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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2084CV01533-BLS2

EATON VANCE SENIOR INCOME TRUST

v.

SABA CAPITAL MASTER FUND, LTD.

MEMORANDUM AND ORDER ON MOTION TO DISMISS COUNTERCLAIMS

The Eaton Vance Senior Income Trust, a closed-end investment fund, seeks a declaration that an amendment to its bylaws is valid. This amendment provides that a trustee may be removed by vote of more than half of all outstanding shares; previously a trustee could be removed by a plurality of shares participating in the vote. In response, Saba Capital Master Fund, Ltd., challenges that amendment plus a second bylaw amendment adopted by three other Eaton Vance funds. That amendment provides that any shareholder controlling more than ten percent of the voting power of one of the Trusts may not exercise its voting rights unless a majority of the other shareholders agree.

Saba asserts what it characterizes as counterclaims against the plaintiff and three other Eaton Vance investment funds (the "Trusts"[1]), their eleven trustees (the "Trustees"[2]), and the Eaton Vance entity that manages the Trusts (the "Adviser"[3]). It claims that, by adopting these amendments, the Trustees breached their obligations under the Declarations of Trust, breached their fiduciary duties, and violated the federal Investment Company Act of 1940. Saba also claims that the Adviser wrongfully induced or helped bring about the amendments. And it seeks a declaration that both amendments are invalid.

The Eaton Vance parties have moved to dismiss all counterclaims. The Court will for the most part deny the motion, as Saba has stated viable counterclaims for breach of contract, breach of fiduciary duty, rescission of at least one bylaw

[1] Eaton Vance Senior Income Trust, Eaton Vance Senior Floating-Rate Trust, Eaton Vance Floating-Rate Income Trust, and Eaton Vance Limited Duration Income Fund.

[2] Thomas E. Faust, Jr., Mark R. Fetting, Cynthia E. Frost, George R. Gorman, Valerie A. Mosley, William H. Park, Helen Frame Peters, Keith Quinton, Marcus L. Smith, Susan J. Sutherland, and Scott E. Wennerholm.

[3] Eaton Vance Management.

notice sent 04.06.21 JBL GPLP EPC JRC RMJ SALP LGA WFM ALP RAS ADR PR HCV RTG LP MD

amendment under the Investment Company Act, and declaratory judgment as to the validity of the bylaw amendments. However, it will allow the motion in part by dismissing the counterclaim against the Trusts and the Trustees for breach of the implied covenant of good faith and fair dealing, and the two claims against the Adviser for tortious interference with contractual relations and for aiding and abetting a breach of fiduciary duty.

1. **Context.**

1.1. **Factual Background.** The Trusts are organized as Massachusetts business trusts under G.L. c. 182. They are registered as closed-end investment companies under the Investment Company Act of 1940 (15 U.S.C. § 80a-1, *et seq.*). Saba holds shares in each of the four Trusts, which gives it a beneficial interest in the assets held by each Trust.

The Trusts are governed by substantially similar Declarations of Trust. Each Declaration provides that:

- the Trustees shall be elected at an annual or special meeting of the shareholders;
- the Trustees have "full power and authority" to adopt, amend, and repeal by-laws "providing for the conduct of the business of the Trust and containing such other provisions as they deem necessary, appropriate or desirable;"
- "the Shareholders shall have the power to vote" on certain matters, including the election or removal of Trustees; and
- "[e]ach whole Share shall be entitled to one vote as to any matter on which it is entitled to vote and each fractional Share shall be entitled to a proportionate fractional vote."

For many years, the bylaws of each Trust allowed shareholders to elect or replace trustees by a plurality of the shares voted.

Last year, the Trustees adopted a "**Majority Rule Amendment**" to the bylaws of each of the Trusts.[4] Under this amendment, where a Trustee is running for election unopposed, the affirmative vote of a plurality of the shares voted at the meeting is still sufficient to elect the trustee. But in a contested election, a

[4] Eaton Vance Senior Income Trust adopted this bylaw in June 2020. The other three Trusts did so in August 2020.

nominee must receive the affirmative vote of a majority of all shares outstanding and entitled to vote in order to be elected.

In addition, the Trustees adopted a "**Ten Percent Stake Amendment**" to the bylaws of three of the Trusts.[5] That amendment provides that a shareholder that owns or controls more than ten percent of the voting power of the Trust may not vote their shares, unless the shareholder receives special authorization to do so by the affirmative vote of a majority of all shares entitled to vote.

1.2. **Legal Standard.** The Trusts, Trustees, and Adviser argue that Saba's counterclaims fail to state any claim upon which relief may be granted, and that they should therefore be dismissed under Mass. R. Civ. P. 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a complaint or counterclaim must allege facts that, if true, would "plausibly suggest[] ... an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). In applying this standard, the Court must assume the allegations in the complaint are true and "draw all reasonable inferences" in Saba's favor. *Buffalo-Water 1, LLC*, v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 18 (2018)

2. **Breach of Contract Claims.** Saba claims in count I of its counterclaims that the two bylaw amendments violate the Declarations of Trust that govern each Trust, and that the adoption of these amendments was therefore a breach of contract. Each of the Declarations is "a contract between the trustees of the trust and the shareholders that defines the rights of the trust's shareholders." See *Brigade Leveraged Capital Structures Fund Ltd.* v. *PIMCO Income Strategy Fund*, 466 Mass. 368, 373–374 (2013) (declaration of trust and bylaws of Massachusetts business trust are contract between trustees and shareholders).

2.1. **The Majority Rule Amendment.** Saba alleges that requiring a majority of all outstanding shares to decide a contested election for a trustee "make[s] it impossible in practice for a shareholder to mount a realistic challenge to the re-election of the Trustees." Though Saba does not explain in its complaint why that is so, it contends in its memorandum of law that this is "because a significant proportion of the shareholders in closed-end funds like the Eaton Vance trusts do not even participate in voting."

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[5] Eaton Vance Senior Floating-Rate Trust, Eaton Vance Floating-Rate Income Trust, and Eaton Vance Limited Duration Income Fund.

One may reasonably infer the explanation (that a large proportion of shareholders in closed-end funds do not vote) from the factual allegation in the counterclaim (that meeting the majority-of-all-outstanding-shares standard is impossible in practice). Though the Trustee contest both of those assertions, in deciding this motion to dismiss the Court must assume that the facts alleged by Saba in its counterclaims are true and must draw "every reasonable inference" in favor of Saba from those allegations. *Rafferty* v. *Merck & Co., Inc.*, 479 Mass. 141, 147 (2018). An inference "need only be reasonable and possible;" it does not have to be "necessary or inescapable." *Parker* v. *EnerNOC, Inc.*, 484 Mass. 128, 132 (2020), quoting *Commonwealth* v. *Kelly*, 470 Mass. 682, 693 (2015). If the assertion that many shareholders in closed-end funds do not vote were not a permissible inference from the facts alleged in the counterclaim, the Court would allow Saba to amend its pleading to include this allegation about voting participation.

This allegation and inference plausibly suggest that the Majority Rule Amendment violates the Declaration provisions that give shareholders the right to remove trustees. "The right of shareholders to vote for the trustees of a business trust is one of the most important rights arising from stock ownership." *Brigade*, 466 Mass. at 379. And the right to remove an existing trustee is particularly important. As the Supreme Judicial Court has explained, "[t]he ability to nominate and elect different trustees is a crucial means for shareholders to prevent the entrenchment of poorly performing trustees." *Id.* A bylaw amendment that effectively deprives shareholders of the power to remove a trustee would likely violate the Declarations and therefore be a breach of contract.

2.2. **The Ten Percent Stake Amendment.** Saba has also stated a viable claim that the Trustees violated the Declarations by effectively depriving shareholders that own more than ten percent of a Trust of their right to vote to elect or remove Trustees, unless a shareholders controlling a majority of all outstanding shares decide to reinstate that right.

The Eaton Vance parties argue that, under the Declarations, "voting rights attach to *shares*, not shareholders." But that is incorrect. In fact, the Declarations provide that "the **Shareholders** shall have power to vote ... with respect to the election of Trustees" and "for the removal of Trustees," among other things. Shares do not vote themselves. Instead, by purchasing shares of the Trust, each shareholder obtains a right to vote on specified topics. The provision that each

whole share gets one vote merely describes how shareholder votes are to be counted; it does not strip the right to participate in Trust decision making from the shareholders and give it to a disembodied share. Cf. *Brigade*, 466 Mass. at 379 ("one of the most sacred rights of any shareholder is to participate in corporate democracy") (quoting *ER Holdings, Inc.* v. *Norton Co.*, 735 F.Supp. 1094, 1100 (D.Mass. 1990) (Tauro, J.). And any doubt about how to interpret this provision of the Declarations must be resolved in favor of preserving shareholder's voting rights. See *Brigade, supra*, at 378.

2.3. **Implied Covenant Claim.** In contrast, Saba has not stated a viable claim in count II for breach of the implied covenant of good faith and fair dealing. That covenant, which is implied in every contract, "does not create rights or duties beyond those the parties agreed to when they entered into the contract." *Boston Med. Ctr. Corp.* v. *Secretary of Executive Office of Health & Human Servs.*, 463 Mass. 447, 460 (2012) (affirming dismissal of claim), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 680 (2011). Saba's contract claims turn on the express terms of the Declarations of Trust. If the challenged bylaw amendments do not violate the express provisions regarding shareholders' voting rights, then they would not violate the implied covenant either. *Id.*

3. Breach of Fiduciary Duty. Saba asserts in count III that, by adopting the challenged bylaw amendments, the Trustees violated the fiduciary duty that they owed to all shareholders. The Trustees argue that this claim fails because (i) they owed a fiduciary duty only to the Trusts, not to the shareholders, (ii) even if they owed such a duty to shareholders, this claim may only be brought derivatively on behalf of the Trusts, and (iii) the claim is also barred by the business judgment rule. The first two of these arguments are wrong, and the third cannot be decided on a motion to dismiss.

3.1. **Existence of Fiduciary Duty.** The Trustees owe a fiduciary duty to Saba and the other shareholders, because—unless the declaration of trust provides to the contrary—the trustees of a Massachusetts business trust always owe fiduciary duties to the trust beneficiaries. See *Fogelin* v. *Nordblom*, 402 Mass. 218, 222 (1988) (calling this principle "axiomatic"); accord *Northstar Fin. Advisors Inc.* v. *Schwab Invs.*, 779 F.3d 1036, 1056–105757 (9th Cir. 2015) (trustees of mutual fund organized as Massachusetts business trust owe fiduciary duty to shareholders). As a leading treatise explains, "Trustees of a business trust stand in fiduciary relationship to the beneficiaries and shareholders and, generally speaking, their liability to the beneficiaries is that which trustees

generally sustain to their trust beneficiaries." 16A Fletcher, Cyclopedia of the Law of Corporations, § 8256.

The Trustees' argument that they only owe fiduciary duties to the Trusts, and not to individual shareholders, loses sight of important differences between corporations and business trusts. While the Supreme Judicial Court has acknowledged many similarities between corporations and business trusts, it has made clear that "trusts are not corporations, nor are they entities apart from the trustee." *Swartz* v. *Sher*, 344 Mass. 636, 639 (1962). "'Save for the purpose of being sued," a business trust "is not made a separate [legal] entity." *Peterson* v. *Hopson*, 306 Mass. 597, 612 (1940), quoting *Larson* v. *Sylvester*, 282 Mass. 352, 359 (1933). If the Trusts are not separate legal entities, the Trustees cannot owe their fiduciary duties to the Trusts; instead, they owe such duties to the shareholders.

3.2. **Direct versus Derivative Claims.** Saba may directly assert its claim that the Trustees improperly restricted the voting rights of shareholders, and need not bring it derivatively on behalf of the Trusts, because Saba is seeking to vindicate its own contractual voting rights. See *Lapidus* v. *Hecht*, 232 F.3d 679, 683 (9th Cir. 2000) (shareholders of mutual fund organized as Massachusetts business trust could bring direct action against trustees for alleged violation of contractual right as shareholder, "such as the right to vote").

"To determine whether a claim belongs to the corporation [or to a business trust], and is therefore derivative, 'a court must inquire whether the shareholders' injury is distinct from the injury suffered generally" by the business entity or the shareholders as a whole. *International Bhd. of Elec. Workers Local No. 129 Benefit Fund* v. *Tucci*, 476 Mass. 553, 557–558 (2017), quoting *Stegall* v. *Ladner*, 394 F.Supp.2d 358, 364 (D. Mass. 2005) (Woodlock, J.) (applying Massachusetts law). Where a shareholder seeks relief for harm caused by alleged breach of a duty "owed directly to them"—and is not seeking relief for harm "derivative of a breach of duty owed to the corporation" or trust—the shareholder may bring an individual claim directly on their own behalf. *Id.* at 558; *Askenazy* v. *KPMG LLP*, 83 Mass. App. Ct. 649, 654–655 (2013).

Saba's claim that the Trustees acted improperly to restrict shareholders' voting rights may therefore be brought as a direct claim.

3.3. **Business Judgment Rule**. The Trustees contend that they exercised "reasoned, considered business judgment" in adopting the bylaw amendments, and that this claim is therefore barred by the business judgment rule. Whether that is correct cannot be resolved at this stage of the case.

The business judgment rule shields those who control a business from liability "stemming from decisions" that are made "in good faith [and] with the care that a person in a like position would reasonably believe appropriate in similar circumstances," and that the person "reasonably believes to be in the best interests of the corporation." *Halebian* v. *Berv*, 457 Mass. 620, 627 n. 11 (2010) (applying business judgment rule to derivative action on behalf of corporation under G.L. c. 156D, § 7.44). If the business judgment rule applies, a corporate or business trust decision maker cannot be held "responsible for mere errors of judgment or want of prudence short of 'clear and gross negligence.' " *Uccello* v. *Gold'n Foods, Inc.*, 325 Mass. 319, 321 (1950), quoting *Spiegel* v. *Beacon Participations, Inc.* 297 Mass. 398, 410–412 (1937). But this rule does **not** apply where the decision maker is alleged or shown to have acted in bad faith. See *Harhen* v. *Brown*, 431 Mass. 838, 847 (2000).

Saba has alleged facts that, if proved, would make the business judgment rule inapplicable. It alleges that the Trustees did not act in good faith to further the best interests of the Trusts, but instead were trying to prevent Saba from voting them out solely to entrench themselves, protect their positions and the money they make off of it, and protect the Adviser from losing its profitable position managing the Trusts.

Corporate directors and business trustees may not act "solely or primarily out of a desire to perpetuate themselves in office;" if they do so, the business judgment rule does not apply. *Unocal Corp.* v. *Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (Delaware law); accord *Treco, Inc.* v. *Land of Lincoln Sav. and Loan*, 749 F.2d 374, 378–379 (7th Cir. 1984) (Illinois law, and collecting cases applying other States' law). This principle applies with full force under Massachusetts law. See *Andersen* v. *Albert & J.M. Anderson Mfg. Co.*, 325 Mass. 343, 346–347 (1950). Directors or trustees may not "manipulate the affairs" of the business to secure control over it, or to exclude a group of shareholders from exercising their voting rights. *L.E. Fosgate Co.* v. *Boston Market Terminal Co.*, 275 Mass. 99, 107 (1931), quoting *Albert E. Touchet, Inc.* v. *Touchet*, 264 Mass. 499, 507 (1928).

Thus, in a case like this, the business judgment rule will not apply if directors or trustees enact a by-law "primarily to frustrate the vote of dissident

shareholders" and thereby entrench existing management. *Int'l Banknote Co.* v. *Muller*, 713 F. Supp. 612, 627 (S.D.N.Y. 1989) (Kimba Wood, J.) (New York law).

Since the counterclaim alleges facts that "would allow a jury to find that the defendant[s] acted in bad faith," the question of whether the Trustees acted in good faith—and thus whether the business judgment rule applies—cannot be resolved at the pleadings stage on a motion to dismiss. Cf. *Chokel* v. *Genzyme Corp.*, 449 Mass. 272, 278 n.6 (2007).

4. **The Investment Company Act.** Saba has also stated a viable claim seeking rescission of the Ten Percent Stake Amendment under the Investment Company Act of 1940. Any contract that violates the ICA is unenforceable and subject to rescission. See 15 U.S.C. § 80a-46(b). This statute creates a private right of action for rescission. See *Oxford Univ. Bank* v. *Lansuppe Feeder, LLC*, 933 F.3d 99, 106 (2d Cir. 2019). The Trusts' bylaws, together with their Declarations of Trust, are contracts between each Trust and its shareholders, see *Brigade*, 466 Mass. at 373, and thus are subject to rescission if they violate the ICA.

The complaint plausibly suggests that the Ten Percent Stake Amendment violates the ICA. In investment funds like the Trusts, "every share of stock ... shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18. The complaint alleges that this amendment strips shares of their voting rights so long as they are owned by someone who controls more than ten percent of a Trust's voting power. If a share cannot be voted by its present owner, then the voting right attached to that share is no longer equal to that attached to shares owned by investors that control a small share of the Trust's total beneficial interest.

5. **Claims against the Adviser.** Saba has sued the Adviser for tortious interference with contractual relations and for aiding and abetting the alleged breach of fiduciary duty. These claims fail because Saba has not alleged any facts plausibly suggesting that the Adviser instigated, participated in, or helped to bring about the bylaw amendments, or that the Adviser had an improper purpose or motive.

To state a claim for intentional interference with contractual relations, Saba must allege facts plausibly suggesting that: "(1) [it] had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the

defendant's actions." *Weiler* v. *PortfolioScope, Inc.*, 469 Mass. 75, 84 (2014), quoting *G.S. Enters., Inc.* v. *Falmouth Marine, Inc.*, 410 Mass. 262, 272 (1991).

The tortious interference claim in count V fails for two, independent reasons. First, the facts alleged in the counterclaim do not plausibly suggest that the Adviser did anything to induce the Trustees to adopt the bylaw amendments. Without active participation in the alleged breach of contract, the Adviser may not be sued for tortious interference. Second, nothing in the complaint plausibly suggests that the Adviser acted with an improper purpose or motive. Though Saba contends the Adviser favored the bylaw amendments because it feared losing substantial future fees if Saba could convince the shareholders to elect new trustees, that is not enough to allege this element of the claim. "[A]dvancing one's own economic interest, by itself, is not an improper motive" for the purpose of a tortious interference claim. See *Skyhook Wireless, Inc.* v. *Google Inc.*, 86 Mass. App. Ct. 611, 621 (2014); accord, e.g., *Pembroke Country Club, Inc.* v. *Regency Sav. Bank, F.S.B.*, 62 Mass. App. Ct. 34, 39 (2004).[6]

To state a claim for aiding and abetting a breach of fiduciary duty, Saba must allege facts plausibly suggesting that: (1) the Trustees breached their fiduciary duty; (2) the Adviser knew they were doing so; and (3) the Adviser "actively participated in or substantially assisted in" the breach of fiduciary duty. Cf. *Go-Best Assets Ltd.* v. *Citizens Bank of Massachusetts*, 463 Mass. 50, 64 (2012).

The aiding and abetting claim in count VI fails because Saba alleges no facts suggesting that the Adviser participated in or did anything to assist the adoption of the bylaws. Though the complaint alleges that the Adviser was "fully aware of the contents and purposes" of the bylaws, that allegation does not plausibly suggest that the Adviser did anything to help bring about the alleged breach of fiduciary duty.

The counterclaim does make conclusory allegations that the Adviser induced or caused the Trustees to breach the Declarations of Trust, did so with an improper purpose and by improper means, and substantially aided the Trustees' alleged breaches of fiduciary duty.

However, such conclusory allegations—unsupported by any assertions of fact—are insufficient. When deciding a motion to dismiss under Rule 12(b)(6), a court must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to

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[6] Saba does not claim the Adviser owes the Trusts' shareholders a fiduciary duty.

relief." *Maling* v. *Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336, 339 (2015), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011). In other words, the court must accept as true only the facts alleged in the complaint, not any "legal conclusions cast in the form of factual allegations." *Sandman* v. *Quincy Mut. Fire Ins. Co.*, 81 Mass. App. Ct. 188, 189 (2012)

6. **Claim for Declaratory Relief**. The complaint states a viable claim for declaratory relief because there is an actual controversy between the parties as to whether the bylaw amendments are enforceable, Saba has standing to challenge the amendments, all necessary parties have been joined, and the facts alleged plausibly suggest that Saba is entitled to the declaratory judgment it seeks. See generally *Buffalo-Water 1, LLC*, v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 18–20 (2018) (requirements for declaratory judgement claim).

There is an actual controversy and Saba has standing for the reasons discussed above and at pages 28 to 30 of Saba's opposition. Defendants do not contend that Saba failed to join any necessary parties as defendants. And, as discussed above, Saba has made allegations that, if true, would show that it is entitled to a declaration that the bylaw amendments are void.

The Eaton Vance parties insist that Saba may not seek declaratory relief regarding the Majority Rule Amendment until it actually affects a contested election for trustee, or regarding the Ten Percent Stake Amendment until Saba buys ten percent or more of the voting shares of each Trust.

The Court is not persuaded. "[A] party seeking declaratory judgment need not demonstrate an actual impairment of rights." *City of Boston* v. *Keene Corp.*, 406 Mass. 301, 304 (1989). To the contrary, a party may seek declaratory relief "either before or after a breach or violation" has occurred, "and whether any consequential judgment or relief" for actual damages "could be claimed ... or not." See G.L. c. 231A, § 1. Saba may therefore seek a declaratory judgment without having to allege or show that it has suffered actual injury from the two bylaw amendments. Cf. *Entergy Nuclear Generation Co* v. *Department of Envtl. Prot.*, 459 Mass. 319, 324–325 (2011) (Pilgrim Nuclear Power Station operator could seek declaratory judgment on whether it was subject to cooling water intake structure regulations, without waiting for enforcement action or for modification to facility or permit that would trigger the regulations).

ORDER

The counterclaim defendants' motion to dismiss all counterclaims is **allowed in part** with respect to the claims for breach of the implied covenant of good faith and fair dealing (count II), tortious interference with contractual relations (count V), and aiding and abetting an alleged breach of fiduciary duty (count VI). When final judgment enters, those counterclaims shall be dismissed with prejudice. The motion to dismiss is **denied in part** with respect to all other counterclaims.

Kenneth W. Salinger
Justice of the Superior Court

31 March 2021