Bulldog Investors, LLC., 250 Pehle Avenue, Suite 708, Saddle Brook, NJ 07663 //201-556-0092

To: The Staff of the Division of Investment Management

From: Phillip Goldstein, Managing Member (pgoldstein@bulldoginvestors.com)

Re: Control Share Statutes

Date: September 13, 2020

Thank you for making time on August 26th for a telephone call to allow us to amplify our views about (1) the withdrawal of the Boulder Letter, and (2) other anti-takeover measures employed by closed-end funds ("CEFs"). The following memorializes our views.

I. ANY LIMITATION ON VOTING RIGHTS OF A SHAREHOLDER OF A CEF VIOLATES SECTIONS 16 AND 18 OF THE ICA.

The May 27, 2020 Statement did not disavow the Boulder Letter's reasoning or its conclusion that a CEF would violate Section 18(i) of the Investment Company Act of 1940 (the "ICA") by opting into a state control share statute ("CSS"). The May 27th Statement solicited comments on, among other things, the following point:

> Apart from 18(i), which turns on the meaning of "equal voting rights," please explain whether the ability to opt-in to and trigger a control share statute would have a practical or functional impact on a fund's compliance with other provisions of the federal securities laws, such as section 12(d)(1)(E) of the Act, which requires pass-through or mirror voting for certain fund of funds arrangements, or rule 13d-1 under the Securities Exchange Act of 1934, which places a limitation on the ability of certain shareholders from voting based on the size of their holding. If relevant, please provide an analysis of any practical or functional differences between how the principle of equal voting rights may apply in those different regulatory contexts.

As you know, Section 1(b) of the ICA requires all of its provisions to be interpreted "to mitigate and, so far as is feasible, to eliminate (1) '[funds that are] organized...in the interest of directors, officers, investment advisers...or other affiliated persons...or in the interest of...special classes of their security holders,' (2) the issuance of 'securities containing inequitable or discriminatory provisions,' and (3) the failure of fund boards 'to protect the preferences and privileges of the holders of their outstanding securities.'" To our knowledge, no state statute regulating corporations or other business entities contains a similar interpretive mandate. By faithfully applying that mandate, the

Boulder Letter rejected the argument that a CSS "which is intended to disenfranchise certain share*holders*, would not be inconsistent with Section 18(i)."

> We believe that this argument is without merit. The plain wording of Section 18(i), in conjunction with Sections 2(a)(36) and 2(a)(42), as described above, clearly prohibits discrimination between or among both shares and shareholders. Any interpretation of Section 18(i) that envisages personal discrimination against an investment company shareholder would be flatly inconsistent with the purposes of Sections 18(i) and 1(b) and the special protection that Congress mandated for investment company shareholders....**Although discrimination between and among shareholders may be permitted for operating companies..., such discrimination is not permitted for a CEF under Section 18(i).** (Emphasis added, footnotes omitted.)

But Section 18(i) does not stand alone. It is the basis for, and must be viewed and interpreted in the context of every provision of the ICA that references voting securities, voting, or elections. Opting into a CSS has significant implications for compliance with other provisions of the ICA. That is because Section 2(a)(42) defines a voting security as "any security *presently* entitling the owner or holder thereof to vote for the election of directors of a company" so opting into a CSS necessarily means that the number of outstanding *voting* shares can be less that the number of outstanding shares which would contravene Section 18(i). Some of the most important affected provisions are as follows:

1. Section 2(a)(3) defining "affiliated persons" with respect to a percentage of an entity's *outstanding voting securities*

2. Section 2(a)(9) defining "control" with respect to a percentage of an entity's *outstanding voting securities*

3. Section 12(d)(1)(A)(i) prohibiting a fund from acquiring more than 3% of another fund's *outstanding voting shares*

4. Section 13(a) prohibiting certain changes in a fund's investment policy unless authorized by the vote of a majority of its *outstanding voting shares*

5. Section 15(a) requiring approval, and permitting termination, of a fund's investment advisory agreement by the vote of a majority of its *outstanding voting shares*

6. Section 16(a) requiring a director of a fund to be elected by the holders of its *outstanding voting securities*

7. Sections 18(a)(1)(C)(i) and 18(a)(2)(C) of the ICA requiring, in certain circumstances, that the holders of (*presumably all outstanding*) senior

securities issued by a fund "shall be entitled" to elect directors

8. Section 32(a)(3) permitting the termination of a fund's accountant by a vote of a majority of the *outstanding voting securities*

In addition to violating Section 18(i), any measure that restricts the ability of a shareholder of a fund to vote all of his or her shares in an election for directors is contrary to these sections of the ICA because each of them presumes that every share issued by a CEF can be voted by its holder on any matter that every other holder of the same class of shares can vote her or her shares. Such unlawful measures include a opting into a CSS or including a similar provision in a CEF's organizing documents. In the context of the entirety of the ICA, no other interpretation of these sections is reasonable.

II. THE WITHDRAWAL OF THE BOULDER LETTER WAS PROCEDURALLY IMPROPER.

There are only two possible reasons that the staff would try to put the Boulder Letter genie back in the bottle: (1) The staff succumbed to undue pressure from the Chairman and/or lobbying by the fund management industry; (2) The staff has come to believe that there may be circumstances in which it would be in the best interest of investors to limit the ability of a shareholder of a fund to vote all of his or her shares. However, if the latter is the case, a fund seeking to limit a shareholder's ability to vote all of his or her shares should seek exemptive relief based upon the facts and circumstances so that that fund's investors and the staff can evaluate whether such relief is warranted. Conversely, until the staff explains why it believes the Boulder Letter was flawed, the blanket no action relief provided in the May 27th Statement is a procedurally improper invitation to violate the ICA as well as an alarming refusal by the staff of a federal regulatory agency to enforce a statute it has a duty to administer.

III. THE ICA ESTABLISHES A FIDUCIARY DUTY FLOOR FOR FUND INSIDERS.

In the May 27th Statement, the staff "reminds market participants that any actions taken by a board of a fund, including with regard to control share statutes, should be examined in light of…the board's fiduciary obligations to the fund…. However, it provides no guidance as to what those fiduciary obligations are or any examples of when it would be a breach of fiduciary duty for a board to cause a fund to opt into a CSS. Instead, it asks readers to comment on the following points:

> What considerations would a fund's board take into account in determining whether to opt-in to and trigger a control share statute, particularly with regard to benefits to shareholders and compliance with

the board's fiduciary duty? Under what specific facts and circumstances would a board decide to opt-in to and trigger a control share statute (or decline to do so)?

Generally, each state establishes its own standard of fiduciary duty for officers and directors of business entities. For example, unlike Delaware's General Corporation Law, the Delaware Statutory Trust Act expressly permits the fiduciary duties of trustees of a Delaware statutory trust to be restricted or eliminated in the governing instrument. It goes without saying that that is not an option contemplated by the ICA. Indeed, in *Brown v. Bullock*, 294 F.2d 415 (2d Cir. 1961), the Second Circuit Court of Appeals stated: "It is...unreasonable to suppose that Congress would have wished to permit its purpose to protect investors in all investment companies...to be frustrated if a particular state of incorporation should be satisfied with lower standards of fiduciary responsibility for directors than those prevailing generally." That is, if a state can water down the fiduciary duties referenced in Section 36 and Section 17(h) of the ICA, that could undermine the effectiveness of those sections. Therefore, the ICA must be deemed to establish a nationwide floor for fiduciary duties that supersedes any more relaxed state law. Absent such a floor, the staff's reminder about fiduciary duty is effectively empty verbiage. Consequently, the staff needs to fill in the blanks so that fund officers, directors, and trustees know what is expected of them when they consider opting into a CSS.

IV. THE PROPER FIDUCIARY DUTY FLOOR FOR ACTION THAT IMPEDES A SHAREHOLDER VOTE IS SET FORTH IN *BLASIUS INDUSTRIES, INC. V. ATLAS CORP.*, 564 A.2D 651 (DEL. CH. 1988).

In *Blasius*, Chancellor Allen ruled that a Delaware corporation's board of directors may only take an action "for the sole or primary purpose of thwarting a shareholder vote" if the board has a "compelling justification." His premise was that while such an action may not be expressly prohibited by statute, "inequitable action does not become permissible simply because it is legally possible." Former Director Donohue expressed a similar view by framing the question for a board as "not just whether the action is legal under state and federal law, but whether it is truly in the best interests of fund shareholders." In sum, *Blasius* holds that in the voting context, absent a compelling justification, a board has a fiduciary duty to permit shareholders to make their own choices, even if the board believes they may be the wrong ones.

Blasius is the gold standard and many states have applied it to determine whether a corporate board breaches its fiduciary duty by taking action primarily intended to thwart the free exercise of the shareholder franchise. However, it is uncertain whether courts in some states that are favored by CEFs like Maryland or Massachusetts would apply *Blasius* to the same set of facts and circumstances as a Delaware court. Moreover, even in Delaware, *Blasius* may not be applicable to other business entities like a

Delaware statutory trust (which, under the Delaware Statutory Trust Act, may not even require trustees to be elected by shareholders).

It is indisputable that the ICA cannot be undermined by state law. Consequently, the staff should conclude that a fund board must apply *Blasius'* "compelling justification" standard before it takes any action that adversely affects the franchise rights of any shareholder including opting into a CSS or otherwise limiting a shareholder's ability to vote all of his or her shares. If a board believes it has a compelling justification for taking such action, it should seek exemptive relief.

V. ABSENT A COMPELLING JUSTIFICATION, OTHER ANTI-TAKEOVER MEASURES BY FUNDS ARE ALSO UNLAWFUL.

As explained above, opting into a CSS violates various sections of the ICA including Section 18(i) and, absent a compelling justification, is also a breach of the board's fiduciary duty. Of course, there are other actions that a board can take to impair the ability of shareholders to effectively exercise their franchise rights. All of them are likely expressly prohibited by the ICA and, even more likely, all of them constitute a breach of fiduciary duty.

For example, the boards of some CEFs have adopted a bylaw that requires that, in order to be elected as a director, a nominee must receive not merely the most votes at a shareholder meeting but a majority (or more) of the votes of holders of the fund's outstanding shares. Its primary purpose is to make almost certain that in a contested election no nominee will be elected so that the incumbent directors will then "hold over" in their positions. As former Director Donohue observed, "[T]his amounts to an anti-takeover device that keeps the existing board in place." A vote requirement that is intended to result an incumbent director continuing to serve despite getting fewer votes than a challenger at a valid shareholder meeting violates Section 18(i) (and Sections 18(a)(1)(C)(i) and 18(a)(2)(C) if senior securities are outstanding), and Section 16. In addition, it clearly constitutes an action taken "for the sole or primary purpose of thwarting a shareholder vote" which, absent a compelling justification, constitutes a breach of fiduciary duty under *Blasius*.

To illustrate the practical effect of a "majority of outstanding shares" bylaw, consider the 2019 annual shareholder meeting of Neuberger Berman High Yield Strategies Fund held on October 3, 2019. Each nominee proposed by a dissident shareholder received approximately 6.2 million votes vs. approximately 4.0 million votes for each incumbent. Yet, because no nominee received the votes cast by holders of a majority of the fund's approximately 19.5 million shares outstanding, each incumbent director whose term expired at the meeting continued to serve as a director "until his or her successor is elected and qualified." This outcome cannot be squared with Section 16(a) or 18(i) or with the board's fiduciary duty to permit shareholders to elect directors of their choice.

More recently, another CEF that had long required a plurality of the votes cast to elect a nominee as a trustee amended its bylaws to require a nominee to be elected by vote by holders of 60% of the fund's outstanding shares. The fund was enjoined by an Arizona court from applying the 60% requirement and at the annual meeting, the challenger easily elected its slate of nominees. The decision is reproduced below. Had the 60% requirement been upheld by the court, the incumbent trustees would have retained their positions. Such an outcome would contravene Section 16. Future litigation would likely be unnecessary if the staff makes it clear that it expects fund boards to adhere to the voting and fiduciary duty provisions contained in the ICA and intends to recommend enforcement action if they fail to do so.

VI. CONCLUSION: THE STAFF SHOULD (1) EITHER REISSUE THE BOULDER LETTER OR PROVIDE REASONS TO DISAVOW IT, AND (2) PROVIDE GUIDANCE ON OTHER ANTI-TAKEOVER MEASURES

The Boulder Letter's unqualified conclusion that voting discrimination between and among shareholders of a fund is impermissible seems irrefutable. However, if the staff believes that that conclusion is no longer correct, it should explain its reasoning. Otherwise, the Boulder Letter should be reissued. In addition, the staff should remind fund boards that they have a fiduciary duty to avoid taking any action that, absent a compelling justification, impairs the effectiveness of a shareholder vote.

Clerk of the Superior Court
*** Filed ***
06/26/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-005293 06/24/2020

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

SABA CAPITAL C E F OPPORTUNITIES 1 LTD DAVID B ROSENBAUM

v.

VOYA PRIME RATE TRUST, et al. DAN W GOLDFINE

JUDGE DANIEL MARTIN

MINUTE ENTRY

Pending before the Court is Plaintiff Saba Capital CEF Opportunities 1 Ltd.'s ("Saba") Application for Preliminary Injunction, filed on May 1, 2020 ("Application"). By Minute Entry dated May 19, 2020 (subsequently amended), the Court set the Application for an evidentiary hearing on June 18, 2020. On May 20, 2020, Defendants Voya Prime Rate Trust (the "Trust"), Voya Investments, LLC ("Voya"), Colleen D. Baldwin, John V. Boyer, Patricia W. Chadwick, Martin J. Gavin, Joseph E. Obermeyer, Sheryl K. Pressler, and Christopher P. Sullivan (the "Independent Trustees"), and Dina Santoro (the "Interested Trustee") filed a Joint Opposition to Plaintiff's Application for Preliminary Injunction. On June 1, 2020, Saba filed a Reply in Support of Plaintiff's Application for Preliminary Injunction.

The parties appeared by videoconference on June 18, 2020 and presented evidence. At the conclusion of the hearing, the Court took the matter under advisement. Having now considered the entire record, and the arguments of counsel, and for the reasons set forth herein, the Court enters its ruling granting the Application.[1]

FACTUAL HISTORY

The foundational facts underlying the present dispute, while somewhat complicated, are not difficult to parse, and the Court adopts portions of Defendants' background statement set forth in their Joint Opposition as conforming generally to the evidence presented at hearing:

> The Trust is a closed-end investment company that focuses on a high level of current income consistent with preserving capital for its shareholders by investing primarily in secured senior loans. Investors in closed-end funds tend to be long-term shareholders who desire a steady, income-like return, such as retirees. Like all registered investment companies, closed-end funds are a product of state law and federal regulation, organized under the law of a given state while also subject to the extensive requirements of the Investment Company Act of 1940 (the "ICA") [15 U.S.C. §§ 80a-1 *et seq.*] The Trust is organized as a business trust under the laws of Massachusetts, with its principal place of business in Scottsdale, Arizona. The Trust's loan portfolio and day-to-day operations are managed by its investment adviser, defendant Voya, an Arizona company headquartered in Scottsdale. As required by the ICA, the Trust is governed by a board of trustees [(the "Board")]. Here, seven of the Board's eight members, or more than 87% of the trustees, are independent (the "Independent Trustees") and not affiliated with Voya . . . . The eighth Trustee is defendant Dina Santoro (collectively with the Independent Trustees, the "Trustees"), who also serves as President of Voya. Ms. Santoro is considered an "interested" trustee because she is also an employee of Voya.
>
> In an *open-end* investment company, commonly known as a mutual fund, investors purchase and redeem shares of the fund in transactions directly with the fund itself, at a price equal to the fund's net asset value ("NAV") – essentially the per-share value of the fund's portfolio holdings minus expenses. By contrast, shares of closed-end funds like the Trust are issued in discrete public offerings and then trade among investors on the secondary market. The Trust's shares trade on

---

[1] On May 20, 2020, Defendants filed a Joint Motion to Dismiss the Verified Complaint with Prejudice. Under ordinary circumstances, the Court would have heard argument on the Motion to Dismiss in advance of the evidentiary hearing on the Application. Here, however, the evidentiary hearing was set prior to the Motion being filed, and in view of the fact that the election to which the challenge is directed is scheduled to close on July 9, 2020, the evidentiary hearing took precedence. As counsel for Voya acknowledged at hearing, many of the arguments set forth in the Motion substantially overlap those presented by the Application.

the New York Stock Exchange. While the Trust publishes its NAV each day (like an open-end fund), its share price does not necessarily trade at the NAV (unlike the price of an open-end fund) – because the trading price on the Exchange is affected by forces of market supply and demand. Unlike mutual funds, closed-end funds do not have to meet daily shareholder redemptions, and can thus establish a fixed asset base of longer-term investments with the use of leverage that can frequently provide greater returns than open-end funds, which need to maintain greater liquidity and have more limited ability to use leverage.

* * * * *

Although the Trust, like most closed-end funds, provides long-term shareholders with steady returns, the differential between the market price of shares in the Trust and the Trust's NAV – when shares trade at less than (or at a "discount" to) NAV – creates an arbitrage opportunity [such as occurred in the present matter].

* * * * *

Saba first announced its intention to seek a tender offer for the Trust's shares on January 10, 2020. . . . Voya and the Board were concerned that Saba's tender offer would benefit Saba . . . to the detriment of remaining shareholders. For example, as discussed in the Proxy Statement filed by the Trust on May 11, 2020, to raise the cash to pay tendering shareholders, the Trust would have to sell a significant portion of its portfolio investments relatively quickly. [The Board takes the position that] [b]ecause the Trust invests almost exclusively in senior loans traded in private markets, a forced sale of that number of loans could result in the Trust selling its loans in a "fire sale" scenario that would drive down the Trust's NAV during the course of, and immediately after, the tender offer to the detriment of all shareholders. [According to the Board,] [t]his risk would be particularly acute because the market would know the Trust must sell those investments to meet its obligations in the tender offer.

Consistent with its stated investment objective and strategies, the Trust is leveraged – it borrows funds to invest and enhance returns. [The Board takes the position that] [t]he reduction in the Trust's size due to the tender offer would similarly result in a reduction of the Trust's leverage. Thus, [according to the Board], the Trust would have to sell not only enough investments to pay tendering shareholders, but also investments previously acquired with the amount of leverage the Trust would need to pay back due to its smaller size.[2]

* * * * *

As discussed in the Trust Proxy Statement, based on research, Voya advised that, upon the announcement of the proposed large tender offer, Saba would attempt to exit the Trust as soon as it could, both by strategically trading its shares in the market after the announcement of any tender offer and during the course of the tender offer, and by then tendering its entire remaining position in the tender offer at its first available opportunity. [According to the Board,] [s]hareholders who might not have the expertise to trade their shares strategically or who might choose or be required to maintain their investments in the Trust would bear the brunt of the adverse effects arising from the reduction in the Trust's size – including the decline in NAV described above, loss of economies of scale, and potentially reduced liquidity in the trading market for the Trust's shares.

* * * * *

Despite their reservations, Voya and the Board did not dismiss Saba's proposals. Rather, Voya representatives, at the recommendation of the Board, attempted to engage in discussions with Saba on three separate occasions regarding its tender offer proposal. The content of each of these conversations was relayed to and considered by the Board. . . . At no point during or after the approaches made by Voya at the request of the Board did Saba withdraw its proposals. . . .

Concerned about the possibility of Saba putting the Trust's assets and shareholders at risk, the Board acted to protect the voice of all shareholders in the Trust's governance, and to ensure that the Board and Voya maintain flexibility in deciding on actions to enhance shareholder value. Consistent with the authority provided under the Trust's governing documents, the Board on April 13, 2020 adopted the By-law Amendment now challenged by Saba, . . . The Trust announced the changes through an SEC filing on April 14, 2020, and issued a shareholder letter explaining that the Board, in changing the voting standard for the election of a trustee to the sixty percent (60%) standard, had been "motivated by general considerations of fairness and by the express purpose of the [ICA] that investment

[2] There was significant dispute between the parties at hearing as to whether a tender offer would, on balance, be a positive event for the Trust and its shareholders or a negative one. For purposes of the analysis herein, the Court need not resolve this dispute.

> companies not be operated or managed for the benefit of persons who control them or for the benefit of certain classes of shareholders over others."
>
> * * * * *
>
> After adopting the By-law Amendment, an officer of the Trust contacted Saba to engage in discussions to address Saba's concerns. Saba filed this lawsuit instead. . . . As it has evolved since the initial tender offer proposal was announced in January, Saba's plan is to replace the entire Board with its own slate of nominees (two of whom are Saba senior management), terminate the Trust's advisory agreement with Voya, and implement a 40% tender offer for the Trust's shares "at or close to NAV." . . .

Joint Opposition, at pages 3-9 (footnotes and record citations omitted).

Additional relevant facts include: (1) Saba currently beneficially holds 4,433,630 common shares (nearly 25%) of the Trust; (2) prior to the adoption by the Board of the Bylaw Amendment presently under challenge, the Bylaws for the Trust provided, as to elections (Article 11, Section 3), "a majority of the Shares shall decide any questions and a plurality shall elect a Trustee"; (3) the Bylaw Amendment requires a nominee for trustee to receive at least 60% of all of the Trust's outstanding shares; (4) if no trustee garners a 60% vote under the Bylaw Amendment, the existing trustees retain their offices; and (5) the Board amended the Trust's Bylaws and added the Bylaw Amendment after Saba had announced its intent to propose its own slate of nominees with the plain intent to frustrate Saba's efforts to seek election of those nominees.

In its Verified Complaint, Saba alleges claims for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty (against the trustee defendants), tortious interference with contractual relations (against Voya), aiding and abetting breach of fiduciary duty (against Voya), and declaratory relief. In its final analysis, Saba claims that the Board's decision to adopt the Bylaw Amendment does not comport with either its contractual or fiduciary obligations because in effect, the Bylaw Amendment makes it impossible to elect new trustees to the Board, with the result that the existing trustees retain their seats indefinitely. By its Application, Saba requests injunctive relief "preliminarily enjoin[ing] Defendants, and all other persons in concert with them, from applying the voting standard set forth in the Bylaw Amendment." Application, at page 17.

DISCUSSION

Legal Standard

> A party seeking a preliminary injunction traditionally must establish four criteria: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction. *Shoen v. Shoen,* 167 Ariz. 58, 63, 804 P.2d 787, 792 (App.1990). A court applying this standard may apply a "sliding scale." *Smith v. Ariz. Citizens Clean Elections Comm'n,* 212 Ariz. 407, 410, ¶ 10, 132 P.3d 1187, 1190 (2006). In other words, "the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] 'the balance of hardships tip[s] sharply' in favor of the moving party." *Id.* at 411, ¶ 10, 132 P.3d at 1191 (citing *Shoen,* 167 Ariz. at 63, 804 P.2d at 792).

Ariz. Ass'n of Providers for Persons with Disabilities v. State, 223 Ariz. 6, 12, ¶ 12, 219 P.3d 216, 222 (Ct. App. 2009). Here, given that the Trust was organized as a business trust under the laws of Massachusetts, the Court applies Massachusetts law. And under Massachusetts law, Saba has demonstrated that it is entitled to injunctive relief.

The Court's analysis is guided primarily by two Massachusetts decisions, *Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund*, 466 Mass. 368, 995 N.E.2d 64 (2013), and *ER Holdings, Inc. v. Norton Co.*, 735 F. Supp. 1094 (D. Mass. 1990). A third case, *Western Inv., LLC v. Deutsche Multi-Mkt. Income Tr.*, 34 Mass L. Rptr. 95, 2017 WL 1103425 (Mass. Super. Ct. Feb. 6, 2017), is also instructive.[3] *ER Holdings* most closely tracks the fact pattern presented by the instant case, inasmuch as it arose out of hostile tender offer and a contemporaneous proxy solicitation, and squarely addressed the question of whether injunctive relief was appropriate. *Brigade*, which arose on appeal from summary judgment entered in favor of the plaintiff shareholders, specifically addresses closed-end investment companies such as the Trust, and identifies the fundamental principles of Massachusetts law on shareholder electoral rights.

Brigade resolved a dispute as to the meaning of a provision requiring shareholder meetings on an annual basis. While its analysis therefore focused on the interpretation of an ambiguous provision, a question not present in the instant case, its reasoning nonetheless establishes the base analytical framework:

---

[3] In addition to *Brigade* and *ER Holdings*, Saba relies on a multitude of Delaware decisions. Those cases, however, apply a different standard of review and therefore, while instructive, are not persuasive.

To the extent that there is any ambiguity in the bylaws as to when a regular annual shareholders' meeting must be held, we construe the ambiguous provisions against the drafters, which here are the Funds. See *Benalcazar v. Goldsmith,* 400 Mass. 111, 114, 507 N.E.2d 1043 (1987), and cases cited. Moreover, where "bylaw provisions are unclear, we resolve any doubt in favor of the stockholders' electoral rights." *Airgas Inc. v. Air Prods. & Chems., Inc.,* 8 A.3d 1182, 1188 (Del.2010). See *Centaur Partners IV v. National Intergroup, Inc.,* 582 A.2d 923, 927 (Del.1990). The right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership. See *Albert E. Touchet, Inc. v. Touchet,* 264 Mass. 499, 509, 163 N.E. 184 (1928), quoting *Camden & Atl. R.R. v. Elkins,* 37 N.J.Eq. 273, 276 (1883) ("The right to hold elections for the directors of a corporation, and to vote at such elections, is a right that is inherent in the ownership of stock"); *Preston v. Allison,* 650 A.2d 646, 649 (Del.1994) ("stockholder's ability to participate in corporate governance through the election of directors is a fundamental part of our corporate law"); *ER Holdings, Inc. v. Norton Co.,* 735 F.Supp. 1094, 1100 (D.Mass.1990) ("one of the most sacred rights of any shareholder is to participate in corporate democracy"). See generally 5 W.M. Fletcher, Fletcher Cyclopedia of the Law of Corporations § 2025, at 143 (rev. ed. 2011). The ability to nominate and elect different trustees is a crucial means for shareholders to prevent the entrenchment of poorly performing trustees. See *MM Cos. v. Liquid Audio, Inc.,* 813 A.2d 1118, 1127 (Del.2003) ("if the stockholders are not satisfied with the management or actions of their elected representatives on the board of directors, the power of corporate democracy is available to the stockholders to replace the incumbent directors when they stand for re-election"); *Aronson v. Lewis,* 473 A.2d 805, 811 (Del.1984), overruled on other grounds by *Brehm v. Eisner,* 746 A.2d 244 (Del.2000) ("The machinery of corporate democracy and the derivative suit are potent tools to redress the conduct of a torpid or unfaithful management"). Delay in holding a shareholder election diminishes electoral rights by allowing these trustees to become more deeply entrenched and to continue to harm the interests of shareholders. See *ER Holdings, Inc. v. Norton, Co., supra* at 1101 ("The Board's suggestion that its proffered special meeting does not endanger shareholder voting rights, but merely delays them, misses the point. Courts have consistently recognized the irreparable harm associated with delay in these contexts"). Cf. Alterbaum, Control Share Acts, Closed–End Funds, and the Battle for Corporate Control, 17 Stan. J.L. Bus. & Fin. 310, 332 (2012) ("the pressure imposed by takeover attempts on closed-end funds forces the funds' management to engage in value creating activities that raise share prices"). Accordingly, we hold that any ambiguity in § 10.2 must be construed in

> favor of allowing the shareholders a timely and effective means of holding the trustees accountable.

Brigade, 466 Mass. at 378-80, 995 N.E.2d at 72-73.

In *ER Holdings*, the federal district court addressed a situation wherein the board of the target company (Norton) canceled the company's annual meeting in a bid to forestall a contested election. The board took the position that it could, consistent with the company's bylaws, instead convene a special meeting two months later. The acquiring company (ER Holdings) sued for injunctive relief, *viz.*, that the annual meeting be held as scheduled. In its decision, the court observed that "[b]ecause Norton's by-laws are a bargained-for agreement between the shareholders and directors, principles of contract construction properly guide the inquiry as to whether the by-laws permit postponement of the meeting. One familiar maxim is that a contract should be construed in accordance with its plain meaning." *ER Holdings*, 735 F. Supp. at 1097. The court then held that the bylaws were clear and unambiguous, that the Norton board's reliance on the special meeting provision was misplaced, and that the meeting change was *ultra vires* and, therefore, invalid. *Id.* at 1100.

More critically, the court found that "[e]ven if the relevant by-laws could be construed to be sufficiently ambiguous to warrant an attempt to divine the parties' intent, this court would, nonetheless, conclude that the Board's purported postponement of the annual meeting was invalid." *Id.* In reaching this conclusion, the court recognized that

> one of the most sacred rights of any shareholder is to participate in corporate democracy. *See Albert E. Touchet v. Touchet,* 264 Mass. 499, 509, 163 N.E. 184 (1928) (quoting approvingly *Camden & Atlantic Railroad v. Elkins,* 10 Stew. (N.J.) 273, 276, which held that "[t]he right ... to vote at [elections of the directors] is a right that is inherent in the ownership of stock ... [and] cannot be deprived ... upon the allegation that he proposes to use his legal rights for purposes which others may think to be detrimental to the interests of the corporation."); *Blasius v. Indus., Inc. v. Atlas Corp.,* 564 A.2d 651 (Del.Ch.1988) (recognizing that, because the legitimacy of democratic corporate governance relies on the integrity of shareholder franchise, corporate law only creates agents for shareholders, not "Platonic masters.").

ER Holdings, 735 F. Supp. at 1100. The court went on to observe that "Courts have consistently recognized the irreparable harm associated with delay in these contexts. *See, e.g., Hyde Park Partners v. Connolly,* 839 F.2d 837, 853 (1st Cir.1988) (threat of delay to tender offer constitutes substantial and irreparable harm); *San Francisco Real Estate Investors v. Real Estate Investment Trust of America,* 701 F.2d 1000, 1002–03 (1st Cir.1983) (finding that "'loss of [a] best opportunity to seize control of a major corporation ... could be crucial'") (citations omitted); *Newell v. Connolly,* 624 F.Supp. 126, 129 (D.Mass.1985) (delay threatened by Massachusetts takeover statute found irreparable). *See also Ocilla Indus. v. Katz,* 677 F.Supp. 1291, 1301 (shareholder disenfranchisement creates serious risk of irreparable harm)." *Id.* at 1101.

With the above framework in mind, the Court addresses the factors applicable to Saba's request for preliminary injunctive relief.

Strong Likelihood of Success on the Merits

This factor favors Saba. Ultimately, the question to be resolved is whether the Board's adoption of the Bylaw Amendment impairs Saba's ability to meaningfully exercise its shareholder interests by rendering a vote in favor of Saba's slate of nominees effectively impossible. The evidence on this question, primarily the testimony of John Grau and supporting examples from other contested closed-end fund elections, was persuasive, if not compelling. Further, neither the Trust, Voya, nor the trustees presented contradictory evidence. Rather, Defendants sought to persuade the Court that Mr. Grau's testimony was unreliable, and that in view of Saba's current holdings (roughly 25% of the Trust's shares), there was at least a reasonable mathematical probability that Saba's nominees could reach the 60% threshold. *See, e.g.,* Defendants' Demonstrative A. But the record is plain – the likelihood that sufficient shareholders will participate such that *any* nominee could reach 60% is so low as to render the new standard a legal impossibility. In effect, the Bylaw Amendment prevents any new trustees from being elected, and results in entrenchment of the existing trustees. This, in turn, deprives Saba of what the *ER Holdings* court described as its "most sacred right . . . to participate in corporate democracy." *See supra.*

Irreparable Injury

This factor favors Saba. As *Brigade* and *ER Holdings* make clear, delaying a shareholder's ability to exercise its franchise is in and of itself an irreparable harm. The Trust urges that a delay in the election pending a final decision on the merits properly maintains the status quo, and further that if Saba's slate is elected and the tender proceeds, the result could be irreparable harm to both the Trust and its shareholders. But, as the *ER Holdings* court observed, this argument "misses the point. Courts have consistently recognized the irreparable harm associated with delay in these contexts." 735 F. Supp. at 1101.

Balance of Hardships

This factor favors Saba. Here, the balance is between delay, on the one hand, and disenfranchisement on the other. The Massachusetts courts are clear that disenfranchisement outweighs delay.

Public Policy

This factor favors Saba. Again quoting *ER Holdings*, "the public interest is also served because the Board's attempted action, which would tend to 'violate[ ] public policy by upsetting the balance between the legitimate interests' of both sides, is prevented." 735 F. Supp. at 1102 (quoting *Seibert v. Milton Bradley Co.,* 380 Mass. 656, 662, 405 N.E.2d 131 (1980)).

CONCLUSION

Having considered all of the evidence and the relevant factors, the Court concludes that Saba has met its burden to show that a preliminary injunction should issue. Accordingly,

IT IS ORDERED granting the Application.

IT IS FURTHER ORDERED that the Defendants, and all other persons in concert with them, are preliminarily enjoined from applying the voting standard set forth in the Bylaw Amendment.

IT IS FURTHER ORDERED that the Trust shall conduct the present election according to the previous provision of Article 11, Section 3: "A majority of the Shares shall decide any questions and a plurality shall elect a Trustee".

/s/ Daniel G. Martin
HON. DANIEL G. MARTIN
JUDGE OF THE SUPERIOR COURT