

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

EATON VANCE SENIOR INCOME  
TRUST,

Plaintiff/Counter-  
Defendant

v.

SABA CAPITAL MASTER FUND, LTD.,

Defendant/Counter-  
Plaintiff,

v.

EATON VANCE SENIOR INCOME  
TRUST, EATON VANCE SENIOR  
FLOATING-RATE TRUST, EATON  
VANCE FLOATING-RATE INCOME  
TRUST, EATON VANCE LIMITED  
DURATION INCOME FUND, EATON  
VANCE MANAGEMENT; and 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, *in their  
capacity as Trustees,*

Counterclaim Defendants.

No. 2084-cv-01533-BLS2

**VERIFIED ANSWER AND  
COUNTERCLAIMS**

SUFFOLK SUPERIOR COURT  
CIVIL CLERK'S OFFICE  
1 2020 AUG 31 A 9: 29  
MAGISTRATE

**DEFENDANT'S ANSWER, COUNTERCLAIMS, AND JURY DEMAND**

Defendant and Counterclaimant Saba Capital Master Fund, Ltd. ("Saba," or "Defendant") hereby answers the Complaint filed by Eaton Vance Senior Income Trust ("EVF" or "Plaintiff"), and further asserts the Defenses and Counterclaims alleged below. All allegations not expressly

admitted (including, but not limited to, assertions contained in the headings of the Complaint) are denied.

ANSWER

1. This Paragraph states legal conclusions to which no response is required. Defendant admits that Plaintiff is seeking a declaratory judgment relating to the validity of a bylaw amendment adopted by EVF's Board. Defendant specifically denies that EVF had any authority to adopt the bylaw amendment. Otherwise, denied.

2. Defendant admits that it is informed and believes that EVF is organized as a Massachusetts Business Trust, and is registered as a closed-end investment company under the federal Investment Company Act of 1940 (the "ICA" or "40 Act"). Otherwise, denied.

3. This Paragraph characterizes the provisions of the Bylaws, which speak for themselves. Defendant admits that Plaintiff, and Plaintiff's Trustees, purported to adopt a bylaw amendment stating that Trustees cannot be elected or replaced without the affirmative vote of a majority of all shares outstanding, and that prior to the purported bylaw amendment, the longstanding bylaws authorized Trustee election and replacement based on a plurality of the votes cast by shareholders. Defendant specifically denies that Plaintiff, or Plaintiff's Trustees, had any authority whatsoever to adopt the bylaw amendment. Otherwise, denied.

4. Defendant is without information and belief as to the date on which the Board actually adopted the illegal Bylaw Amendment. Defendant admits that after March 23, 2020 Defendant provided notice, on June 8, 2020, of its intent to nominate candidates to the Board of Eaton Vance Senior Income Trust at the next annual shareholder meeting. Otherwise, denied.

5. Denied.

6. Defendant admits that it sent a demand letter to EVF's Board of Trustees on July 10, 2020, which speaks for itself. Otherwise, denied.

7. Denied.

8. Defendant admits that it is informed and believes that EVF's next shareholder meeting is currently expected to occur on or about November 16, 2020. Otherwise, denied.

9. This Paragraph states legal conclusions to which no response is required. Defendant admits that EVF seeks an Order from this Court seeking a declaratory judgment regarding the legality or illegality of the bylaw amendment. Otherwise, denied.

#### PARTIES

10. Defendant admits that it is informed and believes that EVF is a Massachusetts business trust located at Two International Place, Boston, Massachusetts 02110. Otherwise, denied.

11. Defendant admits that it is incorporated in the Cayman Islands. Otherwise, denied.

#### JURISDICTION AND VENUE

12. Defendant admits that jurisdiction over this action in this Court is proper. The remainder of this Paragraph states a legal conclusion to which no response is required. Otherwise, denied.

13. Defendant admits that, for purposes of this action only, this Court has personal jurisdiction over Defendant. The remainder of this Paragraph states a legal conclusion to which no response is required. Otherwise, denied.

14. Defendant admits that, for purposes of this action only, venue is proper as to Defendant in this Court. Otherwise, denied.

## FACTUAL BACKGROUND

15. Defendant admits that EVF is a closed-end investment company that invests primarily in secured senior floating-rate loans. Defendant specifically denies that EVF has succeeded in providing the “high levels of current income, consistent with the preservation of capital for its shareholders” (including Defendant) that it advertised. Otherwise, denied.

16. Defendant admits that it is informed and believes that EVF commenced operations in approximately October 1998, and that EVF has provided distributions to shareholders since that time. Defendant specifically denies that such distributions have been adequate. Otherwise, denied.

17. Defendant admits that Eaton Vance Management (the “Adviser”) is the investment adviser for EVF. Otherwise, denied.

18. Defendant admits that EVF is a closed-end investment company, and that, on information and belief, it is a Massachusetts Business Trust with its principal place of business in Boston, Massachusetts. The remainder of this Paragraph states a legal conclusion as to which no response is required. Otherwise, denied.

19. Defendant admits that Thomas E. Faust, Jr. serves as President and CEO of Eaton Vance, and is an “interested” trustee. Defendant specifically denies that the other board members, who are perpetually entrenched in the fund by Plaintiff’s unlawful Bylaw Amendment and paid substantial sums by the Adviser for their service on a network of different Eaton Vance boards, are disinterested. Otherwise, denied.

20. Defendant admits that EVF is a closed-end fund, not an open-end fund, and that its shares trade on the New York Stock Exchange. Otherwise, denied.

21. Defendant admits that it is informed and believes that EVF publishes its Net Asset Value (“NAV”) daily, and that EVF’s share price—significantly below Net Asset Value—is

impacted by market supply and demand. Otherwise, denied.

22. Defendant admits that EVF is a closed-end fund. Defendant specifically denies that EVF has provided “greater returns than open-end funds.” Otherwise, denied.

23. Defendant admits that Saba Capital Management, L.P. is a New York-based hedge fund manager. Otherwise, denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Defendant admits that the Investment Company Institute (“ICI”)—which is a lobbyist and advocacy group for closed-end funds like Plaintiff and their managers—published an advocacy piece titled “Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses” (the “ICI Article”) in March of 2020. The content of the advocacy piece written by Plaintiff’s lobbyist speaks for itself. Otherwise, denied.

31. The ICI Article written by Plaintiff’s lobbyist speaks for itself. Otherwise, denied.

32. The ICI Article written by Plaintiff’s lobbyist speaks for itself. Otherwise, denied.

33. Denied.

34. The ICI Article written by Plaintiff’s lobbyist speaks for itself. Otherwise, denied.

35. Defendant admits that on May 27, 2020, the SEC issued a statement regarding the *Boulder* letter. The SEC’s May 27 statement speaks for itself. Defendant specifically denies that the so-called “defensive” tactics described in the *Boulder* letter are consistent with the Investment

Company Act (“ICA”), its language or purposes, or other applicable law. Otherwise, denied.

36. Defendant admits that Plaintiff quotes portions of the Investment Company Act, at 15 U.S.C. § 80a-1(b). The remainder of this Paragraph states legal conclusions to which no response is required. Otherwise, denied.

37. Defendant admits that Plaintiff quotes portions of what Defendant is informed and believes is the current EVF Declaration of Trust. The Declaration of Trust speaks for itself, and the remainder of this Paragraph states legal conclusions to which no response is required. Defendant denies that Plaintiff attached any documents as Exhibit A to the Complaint. Otherwise, denied.

38. Defendant admits that Plaintiff quotes portions of what Defendant is informed and believes is the EVF Declaration of Trust. The Declaration of Trust speaks for itself, and the remainder of this Paragraph states legal conclusions to which no response is required. Otherwise, denied.

39. The Declaration of Trust speaks for itself, and the remainder of this Paragraph states legal conclusions to which no response is required. Otherwise, denied.

40. Defendant admits that Plaintiff cites portions of the Investment Company Act at 15 U.S.C. §§ 80a-2(a)(42) and 80a-15(a). The remainder of this Paragraph states legal conclusions to which no response is required. Otherwise, denied.

41. Defendant admits that, prior to the purported adoption of the illegal Bylaw Amendment, the bylaws provided that all matters, including Trustee elections, were decided by a plurality standard. The Bylaws speak for themselves, and the remainder of this Paragraph states legal conclusions to which no response is required. Otherwise, denied.

42. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this Paragraph.

43. Defendant admits that it is informed and believes that the EVF Board, substantially the same board as a number of other funds managed by the Adviser, purportedly adopted amendments similar to the illegal bylaw amendment. Defendant lacks knowledge or information sufficient to form a belief as to the actual date on which the amendments were purportedly adopted, or the precise number of Eaton Vance funds that adopted the illegal bylaw amendment. Defendant admits that Plaintiff quotes the illegal bylaw amendment, the content of which speaks for itself. Otherwise, denied.

44. Defendant admits that it is informed and believes that other amendments were purportedly adopted by EVF and other Eaton Vance funds at or around the time of the illegal bylaw amendment. Defendant lacks knowledge or information sufficient to form a belief as to the number of funds that purported to adopt them, or the precise date(s) on which that occurred. Defendant denies that Plaintiff attached any documents as Exhibit B to the Complaint. Otherwise, denied.

45. Defendant lacks information sufficient to admit or deny the allegations in this Paragraph. Otherwise, denied.

46. This Paragraph states legal conclusions to which no response is required. Otherwise, denied.

47. This Paragraph states legal conclusions to which no response is required. Otherwise, denied.

48. Defendant lacks information sufficient to admit or deny the allegations in this Paragraph.

49. Defendant admits that, on June 15, 2020, a copy of what Defendant understands and believes to be the EVF amended bylaws, dated March 23, 2020, was made available on the Securities and Exchange Commission's ("SEC's") EDGAR filing system. Otherwise, denied.

50. Defendant admits that Saba Capital Management, L.P. filed Schedule 13G, Schedule 13G/As, and/or Schedule 13Ds reporting holdings of 5.9%, 7.5%, 10.5%, and 15.9% of the common stock of EVF as of April 2, 2019, December 31, 2019, May 6, 2020, and June 8, 2020, respectively. Otherwise, denied.

51. Defendant admits that, on June 8, 2020, Saba Capital Management, L.P., filed a Schedule 13D with the SEC indicating its intent to nominate trustees to be elected to EVF's Board. Defendant is without information and belief to know the date on which the Board actually adopted the illegal Bylaw Amendment. Otherwise, denied.

52. Defendant admits that, on July 10, 2020, Defendant sent a demand to EVF's Board, citing Mass. Gen. laws ch. 156D, § 7.42, explaining that the Bylaw Amendment was invalid, and demanding that EVF rescind it, and commence judicial action against the EVF Board and the Adviser. The demand letter speaks for itself. Otherwise, denied.

53. Defendant admits that the bylaw amendment makes it impossible in practice, in a contested election, for Eaton Vance's nominees, Saba's nominees, or any other nominees, to be elected by the shareholders. Otherwise, denied.

54. The demand letter speaks for itself. Otherwise, denied.

55. Defendant admits that Saba Capital CEF Opportunities Fund 1 Ltd. ("CEF Opportunities Fund") filed suit in the Maricopa County Superior Court in Arizona, Commercial Division, seeking to invalidate an illegal bylaw amendment that likewise altered the voting threshold for replacing the trustees of the Voya Prime Rate Trust ("Voya Trust") from a plurality-



vote standard to a significant percentage of “all outstanding shares”; that the Voya Trust was represented by the same counsel by which EVF is represented here; and that the Court enjoined the bylaw amendment, concluding that it “impairs Saba’s ability to meaningfully exercise its shareholders’ interests by rendering a vote in favor of Saba’s slate of nominees effectively impossible,” *i.e.*, rendering the “new standard a legal impossibility.” Preliminary Injunction Order, *Saba Capital CEF Opportunities 1, Ltd. v. Voya Prime Rate Trust, et al.*, No. cv2020-005293, at 9 (Ariz. Sup. Ct. June 24, 2020). Otherwise, denied.

56. Defendant admits that the Arizona trial court in *Saba Capital CEF Opportunities* also applied Massachusetts law and also enjoined the application of an “all outstanding shares” bylaw like the one at issue here. Otherwise, denied.

57. Defendant admits that the controversy between Defendant and EVF regarding the illegality of the illegal Bylaw Amendment is justiciable. Otherwise, denied.

### COUNT I

#### **Declaratory Judgment (Mass. Gen. Laws ch. 231A, § 1)**

58. Defendant repeats and re-alleges Paragraphs 1-57 of this Answer as if set forth fully herein.

59. Admitted.

60. Admitted.

61. Denied.

62. Defendant admits that Defendant served a demand letter on EVF regarding the invalidity of the illegal bylaw amendment, and demanded that EVF rescind the bylaw amendment. The demand letter speaks for itself. Otherwise, denied.

63. Denied.

64. Denied.

65. Defendant admits that EVF and Defendant have an active controversy regarding whether the illegal bylaw amendment is valid. Otherwise, denied.

### **DEFENSES**

Pursuant to Massachusetts Rule of Civil Procedure 8(b) and (c), without assuming any burden that it would not otherwise bear, without reducing or removing Counterclaimant's burdens of proof on its affirmative claims against Counterclaim Defendants, without waiving its right to assert additional defenses, and solely to the extent deemed necessary by the Court to maintain any or all of the following defenses, Defendant asserts the following defenses to the Complaint.

#### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff has failed to state a claim against the Defendant upon which relief can be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to a declaratory judgment because Counterclaim Defendants breached the Declarations of Trust and the Bylaws and/or the covenant of good faith and fair dealing inherent in the Declaration of Trust and the Bylaws.

#### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to a declaratory judgment because the Trustee Counterclaim Defendants breached their fiduciary duties in purporting to enact the illegal Bylaw Amendment.

#### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to a declaratory judgment because the Adviser tortiously interfered with the Declaration of Trust and Bylaws, and aided and abetted the Trustee Counterclaim Defendants' breaches of fiduciary duty.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to a declaratory judgment insofar as Counterclaim Defendants' Bylaw Amendments are unlawful under the 40 Act.

## COUNTERCLAIMS

Counterclaimant Saba Capital Master Fund, Ltd. (“Saba” or “Counterclaimant”) asserts the following counterclaims against Eaton Vance Senior Income Trust (“EVF”); and, pursuant to Massachusetts Rules of Civil Procedure 13(h) and 20(a), against Eaton Vance Senior Floating-Rate Trust (“EFR”), Eaton Vance Floating-Rate Income Trust (“EFT”), Eaton Vance Limited Duration Income Fund (“EVV”) (collectively, the “Trust Counterclaim Defendants” or “Trusts”); Eaton Vance Management (“the Adviser”); and trustees Thomas E. Faust, Jr., Mark R. Fetting, Cynthia E. Frost, George J. Gorman, Valerie A. Mosley, William H. Park, Helen Frame Peters, Keith Quinton, Marcus L. Smith, Susan J. Sutherland, and Scott E. Wennerholm in their capacity as trustees (collectively, the “Trustee Counterclaim Defendants” or “Trustees”) (collectively, the “Counterclaim Defendants”). Saba alleges as follows.

## PARTIES

1. Counterclaimant Saba Capital Master Fund, Ltd. is incorporated as a Cayman Islands exempted company.
2. Counterclaim Defendant Eaton Vance Senior Income Trust (“EVF”) is a Massachusetts business trust with its principal place of business at Two International Place, Boston, MA 02110, and conducts substantial business in Boston, Massachusetts.
3. Counterclaim Defendant Eaton Vance Senior Floating-Rate Trust (“EFR”) is a Massachusetts business trust with its principal place of business at Two International Place, Boston, MA 02110, and conducts substantial business in Boston, Massachusetts.
4. Counterclaim Defendant Eaton Vance Floating-Rate Income Trust (“EFT”) is a Massachusetts business trust with its principal place of business at Two International Place, Boston, MA 02110, and conducts substantial business in Boston, Massachusetts.

5. Counterclaim Defendant Eaton Vance Limited Duration Income Fund (“EVV”) is a Massachusetts business trust with its principal place of business at Two International Place, Boston, MA 02110, and conducts substantial business in Boston, Massachusetts.

6. Counterclaim Defendant Eaton Vance Management (the “Adviser”) is a Massachusetts business trust with a principal place of business at Two International Place, Boston MA 02110, and conducts substantial business in Boston, Massachusetts.

7. Counterclaim Defendant Thomas E. Faust, Jr. is a citizen of Massachusetts, a current trustee of the Trusts and has been a trustee since 2007.

8. Counterclaim Defendant Mark R. Fetting is a citizen of New Hampshire, a current trustee of the Trusts, and has been a trustee since 2016.

9. Counterclaim Defendant Cynthia E. Frost is a citizen of North Carolina, a current trustee of the Trusts, and has been a trustee since 2014.

10. Counterclaim Defendant George J. Gorman is a citizen of Massachusetts, a current trustee of the Trusts, and has been a trustee since 2014.

11. Counterclaim Defendant Valerie A. Mosley is a citizen of Massachusetts, a current trustee of the Trusts, and has been a trustee since 2014.

12. Counterclaim Defendant William H. Park is a citizen of Massachusetts, a current trustee of the Trusts, and has been a trustee since 2003.

13. Counterclaim Defendant Helen Frame Peters is a citizen of Massachusetts, a current trustee of the Trusts, and has been a trustee since 2008.

14. Counterclaim Defendant Keith Quinton is a citizen of New Hampshire, a current trustee of the Trusts, and has been a trustee since 2018.

15. Counterclaim Defendant Marcus L. Smith is a citizen of Massachusetts, a current trustee of the Trusts, and has been a trustee since 2018.

16. Counterclaim Defendant Susan J. Sutherland is a citizen of Florida, a current trustee of the Trusts, and has been a trustee since 2015.

17. Counterclaim Defendant Scott E. Wennerholm is a citizen of Vermont, a current trustee of the Trusts, and has been a trustee since 2016.

### **JURISDICTION AND VENUE**

18. This Court has subject matter jurisdiction over this action pursuant to Mass. Gen. L. ch. 212, § 4, which provides this Court with general subject matter jurisdiction over all civil actions.

19. This Court has personal jurisdiction over each Defendant because each Defendant has sufficient minimum contacts within the Commonwealth as to render the exercise of jurisdiction over Defendants by this Court permissible under traditional notions of due process and the law of the Commonwealth of Massachusetts, including Mass. Gen. L. ch. 223A § 3.

20. Venue is proper in this Court pursuant to Mass. Gen. L. ch. 223, § 1 and § 8, because Defendants caused acts or events to occur in Boston, Suffolk County, Massachusetts, which gives rise to the Counterclaims and because multiple Defendants (of which all remaining Defendants are trustees) have their principal places of business in Boston, Suffolk County, Massachusetts.

### **BACKGROUND**

21. The Trusts are diversified, closed-end management investment companies registered under the Investment Company Act of 1940, as amended, and organized as Massachusetts business trusts.

22. The Trusts' Adviser, Eaton Vance Management, has overall responsibility for the management of the Trusts. It oversees all investment advisory and portfolio management services and assists in managing and supervising all aspects of the general day-to-day business activities and operations of the Trusts. The Adviser is currently compensated with significant annual fees of

approximately 0.75% of all assets under management, which—based on current assets—is approximately \$2.9 to \$19.3 million *annually* per Trust, *i.e.*, over \$100 million over the past five years.

23. Because the Trusts employ a “leveraged” strategy of borrowing to purchase assets, the effective impact of the approximately 0.75% management fee is significantly higher.

24. These fees amount to a significant proportion of the actual investment income of the Trusts. For example, according to EVV’s 2020 Annual Report, its “Investment adviser fee” was more than 14.6% of all “investment income” for the year ended March 31, 2020.

25. The Adviser has a significant economic incentive to maximize the Trusts’ assets even if holding certain of those assets would not be beneficial to shareholders.

26. Each of EVF, EFT, and EFR invest primarily in senior loans. EVV invests primarily in mortgage-backed securities and below investment grade securities, including senior loans. Each of the Trusts has a long history of underperformance.

27. As a result of this underperformance, the Trusts trade at a significant discount to their Net Asset Value (“NAV”)—*i.e.*, shares of the Trusts are worth less than the combined value of the assets they own. The Trusts’ excessive discount level over an extended period indicates that the market has lost faith in the Adviser’s ability to add to shareholder value. Likewise, the Boards have done little to address this poor performance or to lessen the Trusts’ discounts to NAV. Over the past five years, the Trusts have also all traded at significant discounts to NAV. Instead of focusing on improving the Trusts’ performance, the Board has focused on implementing purported Bylaw changes ensuring that the Trustees will remain in office in perpetuity, and continue to retain the services of the Adviser.

#### **THE EATON VANCE TRUSTS ADOPT THE UNLAWFUL BYLAW AMENDMENTS**

28. Saba’s counterclaims arise from Counterclaim Defendants’ brazen misuse of corporate machinery to perpetually entrench the Trustees as members of the Trusts’ board of trustees (the “Board”) so that the shareholders of the Trusts cannot ever replace them in practice.

29. For decades, the bylaws of each of the Trusts have contained a provision permitting the shareholders to elect and replace trustees by a plurality of the shares voted.

30. Saba is a shareholder in a number of different Eaton Vance funds, including the Trusts named in this action. Saba is also a shareholder in non-party Eaton Vance Floating-Rate Income Plus Fund (“EFF”), another poorly performing Eaton Vance-managed fund.

31. Saba has been a beneficial owner of shares in EFF since at least October 2018; a beneficial owner of shares in EVF since at least November 2017; a beneficial owner of shares in EFR since at least February 2020; a beneficial owner of shares in EFT since at least March 2019; and a beneficial owner of shares in EVV since at least August 2013.

32. On November 27, 2019 and December 6, 2019, Saba provided notice that it intended to nominate three individuals for election to the Board of EFF. At the EFF Annual Meeting held on April 16, 2020, Saba’s nominees overwhelmingly prevailed over Eaton Vance’s incumbent nominees under a plurality of shares-voted standard. Eaton Vance’s losing nominees for the Board of EFF remain trustees of the Counterclaim Defendant Trusts and are named as Trustee Counterclaim Defendants in this action.

33. On June 8, 2020, Saba provided notice to EVF that it also intended to nominate three individuals as a minority slate for election to the EVF Board at the EVF Annual Meeting. Saba’s Nominees, if elected, would then replace three members of the EVF Board.

34. On June 15, 2020, the week after Saba notified EVF of its intent to nominate candidates for the Board, EVF filed with the SEC Amended and Restated Bylaws, including an amendment purportedly changing the threshold for replacing trustees (the “Entrenchment Amendment”). The filing states that the Entrenchment Amendment was purportedly adopted months earlier, on March 23, 2020 (after the announcement of Saba Capital Management’s nominees to EFF, and before those nominees were elected). The Entrenchment Amendment purported to change the threshold at which shareholders can replace trustees—and only in elections where the sitting trustees are contested—from a plurality of the shares actually voted to a **majority of all outstanding shares**. EVF Amended and Restated Bylaws, art. IV, § 5.



35. On August 5, 2020, EFR also filed with the SEC Amended and Restated Bylaws that included the Entrenchment Amendment. EFR's purported bylaw amendment was also dated months earlier, back to March 23, 2020. EFR Amended and Restated Bylaws, art. IV, § 5.

36. On August 13, 2020, EFT and EVV then filed with the SEC Amended and Restated Bylaws that also included the Entrenchment Amendment. EFT and EVV Amended and Restated Bylaws, art. IV, § 5.

37. The Trustees were aware that, if Saba's nominees won at this year's election, next year's election, or future elections, they would lose their seats, and associated fees.

38. The Adviser was aware that Saba's nominees, if elected, might take efforts to terminate the Adviser due to the Adviser's role in the Trusts' long history of underperformance, resulting in a loss of millions of dollars in fees to the Adviser.

39. The amended bylaws filed on August 13, 2020, by EFR, EFT and EVV also purport to strip voting rights from shares acquired in a "Control Share Acquisition," which is defined to include the acquisition of shares constituting as little as 10% of the voting power of the Trusts (the "Vote-Stripping Amendments"). EFR, EFT, and EVV Amended and Restated Bylaws, art. XIV. Specifically, the Vote-Stripping Amendments provide that "shares acquired in a Control Share Acquisition . . . shall not have 'voting power'" and "shall not be 'entitled to vote' on any matters" unless authorized by "the affirmative vote of the holders of a majority of the shares entitled to vote . . . excluding Interested Shares." *Id.* art. XIV, § 4.

40. On information and belief, the Counterclaim Defendants adopted these illegal Entrenchment Amendments and Vote-Stripping Amendments (collectively, the illegal "Bylaw Amendments") directly in response to Saba's successful nomination and election of trustees to EFF, in response to and/or in anticipation of Saba's nomination of trustees to other funds in the Eaton Vance complex, and in response to and/or in anticipation of Saba's continued acquisition of shares in funds in the Eaton Vance complex. The unlawful Entrenchment Amendments and Vote-Stripping Amendments were aimed squarely at defeating Saba's nominees to the Board of EVF and other candidates the Counterclaim Defendants expected Saba would nominate to other funds

in the Eaton Vance Complex, and, more generally, trampling on the right of shareholders to participate in the election of trustees.

**THE EATON VANCE BYLAW AMENDMENTS ARE UNLAWFUL**

41. The Bylaw Amendments are unlawful. For example, the Entrenchment Amendments purport to change the voting standard for a contested election of a trustee from a plurality of shares voted, *i.e.*, a standard in which the candidate with the most votes is elected, to a **majority of all outstanding shares**, which includes shares represented by those who choose not to participate in the vote. As a result, they make it impossible in practice for a shareholder to mount a realistic challenge to the re-election of the Trustees. The Entrenchment Amendments effectively guarantee that any contested election for trustees will “fail,” *i.e.*, that no nominee will receive the votes needed to be elected. As a result, the Entrenchment Amendments ensure that Trustees will remain improperly in their seats in perpetuity—that is, until resignation or death—either as “holdover” trustees or trustees “elected” by default in an uncontested election.

42. The Declaration of Trust of each of the Trusts is a binding contract between the Trustee Counterclaim Defendants, the Trust, and the Shareholders.

43. The Declaration of Trust of each of the Trusts contains provisions specifically requiring that the trust’s shareholders must “have [the] power to vote” for “the election of Trustees” and “for the removal of Trustees as provided for herein.” Declarations of Trust, art. V, § 5.2.

44. The Declaration of Trust of each of the Trusts further provides that “[e]ach whole Share shall be entitled to one vote as to any matter on which it is entitled to vote” including “with respect to the election of Trustees.” *Id.*

45. The Entrenchment Amendments make it impossible in practice for Saba—or, for that matter, any shareholder—to elect Trustees, as the Declarations of Trust require. The illegal Entrenchment Amendments impose a heightened, impossible-to-meet voting standard only in elections in which shareholders actually exercise the franchise—*i.e.*, nominate and vote on

competing trustee candidates—and not in elections where the incumbent trustees run unopposed. Specifically, article IV, § 5 of the Amended and Restated By-Laws states: “(i) with respect to the election of Trustees, *other than a Contested Election*, a nominee receiving the affirmative vote of a *plurality of the shares* represented in person or by proxy at any meeting at which a quorum is present shall be deemed declared elected; (ii) with respect to a *Contested Election*, a nominee receiving the *affirmative vote of a majority of the shares outstanding* and entitled to vote with respect to such matter at such meeting shall be deemed and declared elected” (emphases added). As a result, the Entrenchment Amendments ensure that the Trustees will remain improperly in their seats in perpetuity—that is, until resignation, or death—either as unelected “holdover” trustees in a contested election or as trustees “elected” by default in an uncontested election.

46. The Trustees knew that the Entrenchment Amendments effectively ensured that any election would “fail”—the equivalent of abolishing trustee elections altogether—which is entirely at odds with the fundamental principle of corporate governance and the Trust documents ensuring that shareholders will elect trustees.

47. That the Entrenchment Amendments are unlawful is clear. Indeed, in a recent action by Saba Capital CEF Opportunities 1 Ltd. against another closed-end fund organized as a Massachusetts business trust; that was governed by Massachusetts law; that adopted a “majority of all outstanding shares” bylaw similar to the one at issue here; and in which the defendant closed-end fund was represented by the very same counsel by which Plaintiff is represented here, the court issued a preliminary injunction enjoining that bylaw for substantially the same reasons Saba has identified in its counterclaims. The Court ruled that the “Bylaw Amendment prevents any new trustees from being elected, and results in entrenchment of the existing trustees,” “depriv[ing] Saba of what [a Massachusetts District Court] described as its ‘most sacred right . . . to participate in corporate democracy.’” Preliminary Injunction Order, *Saba Capital CEF Opportunities 1, Ltd. v. Voya Prime Rate Trust, et al.*, No. cv2020-005293, at 9, (Ariz. Sup. Ct. June 24, 2020).

48. The Vote-Stripping Amendments are also unlawful. The Vote-Stripping Amendments violate, among other things, the “one-share, one-vote” principle enshrined in the Declarations of Trust and the federal Investment Companies Act of 1940.

49. The Trustees adopted the Entrenchment Amendments and the Vote-Stripping Amendments in contravention of the governing trust documents, in bad faith, and in breach of their fiduciary duties. The Entrenchment Amendments and the Vote-Stripping Amendments are illegal, *ultra vires*, and, on their face, interfere with the rights of Saba and other shareholders to vote to elect the trustees.

50. In violation of the Declaration of Trust and the pre-existing Bylaws, and in flagrant disregard of their fiduciary duties, the Trustees are using the Entrenchment Amendments and the Vote-Stripping Amendments for the purpose of entrenching themselves by interfering with Saba’s shareholder rights and thwarting the will of the Trusts’ shareholders.

51. The Trustees’ attempt to rig future elections in their favor, as aided by the Adviser, despite having led the Trusts through extended periods of unrelentingly poor performance is the height of bad faith and utterly contrary to the Trustees’ fiduciary duties.

52. To prevent the Trustees and the Adviser from succeeding in their brazen assault on the shareholder franchise, Saba respectfully requests that the Court (i) declare that the Trustees breached the Declarations of Trust and the pre-existing Bylaws, and/or the covenant of good faith and fair dealing inherent in the Declarations of Trust and the Bylaws, by enacting the Entrenchment Amendments and Vote-Stripping Amendments; (ii) declare that the Trustees breached their fiduciary duties by enacting the Entrenchment Amendments and Vote-Stripping Amendments; (iii) declare that the Adviser tortiously interfered with the Declarations of Trust and Bylaws; (iv) declare that the Adviser aided and abetted the Trustees’ breaches of fiduciary duty; (v) strike the Entrenchment Amendments and the Vote-Stripping Amendments and/or rescind the Amended and Restated Bylaws of the Trusts containing the Entrenchment Amendments and the Vote-Stripping Amendments; and (vi) permanently enjoin Counterclaim Defendants, their agents and

representatives, and all other persons acting in concert with them, from applying the Entrenchment Amendments and the Vote-Stripping Amendments.

### DERIVATIVE ACTION

53. Saba brings this action directly and, in the alternative, derivatively on behalf of and for the benefit of the Trusts to redress injuries suffered, and yet to be suffered, by the Trusts as a direct and proximate result of the illegal acts alleged herein.

54. Saba is a shareholder of common shares in the Trusts and will adequately and fairly represent the interests of the Trusts and their shareholders in this litigation. Saba has been a shareholder in the Trusts at all times relevant to this litigation, including at the time the Entrenchment Amendments and Vote-Stripping Amendments were adopted, and intends to retain shares in the Trusts throughout the duration of this litigation.

55. This action is not a collusive one to confer jurisdiction that the court would otherwise lack.

56. The wrongful acts complained of herein subject, and will persist in subjecting the Trusts to continuing harm because the adverse consequences of the injurious actions are still in effect and ongoing. Specifically, unless the Entrenchment Amendments and Vote-Stripping Amendments are declared invalid and enjoined, the Trusts will be harmed and the will of their shareholders thwarted.

57. Saba made a written derivative demand on each of the Trusts, before filing this Counterclaim Complaint, requesting that the Trust withdraw the Entrenchment Amendments and take appropriate judicial action against the Trustees and the Adviser. Saba also made a written derivative demand on EFR, EFT, and EVV, before filing this Counterclaim Complaint, requesting that the Trust withdraw the Vote-Stripping Amendments and take appropriate judicial action against the Trustees and the Adviser.

58. Counterclaim Defendants have made plain that they will not take suitable action to remedy the wrongs alleged herein and described in Saba's Demand. In fact, after Saba demanded that EVF withdraw the Entrenchment Amendment, EVF responded by filing suit against Saba in

defense of that amendment. The Vote-Stripping Amendments, moreover, were adopted on August 13, just weeks before the filing of this Counterclaim Complaint. There is no indication that Defendants intend to suddenly reverse course and withdraw the Vote-Stripping Amendments.

59. To the extent there is any doubt whether Saba's Demand has been rejected, irreparable injury to the Trusts would result if Saba were required to wait to assert derivative claims until after the expiration of the statutory period for response, particularly in light of the Annual Meeting for EVF to be held this fall, and upcoming meetings for other funds in the Eaton Vance complex.

60. The Board has also effectively rejected Saba's demand to rescind the Vote-Stripping Amendments, given that they were just recently enacted in response to Saba's interest in participating more actively in the governance of funds in the Eaton Vance complex, shortly after EVF initiated its legal action against Saba, and there is no indication that the Trusts intend to suddenly reverse course.

## COUNT I

### **(Breach of Contract Against the Trustees and Trusts)**

61. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 60 above as if set forth in full herein.

62. The Trusts' Declarations of Trust and Bylaws constitute a binding contract between the Trustee Counterclaim Defendants and Saba.

63. The Declaration of Trust of each of the Trusts contains provisions requiring that the trust's shareholders must "have [the] power to vote" for "the election of Trustees" and "for the removal of Trustees as provided for herein." Declarations of Trust, art. V, § 5.2.

64. The Entrenchment Amendments make it impossible in practice for shareholders to elect trustees at the upcoming meeting of shareholders being called for that purpose or, for that matter, at any future meeting of shareholders.

65. By adopting the Entrenchment Amendments, the Trustees breached the Declarations of Trust and the Bylaws.

66. The Declaration of Trust of each of the Trusts further provides that “[e]ach whole Share shall be entitled to one vote as to any matter on which it is entitled to vote” including “with respect to the election of Trustees.” *Id.*

67. The Vote-Stripping Amendments deprive shareholders’ lawfully acquired shares of their power to vote on matters as to which they are entitled to vote—namely, the election of Trustees.

68. By adopting the Vote-Stripping Amendments, the Trustees breached the Declarations of Trust and the Bylaws.

69. Absent relief from the Court, Saba will be irreparably harmed by the Trustees’ breaches of the Declarations of Trust and the Bylaws.

70. Saba has no adequate remedy at law.

## COUNT II

### **(Breach of Implied Duty of Good Faith and Fair Dealing Against the Trustees and Trusts)**

71. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 70 above as if set forth in full herein.

72. The Trusts’ Declaration of Trust and Bylaws constitute a binding contract between the Trustees and Saba.

73. The Declaration of Trust of each of the Trusts contains provisions requiring that the trust’s shareholders must “have [the] power to vote” for “the election of Trustees” and “for the removal of Trustees as provided for herein.” Declarations of Trust, art. V, § 5.2.

74. The Entrenchment Amendments make it impossible in practice for shareholders to elect trustees at the upcoming meeting of shareholders being called for that purpose or, for that matter, at any future meeting of shareholders.

75. The Declaration of Trust of each of the Trusts further provides that “[e]ach whole Share shall be entitled to one vote as to any matter on which it is entitled to vote” including “with respect to the election of Trustees.” *Id.*

76. The Trustees adopted the Entrenchment Amendments and the Vote-Stripping Amendments in bad faith, in a way that is designed to, and does in fact, deprive Saba of the benefits of the Declarations of Trust and the Bylaws and that is incompatible with the parties’ reasonable understanding of the Declarations of Trust and the Bylaws.

77. Absent relief from the Court, Saba will be irreparably harmed by the Trustees’ breaches of the covenant of good faith and fair dealing inherent in the Declarations of Trust and the Bylaws.

78. Saba has no adequate remedy at law.

### **COUNT III**

#### **(Breach of Fiduciary Duty Against the Trustees and Trusts)**

79. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 78 above as if set forth in full herein.

80. The Trustee Counterclaim Defendants owe the Trusts’ shareholders fiduciary duties of loyalty and due care. Specifically, and unique to Saba, the Trustees have breached their fiduciary duty of loyalty to Saba by improperly interfering with Saba’s right to propose and have elected its slate of nominees under the pre-existing and longstanding bylaws governing elections.

81. The Trustee Counterclaim Defendants abused their positions and misused the corporate machinery to impede the exercise of the shareholder franchise and entrench themselves in office.

82. The Bylaw Amendments constitute a breach of the Trustees’ fiduciary duties, in that they ensure that the Trustees will remain in their seats and make it impossible in practice for any shareholder, including Saba, to elect trustees.

83. The Bylaw Amendments constitute a breach of the Trustees’ fiduciary duties in that they deprive shareholders, including Saba, of the rights granted to shareholders under the



Investment Company Act of 1940 and the Declaration of Trust (by which the Trustees are bound) to exercise their one-share one-vote right to elect and remove trustees.

84. The Trustee Counterclaim Defendants' misuse of the corporate machinery to impede the exercise of the shareholders' franchise and entrench themselves in office constitutes a clear violation of their fiduciary duties.

85. Absent relief from the Court, Saba will be irreparably harmed by the Trustee Counterclaim Defendants' interference with the shareholder franchise and the loss of the shareholders' right to freely elect trustees to determine the future direction of the Trust and how best to maximize the value of its assets.

86. Saba has no adequate remedy at law.

#### COUNT IV

##### **(Rescission Under the Investment Company Act Against the Trustees and Trusts)**

87. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 86 above as if set forth in full herein.

88. The Investment Company Act of 1940 (the "40 Act") provides a private right of action for a party to a contract that violates the 40 Act to seek rescission of that violative contract.

89. The Trusts' Declarations of Trust and Bylaws constitute a binding contract between the Trustees and Saba.

90. The Entrenchment Amendments and Vote-Stripping Amendments are unlawful under the 40 Act, rendering so much of the Amended and Restated Bylaws as includes the Entrenchment Amendments and Vote-Stripping Amendments illegal under the 40 Act. For example, under the 40 Act, all common shares "shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i).

91. Absent relief from the Court, Saba will be irreparably harmed by the Trustees' breaches of the covenant of good faith and fair dealing inherent in the Declarations of Trust and the Bylaws.

92. Saba has no adequate remedy at law.

**COUNT V**

**(Tortious Interference with Contractual Relations Against the Adviser)**

93. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 92 above as if set forth in full herein.

94. The Trusts' Declarations of Trust and Bylaws constitute a binding contract between the Trustees and Saba.

95. The Adviser was aware of the Trustee Counterclaim Defendants' contracts with Saba.

96. The Adviser intentionally interfered with the contracts by inducing or causing the Trustee Counterclaim Defendants to breach their contracts with Saba. The Adviser was fully aware of the contents and purposes of the Entrenchment Amendments and Vote-Stripping Amendments being adopted by the Trustee Counterclaim Defendants.

97. The Adviser acted with an improper purpose and by improper means. The Adviser knows that it risks losing millions of dollars in fees if Saba proposes, and the shareholders elect, different nominees to the Boards. To the extent the Adviser attempted to justify the Entrenchment Amendments and the Vote-Stripping Amendments to the Board, its justifications were pretextual, dishonest, and improper.

98. As set forth above, absent relief from this Court, Saba will be irreparably harmed by the Trustees' breaches of contract and/or the implied covenant of the good faith and fair dealing.

99. Saba has no adequate remedy at law.

**COUNT VI**

**(Aiding and Abetting Breach of Fiduciary Duty Against the Adviser)**

100. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 99 above as if set forth in full herein.

101. The Adviser knows that it risks losing millions of dollars in fees if Saba proposes, and the shareholders elect, different nominees to the Boards.

102. The Adviser was fully aware of the contents and purposes of the Entrenchment Amendments and Vote-Stripping Amendments being adopted by the Trustees.

103. The Adviser substantially assisted the Trustees' breaches of fiduciary duty.

104. As set forth above, the Trustee Counterclaim Defendants' breaches of fiduciary duty impede Saba's and other shareholders' rights to elect new trustees at the Annual Meetings, which interferes with the shareholders' exercise of their franchise rights and entrenches the Trustees in office.

105. Saba has no adequate remedy at law.

### **COUNT VII**

#### **(Declaratory Judgment Against All Counterclaim Defendants)**

106. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 105 above as if set forth in full herein.

107. An actual and justiciable controversy exists between Saba and the Trustee Counterclaim Defendants with respect to the validity of the Entrenchment Amendments and the Vote-Stripping Amendments, and by the terms and provisions of Massachusetts Rule of Civil Procedure 57 and Mass. Gen. Laws ch. 231A, this Court is invested with the power to declare the rights, status, and other legal relations of the parties hereto and to grant such relief as it deems necessary and proper.

108. A declaration is necessary and appropriate at this time under the circumstances alleged herein in order that the parties may ascertain their respective rights and duties under the Bylaws.

109. Saba is entitled to a declaration that the purported Bylaw Amendments and Vote-Stripping Amendments are invalid and void *ab initio*.

**REQUEST FOR RELIEF**

WHEREFORE, Saba respectfully requests that this Court enter a judgment in its favor as follows:

- a. Declaring that the Trustees breached the Declarations of Trust and the Bylaws and/or the covenant of good faith and fair dealing inherent in the Declarations of Trust and the Bylaws;
- b. Declaring that Trustees breached their fiduciary duties;
- c. Declaring that the Adviser tortiously interfered with the Declarations of Trust and Bylaws;
- d. Declaring that the Adviser aided and abetted the Trustee Counterclaim Defendants' breaches of fiduciary duty;
- e. Striking and/or rescinding the Entrenchment Amendments and the Vote-Stripping Amendments and/or rescinding the Amended and Restated Bylaws of the Trusts containing the Entrenchment Amendments and/or the Vote-Stripping Amendments;
- f. Permanently enjoining Defendants, their agents and representatives, and all other persons acting in concert with them, from applying the Entrenchment Amendments and/or the Vote-Stripping Amendments;
- g. Awarding Saba costs and disbursements, including a reasonable allowance for Saba's attorneys' fees and experts' fees and pre- and post-judgment interest; and
- h. Such other and further relief as the Court may deem necessary and proper.

**DEMAND FOR JURY TRIAL**

Saba demands a trial by jury on all issues so triable.

Respectfully submitted,

SABA CAPITAL MASTER FUND, LTD.

By its attorneys,

/s/ William F. McGonigle

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Dated August 27, 2020

**VERIFICATION**

**COMMONWEALTH OF MASSACHUSETTS**

**Suffolk, ss.**

I, Paul Kazarian, being first duly sworn, depose and say that I have read the foregoing Counterclaim Complaint and know of its contents, that the facts stated therein are true to my own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true, and that no material facts have been omitted, and that I hereby verify this Complaint.

Signed under the penalties of perjury this 27 day of August, 2020.

  
\_\_\_\_\_  
Paul Kazarian

**CERTIFICATE OF SERVICE**

I, William F. McGonigle, certify that on the 27th of August, 2020, service was made of the foregoing on all counsel of record via email.

*/s/ William F. McGonigle*