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Delaware Statutory Trusts and Shareholder Derivative Actions: Recent Delaware Cases Provide First Rulings on the Law

By Weston Peterson and Anthony W. Rodgers

Shareholder litigation is an ever-present fact of life for many investment funds[1] and more and more shareholder litigation is taking the form of derivative actions.[2] As Delaware's importance as a jurisdiction of formation for registered investment companies has increased over the past decade,[3] more and more funds and their advisors are seeking to become familiar with Delaware's law in this area, particularly the law applicable to Delaware statutory trusts. This article will discuss recent Delaware case law addressing derivative actions involving registered investment companies organized as Delaware statutory trusts. These cases represent the first cases in Delaware discussing in depth the derivative action rules applicable to Delaware statutory trusts. In addition, this article will highlight a little-known provision of the Delaware Statutory Trust Act (the DSTA) that

Wes Peterson is counsel and Anthony Rodgers is an associate with Richards, Layton & Finger, P.A., in Wilmington, Delaware. The views expressed in this article are those of the authors and not necessarily of Richards, Layton & Finger or its clients.

permits governing instrument restrictions on a shareholder's right to bring a derivative action—an ability that is not found in any of Delaware's other business entity statutes. A growing number of public and private investment funds are utilizing this ability to restrict derivative actions and have done so in part to address the potential for abuse inherent in this form of shareholder litigation.

What is a Derivative Action?

Before discussing the recent case law and the restrictions on derivative actions permissible under the DSTA, it is worth reviewing what a derivative action is in the first place. The derivative action was originally a judicially created method for a shareholder to initiate a lawsuit in the name of a company in order to assert a claim belonging to the company when the company's management refused to do so.[4] The action is "derivative" in the sense that the shareholder is not prosecuting its own claim but instead is prosecuting the claim of another, that is, the company. When bringing a derivative suit, a shareholder is in effect bringing two suits simultaneously: the first is a suit by the shareholder to compel the company to sue, and the second is a suit by the company, asserted by the shareholders, against those who are liable to the company.[5] While the nature of the company claim to be asserted could be a claim against a third party alleging damage to the company, derivative actions are more commonly suits against the management of the company for breaches of fiduciary or other duties owed to the company.

In a derivative action, the shareholder-plaintiff seeks to displace management's authority to decide what actions (if any) the company should take to redress an alleged wrong suffered by the company.[6] To justify this usurpation of management's authority, a shareholder-plaintiff in a derivative action must allege with particularity that the company's managers (which, in the corporate context, would be the directors) were presented with a demand to take action to remedy the alleged wrong and refused it wrongfully or that the managers could not properly consider such a demand, thereby excusing the demand requirement as futile.[7] Demand is futile when "the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[8] Because it is often difficult to demonstrate that any demand made on the managers was wrongfully refused, or that demand should be excused as futile due to conflicts of interest suffered by the managers, shareholder-plaintiffs may prefer to characterize their claims as "direct" actions. A direct action is an action brought by the shareholder in its own name seeking redress for a harm to the shareholder (or a class of shareholders) distinct from harm to the company. Generally, for an action to be considered a direct action a shareholder must allege more than injury to the company—the shareholder needs to allege a direct injury to the shareholder, usually independent of injury to the company.[9]

While it is relatively easy to describe the theoretical difference between a derivative action and a direct action, in practice it has been, in the words of one court, "frustratingly difficult"[10] to label a particular claim as derivative or direct. Recognizing that the classification of a claim as derivative or direct can have significant legal consequences (including potentially being outcome determinative), the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* set forth a simple test for distinguishing between direct and derivative claims: "[t]he analysis must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or remedy."[11] Examples of types of actions that have been considered derivative by Delaware courts are:[12]

(i) Mismanagement that depresses the value of shares;
(ii) Breaches of fiduciary duty that harm the company and the shareholders as a whole;
(iii) Waste of corporate assets; and
(iv) Insider trading.

Actions that have been deemed to give rise to a direct right of action have included:

(i) Enforcement of a shareholder right to vote;
(ii) Corporate actions that unfairly affect minority shareholders; and
(iii) A claim that an annual meeting is being postponed to defeat a proxy contest.

Claims relating to management entrenchment have sometimes been characterized as derivative and sometimes as direct, depending on the nature of the underlying claim.

Derivative actions provide numerous opportunities for abuse by shareholders or their counsel. In particular, because the successful prosecution or settlement of a derivative action generally results in an attorney fee award to the plaintiff's counsel, there exists significant competition among plaintiffs' attorneys to be the first to file a derivative action and gain "lead counsel" status in the action. As a result, there may be little or no due diligence by plaintiff's counsel to determine whether derivative litigation is in fact merited.[13] Moreover, after being appointed lead counsel, the plaintiff's attorneys may be more interested in reaching a prompt settlement, which may result in a lucrative fee award, than pressing the claims to trial.[14] Because of these and other concerns, Delaware law has also developed a number of procedural and substantive rules governing derivative actions. In particular, under Delaware Court of Chancery Rule 23.1, a derivative action may not be voluntarily dismissed or settled without the approval of the court and notice and an opportunity to object being provided to other shareholders. However, regardless of such protections, the Delaware courts have recognized that derivative actions continue to provide opportunities for abuse.[15]

The discussion above summarizes the approach that Delaware courts have taken with respect to the direct/derivative distinction in the context of Delaware corporations. Prior to 2011, there were no Delaware cases that provided substantive guidance as to what rules applied in the context of a derivative action involving a Delaware statutory trust. There are now two cases, *Hartsel v. Vanguard Group Inc.*[16] and *Protas v. Cavanagh*,[17] each of which involved a registered investment company and together provide important guidance in a variety of areas to funds organized as Delaware statutory trusts and their advisors as to how Delaware courts will approach derivative suits against them. Non-Delaware courts and practitioners sometimes incorrectly assume that Delaware's jurisprudence applicable to Delaware corporations always applies to Delaware statutory trusts, but this is not necessarily the case.[18] As a result, cases addressing Delaware statutory trusts often gain added attention when first announced, as practitioners seek to determine the approach the Delaware courts are taking in that context.

With respect to the direct/derivative distinction, *Vanguard* and *Protas* confirmed that the *Tooley* test would be applicable to Delaware statutory trusts.[19] In *Protas*, which involved a challenge to the redemption of illiquid auction market preferred shares by a closed-end fund, the Delaware Court of Chancery also confirmed the general rule that it is the substance of the claim—not how it is styled by the plaintiff—that is determinative of whether a claim is direct or derivative. The *Protas* plaintiff, who was a common shareholder of the fund, objected to the fund's redemption of preferred shares and argued that the common shareholders as a class were being treated unfairly and thus were advancing a direct claim that alleged harm to the common shareholders independent of the fund. The court disagreed. Calling the plaintiff's claim a "dressed-up waste allegation," the court stated that "[a]voiding the demand requirement by restating a derivative claim under the guise of a direct claim 'alleging the same fundamental harm in a slightly different way' is the type of bootstrap allegation that this Court has consistently rejected."[20]

Vanguard involved two open-end funds organized in series in which shareholders alleged that the funds' purchase of shares of foreign online gambling businesses violated a federal criminal statute that made it a crime to "own" any part of an illegal gambling business. In the context of the derivative/direct action distinction, the *Vanguard* case is particularly notable for investment funds because of the plaintiffs' arguments that the court rejected. Many of the plaintiffs' arguments that their claims were direct and not derivative were premised on the unique structure of an open-end fund organized in series and thus, the plaintiffs argued, subject to exceptions to the traditional rules. The court generally rejected all of these arguments and thus declined to create unique rules only applicable to series trusts. For example, the court rejected an argument by the plaintiffs that the series structure of the funds resulted in the investors of one series being essentially a minority class of shareholders within the trust as a whole and thus entitled to the benefit of case law that held that claims uniquely held by minority shareholders were generally to be considered direct claims. The plaintiffs also argued that because the shares of the illegal gambling company had not been sold, the funds had not yet realized any loss and therefore the funds themselves had not yet been harmed. However, according to plaintiffs, because the net asset value of the fund is calculated daily, the shareholders had already suffered a harm that was distinct from any harm to the funds. While acknowledging that such an argument had previously been accepted by a California district court in *Strigliabotti v. Franklin Resources, Inc.*,[21] the *Vanguard* court rejected it.

The DSTA and its Default Rules for Bringing a Derivative Action

As mentioned above, Delaware statutory trusts are not corporations and are governed by the DSTA, which has statutory provisions that in some instances differ significantly from similar provisions in the Delaware General Corporation Law (the DGCL). For example, unlike the DGCL, the DSTA has few mandatory rules and few default or gap-filler rules. Instead, the DSTA largely defers to the drafter of the governing instrument to set forth those matters that will govern the internal affairs of a Delaware statutory trust and much of the conduct of its business. In fact, this deference is made clear in the DSTA, which expressly states that its policy is to give maximum effect to the principle of freedom of contract.[22] Though the DSTA itself has few default or gap-filler rules, it expressly provides that Delaware's other trust laws are applicable to statutory trusts to the extent a matter is not addressed in the governing instrument or the DSTA, thus indirectly providing some gap-filler rules.[23]

Section 3816 of the DSTA provides fairly general default rules for bringing a derivative action on behalf of a Delaware statutory trust (which, as discussed below, may be modified in the governing instrument).[24] In general, a shareholder of a Delaware statutory trust may bring a derivative action if the trustees with the authority to bring an action in the name of the trust have refused to do so or if an effort to cause such trustees to do so is not likely to succeed.[25] In the complaint, the plaintiff must set forth with particularity the efforts made to secure initiation of a suit by the trustees (commonly referred to as the demand requirement) or the reasons plaintiff did not make such an effort (commonly referred to as demand excused or demand futility).[26] Prior to the *Vanguard* and the *Protas* cases, the general derivative action rules in the DSTA had not been interpreted in any meaningful manner by Delaware courts, and given the DSTA's incorporation of Delaware's general trust law, it was an open question as to whether Delaware courts would use general trust principles or corporate law principles to provide such interpretation. In both *Vanguard* and *Protas*, the Delaware Court of Chancery adopted Delaware's traditional corporate law principles, as the court had done for the direct versus derivative test.

In *Protas*, the plaintiff did not make a demand on the trustees, and the court looked to the corporate test for demand futility set forth in *Aronson v. Lewis*.[27] Under the *Aronson* test, for demand to be excused the complaint must set forth with particularity facts that raise a reasonable doubt that (i) the trustees are disinterested or independent or (ii) the challenged transaction was the product of a valid exercise of business judgment.[28] Under the first prong of the *Aronson* test, trustees are considered interested when divided loyalties exist or a trustee has received, or is entitled to receive, a personal financial benefit not shared by the shareholders. However, allegations of trustee approval of or participation in a challenged transaction are not sufficient to excuse demand. Instead, the first prong of the *Aronson* test is satisfied by particularized factual allegations of a direct and substantial financial interest on the part of the trustees.[29] Under the second prong of the *Aronson* test, a plaintiff must plead particularized facts that "raise a reasonable doubt that [the challenged transaction was] taken honestly and in good faith."[30] The *Protas* court noted that this is a heavy burden which essentially requires a plaintiff to plead facts amounting to waste. Waste entails a transaction where the consideration received by the trust for trust assets was so disproportionately small that it is beyond the range at which any reasonable person would be willing to make the exchange. Accordingly, a plaintiff's waste complaint, and a derivative action pleading demand futility based on the waste principle, will be dismissed by Delaware courts unless a transaction is so one-sided that "no business person of ordinary sound judgment" could conclude that the trust received adequate consideration in the challenged transaction.[31]

Ability to Impose Restrictions on Derivative Actions

The DSTA contains a provision that is unique among Delaware business entity statutes. Section 3816(e) states that a "beneficial owner's right to bring a derivative action may be subject to such additional standards and restrictions, if any, as are set forth in the governing instrument of the statutory trust…." In addition, the section specifically allows for restrictions that require shareholders owning a specified beneficial interest in the statutory trust to join in the bringing of the derivative action. This latter provision is particularly significant because it means the ability to bring a derivative action is not necessarily an inherent right of every investor, regardless of how many shares such investor may hold. Instead, a fund's governing instrument can effectively require that a significant number of investors join together before they may even initiate an action—a concept, as discussed below, that is common in bond indentures but generally not associated with equity. Since in Delaware the ability to impose restrictions on the right to bring derivative actions is unique to Delaware statutory trusts, how robustly the Delaware courts would uphold such restrictions was somewhat of an open question prior to the *Vanguard* decision. Based on the *Vanguard* opinion, practitioners should be confident that Delaware courts will take the restrictions seriously.

In *Vanguard*, the court upheld the standards set forth in the governing instruments of the Vanguard funds and stated that a plaintiff "must comply" with any standards or requirements contained in a statutory trust's governing instrument in order to proceed with a derivative action.[32] The governing instrument for each of the Vanguard funds contained the following provision:

> [A] demand on the Trustees shall only be deemed not likely to succeed and therefore excused if a majority of the Board of Trustees, or a majority of any committee established to consider the merits of such action, is composed of Trustees who are not "independent trustees" (as that term is defined in the [DSTA]).[33]

The DSTA defines "independent trustees" as any trustee who is not an "interested person" as defined in the Investment Company Act of 1940 (the 1940 Act) and states that if a trustee is not an interested person under the 1940 Act, such trustee will be "deemed to be independent and disinterested for *all purposes*."[34] The court considered whether the Vanguard trustees were interested persons under the 1940 Act and noted that under the 1940 Act a natural person is presumed not to be a controlled person and therefore not an interested person. As all the Vanguard trustees were natural persons, the court presumed they were not interested under the 1940 Act and, accordingly, were presumed to be independent and disinterested for all purposes under Delaware law. The court rejected all of the arguments plaintiffs advanced to rebut the foregoing presumption and found that the complaint did not articulate sufficient grounds to conclude that the Vanguard trustees lacked independence as defined under the funds' governing instruments. Accordingly, demand was not excused in *Vanguard*.[35] The court then upheld a test of independence specified in the funds' governing instruments that was significantly more difficult to overcome for a shareholder than Delaware's traditional test.

Likely recognizing that they would not be able to meet the governing instruments' test with respect to demand futility, the *Vanguard* plaintiffs also argued that satisfying the "not likely to succeed" requirement of the DSTA (presumably as modified by the governing instruments of the Vanguard funds) was not the exclusive means by which to demonstrate demand futility. The *Vanguard* court did not expressly address this argument, but noted that it was "dubious."[36] Presumably wanting to avoid ruling on a novel issue that the court need not address, the court instead applied a traditional corporate analysis and concluded that even under the corporate test the plaintiffs would lose. The result, though, is that although the court upheld the standard for demand futility set forth in the funds' governing instruments, by not ruling squarely on the issue of the governing instrument providing the exclusive means by which to demonstrate demand futility, it left some slight uncertainty as to whether demand would have been excused if the trustees were not independent or disinterested under traditional rules but were independent under the standards in the governing instruments.

The *Vanguard* case did not have occasion to address the enforceability of provisions of a governing instrument that require beneficial owners owning a certain percentage of shares to join in the derivative action. Given the stated policy of the DSTA to uphold the enforceability of governing instruments and that derivative actions may be susceptible to abuse as discussed above, the authors believe that a Delaware court would uphold such a provision, particularly if the percentage set forth in the governing instrument was not considered unreasonable and had been in the governing instrument from the date of the formation of the fund. The authors' belief is buttressed by the fact that Delaware courts have recognized that deterring frivolous suits is a legitimate goal of analogous provisions (no-action clauses) that are common in bond indentures.[37] No-action clauses require a certain percentage of bondholders to join in any litigation against the issuing company.[38] The rationale is that if a suit has merit, it should not be difficult to have the requisite number of investors join as plaintiffs, and if a suit does not have merit, the no-action clause will minimize the risk that the issuing company will have to expend funds in its defense.[39] These same policy justifications for no-action clauses seem to apply equally to provisions in governing instruments of Delaware statutory trusts requiring a certain percentage of shareholders to join in derivative actions. In each case, the provisions protect against a single investor with a small holding or a small group of investors and their counsel from bringing a suit for unworthy reasons, such as a strike suit aimed at generating attorney fees and not much more. Including such a requirement in a fund's governing instrument could be an effective tool for a fund to reduce the risk of frivolous suits that would otherwise require the fund to use its assets to defend itself and divert management's attention from running the fund's business.

Federal Law Overlay of State Rules

Though a detailed treatment is beyond the scope of this article, funds should be mindful that there is a potential federal law overlay to state law derivative action rules for those actions alleging injury under federal statutes, which may be particularly relevant to investment companies registered under the 1940 Act. Federal statutes occasionally are interpreted as granting direct rights of action to shareholders. One important example is litigation regarding investment advisor fees brought pursuant to Section 36(b) of the 1940 Act. Based on Delaware law precedent, a shareholder suit challenging the compensation a fund pays to its investment advisor would appear to be a classic derivative action and not a direct action. In such a suit, the harm to shareholders is not distinct from the harm to the fund. If the fund has overpaid the investment advisor, the harm to the fund is the decrease in the value of its assets, and the corresponding decrease in the value of the shares is derivative of the harm to the fund. Notwithstanding their apparent derivative nature, suits regarding investment advisor fees brought pursuant to Section 36(b) of the 1940 Act are effectively a direct right of action of shareholders under federal law, and state law rules for derivative actions seem to be inapplicable.[40]

Another concern is the extent to which federal law will defer to state law in the context of derivative actions; in particular, derivative actions founded on the 1940 Act. The US Supreme Court has pointed out that because the 1940 Act is a federal statute, there is necessarily a federal component to the demand requirement and any common law rule needed to effectuate a private right of action under the 1940 Act would be federal in nature.[41] However, the US Supreme Court has indicated that federal common law rules should only be used when there is a distinct need for a national standard.[42] In all other cases, the US Supreme Court has indicated that state law should be incorporated as the federal rule of decision unless the application of state law would "frustrate specific objectives of the federal programs."[43] Corporate law, and more specifically the allocation of governing power within a corporate entity, is one area where the US Supreme Court has indicated that the presumption that state law should be incorporated into federal common law is especially strong.[44]

With respect to derivative actions founded on the 1940 Act, the US Supreme Court has held that the contours of the demand requirement and any demand futility exception are generally to be determined by application of state law.[45] However, the US Supreme Court stated that state law should be displaced if a court were to conclude that state law requirements of demand or demand futility were inconsistent with the policies of the 1940 Act.[46] The authors are not aware of any case specifically addressing whether standards and restrictions included in a statutory trust's governing instrument pursuant to Section 3816(e) of the DSTA are consistent with the policies of the 1940 Act. Nonetheless, a fund and its advisors should be mindful of federal law when considering imposing restrictions on the right to bring a derivative action in a fund's governing instrument.

Conclusion

The *Vanguard* and *Protas* cases have provided substantial guidance as to how Delaware courts will approach derivative actions in the context of Delaware statutory trusts. These cases provide a level of certainty to management of funds organized as Delaware statutory trusts by their confirmation that Delaware's well-developed corporate rules will apply as a default matter. At the same time, *Vanguard* indicates that Delaware courts are prepared to uphold variations to those rules when a fund's governing instrument has imposed additional restrictions or standards as permitted by the DSTA. This combination of certainty and flexibility has been a hallmark of Delaware's appeal as the premier jurisdiction for the formation of investment funds, both public and private.

Notes

1. At times shareholder litigation involving investment funds has risen to "a veritable tsunami of shareholder actions." *See, e.g.*, John C. Ertman and David Hartnagel, "Taking Stock of Three Waves of Mutual Fund Shareholder Litigation," *The Investment Lawyer* Vol. 15, No. 10 (Oct. 2008).

2. *See* Advisen Ltd.'s January 2012 Quarterly Report, "Securities Litigation Hits Record in 2011"; *see also* Robert A. Skinner and Daniel V. McCaughey, "Federal Court's Decision Highlights Uncertainty over Mutual Fund Derivative Litigation Under Massachusetts Law," *Journal of Index Investing*, Vol. 1 No. 3 (Winter 2010).

3. According to the statistics provided to the authors by the Investment Company Institute, Delaware is close to surpassing Massachusetts as the state of organization

with the most registered investment companies. *See also* J. Weston Peterson, "Investment Companies Organized as Delaware Statutory Trusts: Practical Considerations for Drafting Governing Instruments," *The Investment Lawyer*, Vol. 15, No. 1 (Jan. 2008).

4. *See* Maximilian Koessler, "The Stockholder's Suit: A Comparative View," 46 *Colum. L. Rev.* 238 (1946).

5. *See* Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984); *see also* R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations 13-22 (3d ed. 2011) (hereinafter *Balotti*).

6. *See Aronson*, *supra* n.5; *see also* Desimone v. Barrows, 924 A.2d 908, 914 (Del. Ch. 2007); La. Mun. Police Employees' Ret. Sys. v. Pyott, No. 5795-VCL, 2012 Del. Ch. LEXIS 130, *74 (Del. Ch. June 11, 2012) (hereinafter *Allergan*).

7. *See Allergan*, *supra* n.6; Del. Ct. Chancery R. 23.1.

8. Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993); *see also Aronson*, *supra* n.5.

9. *See Balotti, supra* n.5, at 13-24.

10. Agostino v. Hicks, 845 A.2d 1110, 1118 (Del. Ch. 2004).

11. 845 A.2d 1031, 1035 (Del. 2004) (hereinafter *Tooley*).

12. The examples given in this paragraph of the article are derived from the examples provided in *Balotti, supra* n.5, Section 13.10 and the Delaware cases cited therein.

13. King v. Verifone Holdings, Inc., 994 A.2d 354, 355 (Del. Ch. 2010).

14. *See Allergan*, *supra* n.6, *96-97; *see also King*, *supra* n.13 at 363 (noting that "the derivative action is susceptible to abuse in cases where derivative claims are filed more with a view to obtaining a settlement resulting in fees to the plaintiff's attorney than to righting a wrong to the corporation (the so-called 'strike suit')") (*quoting* Dennis J. Block, Nancy E. Barton & Stephen A. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Directors 1384-85 (5th ed. 1998)) (internal quotations and citations omitted).

15. *See generally Allergan*, *supra* n.6.

16. No. 5394-VCP, 2011 Del. Ch. LEXIS 89 (Del. Ch. June 15, 2011) (hereinafter *Vanguard*).

17. No. 655-VCG, 2012 Del. Ch. LEXIS 88 (Del. Ch. May 4, 2012) (hereinafter *Protas*).

18. *See* Nakahara v. NS 1991 American Trust, 739 A.2d 770, 783-784 (Del. Ch. 1998) (discussing differences between the Delaware General Corporation Law and the DSTA).

19. As discussed below, the DSTA incorporates the general law of trusts and not corporate law to fill any statutory gaps. However, in the context of distinguishing between direct and derivative claims, the authors believe that Delaware courts' adoption of corporate law principles is appropriate. Statutory trusts, like corporations and unlike common law trusts, are separate legal entities. A common law trust is not an entity, and as a consequence there is no entity in whose name a shareholder could pursue a derivative claim. As a result, the type of remedy available to a trust investor can be dependent on whether the trust in which he or she invests is a statutory trust or a common law trust. The commentary to the Uniform Statutory Trust Entity Act (which is largely based on the DSTA) makes this point clear. "[T]he law of remedies for breach of trust applies to a statutory trust…[h]owever, when a breach of trust injures the trust rather than a beneficial owner directly, such remedies are properly sought in a derivative suit rather than a direct suit…." *See* Uniform Statutory Trust Entity Act § 105 cmt. Remedies, available at *http://www.uniformlaws.org/Act.aspx?title=Statutory%20Trust%20Entity%20Act*.

20. *Protas, supra* n.17, at *22 (*quoting* Feldman v. Cutaia, 959 A.2d 644, 659-660 (Del. Ch. 2007)).

21. Strigliabotti v. Franklin Resources, Inc., No. C 04-00883, 2005 U.S. Dist. LEXIS 9625 (N.D. Cal. Mar. 7, 2005).

22. *See* Delaware Statutory Trust Act, Del Code Ann. tit. 12, § 3825(b) (West 2012).

23. *See id.* § 3809.

24. *Id.* § 3816.

25. The DSTA also sets forth the requirements for the plaintiff to have standing to bring a derivative action. Section 3816(b) requires a plaintiff in a derivative suit to be a beneficial owner of the trust at the time of the derivative action and either (i) be a beneficial owner at the time of the transaction that is the subject of the complaint or (ii) have had the status of beneficial owner devolve upon plaintiff by operation of law or pursuant to the trust's governing instrument from a person who was a beneficial owner at the time of the transaction that is the subject of the complaint.

26. The pleading requirements set forth in Section 3816 of the DSTA are substantively the same as those set forth in Rule 23.1 of the Rules of the Court of Chancery of the State of Delaware. *Protas, supra* n.17, at *16.

27. *Supra* n.5

28. *See Aronson*, *supra* n.5, at 814. The test for demand futility in *Aronson* was originally phrased as a conjunctive, but subsequent Delaware cases have made clear that only one prong of the test need be satisfied to excuse demand. *See*, *e.g.*, Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000).

29. *See generally Balotti, supra* n.5, at 13-55 through 13-64 and the cases cited therein.

30. *Protas*, *supra* n.17, at *33 (*quoting In re* Goldman Sachs Group, Inc. S'holder Litig., No. 5215-VCG, 2011 WL 4826104, at *12 (Del. Ch. Oct. 12, 2011) (internal quotations and further citations omitted)).

31. *Protas*, *supra* n.17, at *36.

32. *Vanguard*, *supra* n.16, at *94.

33. *Id.*

34. Delaware Statutory Trust Act, Del Code Ann. tit. 12, § 3802(d) (West 2012) (emphasis added).

35. *Vanguard*, *supra* n.16, at *105-106.

36. *Id.* at *106-107.

37. *See* Revised Model Simplified Indenture § 6.06, 55 Bus. Law. 1115, 1137-38 (1999-2000).

38. *See* Feldbaum v. McCrory Corp., No. 11866, 1992 WL 119095, *7 (Del. Ch. June 2, 1992).

39. *Id.*

40. *See*, *e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 540 (1984).

41. Kamen v. Kemper Fin. Servs., 500 U.S. 90, 97 (1991).

42. *Id.* at 98.

43. *Id.* at 98 (*quoting* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)).

44. *Id.* at 98.

45. *See Kamen*, *supra* n.41.

46. *Id.* at 107.