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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BLACKROCK CREDIT ALLOCATION INCOME TRUST, BLACKROCK NEW YORK MUNICIPAL BOND TRUST, BLACKROCK ADVISORS, LLC, RICHARD E. CAVANAGH, KAREN P. ROBARDS, MICHAEL J. CASTELLANO, CYNTHIA L. EGAN, FRANK J. FABOZZI, HENRY GABBAY, R. GLENN HUBBARD, W. CARL KESTER, CATHERINE A. LYNCH, ROBERT FAIRBAIRN, and JOHN M. PERLOWSKI, Defendants Below, Appellants v. SABA CAPITAL MASTER FUND, LTD., Plaintiff Below, Appellee	No. 297, 2019 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0416-MTZ

OPENING BRIEF OF APPELLANTS BLACKROCK CREDIT ALLOCATION INCOME TRUST AND BLACKROCK NEW YORK MUNICIPAL BOND TRUST

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August 27, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page(s)**

Statutes

Other Authorities

NATURE OF PROCEEDINGS

Delaware jurisprudence reflects a strong commitment to enforcing valid bylaws adopted in good faith by a corporate board on a "clear day," promoting predictability and fairness in the management of corporate affairs. Defendants-Appellants BlackRock Credit Allocation Income Trust ("**BTZ**") and BlackRock New York Municipal Bond Trust ("**BQH**," and together with BTZ, the "**Fund Appellants**" or the "**Funds**") respectfully submit that the Court of Chancery deviated from these well-established principles in the case below when it gave a sophisticated shareholder with sophisticated Delaware counsel a free pass for negligently failing to comply with a deadline in the longstanding, unambiguous bylaws of two Delaware statutory trusts.

The Funds are both closed-end funds organized as Delaware statutory trusts, and each has bylaws with an identical section providing the requirements and procedures for nominating trustees to the Funds' respective boards of trustees (each a "**Board**," and together the "**Boards**"). The bylaws of the Funds clearly state that a shareholder must, within five business days, provide the Boards with any information the Boards request to determine whether a shareholder's nominee satisfies certain qualification requirements set forth in the bylaws. The Funds' bylaws further state that, should the shareholder fail to meet that deadline, its nominee shall not be eligible for election to the Boards.

On March 30, 2019, Plaintiff-Appellee Saba Capital Master Fund, Ltd. ("**Saba**"), a sophisticated activist hedge fund and shareholder of the Funds, notified the Funds that it intended to nominate four individuals for election to the Funds' Boards. On April 22, 2019, the Boards requested that Saba provide additional information concerning its nominees so that it could determine whether its nominees satisfied the qualification requirements in the bylaws. The Boards' information request was in the form of a questionnaire containing 97 questions and sub questions, more than two thirds of which sought information directly tied to the qualifications in the bylaws. Under the plain and unambiguous language of the bylaws, Saba was required to provide such information to the Boards within five business days—*i.e.*, by April 29, 2019—otherwise its nominees would be ineligible for election. Saba failed to respond to the Boards' request, let alone return completed questionnaires for each of its four nominees, by the deadline.

On May 1, 2019, the Funds notified Saba that it missed the April 29 deadline and that its nominees were therefore ineligible for election pursuant to the bylaws. Later that evening, Saba sent the Funds hastily-completed questionnaires for its four nominees that, in some cases, were incomplete and contained errors. On May 7, the Boards exercised their business judgment to reaffirm that they would not waive compliance with the April 29 deadline. Throughout May 2019, the Funds and Saba filed proxy statements and made other public statements making clear that, in the

Boards' view, Saba failed to comply with the bylaws and therefore its nominees were ineligible for election to the Boards at the Funds' fast-approaching shareholder meetings. Despite this, Saba failed to seek judicial intervention during the entire month of May.

On June 4, 2019—nearly five weeks after Saba first learned that its nominations were invalid—Saba commenced the case below by filing a complaint asserting, among other claims, that Defendants breached the bylaws (Count III) and their fiduciary duties (Count IV) by applying the bylaws to disqualify Saba's nominees. Saba also moved for a mandatory injunction compelling Defendants to count votes for Saba's nominees at the Funds' shareholder meetings as if the nominees had been validly nominated, effectively invalidating the Funds' longstanding bylaws (the "**Motion**"). On June 18, 2019, the Funds opposed Saba's Motion, arguing (among other things) that Saba's claims were inconsistent with the bylaws and barred by the doctrine of laches.

On June 27, 2019, the Court of Chancery issued a Memorandum Opinion (the "**Opinion**") rejecting Saba's interpretation of the bylaws and finding in favor of Defendants-Appellants on nearly all of the matters in dispute regarding the merits of Saba's claims. Indeed, the Court below found that the bylaws permitted the Boards to request information to determine if Saba's nominees met the qualifications in the bylaws, the Boards did request such information, a five business day deadline would

normally apply to such a request, and Saba failed to provide the requested information within five business days. The Court of Chancery further found that the Funds' bylaws were adopted on a "clear day" and there was no evidence that Defendants applied the bylaws to disqualify Saba's nominees in bad faith. For these reasons, the Court of Chancery properly held that Saba failed to show a likelihood of success on its breach of fiduciary duty claim (Count IV).

However, the Court of Chancery issued a mandatory injunction compelling the Defendants to count votes for Saba's nominees anyway. In the Opinion, the Court of Chancery stated that the Board's questionnaire also contained certain other questions that were not tied to the director qualification requirements in the bylaws, and it reasoned that the presence of those additional questions rendered the five business day deadline inapplicable to any part of the Boards' information request. (Op. at 16-17.) Importantly, those additional questions—which made up less than a third of the questionnaire—sought critical information about the nominees, including information concerning whether the nominees satisfied the strict statutory requirements for trustees of closed-end funds. The Court of Chancery concluded that the reasons the Funds included those questions in the questionnaire were "understandable," and Saba did not dispute in the case below that the existence of those other questions were not the reason that Saba missed the deadline. Nonetheless, the Court of Chancery effectively waived the five business day

deadline, rescuing Saba from its own negligence, without any finding of bad faith or inequitable conduct on the part of Defendants.

On July 2, 2019, based on its findings in the Opinion, the Court of Chancery entered a Partial Final Judgment Pursuant To Rule 54(b) (the "**Partial Final Judgment**") on Count III of Saba's Complaint for breach of the bylaws in favor of Saba. The Partial Final Judgment provides, in part:

> Saba's nominees are validly nominated for election to the Boards of the Funds at the 2019 annual meeting. The Funds are enjoined from applying Section 7(e)(ii) of their respective bylaws to invalidate Saba's nominations to the respective boards of trustees of the Funds, shall refrain from precluding, invalidating, or interfering with Saba's presentation of its four trustee nominees for election to the Boards of the Funds at the 2019 annual meeting, and shall count votes for those nominees at the annual meetings of the Funds.

On July 10, 2019, Defendants filed a Notice of Appeal of the Opinion and the Partial Final Judgment in this Court.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by disregarding the plain and unambiguous language of the Funds' bylaws when it held that Saba satisfied the requirements for a mandatory injunction requiring the Funds to count votes for Saba's nominees to the Boards of the funds. The Funds' bylaws provide that a shareholder's nominees are ineligible for election to the Boards if the shareholder fails to deliver, within five business days, any information requested by the Boards to determine if the shareholder's nominees satisfy the qualification requirements in the bylaws. It is undisputed that the Boards requested such information and Saba failed to provide it within five business days. The Court of Chancery nevertheless held that the five business day deadline did not apply at all solely because the Boards also requested other information about the nominees. The Funds' bylaws do not contain any such exception to the five business day deadline.

2. The Court of Chancery erred by effectively invalidating the application of unambiguous, longstanding bylaws adopted on a "clear day" without a finding that Defendants acted for the primary purpose of thwarting Saba's nominees or otherwise acted inequitably in applying the bylaws.

3. The Court of Chancery erred by failing to bar Saba's request for injunctive relief under the doctrine of laches.

STATEMENT OF FACTS

A. Saba Is Managed By A Sophisticated Activist Hedge Fund That Regularly Participates In Proxy Fights.

Plaintiff-Appellee Saba is a hedge fund managed by Saba Capital Management, L.P. ("**Saba Capital**"), a sophisticated activist investor led by multi-millionaire investor Boaz Weinstein. Saba Capital's clients are predominantly institutional and the firm boasts over $4.25 billion in discretionary assets under management. (*See* A267.)

Saba Capital specifically advertises its "activist approach" to investing in closed-end funds like BTZ and BQH, and it touts its ability to use "corporate actions" as "an effective tool" to "generate superior absolute returns" for itself. OUR STRATEGIES, https://www.sabacapital.com/our-strategies/ (last visited June 17, 2019). The firm routinely runs proxy contests against the incumbent directors and trustees on boards of closed-end funds. In the first half of 2019 alone, Saba Capital filed Form 13D disclosures for more than a dozen closed-end funds, indicating possible plans to take an "activist approach" in these investments.

B. The Bylaws Of The Funds Contain Requirements For The Nomination Of Trustees To The Boards Of The Funds.

Appellants BTZ and BQH are both closed-end funds organized as Delaware statutory trusts, and each of their respective Boards consist of eleven trustees, nine of whom are independent. (A358, A362 (BTZ) & A853, A857 (BQH).) Appellant BlackRock Advisors, LLC serves as investment adviser to the Funds. (A79.)

The bylaws for each of the Funds (together, the "**Bylaws**") contain an identical section—Section 7 of Article I[1]—detailing the requirements and procedures for shareholders to nominate trustees to the Boards. (*See* A406-09 (BQH) & A432-35 (BTZ).) For example, Section 7 directs that a shareholder may nominate trustees for election at an annual meeting of shareholders or at any special meeting in lieu of the annual meeting (*see* A406 (BQH) & A432 (BTZ) Art. I § 7(a)), requires that a shareholder give timely written notice of a nomination by a certain date (a "**Nomination Notice**") (*see* A406-07 (BQH) & A432-33 (BTZ) Art. I §§ 7(b), 7(c)), and identifies the information that must be contained in a Nomination Notice (*see* A407-408 (BQH) & A433-34 (BTZ) Art. I § 7(d)).

Section 7(e) of the Bylaws, which became effective in 2010, further provides that a shareholder must timely update and supplement the information in their Nomination Notice upon the occurrence of certain triggers. (*See* A408 (BQH) & A434 (BTZ) Art. I § 7(e).) ***First***, if the information in the Nomination Notice has become stale as of the record date for the annual or special meeting, the shareholder must update and supplement their Nomination Notice within five business days after the record date. (*Id*. Art. I § 7(e)(i).) ***Second***, if the Board requests information to determine whether the shareholder's nominees in fact satisfy the qualification

[1] All references to "Section 7" herein are to Section 7 of Article I of the Bylaws.

requirements in the Bylaws, then the shareholder must provide that information within five business days of the request. (*Id*. Art. I § 7(e)(ii).)

Specifically, Section 7(e) states:

> A shareholder of record, or group of shareholders of record, providing notice of any nomination . . . shall further update and supplement such notice, if necessary, so that: . . .
>
> (ii) ***any subsequent information reasonably requested by the Board of Directors[2] to determine that the Proposed Nominee has met the director qualifications as set out in Section 1 of Article II is provided***, and such update and supplement shall be delivered to or be mailed and received by the Secretary at the principal executive offices of the Fund ***no later than five (5) business days after the request by the Board of Directors for subsequent information regarding director qualifications*** has been delivered to or mailed and received by such shareholder of record, or group of shareholders of record providing notice of any nomination.

(*Id*. Art. I § 7(e) (emphasis added).)

The Bylaws make absolutely clear that a shareholder must follow the procedures and comply with the requirements of Section 7—including the deadlines in Section 7(e)—otherwise their nominees will be ineligible for election. In particular, the first provision in Section 7 provides that "[o]nly persons who are nominated in accordance with the following procedures shall be eligible for election

[2] While the Bylaws refer to a "Board of Directors," the Funds are statutory trusts, and therefore their Boards are comprised of trustees.

as directors of the Fund." (A406 (BQH) & A432 (BTZ) Art. I § 7(a).) And the last provision in Section 7 reiterates that "[n]o person shall be eligible for election as a director of the Fund unless nominated in accordance with the procedures set forth in this Section 7 of this Article I." (A409 (BQH) & A434 (BTZ) Art. I § 7(f).) To emphasize that these requirements and procedures will be strictly complied with, Section 7(f) further provides: "If the chair of the meeting determines that a nomination was not made in accordance with the foregoing procedures, the chair **shall** declare to the meeting that the nomination was defective and such defective nomination **shall** be disregarded." (*Id*. (emphasis added).)

C. Saba Notifies The Funds That It Will Nominate Trustees To The Boards Of The Funds.

On March 30, 2019, Saba submitted via email Nomination Notices for each of the Funds (together, the "**Saba Nomination Notices**"). (A451-82 (BQH) & A484-516 (BTZ).) The Saba Nomination Notices stated that, at the next annual shareholders meetings for each of the Funds, Saba would nominate four individuals for election: Thomas H. McGlade, Stephen J. Flanagan, Frederic Gabriel, and Jassen Trenkow (collectively, the "**Saba Nominees**"). (A465-68 (BQH) & A498-501 (BTZ).) The Saba Nomination Notices contained conclusory statements that the Saba Nominees satisfied the qualification requirements set forth in the Bylaws (*see, e.g.*, A455-62 (BQH) & A488-95 (BTZ)), as well as short and incomplete biographies for each of the Saba Nominees (A465-68 (BQH) & A498-501 (BTZ)).

The Saba Nomination Notices did not include any other supporting information that would allow the Boards to determine whether the Saba Nominees in fact met the qualifications in Section 1 of Article II of the Bylaws. These qualification requirements are not mere technicalities: many are mandated by the Investment Company Act of 1940 (the "**40 Act**"). (*See* A206-07, A233-34.)

D. The Boards Request Additional Information From Saba About Its Nominees, Which Saba Fails To Timely Provide.

On April 22, 2019, the Boards requested by email to Saba's General Counsel that Saba provide additional information concerning the Saba Nominees (the "**April 22 Requests**"). (A518-65 (BQH) & A567-614 (BTZ).) The transmittal emails the Boards sent to Saba attached a questionnaire for the Saba Nominees to complete (the "**Questionnaire**"), and the emails themselves made clear that the Boards' requests were subject to the procedures and requirements of Section 7 of the Bylaws. They stated, in relevant part:

> Pursuant to **Article I, Section 7 of the bylaws** of the Fund, I am writing on behalf of the Board . . . of the Fund (the "Board") to request additional information with respect to the nominees submitted by Saba Capital Master Fund, LTD (the "Shareholder") for election at the Fund's 2019 shareholder meeting. Please have each of the proposed nominees complete and sign the attached questionnaire and return it to my attention with a copy to Janey Ahn, Secretary of the Fund.

(A518 (BQH) & A567 (BTZ) (emphasis added).) Accordingly, under Section 7(e)(ii) of the Bylaws—the only provision in Section 7 governing information

requests by the Boards—Saba was required to provide the requested information by **April 29, 2019** (five business days from the date on which Saba received the April 22 Requests). (*See* A408 (BQH) & A434 (BTZ) Art. I § 7(e)(ii).)

The April 22 Requests sought information that would help each Fund's respective Board "to determine that the [Saba] Nominee[s have] met the director qualifications as set out in Section 1 of Article II" of the Bylaws, including whether the declarative statements in the Saba Nomination Notices were accurate. (A407(BQH) & 433(BTZ) Art. I § 7(d)(i)(C)(6).) This Questionnaire serves an important purpose as it enables the Boards to conduct appropriate diligence into nominees' qualifications, including nominees' potential conflicts, their ability to perform the duties of trustees, and whether they satisfy the 40 Act requirements. It was also important to the Funds that the Saba Nominees sign the completed Questionnaire, providing some additional assurance that the information contained therein was complete and accurate. (A1173-74 at 68:11-69:2.)

The Questionnaire is made of two parts. One part, titled "Annex A," contains 27 questions, 22 of which seek information tied to qualifications in Section 1 of Article II of the Bylaws.[3] The other part of the Questionnaire, titled "BlackRock

[3] At the Court of Chancery's request, the Funds submitted to the Court of Chancery a demonstrative setting forth the information sought by each question, the relevant information (if any) in Saba's Nomination Notice, the qualification in Article II, Section 1 of the Bylaws to which the question pertained, and any other purpose for including the question in the Questionnaire. (A1086-87; A1088-105.)

Annual Questionnaire," is modeled off of the questionnaire that the sitting members of the Boards fill out each year. It contains 70 questions, the majority of which also seek information concerning the qualifications in Section 1 of Article II of the Bylaws. Both parts of the Questionnaire also include some questions that are not directly tied to Section 1 of Article II of the Bylaws, but that are designed to illicit information to determine whether the member or nominee, as the case may be, is suitable to serve as a trustee. For example, the questions seek information about whether the member or nominee is in compliance with the Iran Threat Reduction and Syria Human Rights Act of 2012 (A548 (BQH) & A597 (BTZ) Q. 41), has ever been the subject of sexual misconduct allegations (A555-56 (BQH) & A604-05 (BTZ) Annex A, Q. 21, 22), or has the requisite availability to serve as a trustee (A556 (BQH) & A605 (BTZ) Annex A, Q. 23).

In total, the Questionnaire contains 97 questions and sub questions, with 66 of the questions—more than two thirds—seeking information that would allow the Board to determine whether the Saba Nominees satisfied the qualifications in Section 1 of Article II, and the remaining 31 questions seeking other, critical information.

Upon receiving the April 22 Requests, Saba did not assert (as it did in the case below) that the requests were premature, unreasonable, unnecessary, or duplicative, or that Saba was not required to provide the information requested. Nor did Saba

ask for more time to complete the Questionnaires. Instead, after the Boards made the April 22 Requests, the April 29 deadline for Saba to provide the requested information came and went without any response from Saba.

E. The Funds Notify Saba That It Failed To Comply With The Procedures Set Forth In The Bylaws And Therefore Its Nominations Are Invalid.

On May 1, 2019, the date of the Funds' regularly scheduled board meetings, and two days after the April 29 deadline, with Saba still not having responded to the April 22 Requests, the Funds sent notices to Saba (the "**Disqualification Notices**") confirming that Saba missed the April 29 deadline and that the Saba Nominees' nominations were therefore invalid under the Bylaws. (A616 (BQH) & A618 (BTZ).)

Later that evening, an attorney at the New York law firm of Schulte Roth & Zabel LLP, which was at that time Saba's outside counsel, sent letters to the Boards (the "**Saba May 1 Letters**") claiming—for the first time—that the April 22 Requests were unreasonable. (*See* A621-23 (BQH) & A624-26 (BTZ).) The Saba May 1 Letters also argued that Saba's time to respond to the requests did not start to run until after the record date (which had not yet been set), even though Section 7(e)(ii) does not say anything about a record date. (A622 (BQH) & A625 (BTZ).) Nevertheless, in a tacit concession that the Boards' requests for information were not unreasonable, and that Saba simply blew the deadline, the Saba May 1 Letters

also included responses to the Questionnaires for each of the Saba Nominees. (*See* A627-816.)

On May 7, 2019, the Boards of the Funds met again following their May 1 board meeting, and in the exercise of their business judgment, reaffirmed that they would not waive compliance with Section 7(e)(ii) of the Bylaws. That same day, counsel for the Funds sent a letter to Saba (the "**Funds' May 7 Letter**") advising Saba again that it failed to comply with the Bylaws and therefore its nominees were ineligible for election, and confirming the Boards' decisions not to waive compliance with the Bylaws. (*See* A818-23.) The Funds' May 7 Letter also identified several obvious deficiencies in the responses to the Questionnaires and other entries that raised further questions regarding whether the Saba Nominees in fact met the qualifications under the Bylaws. (*See* A820-22.) Between May 7 and May 9, Saba and the Funds exchanged additional letters setting forth their respective positions on the validity of Saba's nominations. (*See* A825-30 (the "**Saba May 7 Letter**"); A832 (the "**Funds' May 8 Email**"); A835-40 (the "**Saba May 9 Letter**").)

In the Saba May 9 Letter, Saba also provided additional information concerning the Saba Nominees. For example, Question 2.1 of the Questionnaire asked for information about the Saba Nominees' occupations to confirm the accuracy of the biographies in the Saba Nomination Notices. (*See* A522 (BQH) & A571 (BTZ) Q. 2.1.) Mr. McGlade's completed Questionnaire simply referred back

to the information in the Saba Nomination Notices (A629-631, A656, A664-65), but the Saba May 9 Letter disclosed for the first time that Mr. McGlade had also been an investor in and a "sourcing capital" consultant to a cannabis company since 2018. (A838-39.) The Saba May 9 Letter does not provide any further details of Mr. McGlade's involvement in that company, but marijuana is still outlawed under federal law and Mr. McGlade's role with a marijuana company raises real questions about whether he meets the qualifications under the Bylaws, which expressly prohibit nominees from engaging in conduct that could subject them to a statutory disqualification pursuant to Section 9 of the 40 Act. (A414 (BQH) & A440 (BTZ) Art. II § 1(a)(vi).)[4] This information should have been included in the original Saba

[4] As outlined in a September 2018 Investor Alert, the SEC is acutely focused on enforcement actions against investment promoters in the cannabis industry, as it "regularly receives complaints" about such companies. *See* U.S. SEC. & EXCH. COMM'N, INVESTOR ALERT: MARIJUANA INVESTMENTS AND FRAUD (Sept. 5, 2018), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_marijuana (listing recent enforcement actions pertaining to marijuana-related investments and companies). Further, Saba's May 9 disclosure that Mr. McGlade was helping a cannabis company "sourc[e] capital" raises a question as to whether he was as an unregistered broker-dealer in violation of Section 15 of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78o. If this conduct led to an injunction with respect to such conduct, he would be ineligible to serve as a trustee of any registered investment company—including the Funds—pursuant to Section 9 of the 40 Act. This consequence is in addition to any federal criminal liability that could result from Mr. McGlade's involvement with a cannabis company. *See* Kevin Johnson and Trevor Hughes, *Justice Department Cracks Down on Legal Marijuana with Rollback of Obama Policy*, USA TODAY (Jan. 4, 2018), https://www.usatoday.com/story/news/politics/2018/01/04/justice-department-crack-down-legal-marijuana-roll-back-obama-policy/1003183001/.

Nomination Notices (A407 (BQH) & A433 (BTZ) Art. I § 7(d)(i)(C)(6)), and Saba's failure to include it underscores that it was entirely reasonable and prudent for the Boards to make the April 22 Requests.

F. The Funds And Saba Make Public Statements Throughout May 2019 Disclosing The Disqualification Of The Saba Nominees.

After their initial correspondence between May 1 and May 9, described above, the Funds and Saba filed proxy statements with the SEC and made several other public statements concerning the elections at the Funds' upcoming annual shareholder meetings. Those documents, filed over the course of several weeks, disclosed that, in the Boards' view, the Saba Nominees were not eligible for election and votes in their favor would not be counted at the annual meetings. (*See* A843 (May 10 BQH preliminary proxy statement, stating that "[t]he Board has determined the nominations of the [Saba Nominees] to be invalid as a result of Saba's hedge fund failing to comply with the Trust's By-laws"); A902 (May 14 Saba preliminary proxy statement for BQH disclosing that "the Fund claims that Saba's nominations are 'invalid'"); A348 (May 20 BTZ preliminary proxy statement, stating that "[t]he Board has determined the nominations of the [Saba Nominees] to be invalid," and that "any votes with respect to the [Saba Nominees] will not be counted at the meeting"); A925 (May 21 Saba preliminary proxy statement for BTZ disclosing that the Fund claims its nominations are "invalid"); A949, A964 (May 24 BQH definitive proxy statement reiterating that votes for the Saba Nominees will not be counted);

A1004 (May 24 BQH "fight letter" confirming invalidation of Saba Nominees); A1011 (May 28 Saba definitive proxy statement for BQH disclosing that the Fund claims Saba's nominations are "invalid").)

In light of, among other things, (i) the May 1 Disqualification Notices, (ii) the Funds' May 7 Letter, (iii) the Funds' May 8 Email, and (iv) the proxy statements and other public filings disclosing the invalidity of Saba's nominations, there could be no doubt that votes for the Saba Nominees would not be counted at the fast approaching annual meetings for the Funds. (*See* A616 & A618; A818; A832; A347 (BTZ Preliminary Proxy Statement); A948 (BQH Definitive Proxy Statement) and A1004 (BQH "Fight Letter").) Nevertheless, Saba did not seek judicial intervention during the entire month of May 2019.

G. The Litigation

On June 4, 2019—nearly five weeks after the Funds sent the Disqualification Notices to Saba, and more than three weeks after the BQH preliminary proxy statement announced to the market that the Funds viewed the Saba Nominees as ineligible for election—Saba filed the instant action.[5] Saba's delay of more than a month in seeking injunctive relief is inexcusable, sowed confusion in the market about the elections, and prejudiced Defendants, as discussed below.

[5] On June 12, 2019, Saba filed an Amended Complaint that was substantively the same as the original but sought to delay the annual meetings. (*See* A120; A192.)

In the Motion, Saba sought an injunction in connection with its third and fourth causes of action only, which allege that by applying Section 7(e) of the Bylaws, Defendants breached the Bylaws and their fiduciary duties. Saba asked the Court to order Defendants "(1) to refrain from precluding or interfering with [Saba's] presentation of its four trustee nominees for election to the Board of BTZ and BQH at the 2019 annual meetings of shareholders, and (2) to allow any proxies or votes cast in favor of [Saba's] nominees at the meetings to be counted so that [the Court of Chancery] may subsequently determine the outcome of the election and the proper constitution of the Board." (A75.) Saba's Motion characterized this as "preliminary" injunctive relief, but the relief that Saba sought was in the nature of a mandatory injunction requiring the Boards to waive the Bylaws and to count votes in favor of the Saba Nominees at the Funds' annual meetings.

The Court of Chancery held oral argument on the Motion at a hearing on June 25, 2019.

On June 27, 2019, the Court of Chancery issued the Opinion, rejecting Saba's interpretation of the Bylaws and finding in favor of Defendants-Appellants on nearly all of the matters in dispute regarding the merits of Saba's claims. Indeed, the Court of Chancery found that: (i) the injunction Saba sought requiring the Funds to count votes for Saba's nominees was mandatory relief and not "preliminary;" (ii) Section 7(e)(ii) unambiguously permits the Boards to request information about whether

Saba's nominees met the director qualifications in the Bylaws on a five business day deadline; (iii) the April 22 Request sought such information; (iv) Section 7 of the Bylaws was adopted on a "clear day;" and (v) Saba failed to satisfy its burden of showing a likelihood of success on its breach of fiduciary duty claim.

Nevertheless, the Court below held that the presence in the Questionnaire of a minority of questions not directly tied to the director qualification requirements in the Bylaws rendered the entire Questionnaire beyond the scope of Section 7(e)(ii), and therefore the five business day deadline did not apply at all. (Op. at 16-17.) In other words, the Court of Chancery relieved Saba of its obligation to timely provide the Boards with information they requested under valid bylaws simply because the Boards also requested other information. Based on this holding, the Court of Chancery enjoined "Defendants from applying Section 7(e)(ii) to invalidate Saba's nominations to the Boards based on the late return of Saba's Questionnaires," and directed that "[t]he Trusts shall count votes for those nominees at the annual meetings." (Op. at 21-22.)

On July 2, 2019, the Court of Chancery entered the Partial Final Judgment on Count III of Saba's Complaint for breach of the Bylaws, which provides, in part:

> Saba's nominees are validly nominated for election to the Boards of the Funds at the 2019 annual meeting. The Funds are enjoined from applying Section 7(e)(ii) of their respective bylaws to invalidate Saba's nominations to the respective boards of trustees of the Funds, shall refrain from precluding, invalidating, or interfering with Saba's

> presentation of its four trustee nominees for election to the Boards of the Funds at the 2019 annual meeting, and shall count votes for those nominees at the annual meetings of the Funds.

(Partial Final J. at 2-3.)

H. The Election

BTZ and BQH held their shareholder meetings on July 8, 2019 and July 18, 2019, respectively. In accordance with the Opinion and the Partial Final Judgment, the Funds counted votes for Saba's Nominees.

In the BQH election, a quorum was reached and the Board's incumbent trustees won the election under a plurality vote standard. At the BTZ annual meeting, a quorum was achieved and the Board's incumbent trustees received a plurality of the votes. However, under the BTZ bylaws, a majority vote standard applies in a contested election, and a plurality vote standard applies in an uncontested election.[6] Therefore, because the BTZ election was contested pursuant to the Court's Opinion and Partial Final Judgment, the BTZ Board's incumbent trustees are holdovers until the election next year. Had the Saba Nominees not been eligible for election, and had the election therefore been an uncontested election, the Board's incumbent trustees would have been elected to a three-year term under the plurality vote standard. (For this reason, this appeal was not mooted by the election results.)

[6] The validity of the majority vote standard is the subject of ongoing litigation in the case below.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY ISSUING A MANDATORY INJUNCTION REQUIRING THE BOARDS TO COUNT VOTES FOR THE SABA NOMINEES, CONTRARY TO THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE BYLAWS.

A. Question Presented

Whether the Court of Chancery erred by entering a partial final judgment in favor of Saba on its claim for breach of the Bylaws and by issuing a mandatory injunction requiring the Boards to count votes for the Saba Nominees at the Funds' respective shareholder meetings. This issue was preserved for appeal. (A229-42; A1183-84 at 78:19-79:6, A1193-94 at 88:6-89:5.)

B. Scope Of Review

A decision to grant injunctive relief is reviewed for an abuse of discretion while embedded legal conclusions are reviewed *de novo*. *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380-81 (Del. 2014). The construction or interpretation of a corporate bylaw is a question of law reviewed *de novo*. *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990).

C. Merits Of Argument

Under Delaware law, corporate bylaws are interpreted under the same rules as contracts. *See Gentile v. SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001). "Following those rules, if the bylaw's language is unambiguous, the Court need not interpret it or search for the parties' intent." *Id*. (citation omitted). "The bylaw is

construed as it is written, and the language, if simple and unambiguous, is given the force and effect required." *Id*. (citation omitted). The principle that unambiguous bylaws will be enforced as written is particularly strong in the context of statutory trusts like the Funds. *See* 12 Del. C. § 3825(b) ("It is the policy of this subchapter to give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments [for statutory trusts].").

The Court of Chancery's Opinion disregards the plain language of the Funds' Bylaws.

Here, the Bylaws expressly and unambiguously provide that if a shareholder nominates trustees to the respective Boards, then (i) the Boards may request information from the shareholder "to determine that [its nominees] ha[ve] met the director qualifications" in the Bylaws (A408 (BQH) & A434 (BTZ) Art. I § 7(e)(ii)); (ii) the shareholder must provide the requested information "not later than five (5) business days" after receiving the Boards' information request (*id*.); and (iii) if the shareholder misses that five business day deadline, its nominees "shall" not be eligible for election (A406, A409 (BQH) & A432, A434 (BTZ) §§ 7(a), 7(f)). It is undisputed that, after Saba nominated four individuals for election as trustees of the Funds, the Boards asked Saba for information to determine whether those nominees satisfied the qualifications in the Bylaws, and that Saba failed to provide the requested information within five business days. That should have been the end of

the matter. Under the plain language of the Bylaws, the Saba Nominees are ineligible for election to the Boards because Saba missed the deadline.

The Court of Chancery, however, read into the Bylaws an additional condition on the Boards that is not in the Bylaws. The Court of Chancery held that, because the Boards ***also*** sought other information, the five business day deadline did not apply to ***any part*** of the Boards' information requests. The Funds respectfully submit that ruling is at odds with the plain language of the Bylaws.[7] The Bylaws contain no exception to the five business day deadline, nor do they restrict what other information the Boards may, in the exercise of their business judgment, request to determine the suitability of a nominee. The Funds are aware of no precedent that supports rendering deadlines in valid bylaws ineffective simply because a board asked for information that it is fully empowered to request. And the Funds

[7] Notably, in a concurrent litigation that Saba filed in Maryland state court against a different fund advised by BlackRock Advisors, LLC involving nearly identical facts and bylaws, the Circuit Court for Baltimore City expressly declined to follow the Court of Chancery's interpretation of Section 7(e). (A1226-28 at 10:23-12:21.) Instead, the Maryland court, applying Maryland law, found that Saba failed to show a likelihood of success on its claim for breach of the bylaws and invited Saba to withdraw its motion for a preliminary injunction. (A1328 at 112:1-9 ("I do not read the bylaws or attach to the director/Defendants decisions and application of the entire Section 7 of the bylaws as inconsistent with Maryland law or as precluding the Plaintiff's presentation of nominees in any way as interfering with or adversely affecting shareholder franchise or contradicting or breaching the bylaws or the underlying statutory responsibilities of the director shareholders.").) Conceding defeat, Saba withdrew its motion for a preliminary injunction in the Maryland case on July 15, 2019. (A1337.)

respectfully submit that the Court below cannot write into the Bylaws new provisions that do not exist in order to circumscribe the powers of the Boards. *See Gentile*, 788 A.2d at 113 ("It is a fundamental principle that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws."); *Judah v. Shanghai Power Co.*, 546 A.2d 981, 987 (Del. 1988) (courts may not rewrite a contract to read additional terms into it).

It would be one thing had Saba complied with the Bylaws other than to provide responses to disputed questions within five business days. But that is not what happened here. It is undisputed that the scope of the Questionnaire did not cause Saba to miss the deadline. Saba simply blew the deadline as a result of its own negligence. Nor did the Court of Chancery find that the Funds included those additional questions for some improper purpose. Instead, it found that the Funds' reasons for including them, which included to determine whether the Saba Nominees satisfied certain legal requirements for membership on the Boards, were "understandable." (Op. at 16.) Accordingly, Saba—a sophisticated activist hedge fund with sophisticated counsel—effectively received a free pass on its failure to comply with valid, longstanding and unambiguous Bylaws. That is contrary to the law of Delaware, where bylaws are strictly enforced. *See PR Acquisitions, LLC v. Midland Funding LLC*, 2018 WL 2041521, at *7 (Del. Ch. Apr. 30, 2018) (requiring strict compliance with the terms of the contract where defendant "offer[ed] no reason

other than its own error for its failure to comply with the notice provision"); *Heartland Delaware Inc. v. Rehoboth Mall Ltd. P'ship*, 57 A.3d 917, 925 (Del. Ch. 2012) (holding that there is no equitable remedy for failure to comply with a contract because of one's own negligence or inadvertence).

The Opinion is also at odds with the purposes that these types of Bylaws serve, which is "to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations." *See Openwave Systems, Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007) (discussing purpose of advance notice bylaws). As discussed above, the Funds sent the Questionnaire to Saba on April 22 and had regularly scheduled Board meetings on May 1; the Boards met again on May 7; and the first preliminary proxy statement was filed with the SEC on May 10. These facts exemplify why deadlines are necessary to ensure an orderly election process. Permitting Saba to ignore the deadline imposed by the Bylaws and allowing it to submit information about its nominees piecemeal undermines the public policy served by bylaws that are adopted to facilitate orderly elections. *See, e.g.*, *Openwave*, 924 A.2d at 238-39. It opens the door to attacks on all sorts of deadlines in corporate bylaws, and raises serious doubts about whether such deadlines will be enforced regularly and consistently by Delaware courts.

The Court of Chancery rightly held that Saba did not meet its burden for obtaining a mandatory injunction on its claim that Defendants breached their fiduciary duties in applying Section 7 of the Bylaws. It explained that: (i) "[t]he Trusts adopted Section 7 on a 'clear day' before this proxy contest" (Op. at 18), and (ii) Saba failed to offer proof that "defendants acted with the primary purpose of thwarting Saba's nominees under *Blasius*, or otherwise acted inequitably under *Schnell*" (Op. at 18-19 (referring to *Blasius Industries, Inc. v. Atlas Corporation*, 564 A.2d 651 (Del. Ch. 1988), and *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971)). Nonetheless, by requiring the Boards to count votes for Saba's nominees, the practical effect of the Court of Chancery's Opinion and Partial Final Judgment is to invalidate the Boards' decisions to abide by the deadline in Section 7(e)(ii) of the Bylaws. That is contrary to well-established Delaware law.[8]

[8] *See, e.g.*, *AB Value Partners, LP v. Kreisler Mfg. Corp*, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) (holding that plaintiff failed to assert a "colorable claim" that an advance notice bylaw, which was adopted "on a 'clear day' long before the present proxy challenge was contemplated by [the plaintiff]," was invalidly enforced when plaintiff missed a deadline); *Goggin v. Vermillion, Inc.*, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011) (refusing to enjoin shareholder meeting, and stating that "[b]ecause the Board established . . . the deadline for advance notice before [plaintiff] appears to have expressed to the Company his dissatisfaction, the record does not support an entrench[ment] or defensive motive on behalf of this disinterested Board"); *Openwave*, 924 A.2d at 241-42 (holding that shareholder's nominations did not comply with advance notice requirements and finding that defendant corporation did not breach its fiduciary duty by enforcing the provision); *Accipiter Life Sciences Fund L.P. v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006) (enforcing advance notice bylaw to preclude plaintiff from nominating a slate of directors, where the plaintiff "could easily have preserved its rights with reasonable

The Court of Chancery's recent decision in *Bay Capital Finance, LLC v. Barnes and Noble Education, Inc.* denying a request for injunctive relief under similar circumstances confirms that the Court below committed error. C.A. No. 2019-0539-KSJM (Del. Ch. Aug. 14, 2019). In that case, Bay Capital, a beneficial owner of company stock, timely noticed its nomination of a slate of director candidates for election at the company's annual meeting. However, Bay Capital negligently missed the deadline in the company's bylaws to become a record holder of company stock, which the bylaws required in order to nominate directors. After the company rejected Bay Capital's nomination based on the missed deadline, Bay Capital commenced litigation and sought an injunction to force the company to allow it to run its slate of directors anyway. In denying Bay Capital's request, the Court explained that Delaware law does not support giving a shareholder a free pass for missing deadlines:

> [N]ot even Delaware's strong public policy favoring the stockholder franchise will save Bay Capital from its dilatory conduct. ***Bay Capital blew the deadline***. It then made up excuses for doing so. No record evidence suggests that the company is in any way at fault for that mistake. ***If this Court required the company to accept the nomination in these circumstances, advance notice requirements would have little meaning under Delaware law***.

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diligence" by carefully reading a press release announcing the date of the shareholder meeting).

Id. at *23-24 (emphasis added). The Funds respectfully submit that the decision of the Court below to require the Funds to count votes for the Saba Nominees even though Saba negligently missed the deadline in the Bylaws is inconsistent with the decision in *Bay Capital* and important principles of Delaware corporate law.

Finally, the decision of the Court below unreasonably interferes with the Boards' exercise of its business judgment. The Boards must be permitted to diligence nominees and inform shareholders if the Boards determine, in the exercise of their business judgment, that electing those nominees would not be in the best interests of the Funds. That is precisely the purpose of the Questionnaire, as is evident from its face. Indeed, the questions in the Questionnaire that are not directly tied to a qualification set forth in the Bylaws all seek information concerning whether the nominee is suitable—and, in some cases, legally permitted—to serve as a member of the Board. However, in construing the Bylaws as it did, the Court below unreasonably constrains the Boards—forcing them to choose between (i) having an effective deadline and (ii) requesting additional information about a shareholder's nominees. Under the Court of Chancery's Opinion, the Boards cannot do both.

II. THE COURT OF CHANCERY ERRED IN HOLDING THAT SABA'S CLAIMS FOR EQUITABLE RELEIF WERE NOT BARRED BY THE DOCTRINE OF LACHES.

A. Question Presented

Whether the Court of Chancery erred by not holding that Saba's claims for equitable relief were barred by the doctrine of laches. This issue was preserved for appeal. (A252-53; A1195-96 at 90:14-91:15.)

B. Scope Of Review

A decision to grant or deny injunctive relief is reviewed for an abuse of discretion. *N. River Ins. Co.*, 105 A.3d at 380-81. The Court defers to the trial court's factual findings "unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process." *Honeywell Int'l Inc. v. Air Products & Chemicals, Inc.*, 872 A.2d 944, 950 (Del. 2005).

C. Merits Of Argument

The Court of Chancery erred by misapplying Delaware law in refusing to bar Saba's claims under the doctrine of laches. Under Delaware law, the doctrine of laches bars relief where: (i) the plaintiff knew or should have known of its claim; (ii) the plaintiff unreasonably delayed in bringing suit; and (iii) the delay has prejudiced the defendant. *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009); *Khanna v. McMinn*, 2006 WL 1388744, at *30 (Del. Ch. May 9, 2006). That means a party seeking injunctive relief must "move as promptly as possible to

prevent the passage of time from increasing the risk of injury to the opposing party and from depriving the court of an opportunity to make a more informed judgment." *Kahn v. MSB Bankcorp, Inc.*, 1995 WL 1791092, at *1 (Del. Ch. Dec. 6, 1995); *see also Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000) ("Laches is an equitable defense based on the theory that [a party] with knowledge of [a potential claim] should not be permitted to sit by in silence while positions are fundamentally changed by potential adversaries.") (internal quotations and citations omitted).

The undisputed facts in the action below presented a quintessential case for the application of the laches doctrine to bar relief.

First, Plaintiff knew of its claim as of May 1, 2019, when it received the Disqualification Notices from the Funds stating that Saba failed to comply with the deadline in the Bylaws and that its nominees were therefore invalid. (A616, A621 (BQH) & A618, A624 (BTZ).) The Funds' position that votes for the Saba Nominees would not be counted at the upcoming shareholder meetings was reaffirmed in the Funds' May 7 Letter, the Funds' May 8 Email, the May 20 BTZ preliminary proxy statement, the May 24 BQH definitive proxy statement, and the May 24 BQH fight letter. (A347; A818; A832; A948; A1004.)

Second, after receiving the Disqualification Notice, Saba waited until June 4—***35 days***—to commence the action below and seek injunctive relief. Saba offered no justification, let alone a valid and convincing one, for its indolence.

Third, Saba's unreasonable delay prejudiced Defendants. As an initial matter, the Boards required Saba's responses in advance of the May Board meetings in order to knowledgeably discuss the nominees' qualifications. Saba's delay and deficient completion of the Questionnaire prejudiced the Boards from being able to diligently discuss the nominees. Furthermore, as discussed above, the Funds issued proxy statements and other public statements making clear that votes for the Saba Nominees would not be counted. Saba's delay in commencing the action below, therefore, resulted in a prolonged period of time stretching almost two months during which shareholders were casting votes under the impression that votes for the Saba Nominees would not be counted at the annual meeting. Naturally, many shareholders who would have voted for the incumbent trustees may have simply thrown their proxy cards away and not voted at all under the belief that the incumbents were running uncontested. And when the Court of Chancery issued its injunction compelling the Funds to count votes for the Saba Nominees, there was little time for the Funds to solicit votes or for shareholders to cast their votes, if they even knew about the injunction at all. The full extent to which Saba's inexcusable delay in seeking injunctive relief impacted the Funds' elections may never be known, but it is beyond dispute that Saba's weeks of delay while shareholders cast votes with the understanding that the elections were uncontested prejudiced the Funds' electioneering efforts.

The Court of Chancery properly found that Saba "could have brought its claim weeks before it did," but "stop[ped] short" of finding that Saba was guilty of laches "due to its reasonable belief that BTZ's annual meeting would not be scheduled until late July[.]" (Op. at 19-20.) The Court of Chancery's holding was in error.

There is a dearth of evidence in the record concerning Saba's "belief" about when BTZ's annual meeting would be held. (*See* A1137-39 at 32:24-34:17.) Saba did not submit any documentary or testimonial evidence concerning its supposed belief. Instead, Saba's attorney claimed at oral argument on the Motion that Saba "anticipated" that BTZ would hold its shareholder meeting on the anniversary of the 2018 meeting, which was held on July 30. (A1139 at 34:7-9. ("And last year's meeting is the date that we anticipated would be the meeting date for this year, because it typically is.").) The unsubstantiated assertion of Saba's litigation counsel is not sufficient evidence for the Court of Chancery to conclude that Saba was not guilty of laches in waiting more than a month to seek judicial intervention.[9]

[9] *See Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972) ("In exercising our power of review, we have the duty to review the sufficiency of the evidence and to test the propriety of the findings below. . . . If they are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint we accept them, even though independently we might have reached opposite conclusions. It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact.").

In addition, Saba's supposed "belief" that BTZ's shareholder meeting would occur in late July, even if that belief were held in good faith, was not reasonable. BTZ's bylaws provide the BTZ Board with discretion to designate the date, time and place of the annual meeting of shareholders for the election of trustees. (*See* A429 Art. I, § 2.) However, those bylaws further provide that the advance notice period for shareholders to submit proposals to be acted upon at the annual meeting applies only if the annual meeting is called for a date that is within 25 days of the anniversary of the prior year's annual meeting. (*See* A432 Art. I, § 7(c)(i).) BTZ's prior annual meeting was held on July 30, 2018, and therefore BTZ's 2019 meeting could have been held on any date between July 5 and August 24, 2019, without eliminating the application of BTZ's advance notice deadline. Saba should have understood that the annual meeting was most likely to occur at some point during that time period, and therefore it was reasonably likely to occur as early as the first week of July. It was wholly unreasonable for Saba to sit on its hands and delay seeking extraordinary, mandatory injunctive relief based only on its assumption that BTZ would hold its shareholder meeting on the anniversary of the 2018 meeting.

In any event, Saba's belief about when the annual meeting would occur is beside the point. For one thing, the BQH and BTZ meetings were held just 10 days and 20 days before the anniversary of the 2018 meetings, respectively. That does not excuse Saba's 35-day delay in seeking injunctive relief. For another, Saba's

expectations about when the meetings would occur is irrelevant in a laches analysis. What matters is that Saba unreasonably delayed in pursuing its claims, which prejudiced Defendants. *See Steele v. Ratledge*, 2002 WL 31260990, at *3 (Del. Ch. Sept. 20, 2002) ("Laches is defined as an unreasonable delay by a party, without any specific reference to duration, in the enforcement of a right."). As discussed above, Saba knew as of May 1 that the Boards viewed its nominees as ineligible for election, and by May 7 that the Boards were not going to waive the Bylaws. Saba still has not offered any reasonable justification for its delay in bringing the case below.

In short, the Court of Chancery's holding that Saba is not "guilty of laches" is unsupported by facts in the record and is premised on an incorrect application of Delaware law. It should be reversed.

CONCLUSION

For the foregoing reasons, the Fund Appellants respectfully request that this Court reverse the Court of Chancery, order that Plaintiff-Appellees' Motion for Preliminary Injunction be denied, dissolve the mandatory injunction, and grant such other and further relief to which the Fund Appellants may be entitled.

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CERTIFICATE OF SERVICE

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