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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 for the State of Delaware, C.A. No. 2019-0416 MTZ

APPELLEE'S BRIEF IN OPPOSITION TO OPENING BRIEF OF APPELLANTS BLACKROCK CREDIT ALLOCATION INCOME TRUST AND BLACKROCK NEW YORK MUNICIPAL BOND TRUST

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NATURE OF PROCEEDINGS

In this appeal, Defendants challenge the Court of Chancery's application of unambiguous bylaws to undisputed facts to issue a mandatory injunction permitting Plaintiff Saba Capital Master Fund, Ltd. ("Saba") to nominate four individuals to the Board of Trustees of Defendants BlackRock Credit Allocation Income Trust ("BTZ") and BlackRock New York Municipal Bond Trust, ("BQH," and together with BTZ, the "Trusts").[1] Although Saba delivered timely advance notice of the nominations in proper written form, Defendants "invalidated" the nominees over a month later under Article I, Section 7(e)(ii) of the Trusts' bylaws (the "Bylaws"), which provides that a shareholder giving advance notice "shall further update and supplement such notice, if necessary, so that: … any subsequent information reasonably requested by the Board of Directors to determine that the Proposed Nominee has met the director qualifications as set out in Section 1 of Article II is provided … not later than five (5) business days after the request by the Board." (A408 (BQH) & A434 (BTZ)) The lower court, applying Delaware contract principles, correctly concluded that the Board had not issued a request for information regarding director qualifications under Article II, Section 1 within the

[1] Citations herein to Opening Brief of Appellants BlackRock Credit Allocation Income Trust and BlackRock New York Municipal Bond Trust are in the form of "Def. Br. at __". The Court of Chancery Memorandum Opinion, dated June 27, 2019, is cited as "Op. at __," and the Order Granting Partial Final Judgment Pursuant to Rule 54(b), dated July 2, 2019 is cited as "Order at __".

scope of Section 7(e)(ii), and, therefore, that the five-day period for responding in that section did not apply. Defendants filed this appeal.

At issue in this appeal is the BlackRock Annual Questionnaire (the "Questionnaire"), a 45-page document whose stated purpose is to provide information to BlackRock to "prepare regulatory filings, including registration statements filed with the U.S. Securities and Exchange Commission, amendments to such registration statements, annual reports and proxy statements." (A519 (BQH) & 568 (BTZ)). It was not designed to determine director qualifications under Section 1 of Article II, but, according to Defendants, to gather a broader range of information for purposes of submitting annual SEC filings and doing other diligence on directors, including "nominees' potential conflicts" and "their ability to perform duties of trustees." (Def. Br. at 12) Moreover, even by Defendants' count, approximately one-third of the questions cannot be linked in any way to director qualifications under Section I of Article II. Thus, Vice Chancellor Zurn found that "the Questionnaire as a whole was not 'reasonably requested' or 'necessary' to determine whether Saba's nominees met Section 1's requirements," (Op. at 16-17) and that the five-business day response period of Section 7(e)(ii) was not triggered.

Defendants do not dispute the lower court's plain reading of the Bylaws that a Section 7(e)(ii) information request "must be (a) for the purpose of determining whether Saba's nominees met Section 1's enumerated requirements, (b) 'reasonably

requested' with that scope in mind, and (c) 'necessary' for the Boards' determinations." (Op. at 13) Nor do they challenge the legal or factual basis for the court's conclusion that the Questionnaire did not meet those requirements. Instead, Defendants offer arguments concerning a host of unproven and disputed assertions of fact about the Board's good faith and lack of "improper purpose." None of these arguments are relevant to the breach of bylaw claim.

In *Hill Int'l, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30 (Del. 2015), the authority that controls the Plaintiff's breach of bylaw claim, the Court determined that a board could not use the announcement of a range of potential dates to trigger the advance notice period, which pursuant to the bylaw was to be triggered by the announcement of "the date" of the annual meeting. Similarly, in this case, the lower court determined that the board could not use a request for a wide range of information to trigger a five-day response period in a bylaw provision that applied only to a request for information limited to director qualifications under Article II, Section 1. Consequently, as in *Hill,* the Board here breached its own bylaw when it purported to preclude the nominations, and as in *Hill*, there is no need to examine whether the Board acted inequitably or in good faith.

Defendants' laches argument is also meritless. Defendants failed to demonstrate that the request for expedited proceedings, unopposed by Defendants and filed six weeks before the then-scheduled shareholder meeting, constitutes

unreasonable delay. Defendants intentionally compressed the time for considering Plaintiff's motion, after the litigation was filed, by setting BTZ's meeting date earlier than the already scheduled date for BQH's meeting. They have not shown that the lower court's conclusion -- that Saba reasonably believed that the annual meetings of the Trusts would be no earlier than July 18 (Op. at 19-20) -- was "clearly erroneous." Finally, Defendants did not proffer any evidence of unfair prejudice or hardship or even challenge the lower court's conclusion that they suffered no legally cognizable hardship.

Accordingly, the Court of Chancery decision should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery enforced the Trusts' Bylaws and correctly concluded that the Questionnaire, which Defendants admit sought information for a purpose other than determining whether the nominees were qualified under Article II, Section 1, was not a request that fell within the scope of Article I, Section 7(e)(ii). *Hill*, 119 A.3d at 38. The lower court interpreted the Bylaw's words and found them to be unambiguous: "the plain meaning of Section 7(e)(ii) only permits inquiries into director qualifications as confined by Section 1." (Op. at 16)

Defendants' admission on appeal that the Questionnaire is not tethered to the Article II, Section 1 qualifications (Def. Br. at 24 (Questionnaire sought "other information … to determine the suitability of a nominee")) necessarily follows from the demonstrative exhibits, requested of the parties by the lower court, concerning the purpose of each question. The court found that, even assuming Defendants' demonstrative to be correct, "a substantial number of questions [were] unrelated to Section 1's director qualifications," and that "the Questionnaire as a whole was not 'reasonably requested' or 'necessary' to determine whether Saba's nominees met Section 1's requirements." (Op. at 16-17) Accordingly, because the Questionnaire was not an information request that fell within the unambiguous terms of Section 7(e)(ii), the five-business day response period contained in that section did not apply,

and the lower court enjoined Defendants from precluding the nominations on the basis of that inapplicable response period. (A150-153)

Defendants do not challenge the Chancery Court's legal conclusion that the Bylaw imposes three contractual restrictions on the Board's ability to invoke Section 7(e)(ii). Nor do they assert any error in the trial court's finding that the Questionnaire was not "reasonably requested" or "necessary" to determine whether Saba's nominees met Article II, Section 1. As set forth in Plaintiff's demonstrative exhibit, roughly two-thirds of the Questionnaire is completely unrelated to those qualifications, and any questions that do relate to that subject are entirely duplicative of the information delivered in the advance notice Saba delivered weeks earlier. Defendants themselves concede that approximately one-third of the Questionnaire has *nothing whatsoever* to do with Section 1's qualifications. (Def. Br. at 2) As Defendants do not challenge the lower court's reading of Section 7(e)(ii) or its determination that the Questionnaire did not meet the requirements of that Bylaw, Defendants provide no basis for reversing the ruling in favor of Plaintiff on Count III of the Complaint (Breach of Bylaws).

2. Denied. The Court of Chancery did not invalidate or waive the Bylaw, render it ineffective or otherwise preclude or interfere with its application.[2] Rather,

[2] Defendants mischaracterize the lower court opinion to make it appear as though the Bylaw was disabled. *See* Def. Br. at 3 ("effectively invalidating"), *id*. at 4 ("effectively waived"), *id*. at 6 ("invalidating" bylaw application), *id*. at 26 (raises

the court enforced the unambiguous language of the Bylaw, which Defendants breached when they sought to invalidate Saba's nominees using Section 7(e)(ii). Defendants' primary purpose or inequitable conduct is relevant only to the fiduciary duty claim in Count IV of the Complaint (A153-154), which is moot in light of the lower court's ruling on Count III determining that the Questionnaire was not a request for information limited to Article II, Section 1 qualifications to which Section 7(e)(ii) applied. *Hill*, 199 A.3d at 36 (in granting injunction based on breach of bylaw claim, "the court need not reach any of the arguments about whether the defendants have acted inequitably") (citing lower court order).

3. Denied. Defendants did not satisfy their burden of persuading the Court of Chancery that Plaintiff unreasonably delayed in bringing suit or that the Defendants, who did not oppose Plaintiff's motion to expedite, were in any way prejudiced. Plaintiff brought the action and request for expedited preliminary injunction proceedings seeking application of the unambiguous bylaw provisions to undisputed facts so that a hearing could be held before BQH's then-scheduled July 18 meeting, which was six weeks away. When the case was filed on June 4, BTZ had not yet scheduled its meeting, and the one-year anniversary of its annual meeting

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"serious doubts about whether such deadlines will be enforced"), *id*. at 27 ("invalidate the Boards' decisions to abide by the deadline"), *id*. at 29 (""unreasonably interferes with the Boards' exercise of its (sic) business judgment"). In fact, Defendants had not issued a request within the Bylaw's scope, and thus, did not trigger the Bylaw at all.

was still eight weeks away. Defendants made no showing that six weeks for consideration of a preliminary injunction request based on undisputed facts was in any way unreasonable.

Nor do they challenge the lower court's finding that they suffered no prejudice from the timing of the litigation, as they alone controlled the schedule of the annual meetings. Any shortened time for consideration of the injunction motion resulted from Defendants' own actions, as they set the BTZ meeting for July 8, after receiving the motion to expedite and discussing a schedule with plaintiff's counsel based on the July 18 date of the BQH meeting.

Finally, the unsupported assertion that Defendants were unfairly prejudiced because shareholders might not have understood the election was contested is both false and a problem of their own making. Defendants always knew that proxies were being solicited from shareholders for the election of Saba's nominees. Moreover, BTZ's definitive proxy statement and fight letter were not filed or mailed to shareholders until *after* the motion to expedite was filed, yet Defendants intentionally chose to omit any reference to the pending legal proceedings and the possibility that the court would require votes for Saba's nominees to be counted. Accordingly, Defendants cannot show that the lower court's findings on timeliness were "clearly erroneous," and they present no basis for reversal on appeal.

STATEMENT OF FACTS

A. The Parties.

Plaintiff Saba, a Cayman Islands company managed by Saba Capital Management L.P., is a record holder of common shares of the Defendant Trusts, which are organized as Delaware statutory trusts and registered as closed-end investment companies under the federal Investment Company Act of 1940. (A123-124) The Trusts are managed by Defendant BlackRock Advisors, LLC ("Advisor"), a Delaware limited liability company owned by BlackRock, Inc. ("BlackRock"). (A124-125) The Board of Trustees of BQH and BTZ consists of the eleven individual Defendants, who serve as the Board of at least 88 funds managed by BlackRock. (A125-127, 965-969)

B. Saba's Advance Notice Was Timely and In Proper Written Form.

The Trusts have identical advance notice bylaw provisions addressing trustee nominations in Article I, Section 7 of their Bylaws. (A406-409 (BQH) & A432-435 (BTZ)) To make a nomination, under Section 7(b) a shareholder "must have given timely notice thereof in proper written form to the Secretary of the Fund." (A406 (BQH) & A432 (BTZ)) Notice is "timely" under Section 7(c) if it is delivered "not less than one hundred and twenty (120) days nor more than one hundred and fifty (150) days prior to the anniversary date of the immediately preceding annual meeting of shareholders …" (A406-407 (BQH) & A432-433 (BTZ)) Notice is "in proper

written form" under Section 7(d) if it contains specific information regarding each nominee and the nominating shareholder, as well as a consent signed by each nominee. (A407-408 (BQH) & A433-434 (BTZ)) Among the items to be included in the advance notice is information showing that each proposed nominee satisfies the sixteen objective "director qualifications" listed in Article II, Section 1 of the Bylaws. (A407 & A433)

On March 30, 2019, Plaintiff delivered timely advance notice in proper written form to the BQH and BTZ Boards. (A450-482 (BQH) & A483-516 (BTZ)) The exhaustive advance notice letter included specific statements identifying why the nominees met each of the sixteen director qualification requirements. (A455-459 (BQH) & A489-493 (BTZ)) The Defendants never asserted that the advance notice was incomplete or insufficient in any way. (A518 (BQH) & A567 (BTZ))

C. Defendants Ask Saba's Nominees to Complete and Sign The BlackRock Annual Questionnaire, Whose Stated Purpose Is To Provide BlackRock Information For Regulatory Purposes.

Defendants did not contact Saba for three weeks after receiving the notice. On April 22, 2019, without identifying any deficiency in the notice or a specific need for information, the Trusts' counsel sent Saba an email request: "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)) No deadline was provided.

The questionnaire attached to the email was the BlackRock Annual Questionnaire, a 45-page document containing 97 questions. (A518-565 (BQH) & A567-614 (BTZ)) As the title and first page of the Questionnaire indicate, this document was designed to elicit information annually from BlackRock's incumbent directors and chosen nominees so that ***BlackRock*****,** not the Board or the Trusts, is able to complete annual filings and meet regulatory compliance obligations:

BlackRock Annual Questionnaire

> This Annual Questionnaire will provide BlackRock with the information needed to:
>
> - Prepare regulatory filings, including registration statements filed with the U.S. Securities and Exchange Commission, amendments to such registration statements, annual reports and proxy statements;
> - Determine whether a Director or nominee may be an "interested person" of a Fund set forth in Schedule 1 (a "Fund"), as that term is defined under the Investment Company Act of 1940, as amended, and therefore not an independent Director,
> - Evaluate potential conflicts of interest;
> - Update records;
> - Comply with other applicable laws and regulations.

(A519 (BQH) & A568 (BTZ))

The signature page confirms the document's purpose:

> **[T]he information that I am furnishing herein … will be relied upon by the Funds and their legal counsel in connection with the requirements of federal securities law, disclosures under the SEC rules and NYSE listing standards and in the preparation of the Fund reports and disclosure statements and the determination of whether I am an independent director.**

(A559 (BQH) & A608 (BTZ)) (emphasis in original)

The Questionnaire has no five-business day response period (A518-565 & A567-614); nor have Defendants ever suggested that they give BlackRock directors and nominees a mere five business days to complete the Questionnaire. As described by the lower court, the Questionnaire addressed issues that were entirely unrelated to any Article II, Section 1 director qualification requirements. (Op. at 16)

D. The Dispute Between the Parties About Saba's Nominations.

A week after the Questionnaire was delivered to Saba, on May 1, 2019, Defendants' counsel sent a letter to Saba asserting that the Questionnaire should have been returned by each nominee on April 29, two days earlier, and that Saba's nominations were therefore invalid. (A518 (BQH) & A567 (BTZ)) This message was Defendants' first communication of an asserted five-day response period. Defendants were apparently relying on Article I, Section 7(e)(ii) of the Bylaws, the only provision that references such a period. The full text of Section 7(e) is reproduced below:

> (e) A shareholder of record, or group of shareholders of record, providing notice of any nomination proposed to be made at an annual meeting or special meeting in lieu of an annual meeting shall further update and supplement such notice, if necessary, so that:
>
> (i) the information provided or required to be provided in such notice pursuant to this Section 7 of this Article I shall be true and correct as of the record date for determining the shareholders entitled to receive notice

> of the annual meeting or special meeting in lieu of an annual meeting, 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 not later than five (5) business days after the record date for determining the shareholders entitled to receive notice of such annual meeting or special meeting in lieu of an annual meeting; and
>
> (ii) any subsequent information reasonably requested by the Board of Directors 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 not 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.

(A408 (BQH) & A434 (BTZ))

Defendants, however, knew that the Questionnaire was not limited to the narrow scope of Article II, Section 1 qualifications set forth in Section 7(e)(ii), but, as Defendants themselves assert, was generally "designed to illicit information to determine whether the member or nominee, as the case may be, is suitable to serve as a trustee." (Def. Br. at 13)

Later that day, Saba's counsel sent a response disputing the Board's position and setting forth the reasons that Saba understood that the five-day period did not apply to the Questionnaire, all of which were asserted in the subsequent litigation,

including the narrow ground ultimately adopted by the lower court -- that the Questionnaire was not limited to a request for information about director qualifications under Article II, Section 1. (Op. at 16-17) At the same time, "in an effort to resolve this matter amicably," the letter also attached responses to the Questionnaire that Saba had been working diligently to obtain from its nominees. *Id*.

A week passed with no response from Defendants. Then, on May 7, 2019, Defendants' counsel sent Saba a letter indicating that the Board, relying on "the exercise of its business judgment," would not permit Saba's nominees to run against them. (A819) Although the letter purported to rely on Section 7(e)(ii), it addressed general "concerns" from the Questionnaire responses and outside research apparently conducted on the nominees, that were, with limited exceptions, completely unrelated to director qualifications under Article II, Section 1.[3] Saba

[3] For example, Defendants' complaint about a response to Question 2.1 had nothing to do with "director qualification" under Article II, Section 1. The letter asserted: "*Mr. Flanagan's position with Alchemy Global is not mentioned in the biography referenced in response to this question. We understand that in 2014, Mr. Flanagan was named operating partner of Alchemy Global, which is a crowdfunding platform for sports and entertainment investment opportunities." (A821*) Saba responded that: "Q2.1: The question asks for the nominee's 'current principal occupation(s)' and his or her 'principal occupation(s) for at least the last five years.' Mr. Flanagan made an investment in Alchemy Global and provided consulting services between 2014 and 2016. Mr. Flanagan did not and does not consider such services to constitute his principal occupation during the foregoing time period." (A837)

responded to those concerns in a May 9 letter, and again set forth its position, asking the Board to recognize the validity of the nominations. (A835-840)

Defendants knew throughout this process that Saba did not agree with the "invalidation" and was reserving all of its legal rights, while it sought to resolve the dispute.[4]

E. The Parties File Proxy Statements with the SEC.

On May 10, Defendants filed a preliminary proxy statement for BQH, which established May 20 as the record date but set no date for the annual meeting. (A842-896) On May 14, 2019, Saba Capital Management filed its own preliminary proxy statement to solicit votes for Saba's nominees at BQH's 2019 annual meeting. (A898-919) Defendants were thus aware that proxies were being solicited for the Saba nominees (A843), and that the election results could be challenged after the election through a proceeding under Delaware General Corporation Law ("D.G.C.L.") § 225. Defendants chose not to file litigation before the election to resolve the issue and not to disclose in their proxy solicitation materials the

[4] Saba's May 1 letter stated that Defendants' argument "is incorrect" (A621, 623), and that "Saba [will] exercise any and all rights and remedies available to it, including, but not limited to, seeking redress from the courts." (A463 (BQH) & A496 (BTZ). The May 9 letter stated: "Saba reserves all rights in connection with this matter and waives none." (A840) Defendants acknowledged Saba's position when they filed the BQH definitive proxy statement on May 24, 2019, in which they refer to Saba's correspondence "potentially threatening litigation," as well as Saba's solicitation of proxies to elect its nominees. (A964)

possibility of a judicial challenge to their position either before or after the election. (A843)

Defendants filed their preliminary proxy statement for BTZ with the SEC on May 20, 2019 (A347-398), which established a record date of May 30, 2019, ten days later than the BQH record date, but similarly set no meeting date. The next day, Saba Capital Management filed its own preliminary proxy statement for the as yet unscheduled BTZ meeting. (A921-946) Although Defendants decided not to disclose the risk that a court might disagree with them, they declared that they would not change course merely because litigation was filed or preliminary relief sought, but would only respond to "a final non-appealable decision": "In the event that ***there were a final, non-appealable decision issued by a court of competent jurisdiction*** that votes cast in favor of the Hedge Fund Individuals must be counted at the meeting, the voting requirements of a contested election under the Fund's By-laws will apply." (A378) (emphasis added). BTZ's definitive proxy statement, filed and mailed after this litigation commenced, contained the same language. (B47)

The Defendants filed their definitive proxy statement for BQH on May 24 and established the July 18 date for the BQH meeting. (A948-1002) They did not assert that Saba's nominees failed to meet any qualification requirement of Article II, Section 1. Rather, they used the Questionnaire responses to electioneer against

Saba's nominees,[5] and encouraged shareholders to vote to combat Saba's election contest even as they asserted that votes for Saba's nominees would not be counted: "Your vote can help ensure that the Board Nominees will be elected" (A952); "The meeting is very important because a hedge fund managed by Saba Capital Management …announced its intention to elect four individuals …" (A959)

Although Defendants set the BQH meeting date for July 18, 2019, they did not announce a meeting date or file a definitive proxy statement for BTZ until after Saba filed a motion to expedite proceedings to allow a preliminary injunction hearing before July 18, 2019.

F. The Proceedings in the Court of Chancery.

On June 4, 2019, Plaintiff filed the complaint (A23-58) along with a motion for preliminary injunction (A68-69) and a motion to expedite (A59-67), requesting that "this motion [for preliminary injunction] be heard by the Court no later than July 15, 2018, as the Defendants have set the BQH annual meeting for July 18, 2019 and will schedule the BTZ annual meeting shortly." (A69) The preliminary injunction motion was addressed only to Count III, for breach of the bylaws, and, if

[5] BQH's fight letter asserts that Saba is "attempting to install inexperienced individuals" and "has a running history of trying to put these same individuals on the board of other closed-end funds." (A1004)

necessary, Count IV, for breach of fiduciary duty, to rectify Defendants' asserted refusal to count any votes cast for Saba's nominees.[6]

On the morning of June 5, 2019, Plaintiff's counsel conferred with Defendants' counsel to discuss an expedited schedule premised on the July 18 BQH meeting date, as reflected in the proposed scheduling order filed with the motion to expedite. (A59-A67, ¶¶ 11, 14; B1-2) At the time, Plaintiff anticipated that the BTZ meeting would be scheduled after July 18, as it had a later record date than BQH (*compare* A844 (May 20 for BQH) *with* A349 (May 30 for BTZ)), its previous year's meeting had been held on July 30 (B78), and its annual meeting had never been held before July 25. (B4) At the conclusion of the call, defense counsel indicated that they would consider proceeding with an agreed-upon schedule to allow a hearing before July 18. (B4-5; Plaintiff's original proposed order at B1-2)

After 5 p.m. that day, however, BTZ filed its definitive proxy statement and announced that its meeting date would be July 8, three weeks before the meeting date the previous year and ten days before the already scheduled BQH meeting. (B16-67) In response, Plaintiff wrote to the Court advising it of the newly-scheduled BTZ meeting date and seeking an earlier hearing date for the injunction, no later

[6] Counts I and II are claims for breach of declaration of trust and breach of fiduciary duty regarding the two-tier vote standard that the Board adopted for BTZ, which requires a plurality of votes cast in an uncontested election, but the vote of a "majority of outstanding shares" in a contested election.

than June 25. (B3-7) Defendants did not oppose Plaintiff's motion to expedite and stipulated to a briefing schedule and hearing on June 25, which was so ordered by the Court of Chancery on June 7, 2019. (B8-10) On June 12, Plaintiff filed the Amended Class Action Complaint, including allegations about the advancement of BTZ's meeting date. (A143, ¶ 59)

The day before the hearing, on June 24, Vice Chancellor Zurn requested demonstrative exhibits from the parties "categorizing whether each of the subpart questions in the Questionnaire related to Section 1's director qualifications or some other purpose." (A1086-1087; Op. at 13) The parties disagreed on the number of questions in the Questionnaire that related to the director qualification requirements – Saba claimed that less than one-third might in some way be linked to the requirements, and Defendants claimed two-thirds. (Op. at 13-14) Plaintiff's demonstrative exhibit also showed that the few questions that did relate to director qualifications sought information that was entirely duplicative of the advance nomination notice. (B104-135)

Following a lengthy hearing, the Court issued its written opinion. As a preliminary matter, the court accepted the Defendants' argument that the injunction was "effectively a mandatory injunction" and required a showing "sufficient to support a grant of summary judgment." (Op. at 9) Using the summary judgment standard, the court ruled in plaintiff's favor on Count III, "a breach of contract claim

with undisputed facts, based on an unambiguous provision of the Bylaws." (Op. at 10) Having found for Plaintiff on Count III, the court stated that it "need not reach any of the arguments about whether the defendants have acted inequitably," but noted that "on this pre-discovery record, Saba has not met its burden for mandatory injunctive relief on Count IV." (Op. at 17-18)

Reading the plain meaning of the words of Section 7(e)(ii) of the Bylaw, the court determined on the contract claim that information requested under that provision "must be (a) for the purpose of determining whether Saba's nominees met Section 1's enumerated requirements, (b) 'reasonably related' with that scope in mind, and (c) 'necessary' for the Board's determinations." (Op. at 13) Furthermore, "the plain meaning of Section 7(e)(ii) only permits inquiries into director qualifications as confined by Section 1." (Op. at 17) The lower court applied the Bylaw's words to the undisputed facts -- Defendants' admission that the Questionnaire was "designed to ensure that nominees satisfy federal regulations and requirements, as well as to elicit information the Boards would simply like to know about nominees" and that "a substantial number of questions [were] unrelated to Section 1's director qualifications." (Op. at 16) Thus, the lower court concluded that neither Section 7(e)(ii) nor its five-day response period was invoked by the Questionnaire: "I find that the Questionnaire as a whole was not 'reasonably requested' or 'necessary' to determine whether Saba's nominees met Section 1's

requirements. Having issued a request that exceeded the Bylaws' scope, Defendants are not permitted to rely on the five-day deadline for Saba's compliance with that request." (Op. at 17)

On July 2, 2019, the Court of Chancery entered a stipulated partial final judgment under Rule 54(b), which stated: "Saba's nominees are validly nominated for election to the Boards of the Funds at the 2019 annual meeting." (Order at ¶2) On July 10, 2019, Defendants filed their Notice of Appeal.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY APPLIED THE FUNDS' UNAMBIGUOUS BYLAWS TO THE UNDISPUTED FACTS TO ISSUE THE INJUNCTION REQUIRING THE BOARD TO COUNT VOTES FOR SABA'S NOMINEES.

A. Question Presented

Did the Court of Chancery err when it concluded on Plaintiff's breach of bylaw claim that "having issued a request that exceeded the Bylaws' scope, Defendants are not permitted to rely on the five-day deadline for Saba's compliance with that request," and that, therefore, Saba's nominees were eligible for election to the Boards of the Trusts at the 2019 annual meetings?

B. Scope of Review

A "trial court's decision to grant or refuse injunctive relief is generally reviewed for an abuse of discretion," but embedded legal conclusions are reviewed *de novo*." *Hill*, 119 A.3d at 37. Factual findings are given a "high level of deference." *DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund*, 75 A.3d 101, 108 (Del. 2013). The trial court's factual findings will not be set aside "unless they are clearly wrong and the doing of justice requires their overturn." *Id*. (citations omitted). The deferential standard applies to facts "that are based on physical or documentary evidence or inferences from other facts." *Id*. at 109 (citations omitted). In the case of a mixed question of law and fact, the ultimate determination is a legal issue, and "[t]he factual findings that provide the basis for

that determination will not be overturned unless they are clearly erroneous." *Id.,* 75 A.3d at 108.

C. Merits of Argument

The Bylaws "constitute part of a binding broader contract among the directors, officers and stockholders…" *Hill,* 119 A.3d at 38. Thus, principles of contract interpretation apply. *Id.* "Words and phrases used in a bylaw are to be given their commonly accepted meaning unless the context clearly requires a different one or unless legal phrases having a special meaning are used." *Id*. (citations omitted). Where language is unambiguous, "the bylaw is construed as it is written, and the language, if simple and unambiguous, is given the force and effect required." *Id.* On the other hand, if a bylaw is ambiguous, "we resolve any doubt in favor of the stockholder's electoral rights." *Id*. (citations omitted).

Here the lower court applied the commonly accepted meaning of the words of Section 7(e)(ii) -- "the plain meaning of Section 7(e)(ii) only permits inquiries into director qualifications as confined by Section 1." (Op. at 16) Furthermore, the provision requires any such inquiry to be "reasonably requested" and "necessary" with respect to the narrow scope of determining director qualifications under Section 1. (Op. at 13) Defendants do not challenge the lower court's legal interpretation of the Bylaw language. Nor do they make any effort to address the words that narrow the scope of any inquiry under Section 7(e)(ii); they simply omit those words from

their description of what "the Bylaws expressly and unambiguously provide." (Def. Br. at 23)

Instead of giving meaning to the actual Bylaw language, Defendants accuse the Court of Chancery of having "read into the Bylaws an additional condition on the Boards that is not in the Bylaws."[7] Defendants do not identify an ambiguity in the Bylaw or offer an alternative meaning for any of the words used in the Bylaw, but instead simply eliminate and ignore the key language, which violates fundamental rules of contract interpretation.[8] Thus, Defendants offer no basis to reverse the lower court's legal conclusion. Nor do they explain how the Bylaw language could ever be stretched to cover what they call "other information," (Def. Br. at 24), that is not referred to in Section 7(e)(ii).

Defendants fare no better in their effort to undermine the lower court's application of the Bylaw to the undisputed facts. (Op. at 16-17) Defendants make no attempt to apply the legal standard to the material undisputed facts or assert that the Questionnaire was in fact "reasonably requested" and "necessary" to determine

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[7] Def. Br. at 24; *accord* Def. Br. at 25 ("the Court below cannot write into the Bylaws new provisions that do not exist in order to circumscribe the powers of the Boards").

[8] *NAMA Holdings, LLC v. World Market Center Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement and that each word should be given meaning and effect by the court."); *Seidensticker v. Gasparilla Inn, Inc.*, 2007 Del. Ch. LEXIS 155, at *9 (Del. Ch. Nov. 8, 2007).

director qualifications under Article II, Section 1, which is the only inquiry permitted by Section 7(e)(ii).

Factual determinations and inferences of the lower court must be upheld unless clearly erroneous, *DV Realty,* 75 A.3d at 108, but in any event, Defendants admit that the Questionnaire goes beyond "inquiries into director qualifications as confined by Section 1." (Op. at 16) As Defendants explain, the Questionnaire's purpose was broad and not limited to the sixteen qualifications of Article II, Section 1: "to enable 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." (Def. Br. at 12; *id*. at 25) Moreover, even by Defendants' calculation, approximately one third of the Questionnaire has nothing to do with Section 7(e)(ii), which the lower court determined was "substantial." (Op. at 14-16)[9]

Defendants offer only unsupported factual assertions concerning good faith, intent, and causation, none of which is relevant to the breach of bylaw claim. They assert that "the scope of the Questionnaire did not cause Saba to miss the deadline";

[9] The lower court illustrated this point with examples, which show how far the Questionnaire went beyond Section 7(e)(ii) to include inquiries about: The Iran Threat Reduction and Syria Human Rights Act of 2012; academic disciplinary actions; allegations of sexual assault; business and other commitments going forward three years and a CV going back five years; and nominations to any public company or fund board. (Op. at 14-15)

that the cause was Saba's "negligence"; and that Defendants had no "improper purpose" in requesting the Questionnaire. (Def. Br. at 25) These unsupported assertions are irrelevant to the application of Section 7(e)(ii). *Hill*, 119 A.3d at 34, n.4 (the fact that the nominating shareholder could have, but did not, comply with the notice deadline listed in the proxy statement is irrelevant to the breach of bylaw claim).

Defendants here conflate the fiduciary claim (Count IV) with the breach of bylaw claim (Count III), a strategy they used in the Maryland case involving another BlackRock Fund described in Defendants' brief.[10] In that case, the Maryland Circuit Court judge permitted Plaintiff to withdraw its preliminary injunction motion, after previewing her initial view, in discussions with counsel, that the Maryland statutory business judgment rule governed the case, rather than the straightforward contract theory advocated by Plaintiff and applied by the Court of Chancery in this case.[11]

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[10] Defense counsel argued in the Maryland case: "that's the standard I think, the business judgment standard … both with respect to the bylaw issue and with respect to [the] breach of fiduciary duty issue. Because we don't believe that you can divorce the breach of bylaw issue and the requests that were made by the Board of the Saba nominees from the obligation of the Board to act in good faith. And there is no evidence not on this record that the Board did anything that comes close suggesting that they violated 2-405.1 [Maryland's statutory business judgment rule]." (A1297)

[11] The Maryland court thought it appropriate to "attach a standard of conduct in the bylaws interpretation." (A1315) The reasoning was entirely based on Maryland's statutory business judgment rule: "There's no hint, in my view, based on the documents that I've seen and identified of any lack of good faith on the part

The Maryland court did not reach any final conclusion, and counsel were admonished that the court's early feedback was not an opinion and was subject to change. (A1334) Nonetheless, even if a Maryland court would conclude that a claim for breach of an advance notice bylaw is governed by Maryland's statutory business judgment rule, that would have no bearing on the breach of bylaw claim in Delaware, which is controlled by contract principles only. *Hill*, 119 A.3d at 34, 36.

Defendants omit from their brief any mention of *Hill Int'l, Inc. v. Opportunity Partners L.P.*, the controlling precedent here. In *Hill,* the Court of Chancery issued a mandatory injunction permitting shareholder nominees to stand for election after the board had deemed them invalid based on an advance notice bylaw. 119 A.2d at 32. The Court affirmed the breach of bylaw claim, based solely on contract principles. Defendants had announced an "on or about" annual meeting date, which they believed constituted an announcement of "the date of the annual meeting," from which the advance notice window calculation was triggered. They believed that they were appropriately enforcing the bylaw's deadline, based on their interpretation of

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of the directors in making the decisions or determining not to waive the requirements of the bylaws…The Maryland statutory business judgment rule does not work that way. The presumption instead clearly is and has not been overcome in my view based on what I've seen so far that the directors are acting in good faith. It is clear to me that the directors are acting in good faith based on what I've seen so far." (A1331)

its words, past practice, and their announcement of that deadline in a prior year's proxy statement. *Id*. at 34-35 & n.4.

The Court, however, applied the precise words of the bylaw to hold that the advance notice period was not triggered by the announcement of an "on or about date." *Id.* at 39, n. 29 ("reinterpreting" the contract "could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented") (citations omitted). Because the board was in breach of the bylaw, "the court need not reach any of the arguments about whether the defendants have acted inequitably." *Id*. at 36. Just as *Hill* determined that a broad "on or about date" did not constitute the requisite "date" required by the bylaw, the lower court here properly determined that the broad Questionnaire at issue here is not a limited request for information regarding Article II, Section 1 qualifications that would implicate Section 7(e)(ii) of the Bylaws.

Defendants argue that they are entitled to seek information from shareholder nominees beyond Section 7(e)(ii) simply because they are fiduciaries. (Def. Br. at 24) This argument is both incorrect and irrelevant. The Board does not have general authority to prevent ballot access to a shareholder nominee based on a general "diligence" inquiry not tied to a Bylaw election rule. A fiduciary cannot overwrite an express bylaw election rule imposed on shareholders, as bylaws are governed by contract law. *Hill,* 119 A.3d at 39, n. 29. Defendants wrote the Bylaw but did not

include a provision to permit their actions here. *Seidensticker*, 2007 Del. Ch. LEXIS 155, at *9 (by including one or more items specifically, contract language signifies that other items not specifically mentioned are excluded pursuant to the principle "*expression unius est exclusion alterius*"); *Hill*, 119 A.3d at 38 (doubts resolved in favor of electoral rights).

Also, Defendants' assertion contradicts their argument in the lower court that Section 7(e)(ii) is the exclusive means for the Board to make information requests.[12] The lower court agreed: "Section 7(e)(ii) provides the sole method identified by the parties for the Boards to request supplemental information to a Nomination Notice." (Op. at 11) And even if Defendants could seek unlimited information from dissident nominees pursuant to some non-Bylaw "fiduciary" authority, Defendants do not and cannot explain how that type of request would give them the ability to invalidate a nominee based on the five-day response period in Section 7(e)(ii).

Defendants suggest that Saba should have returned incomplete responses to the Questionnaires and answered only the questions that related to the Article II, Section 1 qualifications : "[i]t would be one thing if Saba complied with the Bylaws

[12] Defendants argued that it was paramount that the Bylaw be read so that the Board at its sole option could initiate a Section 7(e)(ii) request, because otherwise, the Board would have "no right to seek additional information." (A237). Defendants' view that, without Section 7(e)(ii), the Board would be precluded from seeking information was noted by the lower court: "Defendants assert that Section 7(e)(ii) is the exclusive method for the Boards to request supplemental information …". (Op. at 11)

other than to provide responses to the disputed questions within five business days." (Def. Br. at 25) This argument contradicts the undisputed evidence that the Questionnaire was a single information request, considered by the lower court "as a whole," and which was to be returned after it was completed in its entirety:

- "Please have each of the proposed nominees ***complete and sign*** the attached questionnaire and return it to my attention …" (cover email) (A518)

- "Please ***complete each question*** …" (instructions) (A520)

- "I hereby … acknowledge that the ***answers to the foregoing questions*** are ***true, correct, and complete*** …" (A559)

- "It was also important to the Funds that the Saba Nominees ***sign the completed Questionnaire***." (Def. Br. at 12)

Nothing in the Bylaws imposes the burden on Saba to parse the Questionnaire items to fit the limited inquiry permitted by the Bylaw. The identification of questions that are related to director qualifications is the subject of vast disagreement, and the determination of relevant questions was impossible even for Defendants' counsel in their after-the-fact justifications. For example, they contended in their briefing that Question 12.1 (regarding 12b-1 distribution plans) related to "director qualifications," and subsequently conceded that the question was "inapplicable" to the Trusts.[13] Finally, no amount of parsing the Questionnaire

[13] *Compare* Independent Director Defendants' Answering Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, dated June 18, 2019 [D.I. 24], at p. 9, n. 6 *with* Defendants' demonstrative, dated June 25, 2019 (A1092).

would have been reasonable or necessary, as the few questions that did relate to those qualifications were almost entirely duplicative of the specific representations set forth in the advance notice. (B108, 110, 111, 118-120, 123-125, 129-132)

The "default rule in Delaware" is that any stockholder may make a nomination at the annual meeting, without providing advance notice or any other information to the Board. *Jana Master Fund, Ltd. v. CNET Networks, Inc.,* 954 A.2d 335, 344 (Del. Ch. 2008). An advance notice bylaw is a permissible restriction on the shareholder nomination process only if the bylaw is tailored to a single purpose – "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." *Openwave Systems Inc. v. Harbinger Capital Partners Master Fund I, Ltd.,* 924 A.2d 228, 239 (Del. Ch. 2007).[14] The cases discussed by Defendants in which a shareholder simply misses an advance notice deadline and seeks an excuse or waiver have nothing whatsoever to do with this case.[15] Here Saba gave timely and proper

[14] "[W]hen advance notice bylaws "unduly restrict the stockholder franchise ..., they will be struck down." *Jana,* 954 A.2d at 344 (*quoting Openwave*, 924 A.2d at 239); *Jana* at 345 (court rejected the board's interpretation of the advance notice bylaw and read it narrowly as applicable only to SEC Rule 14a-8 proposals).

[15] *See Accipiter Life Sciences Fund, L.P. v. Helfer,* 905 A.2d 115, 121 (Del. Ch. 2006) (sophisticated investor provided notice 1½ months after notice period had expired); *AB Value Partners, L.P. v. Kreisler Manufacturing Corp.*, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) (shareholder did not provide any notice of nominations and filed litigation 12 days before meeting); *Goggin v. Vermillion, Inc.*, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011) (shareholder failed to provide

advance notice, and Defendants received the "fair warning" that is the proper subject of an advance notice bylaw. No Delaware case addresses follow-up requests to a timely advance notice.

This case, like *Hill*, concerns the question of whether the Board complied with its own Bylaw, and, as in *Hill,* the lower court correctly determined that it did not. Likewise, the transcript from the unreported *Bay Capital* case provides no support for the Defendants' position. In that case, the advance notice bylaw required a nomination to be made by a record owner, and the plaintiff did not have such ownership at the time of the deadline. Transcript of Oral Argument, at pp. 3, 22-24, *Bay Capital Finance, LLC v. Barnes and Noble Education, Inc*. (Del. Ch. Aug. 14, 2019) (No. 2019-0539-KSJM). It is undisputed here that Saba was a record holder and that the advance notice deadline was met on March 30.

Although the lower court granted the injunction on the narrow ground that the Questionnaire was not a request for Article II, Section 1 information within Section 7(e)(ii)'s scope, other contract-based arguments, raised below and not waived by Plaintiff, support the same result. These include arguments that assume that Section 7(e)(ii) was triggered by the Questionnaire, contrary to the lower court decision, and

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advance notice and filed litigation 4 months after deadline); *Openwave,* 924 A.2d at 241 (shareholder had no intention of conducting proxy contest when notice was due and did not provide any notice until 2 weeks after due date).

would independently support affirmance of the injunction.[16] In addition, Saba argued in the lower court that Section 7(e)(ii), and any information request made under it, could be triggered only after a nominating shareholder makes an "update and supplement" to the advance notice letter to correct information as of the record date. (A1062-1067) On this broader issue of interpretation of the Bylaw, the lower court, after acknowledging "I must construe ambiguity in Saba's favor," disagreed with Plaintiff's reading. (Op. at 11) However, Plaintiff submits that Section 7(e)(ii) could not be applied at all in the absence of an update and supplement to the notice as of the record date, an issue that this Court would need to reach only if it disagreed with the narrow ruling of the court below at issue on this appeal.[17]

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[16] Plaintiff argued that Defendants decision to declare Saba's nominees as ineligible was not valid under the Bylaws. First, only the Chairperson of the meeting – at the meeting - and not the Board before the proxy contest begins – can make that determination. Second, because Section 7(e)(ii) does not specifically indicate that "time is of the essence" or that a mere two-day delay in completing a lengthy, complicated regulatory inquiry could cause a timely advance notice to become void. Here, the questionnaire was returned in a "reasonable" time and well ahead of the proxy contest. Defendants used the information for electioneering, giving them the "fruits" of the contract, and thus precluding them complaining that they suffered a material breach worthy of imposing forfeiture on the contract counterparty. *See generally* A1068 -1073.

[17] Sections 7(e) (i) and (ii) are limited to an "update and supplement" of "subsequent information," and Section 7(e)(ii) follows 7(e)(i) with the conjunction "and," indicating that the request must be connected to an update and supplement by the nominating shareholder and for information relating to a time period subsequent to issuance of the advance notice. *See Jana*, 954 A.2d at 344 (narrowly construing advance notice bylaws).

Accordingly, the Court of Chancery's order that Saba's nominees were eligible for election to the Boards of the Trusts at the 2019 annual meeting was correct and should be affirmed.

II. THE COURT OF CHANCERY PROPERLY REJECTED THE DEFENDANTS' UNSUPPORTED TIMELINESS ARGUMENTS.

A. Question Presented

Did the Court of Chancery err when it rejected Defendants' assertions that preliminary injunctive relief was barred by the doctrine of laches?

B. Scope of Review

"A trial court's application of equitable defenses presents a mixed question of law and fact." *Klaassen v. Allegro Development Corp.*, 106 A.3d 1035, 1043 (Del. 2014). On a laches defense, the defendant has the burden of persuasion. *Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002). Questions of law are reviewed de novo, but factual findings will not be overturned unless they are clearly erroneous. *Id*. The trial court's factual and legal conclusion that the defendant did not carry the burden of proof to support the affirmative equitable defenses asserted "is entitled to deference on appeal." *Poliak v. Keyser*, 65 A.3d 617 (Table), 2013 WL 1897638, *3 (Del. 2013).

C. Merits of Argument

The litigation and motion to expedite were filed on June 4, a full six weeks before the July 18 BQH meeting, the only shareholder meeting scheduled at the time of filing. As part of their argument in the court below that the balance of equities weighed in their favor, the Defendants referenced the doctrine of laches. (A252)

They did not satisfy their burden of persuasion on the issue, and their appeal of the lower court's rejection of their arguments is meritless.

Laches may act as a bar to an action in equity "if the defendant carries the burden of persuasion that two conditions have been satisfied: (1) the plaintiff waited an unreasonable length of time before bringing the suit and (2) the delay unfairly prejudices the defendant." *Hudak*, 806 A.2d at 153. Each of these questions is a question of fact, which depends on the "totality of the circumstances." *Id*. Defendants offered only unsupported and illogical arguments in the court below and did not meet their burden of persuasion.

As an initial matter, Defendants did not oppose the expedited proceedings on the preliminary injunction. On the contract claim, which the parties agree was purely legal in nature and could be decided on undisputed facts, without discovery, Defendants presented no argument that there was insufficient time for briefing and hearing of the issue. Vice Chancellor Zurn noted that discovery would have been necessary to make a determination on the fiduciary duty claim, but also then determined that plaintiff did not wait an unreasonable length of time before bringing suit, due to "[Plaintiff's] reasonable belief that BTZ's annual meeting would not be scheduled until late July." (Op. at 20) The court below also determined that Defendants had failed to demonstrate any hardship, as "Defendants set the BTZ meeting date after Saba filed its initial complaint." (Op. at 21) Accordingly,

Defendants did not meet their burden to show laches, and the lower court's finding is entitled to deference. (Op. at 19-20)

Apparently unaware that it was their burden to persuade the trial court as to both "unreasonable delay" and "unfair prejudice," Defendants raise an argument, not asserted in the court below, about the "dearth of evidence in the record concerning Saba's belief about when BTZ's annual meeting would be held." (Def. Br at 33) Even if they could now raise that argument, Defendants misrepresent the lower court record when they argue that the only evidence before the court was "the unsubstantiated assertion of Saba's litigation counsel" at oral argument. (Def. Br at 33)

This case was filed shortly after BQH announced its July 18, 2019 meeting date in its definitive proxy statement, and before BTZ, which had a later record date, set its meeting date or filed its definitive proxy statement.[18] The record establishes that BTZ's meeting the previous year occurred on July 30, 2018 (B78), and that Plaintiff's counsel reasonably expected that the BTZ meeting in 2019 would similarly be scheduled "no earlier than [July 18, the date of the BQH meeting], and

[18] At the time, BTZ's timetable was more than a week later than BQH's schedule, as BTZ had filed its preliminary proxy statement one week later than BQH and had set its record date ten days later than BQH's record date. (*Compare* A349 *with* A844) Nor was there a 35-day delay in filing the case, as Defendants contend. Nothing requires that suit be filed the minute a dispute arises, and Plaintiff reasonably sought to engage Defendants to resolve the issue in the weeks following the May 1 letter. (A620-816; A825-830; A835-840)

most likely later, as BTZ's meeting has never been held before July 25." (B4) Indeed, when Defendants subsequently set the BTZ meeting date for July 8, after agreeing to consider an expedited schedule that would allow a hearing before the BQH meeting on July 18, Plaintiff was forced to ask the Court for an earlier date for the preliminary injunction hearing than it had first requested in its motion to expedite. (B3-7)

Defendants never explained why, after the motion to expedite was filed, they chose July 8 as the date for BTZ's meeting, knowing it would shorten the time to consider a preliminary injunction motion. Nor have they cited any case in which an action or motion to expedite filed a full six weeks before a scheduled shareholder meeting was considered to be an unreasonable delay.[19] By failing to object to the

[19] In *Whittington v. Dragon Group, L.L.C.,* 991 A.2d 1 (Del. 2009), the lower court applied a three-year contract statute of limitations period as the appropriate laches period, and the Delaware Supreme Court reversed with instructions to consider the application of the 20 year period for contracts under seal. Likewise, in *Fike v. Ruger,* 752 A.2d 112 (Del. 2000), the plaintiff waited more than three years, the analogous statute of limitations period, to challenge the validity of loan agreements. In *Khanna v. McMinn,* 2006 WL 1388744 (Del. Ch. May 9, 2006), the Court of Chancery held that a plaintiff seeking to overturn a board election must present her claim with "reasonable alacrity if useful equitable relief is to be granted," and noted that although an action could have been filed either before or promptly after the election, an unexplained delay of more than a year after the challenged election was inequitable. In *Steele v. Ratlege,* 2002 WL 31260990 (Del. Ch. Sept. 20, 2002), the plaintiff, who never objected during the construction of an encroaching fence, waited ten years to sue. Finally, *Kahn v. MSB Bancorp, Inc.,* 1995 WL 1791092 (Del. Ch. Dec. 6, 1995), was not a laches case, but a case in which the court denied a request to expedite proceedings to enjoin a public offering that was to occur in less than week. Nothing cited by Defendants bars relief where the

expedited proceedings, inexplicably choosing an earlier meeting date for BTZ than the date already set for BQH, and then agreeing to the briefing schedule and hearing date, Defendants conceded that there was no unreasonable delay.

Defendants also failed in their burden on "unfair prejudice." At every step of this dispute, Plaintiff indicated that it did not accept the "invalidation," was not waiving its legal rights, and would continue to run a proxy contest. (A835-840) Defendants knew that Plaintiff could always bring a claim after the election, pursuant to the expedited procedure of D.G.C.L. § 225. *See, e.g. Khanna,* 2006 WL 1388744 (acknowledging that plaintiff could have challenged board election either before or promptly following the election).

Defendants offered no evidence of prejudice resulting from the timing of the expedited proceedings. Their counsel's unsupported speculation that shareholders "may have simply thrown their proxy cards away and not voted at all under the belief that the incumbents were running uncontested," (Def. Br. at 32) is contradicted by the undisputed facts. First, Defendants knew at all times that proxies were being solicited for Saba's nominees, and they encouraged shareholders to vote both for their own nominees and against the Saba shareholder proposal. (A948-1002) Second, Defendants alone are responsible for their own misleading proxy

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plaintiff filed a full six weeks before the meeting, allowing the parties to adequately brief, and the court to decide, a simple contract interpretation issue based on undisputed facts.

disclosures concerning the nominations, as they filed and mailed their proxy statement for BTZ after the motion for expedited proceedings was filed and could have addressed the lawsuit there. Instead, they continued to assert that the nominations were invalid and that they would only change their position in response to a "final, non-appealable decision." (B47) As late as June 19, 2019, just before the hearing, Defendants issued proxy materials in which they referenced the litigation and encouraged shareholders to vote but did not address the possibility that the Court could issue an order allowing the nominations. (B81-103) Defendants' choice not to inform shareholders that their position could be rejected by a court cannot provide a basis to establish prejudice.[20]

Finally, Defendants never address the lower court's determination that the Defendants suffered no hardship because "the incumbent directors have no vested right to continue to serve as directors…" and because, having set BTZ's meeting after the litigation was filed, "costs related to [the BTZ meeting's] rapid approach are at least partly self-imposed." (Op. at 20) Nor do they address the case law, cited by the lower court, holding that any hardship to the Board would be insubstantial, as it can reconvene the annual meeting and re-solicit proxies, if necessary. (Op. at 20,

[20] Defendants also complain, without evidence, that when they received the completed Questionnaires on May 1, the Boards were prejudiced "from being able to diligently discuss the nominees." (Def. Br. at 32) That purported "prejudice" has nothing to do with the timing of the litigation, and Defendants admit that they met again on May 7, a week later, to consider the issue. (Def. Br. at 2)

citing Opportunity Partners L.P. v. Hill, 2015 WL 3582350, at *4 (Del. Ch. June 5, 2013))

CONCLUSION

For the foregoing reasons, the opinion of the Court of Chancery should be affirmed.

ROSENTHAL, MONHAIT & GODDESS, P.A.

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September 26, 2019

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