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Re: Opportunity Partners L.P., et al. v. BlackRock New York Municipal Bond Trust, et al.
C.A. No. 6255-VCN
Date Submitted: March 28, 2011

Dear Counsel:

Defendants have moved to expedite this action, filed on March 8, 2011, to trial on the merits in early May 2011. They seek a final hearing in approximately five weeks, not because they request affirmative relief but, instead, because they fear the negative consequences that might indirectly result if Plaintiffs prevail.

Plaintiffs hold auction market preferred securities ("AMPS") issued by various BlackRock closed-end investment companies. Those funds, all Delaware statutory trusts and traded on the New York Stock Exchange ("NYSE"), and their trustees are the Defendants. According to the Plaintiffs, the holders of the AMPS—only a small number of entities—are entitled, as a group or a class, to elect two directors or trustees to each of the trust's governing boards under the Investment Company Act of 1940. Because the boards are staggered, only one such slot on a board is up for election this year. Each board consists of approximately ten trustees.

The Plaintiffs allege that the Defendants have breached their fiduciary duties and violated substantive Delaware law by imposing discriminatory impediments that make it impossible, or almost impossible, for them to exercise their voting rights and to nominate representatives to the boards. Among the various requirements and stratagems implemented by the Defendants are: adoption of demanding trustee qualifications; implementation of restrictive advance notice requirements, applicable when shareholders nominate a candidate to a fund's board

or when they seek to present a proposal at a shareholder meeting; and acceleration of the annual shareholder meeting from September 2011 to July 2011, effectively triggering the onerous advance notice requirements.

The AMPS at issue—of which the Plaintiffs are beneficial owners—are not traded on an exchange. The Depository Trust Company through Cede & Co. is the only holder of record. The dividend rate for those securities was set through an auction process. The funds' boards are divided into three classes of trustees with each trustee serving a 3-year term. Holders of the AMPS previously elected two trustees and one of those trustee's term is now expiring; thus, the holders will be electing a new trustee to that position at the 2011 annual meeting.

In May 2010, Plaintiff Karpus Management, Inc., d/b/a Karpus Investment Management ("Karpus") purported to give notice of its nominees for the boards of two BlackRock closed-end funds that are not parties to this action. Counsel for those funds advised Karpus that its nominations had not been submitted by a shareholder of record—which was, and continues to be, only Cede & Co.—and that it had failed to comply with certain advance notice provisions. Litigation

ensued but was ultimately rendered moot when Karpus withdrew its nominations rather than defend that lawsuit and conduct a proxy contest. More importantly, after that litigation and the 2010 annual meeting, the Defendants amended the bylaws of the funds named in this action, which allegedly resulted in the preclusive and unreasonable limitations complained of here by the Plaintiffs.

The burden confronting a party seeking expedition is a familiar one: a colorable claim and irreparable injury.[1] Frequently, expedition is a prelude to a preliminary injunction hearing. Occasionally, it is for an extraordinarily early trial date. Depending on the nature of a particular case, the schedule may be brutally concentrated or it simply may be shorter than the typical schedule. In this instance, the Defendants, who have not yet bothered to file a responsive pleading, seek a trial in approximately five weeks.

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[1] *See, e.g.*, *In re Yahoo! Inc. S'holders Litig.*, 2008 WL 2627851, at *1 (Del. Ch. June 16, 2008) ("To successfully earn expedition, the movant must show good cause why it is necessary to impose upon the counterparty and the Court these substantially increased burdens of time, effort, and expense."); *In re SunGard Data Sys., Inc. S'holders Litig.*, 2005 WL 1653975, at *1 (Del. Ch. July 8, 2005) ("To make the necessary showing, a [movant] must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury . . . .").

The dispositive question is easily framed: is there a material risk that the Defendants would suffer irreparable harm if this action is not resolved before the voting process for the trustees commences?[2] The Defendants' efforts to demonstrate that they are likely to suffer irreparable harm in the absence of an aggressively expedited trial ultimately fails because they have offered little beyond speculation and qualitative reflection on the cost of complying with regulatory requirements associated with a vote for the trustees. They invoke generally the rules of the NYSE to suggest that, should this Court declare the July 2011 shareholder meeting null and void, as the Plaintiffs have requested as part of their relief,[3] the funds may be subject to delisting for failure to comply with that exchange's policies.[4]

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[2] The colorable claim prong measures the substantive merits of the dispute and assures that the claim is worthy of the effort and expense of expedition. Because the Defendants have not sought a declaratory judgment validating their actions, there is no direct claim of the Defendants to assess. Nonetheless, they have shown that a significant substantive claim has been framed by the Plaintiffs' pleading.

[3] Compl. ¶ 86.

[4] Presumably, Defendants rely upon NYSE Listed Company Manual § 302.00 which requires the "hold[ing of] an annual shareholders' meeting during each fiscal year."

The spector of delisting seems a reach. If resolution of this action turns on whether a candidate for a single seat on the board of various funds was improperly excluded, then it seems likely that the equitable relief for that wrong would focus on the election of that particular trustee and would, in all likelihood, not impair the status of other trustees whose election is not challenged in this action. This appears particularly accurate in light of the Plaintiffs' lack of effort to move this matter forward more quickly. In short, the concerns that the Defendants raise regarding the possibility of any equitable relief extending beyond correcting the specific problem addressed in this litigation are significantly less than material. The cost of holding a repeat election of a trustee would likely be the adverse (from the Defendants' perspective) outcome, but that cost has not been quantified. Even if the Defendants had described the potential cost in terms of the overall financial context, it is difficult, in the abstract, to characterize an outlay for regulatory compliance as irreparable harm. Moreover, the cost of contesting an election is further minimized in this instance because of the small number of holders entitled to vote for the slots at issue. Thus, the Defendants' irreparable harm claims are

abstract and hypothetical. Although they may want to conclude this litigation promptly, that objective is likely shared by most litigants in this Court. It is not, however, a basis for cranking up the engine of expedited litigation and imposing the associated costs and burdens on the Plaintiffs, or for differentiating this case from among many others.[5]

There is another way of looking at Defendants' request. The Plaintiffs allege in their Complaint that, with a fair election process, their candidate would be elected. In their opposition to Defendants' motion to expedite, they suggest, halfheartedly it seems, that management might win the vote. Based on what has been provided to the Court—admittedly, a very sparse submittal—the better inference is that the small number of AMPS holders would likely coalesce around one candidate who would garner sufficient votes to be elected. Thus, if there is a candidate—and it appears that Defendants may have other means of thwarting the Plaintiffs' efforts to elect a particular candidate—who is likely to be successful, then good cause may exist to address the question of who may rightly serve on the

[5] Depending upon how events unfold, it may still be appropriate to bring this matter to trial under a shorter-than-normal schedule.

governing boards on a summary or expedited basis. The obvious corollary is Section 225 of the Delaware General Corporation Law.[6] An accelerated schedule to resolve whether Plaintiffs' candidate may be barred by the various actions sponsored by Defendants might well be appropriate for the reasons supporting the Court's typical approach to Section 225 matters. Here, however, the parties sponsoring the candidate whose election is in doubt do not appear to care enough to seek an accelerated resolution. If there is harm from the exclusion of a particular candidate, the Plaintiffs will suffer, not the Defendants. Moreover, the Defendants will, regardless of whether the Plaintiffs' candidate is elected, continue to have a sufficient working majority on each board to maintain control. Thus,

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[6] 8 *Del. C.* § 225. The Agreement and Declaration of Trust for each of the funds provides that "the rights of all parties and the validity and construction of every provision hereof shall be subject to and construed according to laws of [Delaware] and reference shall be specifically made to the Delaware General Corporation Law as to the construction of matters not specifically covered herein or as to which an ambiguity exists . . . ." Compl. ¶ 33 (quoting Trust Agreement § 12.3). Moreover, the trustees owe the funds and their shareholders "the same fiduciary duties as owed by directors of corporations to such corporations and their stockholders under the Delaware General Corporation Law." *Id.* ¶ 32 (quoting Trust Agreement § 3.1).

It is not the Court's intention to (and, thus, it does not) consider just what these provisions may mean.

their ability to direct the several entities, in this instance, will not be materially impaired by the question of whether one particular trustee may serve.[7]

Accordingly, for the foregoing reasons, Defendants' Motion for Expedited Proceedings is denied.

**IT IS SO ORDERED.**

Very truly yours,

***/s/ John W. Noble***

JWN/cap
cc: Register in Chancery-K

[7] After argument, counsel supplemented their contentions with a total of three letters. Defendants reported that a trial date in June, while far from perfect in their view, would also mitigate the potential harm that they may suffer. The question is not one of the Court's calendar; if the case needs expediting, a way to that end can be found. As to whether expediting is appropriate, Defendants sought to amplify their argument that "delisting was a reasonable concern." That effort was not persuasive.