

# Massachusetts Court Denies Motion to Dismiss Certain Counterclaims Regarding Closed-End Fund Bylaw Amendments

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On March 31, 2021, the Suffolk County Superior Court in Massachusetts issued a ruling on a motion to dismiss various counterclaims in a suit originally filed on July 15, 2020 by Eaton Vance Senior Income Trust, a registered closed-end fund organized as a Massachusetts business trust, against Saba Capital Master Fund, Ltd., a shareholder of the fund, seeking a declaratory judgment that a previously adopted amendment to the fund's bylaws is valid. In its ruling, the court dismissed certain counterclaims asserted by Saba but allowed other counterclaims to proceed.

At issue are certain bylaw amendments adopted by four Eaton Vance-sponsored closed-end funds that are organized as Massachusetts business trusts. The Trusts sought a declaratory judgment that a bylaw amendment providing that in a contested election a trustee nominee must receive the affirmative vote of a majority of the fund's outstanding shares, but in an uncontested election a trustee nominee need receive only the affirmative vote of a plurality of the votes cast. Prior to the amendment, the plurality standard applied to all trustee elections, contested and uncontested. The amendment also provided that if neither an incumbent nor a new trustee nominee receives the required majority vote in a contested election, the incumbent trustee may continue to serve (the election bylaw). In response, Saba Capital Master Fund, Ltd., an investor in the funds, challenged the validity of that amendment as well as a second bylaw amendment, similar in operation to "control share" provisions under state corporate laws, providing that a shareholder that acquires the ownership or control of more than 10 percent of the voting power of a fund may not vote its shares without special authorization to do so by a majority vote of the fund's shareholders (the control share bylaw). In addition, Saba asserted certain other counterclaims against the funds, their trustees and their investment adviser and sought a declaratory judgment that both bylaw amendments are invalid.

In its ruling, the court dismissed Saba's counterclaims against the funds and their trustees alleging breach of the implied covenant of good faith and fair dealing and two counterclaims against the

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funds' investment adviser alleging tortious interference with contractual relations and aiding and abetting a breach of fiduciary duty. However, the court denied the motion to dismiss Saba's counterclaims alleging breach of contract and breach of fiduciary duty, as well as Saba's counterclaims seeking rescission of the control share bylaw under the Investment Company Act of 1940 and a declaratory judgment as to the validity of the bylaw amendments, allowing those claims to continue.

As stated by the court in this case, to survive a motion to dismiss, a party must simply allege facts that, if true, would "plausibly suggest[ ] . . . an entitlement to relief." Accordingly, in considering the motion to dismiss Saba's claims, the court assumed the accuracy of Saba's factual allegations and drew "all reasonable inferences" in favor of Saba.

With respect to Saba's breach of contract claims, Saba asserted that the declarations of trust that govern the funds are contracts between the funds and their shareholders, and that adoption of the bylaw amendments in question breach that contract. In particular, with respect to the election bylaw, Saba alleged that requiring a trustee to be elected by a majority vote in a contested election makes it "impossible in practice" for a shareholder to challenge the reelection of a sitting trustee because, as Saba claimed in its memorandum of law, "a significant proportion of the shareholders in closed-end funds" do not vote. Accordingly, Saba claimed that this bylaw amendment violated the declaration of trust provision giving shareholders the right to remove trustees. With respect to the control share bylaw, Saba asserted that this amendment deprived shareholders owning more than 10 percent of a fund's outstanding shares of their right to vote, in violation of a declaration of trust provision stating that "Shareholders shall have power to vote . . . with respect to the election of Trustees" and "for the removal of Trustees." Assuming the accuracy of Saba's factual allegations, the court determined that these claims could survive the motion to dismiss.

Saba also asserted that the funds' trustees breached applicable fiduciary duties by adopting the bylaw amendments in question. Although the trustees asserted that they owe a fiduciary duty to the funds but not the funds' shareholders, the court agreed with Saba's assertion that, unless otherwise provided in the declaration of trust, the trustees of a Massachusetts business trust owe fiduciary duties to the trust's beneficiaries. The trustees asserted that their actions should be provided deference under the "business judgment rule," which shields from liability directors who make decisions "in good faith [and] with the care that a person in a like position would reasonably believe appropriate in similar circumstances," that the director "reasonably believes to be in the best interests of the corporation." Saba alleged that in adopting the bylaw amendments, the funds' trustees had not acted in good faith and in the funds' best interests but rather acted to prevent Saba from removing them from office and to protect their own interests and the interests of the funds' investment adviser. Assuming this allegation to be true, the court determined that the breach of fiduciary duty claim could survive the motion to dismiss.

Finally, Saba claimed that the control share bylaw violates Section 18 of the 1940 Act, which generally provides that "every share of stock . . . issued by a registered management company . . . shall be a voting stock and have equal voting rights with every other outstanding voting stock . . . ." Saba further asserted that because the funds' bylaws are contracts between the funds and their shareholders, and because Section 46 of the 1940 Act provides that any contract that violates the 1940 Act is unenforceable and subject to rescission, that the control share bylaw should be rescinded. Assuming the accuracy of Saba's allegation, the court determined that the claim asserting a breach of the 1940 Act could survive the motion to dismiss.

The court's memorandum and order is available under the caption *Eaton Vance Senior Income Trust*

*v. Saba Capital Master Fund, Ltd.*, 2084CV01533-BLS2 (Mass. Super. Ct. Mar. 31, 2021).

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