No. _____

In The

Supreme Court of the United States

DALE L. MIESEN,

Petitioner,

v.

JOHN D. MUNDING, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"The derivative form of action permits an individual shareholder to bring 'suit to enforce a *corporate* cause of action against officers, directors, and third parties.' . . . But although Rule 23.1 clearly *contemplates* both the demand requirement and the possibility that demand may be excused, it does not *create* a demand requirement of any particular dimension. On its face, Rule 23.1 speaks only to the adequacy of the shareholder representative's pleadings." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95-96 (1991) (emphasis in original) (citation omitted). However, certain Circuit Courts of Appeals have created confusion regarding the pleading requirements of Fed. R. Civ. P. 23.1 ("Rule 23.1"), the standard of review for dismissals of derivative actions, and the substantive law which applies to determine the adequacy of derivative demands.

The questions presented here are:

1. Whether the plaintiff in a derivative action, brought under diversity jurisdiction, must plead and prove the adequacy of its derivative demand letter as part of Rule 23.1's pleading requirements and whether the court must apply the law of the state of incorporation to determine the letter's adequacy.

2. Whether a *de novo* or an abuse of discretion standard applies to the review of dismissals of derivative actions under Rule 23.1.

PARTIES TO THE PROCEEDINGS

Petitioner Dale L. Miesen ("Miesen") was the plaintiff below and the appellant on appeal.

Respondents John D. Munding, Karen Munding, Munding, P.S. and Crumb & Munding, P.S. (collectively "Munding") were defendants below and appellees on appeal.

No counsel appeared below or on appeal for the defendants AIA Services Corporation ("Services") and AIA Insurance, Inc. ("Insurance"), and Services and Insurance (collectively the "AIA entities") did not participate below or on appeal.

Defendants John or Jane Does I-III were not identified below, and they did not participate below or on appeal.

CORPORATE DISCLOSURE STATEMENT

Miesen is asserting double derivative claims on behalf of the closely held corporations, Services and its wholly owned subsidiary, Insurance, both of which are Idaho corporations. Based upon the information available to Miesen (since R. John Taylor ("Taylor"), Services' purported sole president and majority shareholder has a long history of failing to disclose facts to shareholders), Services has no parent corporation, and no publicly held company owns 10% or more of its stock.

DIRECTLY RELATED CASES

Miesen v. Munding, et al., United States District Court for the Eastern District of Washington, Case No: 2:18-CV-270-RMP. Judgment was entered on March 28, 2019.

Miesen v. Munding, et al., United States Court of Appeals for the Ninth Circuit, Case No. 19-35255. Judgment was entered on July 30, 2020.

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Miesen petitions for a writ of certiorari to the Ninth Circuit Court of Appeals:

I. OPINIONS BELOW

The Ninth Circuit's decision is found at 822 Fed.Appx. 546 and is reprinted in the Appendix ("App.") at 1a-6a. The district court's decision is found at 2019 WL 1410899 and is reprinted at App. 7a-28a.

II. JURISDICTION

The Ninth Circuit entered its memorandum decision on July 30, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. RULE AND STATUTE INVOLVED

Rule 23.1(b) provides:

> PLEADING REQUIREMENTS. The complaint must be verified and must:
>
> > (1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;
> >
> > (2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
> >
> > (3) state with particularity:

> (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
>
> (B) the reasons for not obtaining the action or not making the effort.

Idaho Code Ann. § 30-29-742 (West 2015) provides:

> No shareholder may commence a derivative proceeding until:
>
> (1) A written demand has been made upon the corporation to take suitable action; and
>
> (2) Ninety (90) days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety (90) day period.

IV. STATEMENT OF THE CASE

A. Introduction

This derivative action is not a strike suit. Miesen is seeking to obtain millions of dollars in damages for the benefit of *bona fide* creditors of Services and its wholly owned subsidiary Insurance, Services' Series A Preferred Shares, Services' Series C Preferred Shares held in Services' 401(k) Plan (owed over $2,700,000),

the common shares previously held in Services' ESOP, and Services' innocent common shareholders. The only significant remaining assets of the AIA entities are the claims in this derivative action and another one in Idaho.[1]

This lawsuit arose after Taylor,[2] who was Services' majority shareholder and acting as the president of both AIA entities, and other insiders had both AIA entities unlawfully guarantee a $10 million line-of-credit for one of their entities in violation of guarantee, debt and financial restrictions under Services' amended articles of incorporation and the guarantee and conflict of interest provisions under the AIA entities' bylaws, and without disclosing the guarantees to the preferred or common shareholders or seeking the required shareholder consents. After the loan was placed in default, a lawsuit was filed against the AIA entities and other parties, including Taylor. Taylor retained attorney John Munding to represent the AIA entities, himself and other entities controlled by Taylor.

However, rather than asserting the AIA entities' guarantees of the $10 million loan were unauthorized, *ultra vires* and illegal because the guarantees violated

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[1] The parties are defined in the Parties to the Proceedings, *supra* at ii.

[2] While Miesen will refer to R. John Taylor as "Taylor" in this petition, he will refer to Taylor's brother Reed Taylor and former sister-in-law Donna Taylor by their full names.

Services' amended articles of incorporation[3] and the AIA entities' bylaws,[4] and were never disclosed to shareholders or authorized by them, Munding improperly advised and permitted the AIA entities to resolve the claims on their unauthorized guarantees by entering into an over $12 million settlement agreement which was also prohibited for the same reasons the guarantees were prohibited, and was never disclosed or authorized by the preferred and common shareholders. That agreement also required Services to transfer its ownership in its former headquarters to the lender (its last material asset), which was also a prohibited transaction under Services' amended articles and bylaws. The entry into that settlement was at Taylor's direction without disclosure to or approval from the shareholders as required.

Despite Munding's knowledge that the AIA entities had no authority to be bound by the over $12 million settlement (Miesen's counsel emailed him advising that any settlement was prohibited), Munding nevertheless forged ahead with the unlawful settlement agreement. At the time of that settlement, Taylor was improperly acting as the sole alleged director and officer of both AIA entities, even though

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[3] Under Idaho law, a corporation may only engage in transactions permitted under its articles of incorporation. *E.g.*, Idaho Code Ann. §§ 30-1-302 (West 1997) and 30-1-801(2) (West 1997). Such articles are a corporation's "constitution." *Hill v. Small*, 228 Ga. 31, 32, 183 S.E.2d 752, 753-54 (1971) (citation omitted).

[4] Under Idaho law, "[a]ctions taken in violation of a corporation's bylaws are void." *Kemmer v. Newman*, 161 Idaho 463, 466, 387 P.3d 131, 134 (2016) (citation omitted).

he had not been duly elected, annual shareholder meetings were not being held as required by the bylaws, the board was not fully seated because Taylor improperly refused to honor the designation of a director for Services' Series A Shares, and Taylor failed to have a director appointed to represent the interests of the Series C Shares held in Services' 401(k) Plan as required by Services' amended articles.

Consequently, Miesen and two other shareholders served two derivative demand letters upon the purported boards of the AIA entities. After the two demands were rejected by Taylor (who was acting as the sole director of the AIA entities), Miesen, Services' second largest common shareholder, filed this double derivative action on behalf of the AIA entities against Munding for legal malpractice, breaches of fiduciary duties, aiding and abetting, and other claims associated with their purported representation of the AIA entities and other defendants with conflicting interests in a lawsuit.

After the district court erroneously dismissed the lawsuit for lack of jurisdiction because there were insufficient allegations to find management was antagonistic[5] for the purposes of alignment of the AIA

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[5] This Court has held "management is . . . antagonistic to the stockholders" and that the corporation must be aligned as a defendant when the complaint alleges that "the management—for good reason or for bad—is definitely and distinctly opposed to the institution of" the derivative action. *Swanson v. Traer*, 354 U.S. 114, 116 (1957). Miesen's First Amended Complaint ("FAC") alleged antagonism.

entities and by finding Miesen's demand letters were inadequate under Rule 23.1 without applying Idaho law, App. 7a-28a, Miesen appealed. The Ninth Circuit affirmed the district court, without addressing whether management was antagonistic, by misapplying Rule 23.1 to create a substantive demand requirement, and incorrectly finding Miesen's two demand letters were inadequate by not following Idaho law, the law of the state of incorporation. App. 1a-6a. The Ninth Circuit also erroneously applied an abuse of discretion standard in reviewing the district court's decision. *Id*.

B. Factual Background

For purposes of review of the Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)") dismissal, the factual allegations in Miesen's FAC "are taken as true." *Zinermon v. Burch*, 494 U.S. 113, 118 (1990). That FAC, the attached amended articles of incorporation of Services and its bylaws (Insurance's bylaws are substantively the same), and matters which may be judicially noticed, provide the facts alleged in Sections IV(A) and (C) and as follows:

Miesen is a Texas citizen. During all relevant times, Miesen has owned 45,000 common shares of Services making him its second largest common shareholder. Miesen traded a book of insurance business worth approximately $500,000 for his common shares. He has not received a penny in

dividends or any other compensation on those shares in over twenty years.

Munding and his law firms, both Washington corporations,[6] are Washington citizens.

Services is a closely held Idaho corporation and Insurance, also an Idaho corporation, is Services' wholly owned subsidiary. During all relevant times, Services owned the common shares of Insurance. Services and Insurance's offices are in Idaho.

Services' ownership structure is through three classes of stock: (1) Series A Preferred Shares, which have a stated value of $10 per share, plus accrued interest until fully redeemed, and the highest payment priority over all other preferred and common shares; (2) Series C Preferred Shares, which have a stated value of $10 per share, plus mandatory cumulative dividends of 2.5% per quarter, and the second highest payment priority; and (3) common shares.

"Donna [Taylor] and her husband Reed Taylor . . . created [Services] in 1983. Donna [Taylor] and Reed [Taylor] divorced in 1987, and as part of the divorce settlement, Donna [Taylor] received 200,000 Series A Preferred Shares in [Services], making her the sole owner of all outstanding Series A Preferred Shares issued by [Services]." *Taylor v. Taylor*, 163 Idaho 910, 913-14, 422 P.3d 1116, 1119-20 (2018), *as corrected*

[6] It is unclear why Munding formed a new law firm.

(July 31, 2018). The AIA entities' primary business over the years has been selling insurance products.

In 1995, after Taylor sought to reorganize Services by, *inter alia*, having Services redeem his brother Reed Taylor's controlling common stock interest, Taylor became "the president and majority shareholder in [Services]." *Taylor*, 163 Idaho at 914, 422 P.3d at 1120. Since that time and during all relevant times, Taylor was the majority shareholder of Services (his ex-wife, Connie Taylor Henderson ("Henderson"), held a community property interest in those shares). During all relevant times, Taylor and Henderson were attorneys licensed in Idaho.[7]

During all relevant times, Donna Taylor held 41,651.25 Series A Preferred Shares with a principal value of $416,512, plus accrued interest since the last payment was made to her on May 30, 2008. Donna Taylor's Series A Preferred Shares were required to have been fully redeemed by December 2, 2003. Instead of timely paying Donna Taylor as required or declaring any dividends, Taylor and other insiders improperly had the AIA entities provide millions of dollars in loan guarantees, funding, and assets for other entities that Taylor, Henderson, James Beck ("Beck") and other insiders owned, including CropUSA Insurance Agency, Inc. and CropUSA Insurance Services, LLC (collectively "CropUSA").

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[7] https://isb.idaho.gov/licensing-mcle/attorney-roster-search/, last visited on December 16, 2020.

During all relevant times, there were 92,500 outstanding Series C Preferred Shares, which are held by Services' 401(k) Plan (an ERISA plan). Those 92,500 Series C Shares have a stated value of $925,000 and are owed over $1,800,000 in unpaid dividends for a total owed of over $2,700,000. Taylor, the purported trustee of Services' 401(k) Plan, failed to take any action to protect the innocent participants in the Plan. In fact, Taylor engaged in prohibited transactions as the purported trustee and he failed to properly discharge his fiduciary duties owed under ERISA, let alone address his conflict as a trustee and alleged director and officer of the AIA entities involved in the malfeasance described in the FAC. For example, Taylor improperly acquired and transferred an interest in Services' former headquarters exclusively for his benefit in Services' 401(k) Plan, which was prohibited under ERISA.[8]

Under the terms of Services' amended articles, a director must be appointed to Services' board by the vote of the holders of the majority of the Series A Preferred Shares (Donna Taylor) and another director by the holders of the Series C Preferred Shares held in Services' 401(k) Plan. During all relevant times, Services' unelected board refused to honor Donna Taylor's designee as a director to the board. During all relevant times, no director was appointed to represent the interests of Services' 401(k) Plan, even

[8] *See*, *e.g.*, 29 U.S.C.A. § 1106.

though Taylor was also simultaneously serving as the purported trustee of Services' 401(k) Plan.

Despite demands by shareholders and during all relevant times, annual shareholder meetings were not being held for the AIA entities as required by their bylaws, the boards were not properly elected and fully seated (including with the directors designated by the Series A and C Preferred Shares to the board of Services), officers were not duly appointed, no proper disclosures were provided to the shareholders, and shareholder consents were never sought or obtained for any of the corporate actions at issue in this lawsuit. Taylor, Henderson, and Beck consciously disregarded fundamental corporate governance. These actions were even more egregious because Taylor, Henderson and Beck had already been named as defendants in other lawsuits, including one other pending derivative action, involving their malfeasance and improper activities and since Taylor and Henderson were both attorneys.

In addition to the mandatory requirements for the appointment of a director by the Series A and Series C Preferred Shares to protect Services and its shareholders, Services' amended articles of incorporation also restricted Services and Insurance

from guaranteeing loans for others, incurring indebtedness for others or engaging in certain transactions, and Services was required to maintain a minimum net worth of at least the sums owed to the Series A Preferred shareholder Donna Taylor, among other restrictions. These restrictions could only be violated if Donna Taylor, the majority holder of Services' Series A Preferred Shares, consented and the articles were amended. During all relevant times, Donna Taylor's consent was never sought or obtained for any the transactions at issue in this lawsuit, which were prohibited by Services' articles.

Despite numerous demands by shareholders to lawfully operate both AIA entities, properly conduct corporate governance, to cease improperly guaranteeing loans and funding other entities owned by the directors Taylor, Beck, and Henderson, and those purported directors being named as defendants in another presently pending derivative action for their unlawful conduct,[9] they improperly had the AIA entities guarantee a new loan for CropUSA (an entity they owed which had been unlawfully taken from the AIA entities).

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[9] *See*, *e.g.*, *Taylor v. Hawley Troxell Ennis & Hawley, LLP*, 628 Fed.Appx. 490, 491-92 (9th Cir. 2015) ("Donna Taylor's claims here revolve around post–1995 malfeasance by certain Services directors since they took over Reed Taylor's majority stake.").

Specifically, Taylor, Beck and Henderson, purportedly acting as directors, permitted Services to unlawfully guarantee a "hard money" $5 million line-of-credit provided to CropUSA by a "hard money" lender named GemCap Lending I, LLC ("GemCap") in violation of Services' amended articles (which contained provisions expressly prohibiting the guarantee of loans or incurring any indebtedness for other entities and other financial restrictions)[10] and the AIA entities' bylaws (which contained provisions prohibiting loan guarantees).[11] The line-of-credit was ultimately increased to $10 million with interest accruing at 18.5% per annum, a default rate of 24% and additional excessive loan fees ("GemCap loan"). Taylor, Beck and Henderson had both AIA entities improperly guarantee the line-of-credit without disclosing the guarantees to Donna Taylor's board designee or allowing him to participate

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[10] *E.g.*, Idaho Code Ann. § 30-1-302 (West 1997) (a corporation may engage in various transactions, including guaranteeing loans, "[u]nless its articles of incorporation provide otherwise . . . "); Idaho Code Ann. § 30-1-801(2) (West 1997) ("All corporate powers shall be exercised by or under the authority of . . . its board of directors, subject to any limitation set forth in the articles of incorporation."); *Hill*, 228 Ga. at 32, 183 S.E.2d at 753-54 (explaining that "'a corporation has only the power conferred upon it by its charter,'" and "'[t]he charter of a corporation is in effect its constitution . . . [that is] to be strictly construed'") (citations omitted). The GemCap settlement violated numerous Idaho Code sections. *Farrell v. Whiteman*, 146 Idaho 604, 609, 200 P.3d 1153, 1158 (2009) ("Generally, when the consideration for a contract explicitly violates a statute, the contract is illegal and unenforceable.") (citation omitted).

[11] "Actions taken in violation of a corporation's bylaws are void." *Kemmer*, 161 Idaho at 466, 387 P.3d at 134 (citation omitted).

in the decision.[12] The AIA entities' guarantee of the GemCap loan was never disclosed to shareholders and no consents were obtained from them or the Series A Preferred shareholder. The AIA entities received no consideration for the guarantees. Taylor also guaranteed the GemCap loan.

When CropUSA failed to repay the $10 million loan after GemCap declared a default, GemCap filed suit against CropUSA, Taylor, the AIA entities, and other entities associated with Taylor in California. GemCap asserted claims against the AIA entities for breach of their purported guarantees and against Taylor and other entities that he controls for fraud, conversion, breach of guarantee and other claims. These claims created new conflicts of interest for Taylor. Nevertheless, Taylor retained Munding to purportedly represent numerous defendants in the California litigation. While Taylor ultimately retained independent counsel for himself, he continued to make the litigation decisions and no independent counsel was retained for either of the AIA entities.

After Miesen discovered the existence of the guarantees subsequent to the filing of the California lawsuit, his attorney contacted Munding and specifically advised him that the guarantees and any settlement requiring the AIA entities to pay

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[12] *E.g.*, *Marine Servs. Unlimited, Inc. v. Rakes*, 323 Ark. 757, 763, 918 S.W.2d 132, 134 (1996) ("corporate actions taken at shareholders' and board of directors' meetings are illegal and invalid if absent shareholders and directors had no notice of the meetings.").

any sums would be prohibited for the same reasons the guarantees were prohibited. Munding failed to take any action to extricate the AIA entities from exposure to any liability for the unlawful guarantees.

Nevertheless, Munding had the AIA entities enter into a settlement agreement with certain other defendants obligating the AIA entities to pay over $12 million to GemCap. A formal written settlement agreement was executed by the parties, which provided *inter alia*: (1) judgments for over $12 million would be entered against the AIA entities and CropUSA, while judgment would be deferred as to Taylor (i.e., Taylor put his interests ahead of the AIA entities); (2) the AIA entities could not file for bankruptcy;[13] and (3) legal malpractice claims would be improperly assigned to GemCap.[14] The GemCap settlement was concealed from Services' shareholders (including Miesen). Miesen and other shareholders first learned of the terms of the settlement agreement after it was filed in a lawsuit.

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[13] *E.g.*, *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983) ("It is a well settled principal (sic) that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy.") (citations omitted).

[14] *E.g.*, *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 43, 293 P.3d 661, 667 (2012) (" . . . legal malpractice claims are generally not assignable . . . ").

The GemCap settlement was prohibited for the same reasons the AIA entities were prohibited from guaranteeing the GemCap loan in the first place. In addition, Taylor, then acting as the only alleged director and officer for the AIA entities because Beck and Henderson had resigned, refused to hold shareholder meetings and refused to honor Donna Taylor's designee to Services' board.

Meanwhile, Donna Taylor, the Services' Series A Preferred shareholder who had not been paid as required and had priority over all other shareholders, discovered the GemCap settlement, sought to intervene in the California lawsuit to have the GemCap settlement set aside as to the AIA entities. Rather than representing the AIA entities' interests and joining Donna Taylor's effort to have the GemCap settlement set aside, Munding improperly worked with GemCap and Taylor to successfully oppose Donna Taylor's intervention before the trial court and on appeal by asserting her intervention was untimely. Thus, a derivative action against Munding was necessary.

C. Procedural History

Miesen served two written derivative demand letters upon the AIA entities' ostensible boards. The two lengthy letters contained defined terms, extensive facts and requested that legal action be taken against

various parties, including Munding. The letters provided detailed facts and specifically alleged many causes of action. The district court quoted the portions of the letters set forth in Miesen's FAC. App. 19a-23a. The letters also incorporated Miesen's proposed second amended complaint in his Idaho derivative action providing additional information about the pertinent additional facts, causes of action, and relief requested for the AIA entities because the conduct was based on similar acts of ongoing malfeasance.

At the time of Miesen's two derivative demand letters, Taylor was unlawfully acting as the AIA entities' sole director and officer. Taylor did not respond within 90 days to Miesen's first demand letter, but he did respond within 90 days to the second demand letter. In his response, he declined to take legal action against himself, Munding and others, and he asserted (incorrectly), *inter alia*, that Miesen's requested claims were subject to certain defenses, including the statute of limitations and *res judicata*.[15] Taylor did not ask Miesen for any clarifications, nor did he ask for any further information.

On August 21, 2018, Miesen filed this derivative action. Services and Insurance were served, but no

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[15] While it appears that this Court has never addressed the issue, other courts have held *res judicata* and collateral estoppel inapplicable to legal malpractice claims pertaining to the underlying action. *See*, *e.g.*, *Kerner v. Superior Court*, 206 Cal.App.4th 84, 126-28, 141 Cal.Rptr.3d 504, 536-38 (2012).

counsel appeared for them. John or Jane Does I-III were not identified, and no counsel appeared for them.

Munding moved to dismiss Miesen's complaint. In response, Miesen filed his FAC with Services' amended articles of incorporation and bylaws attached as exhibits, which also rendered Munding's motion to dismiss moot.

The FAC named the AIA entities as defendants and asserted state law claims for legal malpractice, breaches of fiduciary duties, violations of Washington's Consumer Protection Act, aiding and abetting, fraudulent concealment, equitable indemnification, and declaratory relief. The FAC was verified and alleged that: (1) Miesen held 45,000 common shares in Services during all relevant times; (2) this derivative action is not a collusive one to confer jurisdiction that the court would otherwise lack and that he was pursuing claims for the benefit of *bona fide* creditors, preferred shareholders, the participants of Services' 401(k) Plan holding Series C Preferred Shares and the common shareholders; and (3) Miesen made two derivative demands to the AIA entities' boards comprised of Taylor acting as the sole alleged director even though he was not properly elected and Services' board was not fully seated, the demands were rejected, and Miesen filed this lawsuit more than 90 days after the demands were made.

Munding filed a motion to dismiss the FAC by asserting, *inter alia*, that: (1) the district court did not have diversity jurisdiction because Miesen had

allegedly named the AIA entities as both plaintiffs and defendants; and (2) Miesen's two derivative demand letters were inadequate under Rule 23.1. Miesen opposed the motion by asserting, *inter alia*, that: (1) Idaho law governed the adequacy of his two demand letters and the letters were more than sufficient; and (2) the AIA entities were properly named and aligned as defendants because management was antagonistic since they had rejected Miesen's demand letters and the facts alleged in the FAC also established antagonism.

The district court granted the motion to dismiss, without prejudice, on the grounds that: (1) the portions of Miesen's two derivative demands quoted in the FAC failed to describe "with particularity the claims for relief sought and the factual bases for those claims as required by Rule 23.1's pleading requirements," App. 23a, his FAC "fails to provide specific information from which the Court can conclude that Plaintiff has established statutory standing under Rule 23.1," *id*. at 24a; and (2) "Just as Plaintiff's Rule 23.1 demand was insufficiently pleaded," *id*. at 25a, the FAC's "allegations are insufficient to determine proper alignment as a matter of law and to establish jurisdiction." *Id*. at 26a. Miesen appealed.

On appeal, Miesen asserted that a *de novo* standard of review applied and, *inter alia*, that the district court erred because: (1) Idaho law applied to the adequacy of Miesen's demand letters and that the letters were more than sufficient; and (2) the district court failed to comply with its duty to determine

alignment of the AIA entities and that they were properly aligned as defendants because management was antagonistic for rejecting Miesen's demands and based on the allegations in the FAC.

The Ninth Circuit: (1) held the district court "erred in concluding that it lacked subject-matter jurisdiction" but failed to comply with its duty to find that antagonism required the alignment of the AIA entities as defendants; (2) erroneously reviewed the district court's dismissal under Rule 23.1 for "abuse of direction;" and (3) erroneously held that the district court did not abuse its discretion by dismissing Miesen's FAC "for failure to meet Rule 23.1 pleading requirements" and refusing to permit Miesen to amend his FAC because it would be "futile" without applying Idaho law.[16] App. 1a-6a.

Miesen did not pursue a petition for rehearing. This petition followed.

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[16] Miesen maintains that the continuous representation rule continues to toll the statute of limitations. *See*, *e.g.*, *Laclette v. Galindo*, 184 Cal.App.4th 919, 926-29, 109 Cal.Rptr.3d 660, 664-66 (2010). However, Munding maintains the claims are no longer tolled and the statute of limitations has now run. If Munding is correct, the dismissal acts as one with prejudice.

V. REASONS TO GRANT REVIEW

A. Introduction

Derivative actions provide an important check and balance for the misfeasance and malfeasance of corporate management and third parties; they provide equitable relief to countless shareholders throughout the United States for the wrongs committed against corporations.

Rule 23.1 was adopted to provide pleading requirements to help curb certain abuses in derivative actions. "Rule 23.1 clearly *contemplates* . . . the demand requirement . . . it does not *create* a demand requirement of any particular dimension. On its face, Rule 23.1 speaks only to the adequacy of the shareholder representative's pleadings." *Kamen*, 500 U.S. at 96 (emphasis in original). Rule 23.1 was not adopted to provide courts with the discretion to determine which derivative actions will proceed or that a plaintiff is required to plead and prove the adequacy of a demand letter as one of the pleading requirements. C.f. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 529-30 (1984).

However, Circuit Courts have misinterpreted Rule 23.1, granting courts discretion to determine which derivative actions are permitted to proceed beyond the pleading stage because the plaintiff purportedly failed to comply with what amounts to a substantive requirement for demand letter adequacy never established by Rule 23.1. That is an unfair burden on plaintiffs leading to the improper dismissal of

meritorious derivative actions, contrary to the purpose and intent of Rule 23.1.

This Court should accept review to clarify the conflicts regarding Rule 23.1 to ensure that a derivative action plaintiff is held to the same standards for dismissals on the pleadings as other plaintiffs in federal court. Specifically, this Court should accept review to resolve the conflict among the Circuits and to establish that: (1) the adequacy of a derivative demand letter is not a pleading requirement under Rule 23.1 and its adequacy must be determined solely by the law of the state of incorporation; and (2) the *de novo* standard of review should be universally employed by all Circuits for all dismissals implicating Rule 23.1, including dismissal regarding the adequacy of derivative demand letters.

This Court has never addressed the issue of the adequacy of derivative demand letters under Rule 23.1 or the law that applies to determine adequacy. A derivative action plaintiff should not be required to prove the adequacy of the derivative demand letter to comply with Rule 23.1. Rule 23.1 was not adopted to place any requirements on the substantive adequacy of derivative demand letters.

In addition, derivative action plaintiffs should be entitled to the same *de novo* standard for dismissals under Rule 23.1 as other plaintiffs receive for dismissals under Rule 12(b)(6). As this Court has observed: "the difference between a rule of deference

and the duty to exercise independent review is 'much more than a mere matter of degree.'" *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) (citation omitted). Compliance with Rule 23.1 and Rule 12(b)(6) should be reviewed under the same *de novo* standard of review.

B. The Ninth Circuit's Decision Conflicts with Decisions of this Court and Other Circuits on Rule 23.1.

The Ninth Circuit's decision erroneously affirmed the dismissal of Miesen's FAC "based on the insufficiency of the Rule 23.1 demand letters," App. 2a-3a, "for [the] failure to meet Rule 23.1 pleading requirements," *id*. at 5a, after applying the law of other jurisdictions to incorrectly find that Miesen's two derivative demand letters were inadequate and thus amendment would be "futile." *Id*. at 6a. The Ninth Circuit should have construed Rule 23.1 as only a rule of pleading and applied law of the state of incorporation, here, Idaho, to determine the adequacy of Miesen's derivative demand letters.

This Court's review is merited to establish a uniform application of Rule 23.1.

1. The Ninth Circuit's Decision Misapplying Rule 23.1 Conflicts with the Decisions of this Court and Other Circuits.

The Ninth Circuit followed its prior erroneous decision of *Potter v. Hughes*, 546 F.3d 1051 (9th Cir. 2008),[17] and erroneously affirmed the dismissal of Miesen's FAC "based on the insufficiency of the Rule 23.1 demand letters" and "for failure to meet Rule 23.1 pleading requirements." App. 2a-3a, 5a. But Rule 23.1 is only a pleading rule and has no role in determining the adequacy of demand letters for state law claims. Rule 23.1 does not speak to the substance of a demand letter in a derivative action.

First, the Ninth Circuit's position conflicts with this Court's mandate in that regard:

> But although Rule 23.1 clearly *contemplates* both the demand requirement and the possibility that demand may be excused, it does not *create* a demand requirement of any particular dimension. On its face, Rule 23.1 speaks only to the adequacy of the shareholder representative's pleadings . . . a court that is entertaining a derivative action . . . must apply the demand [requirement] as

[17] *See also Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1209 (9th Cir. 1980). The district court erroneously relied upon *Potter* and a New York decision applying Delaware law when it found Miesen's demand letters failed to comply with "Rule 23.1's pleading requirements." App. 18a, 23a (citations omitted).

> it is defined by the law of the State of incorporation.[18]

Kamen, 500 U.S. at 96 & 108-09 (emphasis in original); *accord Daily Income Fund, Inc.*, 464 U.S. at 542 ("Rule 23.1, which establishes procedures . . . "); *id*. at 542-43 (Stevens, J., concurring) ("Rule 23.1 . . . merely requires that the complaint in such a case allege the facts that will enable a federal court to decide whether such a demand requirement has been satisfied; Rule 23.1 is not the source of any such requirement. The plain language of the rule makes that perfectly clear; the rule does not require a demand, it only requires that the complaint allege with particularity what demand if any has been made on the corporation.") (footnote omitted).

The Ninth Circuit's decision also conflicts with decisions of other Circuits holding that Rule 23.1 does not create a requirement for the particular substantive demand.[19] *See*, *e.g.*, *Unión de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan v. UBS Fin. Servs. Inc. of Puerto Rico*, 704 F.3d 155, 163 (1st Cir. 2013) (addressing futility); *RCM Sec. Fund, Inc. v. Stanton*, 928 F.2d 1318, 1325-29 (2d Cir. 1991) (same); *Star v.*

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[18] Notably, a Ninth Circuit judge recognized that this Court's mandate was not being followed. *Potter*, 546 F.3d at 1061-62 (Ikuta, J., dissenting).

[19] The Circuit Court decisions primarily address the substantive law that applies for demand futility cases. "[D]emand typically is deemed to be futile when a majority of the directors have participated in or approved the alleged wrongdoing, or are otherwise financially interested in the challenged transactions." *Kamen*, 500 U.S. at 102 (citations omitted).

TI Oldfield Dev., LLC, 962 F.3d 117, 134 (4th Cir. 2020) (addressing demand letters); *In re Abbott Lab. Derivative S'holders Litig.*, 325 F.3d 795, 803-04 (7th Cir. 2003) (addressing futility); *Cottrell on behalf of Wal-Mart Stores, Inc. v. Duke*, 829 F.3d 983, 989 (8th Cir. 2016) (same); *In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d 1222, 1227-28 (10th Cir. 2016) (same).[20]

Commentators have also noted the confusion in Rule 23.1. *See*, *e.g.*, Deborah A. DeMott, Shareholder Deriv. Actions L. & Prac. § 5:3 (2019-2020) ("Despite the straightforward wording of this portion of the rule, judicial interpretation of the language it uses has at times been confused.").

Notably, Miesen's demand letters were more than adequate in any event as to their content. *E.g.*, App. 19a-23a.[21] The letters contained defined terms for the parties listed, groups of the parties, and the court in California in which Munding represented the AIA entities. The letters stated, *inter alia*, that legal action should be taken, that all possible claims

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[20] Other Circuits have misinterpreted Rule 23.1 to create a substantive requirement regarding the adequacy of demand letters. *See*, *e.g.*, *Shlensky v. Dorsey*, 574 F.2d 131, 139-42 (3d Cir. 1978).

[21] In further support of Miesen's position, the Ninth Circuit's decision also conflicts with the well-established principle that on Rule 12(b)(6) review, the facts alleged in Miesen's FAC must be "taken as true." *Zinermon*, 494 U.S. at 118; *see City of Cambridge Ret. Sys. v. Ersek*, 921 F.3d 912, 918 (10th Cir. 2019). The Ninth Circuit made findings which were contrary to the allegations in the FAC. App. 5a. For example, Miesen's FAC alleged that there were no duly elected, fully seated, and properly functioning boards.

(including malpractice, breach of fiduciary duty, aiding and abetting, and declaratory relief) should be asserted against Munding, and all possible damages should be recovered because *inter alia*: (1) the AIA entities were prohibited from guaranteeing any loans for CropUSA or entering into any settlement agreements under Services' amended articles of incorporation and the AIA entities' bylaws, and that the guarantees and agreements were never properly authorized by the AIA entities' board of directors or disclosed and approved by shareholders; (2) the guarantees and any settlements should have been declared illegal, *ultra vires*, and void; (3) the AIA entities received no consideration for entering into the guarantees and settlements; and (4) the AIA entities transferred real property, including its former headquarters, as a result of the unlawful settlement agreement. The demand letters also incorporated by reference the facts and claims in the proposed Second Amended Complaint filed in the Idaho derivative action to provide additional information to the purported boards of the AIA entities because the malfeasance was ongoing.

In addition, Miesen's FAC complied with the pleading requirements of Rule 23.1. Miesen's FAC was verified and alleged that: (1) he held 45,000 common shares in Services during all relevant times (for over twenty years); (2) this derivative action is not a collusive one to confer jurisdiction that the court would otherwise lack and he was pursuing claims for the benefit of *bona fide* creditors, preferred shareholders, the participants of Services' 401(k) Plan holding Series C Preferred Shares and common shareholders; and

(3) he made two derivative demands to the boards comprised of Taylor, that Taylor was not properly elected and the board not fully seated, the demands were rejected by Taylor, and Miesen waited over 90 days after his demands to file this lawsuit. Fed. R. Civ. P. 23.1(b). Thus, Miesen complied with Rule 23.1 and the adequacy of his demand letters is governed and determined solely by Idaho law with Rule 23.1 having no part in that determination.

The district court and Ninth Circuit erred in dismissing Miesen's derivative action. This Court should accept review. Sup. Ct. R. 10(a) & (c).

2. The Ninth Circuit's Decision Conflicts with Decisions of this Court and Other Circuits Because It Failed to Apply the Law of the State of Incorporation to Determine the Adequacy of Miesen's Two Demand Letters.

The Ninth Circuit's decision, like the district court's, noted the application of state law and quoted a portion of Idaho Code Ann. § 30-29-742 (West 2015), but erroneously failed to apply Idaho law to determine the adequacy of Miesen's two adequate derivative demand letters, if adequacy was a legitimate issue for the courts at all. App. 4a-6a, 18a-24a.

The Ninth Circuit's decision conflicts with the decisions of this Court and other Circuits for failing to actually apply the law of the state of incorporation to determine the adequacy of derivative demand letters,

which is not a Rule 23.1 issue, in any event. *See*, *e.g.*, *Kamen*, 500 U.S. at 96-98 & 108-09; *Daily Income Fund, Inc.*, 464 U.S. at 542-43; *Unión de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan*, 704 F.3d at 163; *RCM Sec. Fund, Inc.*, 928 F.2d at 1325-29; *Star*, 962 F.3d at 134; *In re Abbott Lab. Derivative S'holders Litig.*, 325 F.3d at 803-04; *Cottrell on behalf of Wal-Mart Stores, Inc.*, 829 F.3d at 989; *In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d at 127-28.

The Ninth Circuit's decision did not follow Idaho law as required to determine the adequacy of Miesen's two demand letters.[22] App. 2a-5a. There is no Idaho Code section or Idaho appellate court decision that required Miesen's demand letters to "describe with particularity the claims for relief he sought or the factual bases for those claims." App. 5a.

To the contrary, Idaho law's relaxed standard merely requires "[a] written demand [to be] made upon the corporation to take suitable action."[23] Idaho Code Ann. § 30-29-742(1) (West 2015). Idaho law requires a literal application of the statute's words. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892-93,

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[22] "A federal court applying [Idaho] law must apply the law as it believes the [Idaho] Supreme Court would apply it." *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003) (citation omitted).

[23] The interpretation and application of an Idaho statute is reviewed *de novo*. *Bright v. Maznik*, 162 Idaho 311, 314, 396 P.3d 1193, 1196 (2017); *St. Luke's Regional Medical Center, Ltd. v. Board of Com'rs of Ada Cnty.*, 146 Idaho 743, 755, 203 P.3d 683, 685 (2000).

265 P.3d 502, 505-06 (2011). When interpreting the Idaho Business Corporation Act, the Idaho Supreme Court looks to the ABA Comments of the Model Business Corporation Act. *See*, *e.g.*, *Wagner v. Wagner*, 160 Idaho 294, 298, 371 P.3d 807, 811 (2016). The Official Comment to Section 7.42 provides:

> Section 7.42 specifies only that the demand shall be in writing. The demand should, however, set forth the facts concerning share ownership and be sufficiently specific to apprise the corporation of the action sought to be taken and the grounds for that action so that the demand can be evaluated. See Allison v. General Motors Corp., 604 F. Supp. 1106, 1117 (D. Del. 1985). Detailed pleading is not required since the corporation can contact the shareholder for clarification if there are any questions. In keeping with the spirit of this section, the specificity of the demand should not become a new source of dilatory motions.

Mod. Bus. Corp. Act § 7.42 cmt. 1 (2002).

In *McCann v. McCann*, the Idaho Supreme Court held that Idaho does not recognize demand futility and adopted a more relaxed standard for derivative demand letters, noting the sufficiency of the written demand is "a question of fact" and that the "demand on the directors need not assume a particular form nor . . . be made in any special language." *McCann v. McCann*, 138 Idaho 228, 234-35, 61 P.3d 585, 591-92 (2002) (citation omitted). The Idaho court did not hold that a shareholder is required to provide all facts or provide

any, let alone all, of the specific causes of action in the demand. *Id*. Instead, consistent with Idaho not recognizing futility, the Idaho court adopted a relaxed standard consistent with the plain meaning of Idaho Code Ann. § 30-29-742 (West 2015) and the ABA Comments.

The Ninth Circuit's decision failed to follow Idaho law and apply the plain meaning of Idaho Code Ann. § 30-29-742(1) (West 2015), the standard articulated in *McCann*, and the ABA Comments. Indeed, the Ninth Circuit did not even mention *McCann* or the ABA Comments (even though Miesen provided citations to both on appeal). Instead, the Ninth Circuit erroneously relied upon the law of other jurisdictions. Consistent with the standard under Idaho law, on appeal, Miesen maintained that a court in Miesen's other pending derivative action properly followed the relaxed standard under Idaho law when it found that the same two letters were adequate to pursue claims against other defendants.

> The Court finds the demand letters demonstrate an earnest and sincere effort to inform AIA board of directors of the alleged wrongdoing. To argue that Miesen could have attempted to clarify his allegations is disingenuous, considering AIA itself did not ask for clarifications. Because no follow up was requested by AIA, Miesen was left with no alternative, other than to file suit.

Miesen v. Henderson, No. 1:10-cv-00404-CWD, 2017 WL 1458191, at *7 (D. Idaho April 21, 2017). If the Ninth Circuit had properly followed Idaho law, it

likewise would have concluded Miesen's two demands were sufficient. *Id*.

The Ninth Circuit's decision did not cite or address *McCann* or follow Idaho's more relaxed standard for derivative demand letters, App. 2a-5a, erroneously relying on the standard in *Potter*, 546 F.3d at 1055, App. 4a, to find that Miesen's two demand letters "failed to describe with particularity the claims for relief he sought or the factual bases for those claims," App. 5a, and to find "the omitted portions of the letters are no more specific, nor any more relevant, than the excerpts included in the [FAC]." *Id*. at 6a. However, *Potter* did not apply Idaho law.[24]

If the Ninth Circuit's decision had followed Idaho law, *McCann* and the ABA Comments, it would have readily concluded that Miesen's two letters

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[24] *Potter* involved derivative claims brought under California law, which requires that the "plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file." Cal. Corp. Code § 800(b)(2) (West 1982). When *Potter* adopted the standard that a demand must contain all facts and the specific causes of action, the Ninth Circuit cited and relied upon *Shields v. Singleton*, 15 Cal.App.4th 1611, 1618, 19 Cal.Rptr.2d 459, 463 (1993), which applied the standard required under California law, specifically Cal. Corp. Code § 800(b)(2) (West 1982). *Potter*, 546 F.3d at 1056; *compare* Idaho Code Ann. § 30-29-742 (West 2015) *with* Cal. Corp. Code § 800 (West 1982). Simply put, the Ninth Circuit erroneously relied on the law of other jurisdictions to create its own standard of whether Miesen's demands were "suitable" under Idaho law, instead of following Idaho's actual legal standard that applies here.

adequately requested that "suitable" action be taken.

In sum, the letters stated that Munding improperly advised the AIA entities to enter into the unauthorized and unlawful over $12 million settlement and demanded that legal action be taken against Munding and his law firms for doing so.[25] In any event, Miesen's two demands more than satisfied Idaho's relaxed demand requirements and were also sufficient under *Potter*. It is unclear why the Ninth Circuit found the letters inadequate under either standard.

Finally, subsumed in these issues is the Ninth Circuit's failure to follow this Court's mandate to align

[25] Notably, Taylor's response letter rejecting Miesen's demands alleged (falsely) that Miesen's claims were barred by statutes of limitations and *res judicata*. It is unclear how the Ninth Circuit could find the letters were inadequate when Taylor, who was also a defendant in the California lawsuit and an attorney, implicitly acknowledged that he was aware of the facts and claims when he alleged that they were allegedly barred by defenses. As the Idaho federal court noted, Taylor never requested clarification or additional information. *Miesen*, 2017 WL 1458191, at *7. This is because he needed no further information.

the AIA entities as defendants when management is antagonistic.[26] App. 2a-4a.

Accordingly, this Court should accept review. Sup. Ct. R. 10(a) & (c).

C. This Court Should Grant Review to Resolve the Split Among the Circuits Regarding the Proper Standard of Review for Dismissals Under Rule 23.1.

In making its decision here, the Ninth Circuit mistakenly followed prior erroneous precedent and held that "[d]istrict court determinations regarding the demand requirement for derivative actions are reviewed for abuse of discretion." App. 4a (citing *Potter*, 546 at 1056). Review should be accepted to resolve the conflicts among the Circuits and have the *de novo* standard of review be universally employed for Rule 12(b)(6) motions to dismiss under Rule 23.1.

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[26] *See City of Indianapolis v. Chase Nat. Bank of City of New York*, 314 U.S. 63, 69 (1941); *Smith v. Sperling*, 354 U.S. 91, 95-98 (1957); *Swanson*, 354 U.S. at 116. Here, Miesen's FAC alleged two different bases to find antagonism: (1) his derivative demands were rejected; and (2) management was antagonistic to the interests of shareholders as established above—either of which established antagonism. *See supra* at 2-15. Thus, the AIA Entities should have aligned as defendants as pleaded and alleged by Miesen. *Id*.; App. 1a, 7a. Yet, the Ninth Circuit did not comply with its duty to address these important jurisdictional issues. Instead, the Ninth Circuit held the AIA Entities could be "listed on both sides of the caption." App. 3a (citations omitted).

1. There Is a Circuit Split Over Whether *De Novo* or Abuse of Discretion Standard Applies.

Rather than employing the *de novo* standard of review for motions to dismiss under Rule 12(b)(6), the Ninth Circuit followed prior Ninth Circuit precedent and employed the "abuse of discretion" standard to affirm the district court's Rule 12(b)(6) dismissal of Miesen's FAC under Rule 23.1.[27] App. 4a (citing *Potter*, 546 F.3d at 1056); *see also Rosenbloom v. Pyott*, 765 F.3d 1137, 1147 (9th Cir. 2014); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 983 (9th Cir. 1999); *Greenspun*, 634 F.2d at 1209.

The Ninth Circuit's position conflicts with decisions of the First, Second, Sixth, Seventh, Eighth and Tenth Circuit Courts of Appeals that employ a *de novo* standard of review. *See*, *e.g.*, *Unión de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan*, 704 F.3d at 161-63; *Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229, 234-35 (2d Cir. 2015); *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 617 (6th Cir. 2008); *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson*, 727 F.3d 719, 724-25 (7th Cir. 2013); *Gomes v. Am. Century Cos., Inc.*, 710 F.3d 811, 815 (8th Cir. 2013); *City of Cambridge Ret. Sys.*, 921 F.3d at 917-18.

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[27] Certain Ninth Circuit judges have expressed concern over the abuse of discretion standard. *See*, *e.g.*, *Rosenbloom*, 765 F.3d at 1159-60; *Israni v. Bittman*, 473 Fed.Appx. 548, 550 n.1 (9th Cir. 2012); *Laborers Int'l Union of N. Am. v. Bailey*, 310 Fed.Appx. 128, 130 n.1 (9th Cir. 2009).

In addition to the Ninth, the Third, Fifth, Eleventh and the D.C. Circuits also employ an abuse of discretion standard. *See*, *e.g.*, *Blasband v. Rales*, 971 F.2d 1034, 1040 (3d Cir. 1992); *Smith v. Ayres*, 977 F.2d 946, 948 (5th Cir. 1992); *Freedman v. magicJack Vocaltec Ltd.*, 963 F.3d 1125, 1130-31 (11th Cir. 2020); *Gaubert v. Fed. Home Loan Bank Board*, 863 F.2d 59, 68 n.10 (D.C. Cir. 1988).[28]

Commentators have also noted the conflicts among the Circuits. *E.g.*, 7C Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1831 (3d ed.); 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 9:7 (17th ed.); 1 Steven S. Gensler and Lumen N. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary Rule 23.1 (Westlaw 2020).

Notably, "[t]he Delaware Supreme Court, known for its corporate law jurisprudence, expressly discarded abuse-of-discretion review of dismissals under the substantively identical Delaware Chancery Court Rule 23.1." *Espinoza*, 797 F.3d at 235 (citing *Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000)). "Because so many derivative actions arise under Delaware law, [this Court should] pay special heed to the Delaware Supreme Court's decision in *Brehm*. By aligning [the] standard of review with the standard used by the Delaware appellate courts, [this Court would] minimize any 'anomalies resulting from separate federal and

[28] The D.C. Circuit has questioned whether the abuse of discretion standard is "logical." *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 783 n.2 (D.C. Cir. 2008) (Kavanaugh, J.).

state demand requirements.'" *Espinoza*, 797 F.3d at 235 n.5 (citation omitted).

Moreover, the Second Circuit recently abandoned the abuse of discretion standard "[s]eeing no reason to treat derivative actions differently than any other dismissed case." *Espinoza*, 797 F.3d at 235 (citations and footnote omitted).

Significantly, this Court recognized the need to resolve the conflicts when it granted certiorari in *UBS Fin. Servs. Inc. of Puerto Rico v. Unión de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan*, 570 U.S. 916 (2013). However, this Court did not reach the issue because the lawsuit was settled. *UBS Fin. Servs. Inc. of Puerto Rico v. Unión de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan*, 570 U.S. 943 (2013).

Accordingly, this Court should grant review to resolve the conflicts among the Circuit Courts of Appeals and settle the important issue of the correct standard of review for dismissals under Rule 23.1.

2. The Ninth Circuit's Decision Applying an Abuse of Discretion Standard of Review Conflicts with this Court's Decisions and Departs from the Universally Accepted *De Novo* Standard of Review for Rule 12(b)(6) Motions and Issues of State Law.

This Court should also accept review because the Ninth and certain other Circuits have departed from the *de novo* standard employed for motions to dismiss

under Rule 12(b)(6) simply because Rule 23.1 is implicated. App. 4a. *See supra* at 33-36; *see also* 5B Arthur R. Miller, Mary Kay Kane and A. Benjamin Spencer, Fed. Prac. & Proc. Civ. § 1357 (3d ed.) ("A proposition of universal application . . . is that a district court's ruling on a Rule 12(b)(6) motion is reviewed de novo by the court of appeals.") (footnote and citations omitted). The same universal Rule 12(b)(6) *de novo* standard should also be employed for dismissals under Rule 23.1. *See Espinoza*, 797 F.3d at 235.

Motions to dismiss under Rule 23.1 also implicate the law of the state of incorporation to determinate the adequacy of derivative demand letters and pleading futility. *See Kamen*, 500 U.S. at 108-09 (demand futility governed by state law). Thus, the Ninth Circuit's decision also conflicts with this Court's decision that determinations of state law are reviewed *de novo*.[29] App. 4a-6a. *Salve Regina Coll.*, 499 U.S. at 231 ("We conclude that a court of appeals should review *de novo* a district court's determination of state law."). Accordingly, the Ninth Circuit's decision conflicts with this Court's decision because it failed to apply a *de novo* standard of review for determining the adequacy of Miesen's demands under Idaho state law. App. 4a-6a. *See supra* at 22-36. As this Court has observed: "the difference between a rule of deference and the duty to exercise independent review is 'much more

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[29] The interpretation and application of an Idaho statute is reviewed *de novo*. *Bright*, 162 Idaho at 314, 396 P.3d at 1196; *St. Luke's Regional Medical Center, Ltd.*, 146 Idaho at 755, 203 P.3d at 685.

than a mere matter of degree.' When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll.*, 499 U.S. at 238 (citation omitted).

Therefore, this Court should accept review to rectify the Ninth and other Circuits' departure from the accepted and usual practice of employing a *de novo* standard of review for motions to dismiss when Rule 23.1 is implicated and because the Ninth Circuit's decision conflicts with this Court's decisions that *de novo* review is required for state law matters.

VI. CONCLUSION

Miesen's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted.

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