

Court Finds Derivative Claims Involving Nevada Corporation Were Not "Validly In Litigation"

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A shareholder bringing a derivative claim, faces a choice. The shareholder can either make a demand on the board of directors and then challenge the board's decision not to proceed or file a complaint alleging that the demand would be futile. NRCP 23.1 If the shareholder elects the latter, then the shareholder must plead facts showing "interestedness" on the part of the board. Essentially, a plaintiff must allege that the directors' interest(s) in the challenged act or litigation outcome vitiates the board's ability to consider a demand impartially. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 641 n. 62 (2006).

In general, the relevant board for purposes of determining demand futility is the board in place at the time of filing of the operative complaint. A plaintiff may problem if it files an amended complaint after a change in the board's constituents. Delaware allows plaintiffs to plead demand futility based on the prior complaint if the derivative claims are "validly in litigation". *Braddock v. Zimmerman*, 906 A.2d 776, 778-79 (Del. 2006). Three conditions must be met for a claim to be "validly in litigation":

- The original complaint was properly pled as a derivative action;
- The original complaint satisfied the test for demand excusal; and
- The act or transactions that are the subject of the amended complaint are essentially the same as those challenged in the original complaint.

Id. at 786.

In a recent ruling in *Barenbaum v. Palleshi*, 2020 U.S. Dist. LEXIS 180624, U.S. District Court Judge [Mary Kay Vyskocil](#) found "no indication that Nevada would not follow the *Braddock* test". However, she found that because the plaintiff's original complaint did not plead demand futility, the plaintiff's claims were not "validly in litigation" when he filed his amended complaint. As a result, the plaintiff lacked standing to sue derivatively.

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