN, 2009 WL 1204363, at *1 & 3 (Del. Ch. Apr. 21, 2009).

296. *Solak*, 2019 WL 5588877, at *1.

297. Feuer v. Zuckerberg, C.A. No. 2019-0324-JRS, 2021 WL 4552160, at *5 (Del. Ch. Oct. 5, 2021).

298. Spiegel v. Buntrock, 571 A.2d 767 (Del. 1990).

299. *See* Appendix A.

300. Thompson & Thomas, *supra* note 36, at 1783 (reviewing all complaints filed in the Chancery Court in 1999 and 2000) (finding that the Chancery Court just ruled on demand futility in eight cases, six against public companies and two against private companies) (finding that the Court dismissed the complaint for failure to make demand in five cases, all of which were against public companies) [62.5%]; Randall S. Thomas & Kenneth J. Martin, *Litigating Challenges to Executive Pay: An Exercise in Futility?*, 79 WASH. U. L.Q. 569, 580 (2001) ("For the Delaware sample, we find that there is an increase in the percentage of these motions that plaintiffs win after *Aronson*, with a thirty-three percent success rate before that case, and a thirty-nine percent success rate after that decision.") [61%].

In sum, the more onerous pathway for demand made cases disincentivizes pre-suit demand, channeling shareholders to plead demand futility. Indeed, as recognized by John C. Coffee, Jr., "[t]he great failure of the 'demand required/demand excused' approach is that for all its rhetorical deference to the board of directors it actually minimizes the board's role in the litigation."[301] As the Honorable Collins J. Seitz, Jr. and S. Michael Sirkin have likewise noted, the effect is to "deprive independent boards of the opportunity to consider the merits of potential litigation outside the courtroom,"[302] undercutting the central rationale for the pre-suit demand requirement itself, the "salutary results of director control."[303] Moreover, as I argue below, when combined with the Delaware courts' expansive definition of pre-suit demand, this channeling effect also operates to disincentivize shareholder voice about topics other than litigation, undercutting shareholders' monitoring and information-sharing roles.

B. Defining Pre-Suit Demand

In Delaware, under the test adopted in *Yaw v. Talley*, in order for a communication to constitute a pre-suit demand, it must "specifically state: (i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf."[304] The party asserting that the communication was a pre-suit demand—usually the defendant in order to invoke the more onerous demand made pathway—bears the burden of proof.[305] As a consequence, ambiguous communications should not be held to be pre-suit demands, lest a shareholder be discouraged "from bringing potential wrongdoing to the corporation's attention in a forum

301. Coffee, *supra* note 180, at 1415.

302. Seitz & Sirkin, *supra* note 202, at 305.

303. Zucker v. Hassell, C.A No. 11625-VCG, 2016 WL 7011351, at *1 (Del. Ch. Nov. 30, 2016), *aff'd*, 165 A.3d 288 (Del. 2017); *see also* Seitz & Sirkin, *supra* note 202, at 314 ("The aggregate result is that the demand requirement is underused and falls short of its promise as a tool for promoting internal dispute resolution.").

304. Yaw v. Talley, Civ.A. No. 12882, 1994 WL 89019, at *7 (Del. Ch. Mar. 2, 1994).

305. *Id.*

other than the courtroom, for fear that his position, should he later decide to sue derivatively, would procedurally be more difficult to support."[306] Despite this placement of the burden of proof, Delaware courts have expansively applied the definition of pre-suit demand to include a wide swath of shareholder communications to boards, particularly because of the breadth of courts' interpretation of "legal action" in the third element of the pre-suit demand test.[307]

The first element is met only if the communication actually identifies the alleged wrongdoers. For example, where a communication asked the board to "'[s]eek a court order preventing the payment of any further compensation" to the corporation's former president and CEO, the court held that this element was not met because "the letter does not identify who was in the wrong."[308]

The second element is met if the communication alleges facts about the alleged wrongdoing and resultant actual injury to the corporation. Thus, where there is a factual mismatch between the communication to the board and the allegations in the complaint, the communication does not constitute a pre-suit demand.[309] Likewise, where the communication merely alleges "potential," rather than actual, wrongdoing and injury, it is not a pre-suit demand.[310] If a communication and a complaint allege the same facts about the wrongdoing and injury, the communication constitutes a pre-suit demand, even if the communication identifies different legal theories than those asserted in the complaint.[311] As explained by the Delaware Supreme Court,

306. *Id.* at *8.

307. *See infra* text accompanying notes 314–20.

308. Gatz v. Ponsoldt, No. Civ.A. 174-N, 2004 WL 3029868, at *4–5 (Del. Ch. Nov. 5, 2004).

309. *E.g.*, Seibert v. Harper & Row, Publishers, Inc., No. CIV. A. 6639, 1984 WL 21874, at *3 (Del. Ch. Dec. 5, 1984) (holding that a communication was not a pre-suit demand where "several of the claims in plaintiff's amended complaint were not addressed in the August letter and two of the four 'areas of concern' enumerated in the letter were not included as claims in this litigation.").

310. *E.g.*, Bresalier *ex rel.* Duke Energy Corp. v. Good, 246 F. Supp. 3d 1044, 1057 (D. Del. 2017) (applying Delaware law) (holding that a communication was not a pre-suit demand where it "complains of potential wrongdoing and a potential injury rather than actual wrongdoing and injury to the corporation").

311. *E.g.*, Raj & Sonal Abhyanker Fam. Tr. *ex rel.* UpCounsel, Inc. v. Blake, No. CV 2020-0521-KSJM, 2021 WL 2477025, at *8 (Del. Ch. June 17, 2021) ("Because Plaintiff's

"[p]ermitting a stockholder to demand action involving only one theory or remedy and to argue later that demand is excused as to other legal theories or remedies arising out of the same set of circumstances as set forth in the demand letter would create an undue risk of harassment."[312]

As interpreted by the Delaware courts, the third element—the statement of "the legal action the shareholder wants the board to take on the corporation's behalf"—is met if the communication demands *either* (1) litigation on behalf of the corporation *or* (2) corrective action that would benefit the corporation. For example, a demand that the "board of directors 'promptly institute suit against the responsible officers and directors to recover its damages'"[313] is a demand for litigation on behalf of the corporation.

Importantly, the Delaware courts have repeatedly held that a communication that requests corrective action to benefit the corporation—even if the communication does not request litigation—qualifies as a pre-suit demand.[314] For example, a letter that stated "that its purpose is 'to suggest that the [Board] take corrective action to address excessive director compensation as well as compensation practices and policies pertaining to directors'" was held to constitute a pre-suit demand.[315] Citing authority, the Court of Chancery rejected the shareholder's argument that, because the communication requested corrective action rather than litigation, it was not a pre-suit demand: "Delaware law does not construe the third *Yaw* criterion as

---

unjust enrichment claims arise from the subject matter of the pre-suit demands, Plaintiff is limited to claiming that the Board wrongfully refused the demands."); City of Tamarac Firefighters' Pension Tr. Fund v. Corvi, C.A. No. 2017-0341-KSJM, 2019 WL 549938, at *11 (Del. Ch. Feb. 12, 2019) ("If the waste and unjust enrichment claims arise from the same underlying facts that are the subject of the litigation demands, then the plaintiff cannot proceed without showing demand refusal.").

312. Grimes v. Donald, 673 A.2d 1207, 1220 (Del. 1996).

313. Boeing Co. v. Shrontz, Civ. A. No. 11273, 1994 WL 30542, at *1 (Del. Ch. Jan. 19, 1994).

314. *E.g.*, Dahle *ex rel.* R.R. Donnelley & Sons Co. v. Pope, C.A. No. 2019-0136-SG, 2020 WL 504982, at *6 (Del. Ch. Jan. 31, 2020), *judgment entered*, 2020 WL 796737 (Del. Ch. Feb. 17, 2020); Solak *ex rel.* Ultragenyx Pharm. Inc. v. Welch, C.A No. 2018-0810-KSJM, 2019 WL 5588877, at *7 (Del. Ch. Oct. 30, 2019), *aff'd*, 228 A.3d 690 (Del. 2020).

315. *Solak*, 2019 WL 5588877, at *2.

narrowly as Plaintiff suggests, and this Court has deemed pre-suit communications that do not expressly demand litigation sufficient to constitute pre-suit demand."[316] The Court also reasoned that the fact that the remedial measures requested in the letter "resemble therapeutic benefits commonly achieved in derivative lawsuits challenging non-employee director compensation" lent further support for its conclusion that the letter was a pre-suit demand.[317] A communication requesting corrective action does not satisfy the third element, however, if it is not asking the board, as opposed to someone else, to effectuate that corrective action;[318] if it raises a concern without requesting a specific corrective action;[319] or if it requests action to benefit the shareholder personally rather than to benefit the corporation and its shareholders.[320]

Shareholders' attempts to communicate with the board to request corrective action to benefit the corporation without triggering the demand made pathway have been unsuccessful. Courts have held that the inclusion of a disclaimer in the communication—such as "nothing contained herein shall be construed as a pre-suit demand under Delaware Chancery Rule 23.1"—is ineffective, reasoning that the "disclaimer does not obviate the Court's review of the Letter's substance for obvious reasons, namely that 'Delaware law is quite strict as to the application of Chancery Rule 23.1.'"[321] Memorably, courts have

316. *Id.* at *5.

317. *Id.* at *7 ("Where a communication demands action that stockholders commonly achieve through derivative litigation challenging similar conduct, it is more likely that the communication will be construed as a demand for the purposes of Rule 23.1.").

318. Yaw v. Talley, No. Civ. A. 12882, 1994 WL 89019, at *8 (Del. Ch. Mar. 2, 1994) (holding that the communications were not pre-suit demands where "they do not specifically request the board to embark upon a particular course of remedial corporate action" and instead "consistently ask the other shareholders to agree to sell their shares to a third party bidder").

319. Seibert v. Harper & Row, Publishers, Inc., CIV. A. No. 6639, 1984 WL 21874, at *3 (Del. Ch. Dec. 5, 1984) (holding that a letter was not a pre-suit demand where it expressed "some opposition to the proposed Buy Back" but "its stated purpose was not to demand that specific corrective action be taken," instead asking "that counsel be given the opportunity to discuss the matter in person with the entire board of directors").

320. Khanna v. McMinn, No. Civ.A. 20545-NC, 2006 WL 1388744, at *13 (Del. Ch. May 9, 2006).

321. *Solak*, 2019 WL 5588877, at *5; *see also* Dahle *ex rel.* R.R. Donnelley & Sons Co. v. Pope, C.A No. 2019-0136-SG, 2020 WL 504982, at *1 (Del. Ch. Jan. 31, 2020).

coined shareholders' unsuccessful attempts to disclaim pre-suit demand status as the "Magritte defense," which references "a 1929 painting by surrealist artist René Magritte" that "portrays a smoking pipe, but . . . bears the caption: 'This is not a pipe.'"[322] Courts have also held ineffective a non-waiver agreement between a shareholder and the corporation, entered into prior to the shareholder's demand on the board, that the shareholder would make a demand on the board without waiving the right to plead demand futility in any subsequent litigation.[323] Courts have also rejected shareholders' attempts to preserve the demand futility pathway by asserting in the communication to the board that demand was futile.[324] Finally, courts have rejected shareholders' attempts to withdraw their pre-suit demand and proceed via the demand futility pathway,[325] although courts have recognized the potential for an exception permitting withdrawal of demand if the corporation misled a shareholder into believing that the board was disinterested and independent.[326]

C. Disincentivizing Voice

I contend that the onerous demand made pathway—combined with the expansive definition of pre-suit demand—

322. *Solak*, 2019 WL 5588877, at *4.

323. Starr Int'l Co., Inc. v. United States, 111 Fed. Cl. 459, 471 (2013), *vacated in part*, 856 F.3d 953 (Fed. Cir. 2017) (vacated on other grounds) ("Starr's September 5, 2012 agreement with AIG, in which Starr purportedly reserved 'the right to assert that demand was . . . excused,' . . . is insufficient to overcome binding black letter law.").

324. Levit *ex rel.* Boeing Co. v. Shrontz, No. CIV.A. 11273, 1992 WL 81228, at *5 (Del. Ch. Apr. 20, 1992).

325. FLI Deep Marine LLC v. McKim, C.A. No. 4138-VCN, 2009 WL 1204363, at *4 (Del. Ch. Apr. 21, 2009).

326. Busch *ex rel.* Richardson Elecs., Ltd. v. Richardson, C.A. No. 2017-0868-AGB, 2018 WL 5970776, at *12 (Del. Ch. Nov. 14, 2018) ("It would be inequitable in my view to hold Busch to the concession of independence and disinterestedness attendant to his making the Demand if it were true that the Company misled him—intentionally or not—into making the Demand where he otherwise would not have done so. . . . It is not necessary to consider this issue further, however, because the outcome of the pending motion would be the same even if the court disregarded the fact that Busch made the Demand and did not deem him to have conceded the independence of the Board.").

disincentivizes shareholder voice, undercutting shareholders' monitoring and information-sharing roles.[327]

First, because the demand made pathway is more onerous than the demand futility pathway, shareholders who wish to preserve their ability to pursue a derivative complaint are disincentivized from making a pre-suit demand.[328] This disincentive is confirmed, not only by the differential standards applied in demand futility and demand made cases,[329] but also by shareholders' actual behavior, courts' acknowledgement that the demand made pathway is more onerous, and the dismissal statistics in demand made versus demand futility cases.[330]

Second, because courts expansively interpret shareholders' communications to boards as pre-suit demands, shareholders are disincentivized from engaging in communications that risk being so construed. If a shareholder communication identifies the alleged wrongdoers, wrongdoing, and injury to the corporation and requests that the board take corrective action to benefit the corporation, the communication will likely be interpreted as a pre-suit demand, even if the shareholder does not request that the board initiate a lawsuit on behalf of the corporation.[331] A shareholder's attempt to avoid this result—via disclaimer, non-waiver agreement, assertion of demand futility in the communication, or withdrawal of the communication—will be unavailing.[332]

As a consequence, if a shareholder is concerned about corporate mismanagement, the shareholder must stifle its voice lest the shareholder sacrifice a potential derivative suit. This stifling of shareholder voice inhibits shareholders' monitoring and information-sharing functions.[333] Moreover, perversely, the

327. *See* Dahle *ex rel.* R.R. Donnelley & Sons Co. v. Pope, C.A No. 2019-0136-SG, 2020 WL 504982, at *5 n.52 (Del. Ch. Jan. 31, 2020) ("I also note that the argument is in effect an allegation that our courts have gotten the fundamental policy balance inherent in our treatment of litigation demands wrong, improvidently chilling communications that might obviate litigation out of undue respect for the interest of directors in efficient management of the entity. Such arguments to a trial judge are misplaced.").

328. *See supra* Part III.A.

329. *See supra* Part II.B.

330. *See supra* Part III.A.

331. *See supra* Part III.B.

332. *See supra* Part III.B.

333. *See supra* Parts I.A & I.B.4.

only shareholder communications stifled are those that seek corrective action to benefit the corporation and its shareholders, not communications that seek to benefit the shareholder personally, because those self-interested communications are outside the definition of pre-suit demand.[334] Accordingly, shareholder communications that seek to benefit "narrow interests rather than shareholders as a class"[335] or that seek to "extract some private benefits from management"[336] are not stifled, while shareholder communications that seek corrective action to benefit the corporation are. Thus, I contend that the Delaware "courts have gotten the fundamental policy balance inherent in [their] treatment of litigation demands wrong, improvidently chilling communications that might obviate litigation" and that might enhance directors' effectiveness as managers of the corporation.[337]

IV. REVIVING SHAREHOLDER VOICE BY REVISING PRE-SUIT DEMAND

One way to revive shareholder voice is to stop disincentivizing pre-suit demand. Options include overruling *Spiegel*'s holding that a pre-suit demand constitutes a concession of the independence of a majority of the board to respond;[338] adding the second step of the *Zapata* inquiry—whereby the court would apply "its own independent business judgment" to determine whether the litigation is in the best interests of the corporation—to the wrongful refusal litigation pathway;[339] and adopting universal demand, as under the Model Business Corporation Act.[340] Each of

334. *See supra* Part III.B.

335. Kang, *supra* note 29, at 1331.

336. Bebchuk, *supra* note 70, at 884-85.

337. *See* Dahle *ex rel.* R.R. Donnelley & Sons Co. v. Pope, C.A No. 2019-0136-SG, 2020 WL 504982, at *5 n.52 (Del. Ch. Jan. 31, 2020) ("Such arguments to a trial judge are misplaced.").

338. Spiegel v. Buntrock, 571 A.2d 767, 777 (Del. 1990).

339. Zapata Corp. v. Maldonado, 430 A.2d 779, 789 (Del. 1981).

340. Davis, *supra* note 38, at 445 (citing MODEL BUS. CORP. ACT §§ 7.42(1) & 7.44(a) (1990)) ("In 1990, the MBCA adopted a tough approach to derivative suits. Demand is required as a pre-condition to suit in all cases, and courts are required to accept the

these options would ensure that shareholder voice is no longer stifled, albeit disrupting decades of Delaware corporate law precedent and undercutting Delaware's reputation for "consistency, predictability, and nuance."[341]

A second way to revive shareholder voice is to limit the pre-suit communications that channel shareholders into the onerous demand made pathway. For example, Chief Justice Seitz and Sirkin have proposed "a private-ordering solution, in which stockholders and boards can agree, if they choose, to reserve rights on demand futility arguments while a demand review process is undertaken."[342] They argue that "[t]his would allow boards to engage with stockholders in the review process, and would replace some demand futility litigation with boardroom deliberation, thereby restoring the internal dispute resolution function to the demand requirement."[343] I contend that this solution, while elegant, would have limited effect because it would depend on boards' agreement to preserve demand futility arguments. Boards may be willing to enter into such agreements in order to further the information-sharing role of shareholder voice, but they are unlikely to do so to further the monitoring role of shareholder voice, particularly if the directors themselves are potential targets of subsequent litigation. Moreover, even if they themselves are not targets, boards may be hesitant to enter into agreements that facilitate future derivative litigation, lest other shareholders contend that the agreements themselves are a violation of the directors' fiduciary duties.

I propose instead that the Delaware courts narrow the definition of pre-suit demand. The third element of the *Yaw* pre-suit demand test currently requires only that a shareholder's communication "specifically state . . . the *legal action* the

independent directors' recommendation to dismiss the suit so long as that recommendation was made in good faith following a reasonable investigation.").

341. Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19 VA. L. & BUS. REV. 145, 151, 151 n.26 (2025); *see also* E. Norman Veasey & Michael P. Dooley, *The Role of Corporate Litigation in the Twenty-First Century*, 25 DEL. J. CORP. L. 131, 136 (2000) (comments of Chief Justice Veasey) ("I hope that whatever's done either by the Bar Association and the General Assembly or by the courts in changing the law will reflect the goal of the physician's Hippocratic Oath: first, do no harm. I would add a second: adhere to principles of gradualism.").

342. Seitz & Sirkin, *supra* note 202, at 305.

343. *Id.*

shareholder wants the board to take on the corporation's behalf."[344] I argue that this element should be revised to require that the shareholder's communication specifically state the *litigation* the shareholder wants the board to take on the corporation's behalf. This proposed revision is consistent with the Delaware Supreme Court's description of the pre-suit demand requirement as a "pre-suit demand *that the board assert the corporation's claim*"[345] and as a "*litigation* demand."[346] Under this revised definition of pre-suit demand, a shareholder communication that merely[347] demands that the board take corrective action to benefit the corporation would not constitute a pre-suit demand, contrary to the courts' current definition of pre-suit demand.[348]

This narrowed definition of pre-suit demand is consistent with the policy rationales for the demand requirement itself. Because pre-suit communications to the board identifying problems and requesting corrective action would no longer be disincentivized, corporations would have "the opportunity to address an alleged wrong without litigation."[349] Moreover, consistent with the "cardinal precept" that the directors "manage the business and affairs of the corporation,"[350] the directors would have the first opportunity to institute corrective action, rather than the courts.

This narrowed definition of pre-suit demand is also doctrinally consistent with the demand futility analysis, which inquires whether the board could impartially consider a litigation demand, not whether the board could impartially consider

344. Yaw v. Talley, Civ.A. No. 12882, 1994 WL 89019, at *7 (emphasis added).

345. Grimes v. Donald, 673 A.2d 1207, 1216 (Del. 1996) (emphasis added).

346. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1049 (Del. 2021) (emphasis added).

347. If the communication both demanded corrective action and demanded that the corporation pursue litigation to assert the corporation's claim, it would still qualify as a pre-suit litigation demand. If the communication demanded corrective action and threatened, either implicitly or explicitly, derivative litigation if the corrective action is not taken, it would not qualify as a pre-suit litigation demand.

348. *See supra* Part III.B.

349. Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 730 (Del. 1988).

350. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (citing 8 DEL. C. § 141(a)).

corrective action to benefit the corporation.[351] Thus, by requesting corrective action other than litigation, a shareholder does not "tacitly acknowledge[] the absence of facts to support a finding of futility."[352] Indeed, a reasonable shareholder could determine that a board, even if incapable of making an unconflicted decision about whether to file a lawsuit, is capable of making an unconflicted decision about whether to take other corrective action to benefit the corporation.

There is admittedly a slight risk, in light of the potential for a board's conscious disregard of red flags raised in a pre-suit demand to form the basis of a subsequent *Caremark* claim,[353] for this narrowed definition of pre-suit demand to facilitate gamesmanship. Even under the current expansive definition of pre-suit demand, the Court of Chancery has acknowledged that this risk of abuse exists,[354] but this risk is at least currently tempered by the shareholder's being forced to pursue the more onerous demand made pathway in subsequent derivative litigation based on the contents of the pre-suit communication itself. A narrowed definition of pre-suit demand would enable a shareholder both to lay the groundwork for a subsequent *Caremark* claim and to pursue derivative litigation based on the contents of the pre-suit communication under the less onerous demand futility pathway. For example, harkening back to the hypothetical scenario posed at the beginning of this Article, if the board declined to act on the shareholder's letter requesting that the board bring the unlawful transaction into compliance with export control laws, the shareholder could theoretically (1) assert a derivative claim based on the board's approval of the underlying transaction under the demand futility pathway and (2) assert a new *Caremark* claim based on the board's conscious disregard of the unlawfulness of the transaction, which was brought to the board's attention in the shareholder's letter. This risk derives, however, not from the definition of pre-suit demand, but from the potential for a shareholder's communication to the board to serve as the basis for a future *Caremark* claim. I argue that the Delaware

351. *See supra* Part II.B.1.

352. Spiegel v. Buntrock, 571 A.2d 767, 775 (Del. 1990).

353. *See supra* text accompanying notes 279–86.

354. *Id.*

courts "will be able to see through an artifice of that sort," as they do now.[355]

Delaware courts should redefine pre-suit demand as including only communications that request litigation, excluding communications that request other corrective action to benefit the corporation and its shareholders. This revised definition would encourage shareholders to exercise their voice, both as monitors and information-sharers, without, in effect, foreclosing the potential to exercise the suit lever of influence.

CONCLUSION

In this Article, I diagnose, and seek to correct, the collision between suit and voice in the modern public corporation, with the goal of reviving shareholder voice in order to further shareholders' monitoring and information-sharing roles. In particular, I argue that the Delaware courts should redefine pre-suit demand more narrowly, thus excluding shareholder communications that seek corrective action other than litigation. The risk of this Article is that, by elucidating the current collision between suit and voice, I will inadvertently further stifle shareholder voice. I hope that, instead, this Article will encourage shareholders to challenge the current dynamic, leading to a change in Delaware precedent.

355. Garfield *ex rel.* ODP Corp. v. Allen, 277 A.3d 296, 338 (Del. Ch. 2022).

APPENDIX A

	Post-*Spiegel* Delaware Cases Analyzing Whether the Board Wrongfully Refused Demand (in date order)	**Wrongfully Refused**	**Not Wrongfully Refused**
1	*Levine v. Smith*, 591 A.2d 194 (Del. 1991)		X
2	*Mount Moriah Cemetery* ex rel. *Dun & Bradstreet Corp. v. Moritz*, No. CIV.A. 11431, 1991 WL 50149 (Del. Ch. Apr. 4, 1991), *aff'd*, 599 A.2d 413 (Del. 1991)		X
3	*Thorpe v. CERBCO, Inc.*, 611 A.2d 5 (Del. Ch. 1991)	X	
4	*Boeing Co. v. Shrontz*, No. CIV.A. 11273, 1994 WL 30542 (Del. Ch. Jan. 19, 1994)		X
5	*Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049 (Del. Ch. 1996)		X
6	*Grimes v. Donald*, 673 A.2d 1207 (Del. 1996)		X
7	*Baron v. Siff*, No. 15152, 1997 WL 666973 (Del. Ch. Oct. 17, 1997)		X
8	*Scattered Corp. v. Chicago Stock Exch., Inc.*, 701 A.2d 70 (Del. 1997), *as modified on denial of reh'g* (Oct. 22, 1997)		X
9	*Rich* ex rel. *Fuqi Int'l, Inc. v. Yu Kwai Chong*, 66 A.3d 963 (Del. Ch. 2013)	X	
10	*Belendiuk v. Carrion*, No. CV 9026-ML, 2014 WL 3589500 (Del. Ch. July 22, 2014)		X
11	*Ironworkers Dist. Council of Phil. & Vicinity Ret. & Pension Plan v. Andreotti*, No. CV 9714-VCG, 2015 WL 2270673 (Del. Ch. May 8, 2015), *aff'd sub nom. Ironworkers Dist. Council of Phil. v. Andreotti*, 132 A.3d 748 (Del. 2016)		X
12	*Friedman v. Maffei*, No. CV 11105-VCMR, 2016 WL 1555331 (Del. Ch. Apr. 13, 2016)		X

	Post-*Spiegel* Delaware Cases Analyzing Whether the Board Wrongfully Refused Demand (in date order)	**Wrongfully Refused**	**Not Wrongfully Refused**
13	*Zucker v. Hassell*, No. CV 11625-VCG, 2016 WL 7011351 (Del. Ch. Nov. 30, 2016), aff'd, 165 A.3d 288 (Del. 2017).		X
14	*Kops v. Hassell*, No. CV 11982-VCG, 2016 WL 7011569 (Del. Ch. Nov. 30, 2016)		X
15	*Andersen v. Mattel, Inc.*, No. CV 11816-VCMR, 2017 WL 218913 (Del. Ch. Jan. 19, 2017)		X
16	*Patterson v. Kriegsman*, No. 2017-0636-TMR, 2018 WL 1317237 (Del. Ch. Mar. 13, 2018)		X
17	*Busch* ex rel. *Richardson Elecs., Ltd. v. Richardson*, No. CV 2017-0868-AGB, 2018 WL 5970776 (Del. Ch. Nov. 14, 2018)		X
18	*City of Tamarac Firefighters' Pension Tr. Fund v. Corvi*, No. CV 2017-0341-KSJM, 2019 WL 549938 (Del. Ch. Feb. 12, 2019)		X
19	*Solak* ex rel. *Ultragenyx Pharm. Inc. v. Welch*, No. CV 2018-0810-KSJM, 2019 WL 5588877 (Del. Ch. Oct. 30, 2019), *aff'd*, 228 A.3d 690 (Del. 2020)		X
20	*Dahle v. Pope*, No. CV 2019-0136-SG, 2020 WL 504982 (Del. Ch. Jan. 31, 2020)		X
21	*Raj & Sonal Abhyanker Fam. Tr.* ex rel. *UpCounsel, Inc. v. Blake*, No. CV 2020-0521-KSJM, 2021 WL 2477025 (Del. Ch. June 17, 2021)		X
22	*Drachman v. Cukier*, No. CV 2019-0728-LWW, 2021 WL 5045265 (Del. Ch. Oct. 29, 2021)	X	
23	*In re Kraft Heinz Demand Refused Derivative S'holder Litig.*, No. 2022-0398-LWW, 2024 WL 3493957 (Del. Ch. July 19, 2024)		X