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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2084CV01533-BLS2

EATON VANCE SENIOR INCOME TRUST

vs.

SABA CAPITAL MASTER FUND, LTD.

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This dispute arises from a pair of bylaw amendments adopted by the eleven trustees [1] (the "Trustees") of four closed-end investment funds – Eaton Vance Senior Income Trust ("EVF"), Eaton Vance Senior Floating-Rate Trust ("EFR"), Eaton Vance Floating-Rate Income Trust ("EFT"), and Eaton Vance Limited-Duration Income Fund ("EVV") (collectively, the "Funds) – that Saba Capital Master Fund, Ltd. ("Saba"), a shareholder of the Funds, asserts are invalid. The first amendment provides that a trustee may only be removed by vote of more than half of all outstanding shares ("Majority Rule Amendment"); previously a trustee could be removed by a plurality of shares participating in the vote. The second amendment prevents any shareholder controlling more than ten percent of the voting power in a Fund from exercising its voting rights without the consent of a majority of the other shareholders ("Control Share Amendment") (collectively with the Majority Rule Amendment, the "Bylaw Amendments").

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Presently before the Court are the parties' cross-motions for partial summary judgment. The Trustees and the Funds (collectively, the "EV Parties") seek summary judgment on Saba's

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

breach of contract counterclaim (Count I) and breach of fiduciary duty counterclaim (Count III). Saba, in turn, seeks summary judgment on its counterclaim for breach of fiduciary duty; its counterclaim for recission (Count IV) to the extent it relates to the Control Share Amendment; and its counterclaim for declaratory judgment (Count VII) to the extent it seeks a ruling on the validity of the Control Share Amendment. Saba also seeks summary judgment on the declaratory judgment counterclaim brought by EFR, EFT, and EVV, which seeks a declaration as to the validity of the Control Share Amendment (Count II).

In light of the parties' arguments and filings, and for the reasons that follow, each motion is **ALLOWED** in part and **DENIED** in part. The EV Parties' motion for partial summary judgment is **DENIED** on Saba's breach of contract counterclaim (Count I) but **ALLOWED** on Saba's breach of fiduciary duty counterclaim (Count III). Saba's motion for partial summary judgment is **DENIED** as to its counterclaim for breach of fiduciary duty; **ALLOWED** as to its counterclaim for recission (Count IV) to the extent it relates to the Control Share Amendment; **ALLOWED** as to its counterclaim for declaratory judgment (Count VII) to the extent it seeks a ruling on the validity of the Control Share Amendment, and **ALLOWED** on the declaratory judgment counterclaim brought by EFR, EFT, and EVV, seeking a declaration as to the invalidity of the Control Share Amendment (Count II).

BACKGROUND[2]

A. The Funds

The Funds are closed-end funds organized as separate Massachusetts business trusts and registered as investment companies under the federal Investment Company Act of 1940 ("ICA"), 15 U.S.C. § 80a-1, et seq. The primary investment objective of each Fund is to provide "a high

[2] Certain facts are reserved for the discussion.

level of current income" – in the form of regular monthly distribution payments – generated by interest earned on the Funds' portfolio holdings. Eaton Vance Management ("EVM") is the investment manager of the Fund.

Although somewhat similar to "open-end" investment companies (i.e., mutual funds), closed-end funds, like the Funds ere, have certain structural features that enhance their income-generating capabilities and potentially generate higher returns for their shareholders. For example, unlike mutual funds, closed-end funds are not subject to the inflows and outflows of shareholder money. Shares of closed-end funds are normally issued in discrete public offerings and then traded among investors on the secondary market, typically at a premium or a discount to their net asset value ("NAV"). Closed-end funds have an essentially fixed asset base that allows investment in relatively less-liquid holdings. Given their income generating capabilities, most shareholders in closed-end funds are individual (or "retail") investors, including retirees, who invest in them to obtain a steady and predictable income stream.

The Funds are each governed by a declaration of trust ("Declarations") and bylaws adopted under them. The Trustees have full, general and plenary power and authority to act for the Funds, including to adopt bylaws. See Declaration of Trust, Ex. 17, at Art. 2, §§ 2.8, 2.11. "Any determination as to what is in the interests of the Trust ... made by the Trustees in good faith shall be conclusive and binding upon all Shareholders." Id. at Art. 2, § 2.8. However, the Declarations provide that "the Shareholders shall have the power to vote" on certain matters, including the election and removal of Trustees. Id. at Art. V, § 5.2.

Each Fund is overseen by an eleven-member Board of Trustees (collectively, the "Board"). Ten of the Trustees are unaffiliated with EVM ("Independent Trustees"). With limited exceptions, each Trustee serves as trustee for the entire family of Eaton Vance mutual

funds and closed-end funds, numbering approximately 139 funds as of February 25, 2022 and approximately 156 at the time of the Bylaw Amendments' adoption. Most of those are open-end mutual funds which are not implicated in this case.

Trustee compensation is determined by the Independent Trustees and is paid out of the Funds' assets. EVM has no role in determining the amount of fees earned by the Independent Trustees for their Board service.[3] Trustee Thomas E. Faust, the Chief Executive Officer of EVM and the sole interested trustee, does not receive compensation from the Fund for his Board service but does receive employment compensation from EVM or its affiliates. Subject to limited exceptions, the fees each Independent Trustee earns are determined on an aggregate, complex-wide basis. Historically, when an Independent Trustee ceased to serve on the board for a specific fund, the impact on that trustee's compensation was approximately $1,000, or less than 1% of their aggregate compensation.

The Board has various committees. Among them is the Ad Hoc Committee for Closed-End Fund Matters ("AHC"), the purpose of which is to consider, evaluate, and make reports and recommendations to the Board with respect to Eaton Vance's closed-end funds, including the Funds. The AHC consisted of three Independent Trustees at the time the Board considered adopting the Bylaw Amendments.

B. Saba

Saba is a New York-based hedge fund. Along with several other hedge funds it controls, Saba engages in what it refers to as a closed-end fund "arbitrage strategy," pursuant to which it purchases shares in closed-end funds with investor-friendly provisions primarily for the purpose

[3] The evidence cited by Eaton Vance is consistent with this statement. See Gorman Aff. ¶ 9; Frost Aff. , ¶ 9. While Saba claims to dispute this fact, it has cited no contradictory evidence and thus has not shown a dispute exists.

of monetizing the NAV discount through activist corporate actions that result in Fund liquidations, buybacks, and tender offers to repurchase a portion of the fund's shares.[4] Saba and the other hedge funds all share the same investment adviser, Saba Capital Management, L.P. ("Saba Capital"). Saba Capital describes itself as "an industry leader in closed-end fund activism."[5]

Until 2021, Saba was a shareholder of all four Funds (EVF, EFT, EFR, and EVV) and non-party Eaton Vance Floating-Rate Income Plus Fund ("EFF"). Between 2019 and 2021, Saba and the hedge funds it controls amassed substantial holdings in EFF and the Funds. Saba's stakes in EVF, EFT, EFR, and EVV topped out at 21.2%, 15.6%, 9.5%, and 7.9% ownership, respectively.[6]

Consistent with its arbitrage strategy, Saba sought an active role in the operations of the Funds and EFF upon acquiring their shares. In connection with that effort, in 2019 and 2020, Saba amassed ownership of 22.05% of the shares of EFF, proposed at a shareholder meeting in December 2019 that EFF merge into one of EVM's existing open-ended funds to achieve Saba's liquidity goal, and Saba nominated three trustees to the EFF Board, who won election in April 2020 under the plurality voting standard then in effect (i.e., persons receiving the greatest number of votes cast).[7] Moreover, in January 2020, Saba won a vote to declassify EVV's Board (i.e., require all Trustees to stand for re-election each year) and Saba notified EVF in June 2020 of its intention to nominate three trustees to EVF's Board at the following annual meeting, which was scheduled for November 12, 2020.

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[4] See Exs. 83, 117.
[5] See Ex. 83.
[6] Section 12(d)(1) of the ICA imposes a three percent cap on the amount of shares a hedge fund and its controlled entities can own in a fund subject to the statute. 15 U.S.C. § 80a-12(d)(1). Saba allocates the shares it holds among multiple affiliated hedge funds such that no individual fund exceeds this threshold.
[7] As noted below, in March 2021, the reconstituted EFF board announced plans to liquidate and terminate EFF.

C. Adoption of the Bylaw Amendments

On March 23, 2020, the Trustees adopted the Majority Rule Amendment for each of the Funds (no amendment was made to non-party EFF's bylaws, as the proxy contest initiated by Saba in connection with EFF was already in progress). This amendment provides that: (1) in an uncontested election, i.e., any election in which the incumbent trustees run unopposed, a plurality vote is sufficient to elect a trustee; and (2) in a contested election, i.e., an election where the incumbents are challenged, any nominee must receive the vote of a majority of all outstanding shares. See Ex. 8, Art. IV, § 5; Ex. 29–31, Art. IV, § 5. If no candidate receives a majority in a contested election, the incumbents remain in office as holdover trustees.

The adoption of the Majority Rule Amendment occurred after at least 11 meetings by the full Board and the AHC in 2019 and 2020. In these meetings, the AHC and full Board discussed, among other things, actions by closed-end fund activists; the negative effects experienced by closed-end funds subject to the liquidity events pursued by Saba and other activists; the shareholder makeup of the Funds and voter participation rates among different fund constituents; the Funds' limited ability to defend against activists' actions; and whether the Majority Rule Amendment would protect shareholders from activist investors seeking to exploit arbitrage opportunities in a manner inconsistent with the Funds' and their shareholders' long-term interests. The Board also received multiple reports prepared by EVM, proxy solicitation firm AST Fund Solutions, LLC ("AST"), and market consultant UBS Securities,[8] as well as a

[8] The reports concerned: (1) the actions of Saba and other activists involving the Eaton Vance closed-end funds and others such funds; (2) the closed-end funds' market price discounts to NAV, the market forces causing those discounts, and steps that could be and were being taken to address those discounts; (3) the types of liquidity events being pursued by Saba and other activists, such as tender offers and liquidation; (4) the negative effects of the liquidity events being pursued by Saba and other activists; and (v) the shareholder makeup of the Funds, voter participation rates among different fund constituents, and potential effects on outcomes from different voting standards.

form of the proposed amendment and input from the Funds' special counsel, Ropes & Gray LLP, and counsel to the Independent Trustees, Goodwin Proctor LLP.

On July 10, 2020, Saba demanded that the EVF Board rescind the Majority Rule Amendment. In response, EVF filed this action on July 15, 2020, seeking declaratory judgment on the validity of the amendment. Shortly after this occurred, Saba inquired whether EVF would agree to conduct a tender offer for 40% of the Fund's outstanding common shares in exchange for a standstill agreement to limit Saba's activist activities in the Fund, including a withdrawal of its demand. The Board decided not to proceed with the tender offer.

On August 13, 2020, the Board adopted the Control Share Amendment (also referred to as the Ten Percent Stake Amendment by the parties) for EFR, EFT, and EVV (but not EVF, as the proxy contest initiated by Saba in connection with EVF was already in progress). This amendment strips voting rights from any shares that a shareholder acquires in excess of ten percent. Voting power can be restored to the shares only by a vote of a majority of the outstanding shares, excluding from the vote the shares owned by the shareholders subject to the amendment. See Exs. 11-13, at Art. XIV, §§ 3, 4.

As with the Majority Rule Amendment, the Board adopted the Control Share Amendment after several meetings by the AHC and the Board. For example, in August 2020, the AHC held a meeting during which EVM presented, at the request of an Independent Trustee, a proposed Control Share Amendment, and the AHC received reports from AST and EVM. The AHC recommended adoption of the amendment at the meeting after an executive session with Goodwin Proctor (and without any representatives of EVM), during which they discussed the amendment's potential advantages and disadvantages and alternatives to it. [9] Following the

[9] Saba offered no facts to properly dispute this statement.

AHC meeting, the full Board convened and reviewed the proposed amendment, a memorandum from EVM regarding the amendment, and a May 27, 2020 SEC Staff Statement ("Statement"), and discussed its desire to protect shareholders by limiting the influence of activist investors whose interests and objectives may be in conflict with the implementation of the Fund's investment objective, strategy and structure.

In the Statement that the Board reviewed, the SEC Division of Investment Management's staff withdrew a no-action letter it had issued in 2010 (discussed below) and stated that it "would not recommend enforcement action to the Commission against a closed-end fund under [S]ection 18 (i) of the [ICA] for opting in to and triggering a control share statute if the decision to do so by the board of the fund was taken with reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally." Ex. 52. It further stated that it "would expect any inquiry into the application of section 18 (i) to be based on the facts and circumstances ... [and] be examined in light of (1) the board's fiduciary obligations to the fund, (2) applicable federal and state law provisions, and (3) the particular facts and circumstances surrounding the board's action." Id. The Statement included no legal analysis, and noted that it reflected "the staff's view" and "was not a rule, regulation, or statement of the Commission, and has no legal force or effect." Id. It also noted that the staff sought "further input to determine whether additional Commission action is warranted," and outlined several questions on which it sought such input. Id.

The no-action letter withdrawn by the Statement, the Boulder Total Return Fund, Inc. No-Action Letter, 2010 WL 4630835 ("Boulder No-Action Letter"), concluded that a fund subject to the ICA could not opt into the provisions of a state control share acquisition act consistently with Section 18 (i) of the ICA. The Boulder No-Action Letter involved a closed-end

fund that had opted into a state control share acquisition act that prevented holders of control shares acquired in a control share acquisition from voting its control shares unless approved by two-thirds of the vote of the remaining shareholders. While recognizing the "vigorous public debate" on the issue, and "appreciat[ing] that directors of [closed-end funds] ... often must perform a difficult balancing function when faced with a takeover attempt," the SEC staff nonetheless concluded in a detailed legal analysis that adopting a control share requirement for such a fund "would be inconsistent with the fundamental requirements of Section 18 (i) of the [ICA] that every share of stock issued by [a fund] be voting stock and have equal voting rights with every other outstanding voting stock." Boulder No-Action Letter, 2010 WL 4630835, at *1-2. It noted that the control share requirement conflicted with the wording of Section 18 (i), which requires that "every share of stock issued by an investment company ... presently entitle[] the owner or holder to vote such share of stock for the election of directors," and that control share provisions improperly "[n]ullif[ied]" voting rights by denying an acquirer of control shares the present right to vote those shares in director elections and by failing to accord those shares the equal voting rights to a single class of shares demanded by the statute. Id. at *7-9. It further noted that control share requirements conflicted with the purpose of Section 18 (i), which was to prevent fund insiders from using various devices to entrench themselves and thwart majority voting control over the fund by ensuring that each stockholder had an equal voice in the management of the fund. Id. at *6, 8.

D. Morgan Stanley's Acquisition of EVM and Events Thereafter

On October 8, 2020, EVM announced that it would be acquired by Morgan Stanley. Under the ICA, when a registered fund adviser undergoes a "change of control" of this type, all of its investment advisory agreements are effectively terminated and new agreements must be

approved by shareholder vote. The Morgan Stanley transaction thus required shareholder approval of new investment advisory agreements for each of the approximately 150 mutual funds and closed-end funds EVM sponsored, including the Funds. In response to the acquisition, Saba initiated proxy campaigns, soliciting shareholders in EVF, EFR, EFT, and non-party EFF to vote against the new investment advisory agreements.

On March 11, 2021, the reconstituted EFF board announced a plan for the "liquidation and termination" of EFF, resulting in the fund shutting down.

Three months later, on May 12, 2021, Saba and EVM negotiated an agreement whereby Saba would vote its shares in favor of the new investment advisory agreements if the Board authorized tender offers to effect the repurchase of 60% of EVF's shares and 50% of each of EFR's and EFT's shares.[10]

The tender offers in EVF, EFR, and EFT and the liquidation of non-party EFF resulted in Saba almost entirely cashing out of its investments in these four funds. Saba now owns only 0.01% and 0.06% of shares in EFR and EVV, respectively, and no shares of the other Funds.

DISCUSSION

Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c); see DuPont v. Commissioner of Corr., 448 Mass. 389, 397 (2007). The moving party bears the initial burden of demonstrating that there is no triable issue and that he or she is entitled to judgment. Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 644 (2002), citing

[10] The EV Parties claim that the liquidation of EFF occurred because Saba was unwilling to enter into an agreement concerning that fund. They further claim that they agreed to the tender offers in connection with EVF, EFR, and EFT because Saba's actions threatened the funds' extinction. Saba, however, disputes this.

Pederson v. Time, Inc., 404 Mass. 14, 17 (1989); see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

A. Breach of Contract

The Funds' Declarations of Trust provide that "the Shareholders shall have the power to vote" on certain matters, including the election and removal of Trustees. Declarations of Trust, Art. V, § 5.2. Saba alleges that the Bylaw Amendments breached the Declarations of Trust because they make it effectively impossible to mount a challenge to the reelection of a Trustee. The EV Parties assert that they are entitled to summary judgment on this claim to the extent it is based on the Majority Rule Amendment.[11] The Court disagrees.

"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 Leveraged Cap. Structures Fund Ltd. v. PIMCO Income Strategy Fund, 466 Mass. 368, 379 (2013). In allowing Saba's contract claims to proceed at the outset of this litigation, this Court noted that "[a] bylaw amendment that effectively deprives shareholders of the power to remove a trustee would likely violate the Declarations [of Trust] and therefore be a breach of contract." Eaton Vance Senior Income Tr. v. Saba Cap. Master Fund, Ltd., 2021 WL 2222812, at *3 (Mass. Super. Mar. 31, 2021) (Salinger, J.) (hereinafter, "2021 Decision"). Saba has put forward an expert opinion from Professor Lucian Bebchuck that creates a genuine dispute as to whether, given the nature of the Funds, the Majority Rule Amendment deprives shareholders of a meaningful opportunity to exercise their right to elect trustees.

[11] In their motion, the EV Parties purport to seek summary judgment on the breach of contract counterclaim as to both Bylaw Amendments. However, their briefing has no argument about the Control Share Amendment. Thus, the Court treats the motion as only seeking summary judgment on the breach of contract counterclaim to the extent it alleges a breach based on the Majority Rule Amendment.

The EV Parties argue the merits of Prof. Bebchuck's analysis, and assert that Prof. Bebchuck is not qualified to provide expert evidence on this subject and that his opinion is otherwise unsound. While the EV Parties complain that Prof. Bebchuck does not have expertise in proxy solicitation and shareholder voting, they do not move to exclude Prof. Bebchuck under Section 702 of the Massachusetts Guide to Evidence. The EV Parties' arguments thus go to the weight to be given to Prof. Bebchuck's testimony by the trier, not to its admissibility. See, e.g., Henshaw v. Cabecciras, 14 Mass. App. Ct. 225, 229 (1982) ("The duty of a trial judge ... on a motion for summary judgment is not to conduct a trial by affidavits (or other supporting materials), but to determine whether there is a substantial issue of fact.") (citation, internal quotation marks excluded). In short, the Court is not persuaded on the record before it that Prof. Bebchuck is not a qualified expert in this matter or that his opinion is insufficient to create a genuine dispute as to the breach of contract claim.

The EV Parties also argue that the presence of other actions requiring a greater than plurality vote by the shareholders in the Declarations necessarily establish the appropriateness of the Majority Rule Amendment's adoption. This, however, does not eliminate the factual dispute here in light of the provenance of the amendment and the dispute over the amendment's effect.

B. Declaratory Judgment and Rescission Under the ICA

Saba seeks a declaration that the Control Share Amendment violates Section 18 (i) of the ICA, which states: "Except as provided in subsection (a) of this section, or as otherwise required by law, 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." 15 U.S.C. § 80a-18 (i). Saba also seeks rescission of the Control Share Amendment under Section 46 (b) of the ICA. Section 46 (b) states:

> (1) A contract that is made, or whose performance involves, a violation of this subchapter, or of any rule, regulation, or order thereunder, is unenforceable ... unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this subchapter.
>
> (2) To the extent that a contract described in paragraph (1) has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter.
>
> (3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it may be severed from the unlawful portion of the contract, or (B) to preclude recovery against any person for unjust enrichment.

15 U.S.C. § 80a-46 (b).

In interpreting a statute, a court "begin[s] with the language of the statute" and "determine[s] whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002) (internal quotes omitted). If there is no ambiguity, "then judicial inquiry is complete." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (internal quotes omitted).

Here, Section 18 (i) is unambiguous. Under the plain language of the provision, all common shares of stock must be "voting" and have voting rights that are "equal" to the voting rights of all other shares. Thus, every share of common stock must have the right to vote and must have voting power that is equivalent to that of all other stock.

The Control Share Amendment violates this unambiguous requirement. The amendment conditions the voting of certain shares on the consent of the majority of shareholders not subject to the amendment. It thereby imposes conditions on voting rights on some shares that do not exist for others. As a result, different shares are subject to different voting rights, which the statute does not permit. On this point, the Court agrees with the reasoning of a recent New York

case. See Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-CV-327 (JPO), 2022 WL 493554, at *2 (S.D.N.Y. Feb. 17, 2022).

In opposing the motion, the EV Parties argue that the Control Share Amendment merely restricts *shareholders*, not *shares*, and therefore does not run afoul of Section 18 (i). The Court disagrees that this is an accurate reading of federal law. [12] As the New York decision cited above held:

> To be sure, Section 18 (i) requires that "every share of stock" be voting stock, as opposed to requiring that every shareholder be able to vote. But this is a meaningless distinction. What makes a stock "voting" hinges on the ability of its holder to presently vote the stock, instead of a quality or status of the stock separate from its holder. Depriving a control shareholder of her ability to vote her stock, even temporarily, necessarily means that her stock cannot be considered a "voting security" as the ICA defines the term. See 15 U.S.C. § 80a-2 (a) (42) [defining "voting security" as "any security presently entitling the owner or holder thereof to vote for the election of directors of a company."] ... Under the ICA, stock must presently entitle its holder—non-control shareholder and control shareholder alike—to vote.

Saba Cap. CEF Opportunities 1, Ltd., 2022 WL 493554, at *4. [13] See also Boulder No-Action Letter, 2010 WL 4630835 at *10-11 & n. 44 (rejecting this argument as conflicting with the "plain wording" of Section 18 (i) read in conjunction with Section 2 (a) (36) and explaining: "Because the definition of 'security' under Section 2 (a) (36) includes 'any stock,' the term 'voting stock' in Section 18 (i) may be properly interpreted with reference to the definition of 'voting security.' 'Voting security' is defined by Section 2 (a) (42) to mean 'any security presently entitling the owner *or holder* thereof to vote for the election of directors of a company[.]'") (emphasis in original).

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[12] The EV Parties are correct that Massachusetts law has statutory one-share, one-vote provisions as well as control share provisions. See EV Parties' Opp. at 19, citing G. L. c. 156, § 32, G. L. c. 110D, §§ 1, 5, G. L. c. 110E, §§ 1, 5. But these reflect state law, not federal law.

[13] The court also rejected the defendant's contention, also made by the EV Parties in this action, that its interpretation of the statute was supported by Section 12 (d) (1) of the ICA, which requires that a fund that wants to acquire more than three percent of another fund's stock must agree to engage in either "pass-through" or "mirror" voting. See Saba Cap. CEF Opportunities 1, Ltd., 2022 WL 493554, at *3.

The EV Parties also argue that summary judgment is inappropriate because there is no private right of action for recission. This argument is without merit. This Court previously concluded that the ICA provides a private right of action. See 2021 Decision, at *5. See also Oxford Univ. Bank v. Lansuppe Feeder, LLC, 933 F.3d 99, 109 (2d Cir. 2019) ("we find that ICA § 47 (b) (2) creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract."). The Court declines to revisit the ruling. See Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815–816 (1988) ("[T]he doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.") (internal quotes and citation omitted).

Lastly, the EV Parties point to language in Section 46 (b) indicating that a court may deny recission on equitable grounds and contends that there is at the very least a genuine dispute as to whether the equities support the recission claim in light of evidence that Saba's arbitrage strategy was harmful to the Funds and their retail investors. See 15 U.S.C. § 80a-46 (b) (1)-(2) (permitting courts to deny recission of "[a] contract that is made, or whose performance involves, a violation of this subchapter, or of any rule, regulation, or order thereunder" where "under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter."). But Section 46 (b) does not permit the Court to sanction actions that are "inconsistent with the purposes of this subchapter," and the EV Parties cite no case that allowed the provisions of Section 18 (i) protecting voting to be overridden pursuant to Section 46 (b). It is true that, as noted above, on May 27, 2020, the SEC issued the Statement that the staff would not recommend an enforcement action under

Section 18 (i) to the Commission against a closed-end that had opted into and triggering a control share statute if its board did so in the manner detailed in the Statement. But by its own terms, the Statement has "no legal force or effect" and unlike the 2010 no-action letter, contains no legal analysis of Section 18 (i). See Saba Cap. CEF Opportunities 1, Ltd, 2022 WL 493554, at *3 (finding the Statement unpersuasive on these grounds). The Statement thus reflected the SEC staff's tentative, non-binding view on an enforcement issue that was within its purview, and did little to change the legal analysis of Section 18 (i) for the Court.

The Court concludes that recission is appropriate given that Section 18 (i) represents a fundamental requirement of the statute. Accordingly, Saba is entitled to prevail on its counterclaims to the extent they seek a declaration that the Control Share Amendment violates Section 18 (i) and recission of the amendment.

C. Breach of Fiduciary Duty

Corporate directors "stand in a fiduciary relation to the corporation, and are bound to act honestly and in good faith solely in the interests of the corporation and to subordinate to that paramount duty their own individual benefit and personal gain. A corporation has a vital interest in seeing that its business is conducted in an orderly manner in compliance with its bylaws, and that its directors act faithfully in administering its affairs[.]" Andersen v. Albert & J.M. Anderson Mfg. Co., 325 Mass. 343, 346 (1950) (internal citation omitted). It is undisputed that the Trustees have the same fiduciary obligations to the Funds. [14] Here, Saba asserts that the Trustees breached their fiduciary duties by adopting the Bylaw Amendments.

[14] The parties agree that Massachusetts business trusts like the Funds are treated like corporations for purposes of analyzing claims against them. See Western Inv., LLC v. Deutsche Multi-Mkt. Income Tr., No. SUCV20163082BLS1, 2017 WL 1103425, at *3-4 (Mass. Super. Feb. 6, 2017) (Leibensperger, J.), citing Brigade Leveraged Cap. Structures Fund Ltd., 466 Mass. at 369 n.4 (applying business judgment rule to Massachusetts business trust).

In moving for summary judgment, the EV Parties argue that Saba's counterclaim is barred by the business judgment rule because there is no evidence that the Trustees were not independent or disinterested or that they adopted the amendments in bad faith. The business judgment rule "protect[s] a [corporate] director against liability arising from second-guessing by the courts." G. L. c. 156D, § 8.30 (c), Comment 1. See also Harhen v. Brown, 431 Mass. 838, 846 (2000) ("It is axiomatic that the decision of a disinterested board to refuse demand receives the protection of the business judgment rule."). Even in light of its rulings above, the Court nonetheless concludes that the business judgment rule applies and that no action lies on this record for breach of fiduciary duty.[15]

At the outset, Saba contends that the business judgment rule does not apply here. Citing Delaware law, it argues not only that the business judgment rule is inapplicable but that the Trustees' actions are subject to enhanced scrutiny. Under Delaware law, "[w]hen the election machinery appears, at least facially, to have been manipulated, those in charge of the election have the burden of persuasion to justify their actions." Pell v. Kill, 135 A.3d 764, 786 (Del. Ch. 2016), quoting Aprahamian v. HBO & Co., 531 A.2d 1204, 1207 (Del. Ch.1987). Directors who engage in actions affecting stockholder voting "bear the burden of proving (i) that their motivations were proper and not selfish, (ii) that they did not preclude stockholders from

[15] The fact that the Control Share Amendment violated the ICA does not necessarily mean the Trustees acted in bad faith when they adopted it. "The business judgment rule can insulate unlawful conduct" where the "directors ... act on an informed basis, in good faith and in the honest belief that an action taken is in the best interests of the company[.]" Landy v. D'Alessandro, 316 F. Supp. 2d 49, 64 (D. Mass.2004) (applying Delaware's business judgment rule) (emphasis removed). See Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 n.2 (Del. Ch.1996) ("By 'bad faith' is meant a transaction that is authorized for some purpose *other than* a genuine attempt to advance corporate welfare or is *known to constitute* a violation of applicable positive law. There can be no personal liability of a director for losses arising from 'illegal' transactions if a director were financially disinterested, acted in good faith, and relied on advice of counsel reasonably selected in authorizing a transaction.") (citations omitted, emphasis in original). As explained below, there is no evidence that the Trustees acted to benefit themselves or acted without reliance on counsel. Nor is there evidence that the Trustees acted with knowledge that the Control Share Amendment violated the ICA, particularly given that 2020 Statement seemingly greenlighted such actions and that the Statement served as one basis for the amendment's adoption.

exercising their right to vote or coerce them into voting a particular way, and (iii) that the directors' actions were reasonable in relation to their legitimate objective." Id. at 787 (internal quotes omitted). Saba, however, has cited to no Massachusetts decision applying the enhanced scrutiny standard, and at least one decision from this Court has declined an invitation to do so in a similar context. See Western Inv., LLC, 2017 WL 1103425, at *5 (declining to apply enhanced scrutiny standard to claim challenging the application of a 'majority of outstanding' bylaw to contested elections by the board of a closed-end fund). See also Keros v. Massachusetts Mut. Life Ins. Co., 958 F. Supp. 2d 306, 314 n. 6 (D. Mass. 2013) (Delaware case law "which suggests that a business judgment rule does not apply to a denial of voting rights ... has not been adopted by any federal or state court in Massachusetts."). Cf. G. L. c. 156D, § 8.30 (c) (detailing general standard of care for directors).[16] Given the absence of Massachusetts authority supporting Saba's argument, the Court is not persuaded that it should apply the enhanced scrutiny standard to the breach of fiduciary duty claim.

Under the business judgment rule, a director (or a trustee as in this case) is presumed to have acted in good faith, with reasonable care, and in a manner the director reasonably believed to be in the best interests of the corporation. See G. L. c. 156D, § 8.30 (a), (c); Halebian v. Berv, 457 Mass. 620, 627 n. 11 (2010) ("The business judgment rule shields individual directors from liability for damages stemming from decisions ... Therefore, the statutory business judgment rule ... in G. L. c. 156D, § 8.30 ... protects directors ... from liability for conduct they have taken in good faith, with the care that a person in a like position would reasonably believe

[16] At the hearing, Saba suggested that Judge Salinger adopted the enhanced scrutiny standard in the 2021 Decision. The 2021 Decision (which only concerned a motion to dismiss) did not expressly state any desire to change Massachusetts law, and did not do so implicitly. While citing Delaware, Illinois, and New York decisions for the proposition that business trustees cannot act solely or primarily to perpetuate themselves in office, he found that this general principle "applies with full force under Massachusetts law," showing that he was reading the case law from other states consistently with existing Massachusetts precedents, not relying on other states' law to alter Massachusetts law. See 2021 Decision at *5.

appropriate in similar circumstances, and in a manner the director ... reasonably believes to be in the best interests of the corporation.") (internal quotation marks and emphasis omitted). To succeed on a breach of fiduciary duty claim, a plaintiff bears the burden of adducing facts rebutting this presumption. See Western Inv., LLC, 2017 WL 1103425, at *4; MAZ Partners LP v. Shear, 204 F. Supp. 3d 365, 375 (D. Mass. 2016), on reconsideration in part, 218 F. Supp. 3d 132 (D. Mass. 2016).

As explained below, applying the business judgment rule, the Court concludes that Saba has failed to rebut the rule's presumption by putting forward evidence either that the Trustees were not independent or disinterested, or that they acted in bad faith or in self-interest to entrench themselves.

1. Independence and Disinterest

It is undisputed that ten of the eleven Trustees ("Independent Trustees") are considered disinterested under the ICA. See 15 U.S.C. § 80a-2 (a) (19). Therefore, under the Massachusetts business trust statute, they are "deemed to be independent and disinterested when making any determination or taking any action" as trustees. G. L. c. 182, § 2B.

Saba argues that the Independent Trustees are nevertheless interested (and therefore not entitled to the business judgment rule's presumption) because they are paid more than $300,000 per year to serve as Trustees of all the more than 100 funds. See Harhen, 431 Mass. at 843 (to be disinterested, a director must be "free from significant contrary personal interests"). However, it is undisputed that this compensation is for the oversight of the *entire* Eaton Vance fund family (which consisted of approximately 156 funds at the time of the Bylaw Amendment's Adoption), and that losing a seat on the board of one fund would have a de minimus impact on the Independent Trustees' overall compensation. Cf. MAZ Partners LP, 204 F. Supp. 3d at 375

(noting that "[t]here is no bright-line rule for determining whether additional, merger-related compensation constitutes a disabling interest," and that "[t]he Court must determine whether the additional compensation is 'so substantial as to have rendered it improbable that the board could discharge their fiduciary obligations in an even-handed manner.'") (citations omitted). Moreover, it is well established that "the receipt of 'usual and customary director's fees and benefits' does not render a director interested," Forsythe v. Sun Life Fin., Inc., 417 F. Supp. 2d 100, 111 (D. Mass. 2006), quoting Harhen, 431 Mass. at 843 n.5, and Saba has put forward no evidence indicating that the fees paid to the Trustees are outside the norm. See Krantz v. Fidelity Mgmt. & Research Co., 98 F. Supp. 2d 150, 151-157 (D.Mass.2000) (finding under the ICA that trustees who served on the twelve-person boards of all 237 Fidelity investment companies and received substantial annual salaries ranging from $220,500 to $273,500 were not interested even though it was alleged that "[t]heir compensation exceed[ed] the amounts paid to other, similarly situated trustees").

Saba also suggests that the independent trustees are interested because they "have an incentive to protect EVM's role as the investment advisor, as EVM is the manager who kept the Trustees on the payroll for years and who could ensure that they remain in their positions." Saba Opp. at 8. There is no evidence that EVM has control over who is nominated to the Board as an independent trustee, whether they remain on the Board, or the amount of their compensation. See Jones v. Harris Assocs. L.P., 559 U.S. 335, 348 (2010) ("The [ICA] interposes disinterested directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser."); Burks v. Lasker, 441 U.S. 471, 483-485 (1979) ("Congress consciously chose to address the conflict-of-interest problem through the Act's independent-directors section" and "entrusted to the independent directors of investment companies, exercising the authority granted

to them by state law, the primary responsibility for looking after the interests of the funds' shareholders.").

Additionally, Saba suggests that the Independent Trustees are interested by the very fact that the Bylaw Amendments concerned their own tenure and because they relied in part on information provided by EVM. Saba Opp. at 2. The Court disagrees that these circumstances, without more, support the conclusion that the Independent Trustees are interested.

2. Good Faith/Self Interest

Saba maintains that the Trustees enacted the Bylaw Amendments to entrench themselves in office and therefore acted in bad faith. The Court disagrees that Saba has discharged its burden to adduce facts to rebut the business judgment rule and that would allow a jury to find that the Trustees acted in bad faith.[17]

A breach of fiduciary duty occurs where the defendant acts in bad faith, or otherwise acts primarily or solely for their own benefit to the detriment of the company. See Andersen, 325 Mass at 543 ("directors stand in a fiduciary relation to the corporation, and are bound to act honestly and in good faith solely in the interests of the corporation and to subordinate to that paramount duty their own individual benefit and personal gain."); Coggins v. New England Patriots Football Club, Inc., 397 Mass. 525, 534 (1986) ("A director of a corporation violates his fiduciary duty when he uses the corporation for his or his family's personal benefit in a manner detrimental to the corporation."); Production Mach. Co. v. Howe, 327 Mass. 372, 377–378 (1951) (acting solely in self-interest can suffice to show a breach of fiduciary duty even where

[17] Even though the issue of good or bad faith is fact-dependent, that does not mean it cannot be addressed definitively on summary judgment. Indeed, the Supreme Judicial Court has resolved such claims adversely to a claimant on a motion to dismiss. See Chokel v. Genzyme Corp., 449 Mass. 272, 278 n. 6 (2007) ("Chokel's contention that allegations of bad faith must always be allowed to proceed to a jury is without merit. Although whether a defendant has acted in bad faith is, once presented at trial, a question of fact to be decided by a jury ... before reaching that stage, in order to prevail on a motion to dismiss, a plaintiff's complaint must indicate some facts that would allow a jury to find that the defendant acted in bad faith ..., This Chokel has not done.").

"no corruption, dishonesty, or bad faith was involved."); Cain v. Cain, 3 Mass. App. Ct. 467, 476 (1975) (where defendant acquired business formerly enjoyed by the corporation, "good faith [was] not decisive"); Western Inv., LLC, 2017 WL 1103425, at *5 n. 6, quoting Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 416 (1937) ("The concept of bad faith 'imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud.'"). Thus, if the Trustees' "'primary' reason [for the Bylaw Amendments] was to protect their jobs," International Banknote Co. v. Muller, 713 F. Supp. 612, 626 (S.D.N.Y. 1989), that goal would have placed the Trustees' personal interests above those of the Funds and would support a finding of a breach of fiduciary duty.

It is not enough to show bad faith for Saba to show that the Trustees made a decision with which Saba disagreed or that frustrated its strategy. The Trustees were faced with a conflict between Saba's interests and those of other shareholders, and had to address that conflict. Here, Saba has failed to put forward sufficient evidence to overcome the presumption of the business judgment rule and create a genuine dispute that the Trustees acted primarily to serve their own personal interests or engaged in corruption or dishonesty of some type.

There is no evidence that the Trustees' primary reason for the Bylaw Amendments was to protect their jobs. It is undisputed that their positions as Trustees of more than 100 funds in which Saba had no interest would continue whether or not the Bylaw Amendments were adopted, and that, given that the Trustees' oversaw more than 100 funds in which Saba was not invested, the effect on the Trustees themselves of liquidation of any one fund by Saba was de minimus. Instead, the record reflects that the Trustees had a legitimate business reason for their action, albeit one with which Saba disagreed – that the purpose of the Bylaw Amendments was

to protect the Funds' retail shareholders from the harm they perceived that activist hedge funds like Saba could cause if they gained a concentrated minority of shares, forced short-term liquidity events, and thereby threated retail investors' interest in the Funds and the Funds' viability. See Statement and Boulder No-Action Letter, at *2 (recognizing, expressly and implicitly, the legitimacy of actions taken by boards of closed-end funds to respond to activist investors). The Trustees' interest in ensuring that any potential changes to the Funds the activists sought had the support of a majority of shareholders was a legitimate interest. The record also shows that the Trustees made themselves well-informed before adopting the Bylaw Amendments. The Board and the AHC, which specifically focuses on closed-end fund matters, met 11 times over several months to consider the Bylaw Amendments, and received input from the Funds' counsel, counsel to the Independent Trustees, EVM, and third-party proxy solicitors with expertise in closed-end fund elections.

Saba argues that it can be reasonably inferred that the Trustees were motivated by a desire to entrench themselves based on the nature of the amendments themselves and the circumstances surrounding their adoption. Specifically, it argues that there is a genuine issue of dispute regarding bad faith because the Bylaw Amendments were a disproportionate response to the Trustees' purported concerns;[18] that the design and operation of the Majority Rule Amendment deny shareholders a meaningful opportunity to elect non-incumbent trustees;[19] that the timing of the Majority Rule Amendment was suspect;[20] and the Trustees relied upon

[18] Saba notes that the amendments were not directly related to any particular activist measure like a tender offer, and it asserts that the Funds' retail shareholders would have been adequately protected by the fiduciary duties any Saba-approved trustee would owe them.

[19] Saba points to statements from Prof. Bebchuck to this effect.

[20] Saba points out that the Majority Rule Amendment was adopted after of Saba's successful declassification vote in EVV, Saba's notification that it intended to nominate three trustees to the EFF Board, and projections from EFF's proxy solicitors that Saba's candidates would likely win seats. The Court notes, however, that the Trustees did not adopt the Majority Rule Amendment for EFF in light of the fact that Saba's proxy contest in connection with EFF was already underway.

information from EVM, which had a conflict of interest. Saba Opp. at 9-12. But these arguments do little more than show that the net effect of the Bylaw Amendments is to prevent a minority from dominating the vote, and do not create a triable case that the Trustees were acting to protect their own interests. As noted above, the Trustees' roles at Eaton Vance were simply not threatened here. Further, the Trustees consistently testified that this was their concern and that they acted to protect the Funds and their shareholders in adopting measures that they believed preserved majority rule.[21] Additionally, while not dispositive, the Statement, which the Board reviewed, made it clear that the SEC's staff concluded that it was appropriate for trustees of closed-end funds to consider defensive strategies of precisely the type here without risking enforcement action. Such defensive measures, by their nature, have the effect of reducing the likelihood of board changes spurred by activist minorities. It is thus difficult to see, on this record, a triable case on bad faith where the Trustees implemented such measures.[22]

Saba also argues that testimony from Trustees Mark Fetting, Helen Peters, William Park, and Keith Quinton, as well as an email from Trustee Thomas Faust,[23] serve as evidence of bad faith. Saba Opp. at 11-12. Saba maintains that this evidence demonstrates that the Trustees set

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[21] The Court notes that in his expert report, Prof. Bebchuck highlighted statements in two documents provided to the Trustees: (1) the "Summary of Potential By-Law Amendments – Modernization & Enhancements," provided to the Board in connection with its March 23, 2020 meeting; and (2) an EVM memorandum, provided to the AHC prior to its August 3, 2020 meeting. See Ex. 130 at 59. The summary stated that the proposed Majority Rule Amendment "would make it more difficult for insurgents to win Board seats" and that it was "designed to establish a more reasonable threshold for contested elections and ensure that a shareholder with a large position in the Fund does not unduly influence the election." Ex. 119 at EV_00000419 - EV_00000420. In its memorandum, EVM wrote: "Based on its analysis of the Fund's shareholders, AST believes that under the majority of outstanding shares voting standard, there is an 80% likelihood that the Saba Nominees will not be elected. If a court were to find the Fund's By-Law Amendment invalid, AST believes that there is a greater than 50% chance that the Saba Nominees will not be elected under a plurality standard. AST noted, however, the likelihood of Saba being successful under either voting standard increases if Saba and other activists continue to purchase additional Fund common shares." Exhibit 115 at EV_0001565. The statement in these materials do not show that the Trustees were primarily seeking to protect their own interests.

[22] It is also worth noting that before adopting the Bylaw Amendments, the Trustees did not have the benefit of the expert analyses now in the record.

[23] As noted above, Faust was Chief Executive Officer of EVM and the only interested trustee. See Deposition of William Park (Ex. 40) at 32:4-8.

the threshold to an unattainable level and did not consider whether there was a reasonable prospect that any candidate would reach the 50%-of-outstanding threshold before adopting the Majority Rule Amendment. This argument does not show that the Trustees were acting primarily to preserve their own roles, as noted above. Nor does it otherwise show a triable case on some other form of bad faith. The testimony Saba cites from the depositions of Fetting, Park, and Quinton reflect that these trustees were looking to protect the Funds from Saba's efforts to force short-term liquidation events and the resulting harm they perceived to the Funds and the majority of shareholders, not to entrench themselves or protect their personal incomes.[24] With regard to Peters, she testified that "our board was a good board" that reflected a "mosaic" of interests and in which she had confidence, and that one of Saba's prior board nominees, who left the Board after two meetings, was not adequately committed. See Ex. 41 at 47:1-19. But Peters

[24] See Ex. 35 (Fetting) at 233:4 – 235:18 (50% threshold chosen because "the focus is on the notion of majority"; 40% threshold would not have been sufficient to accomplish the Board's purpose of preventing Saba from forcing short-term liquidity events and was not consistent with precedent followed by other fund complexes; 40% threshold was readily achievable by Saba whereas that was not the case with 50%); Ex. 40 (Park) at 34:17 - 39:14 (bylaws were amended in March 2020 after a study of best practices performed by Ropes & Gray that was commissioned before Saba's proposal to declassify the EVV board); 42:6-17 (Board considered a range of possibilities but adopted the majority vote standard as "logical and advisable"); 44:22 – 45:18 (Board adopted majority standard because it was aware of a number of circumstances in the industry where activist investors proposed slates of directors who were elected without the votes of a majority of shareholders); 46:8 - 47:17 (50% threshold was a best practice in Ropes & Gray study); 53:17 – 54:13 (Board's deliberations on majority vote standard were focused on the best interests of the fund and shareholders, not effect on incumbent trustees, although Park was aware that there could be an election where the 50% wasn't achieved and the incumbent trustees would continue); 55:17 – 56:20 (the issue posed a very slight conflict of interest for the Board, but the Board was concerned with ensuring the majority's voice was heard on such significant changes); 57:9 – 60:24 (Park understood that it is harder to achieve 50% of the vote than a plurality, not that it was unlikely; the Board was not aware of a contested closed-end fund election in which a candidate received the votes of 50% of the outstanding shares; Park was aware that no candidate in the April 2020 EFF election received 50 of the outstanding shares); 196:4-9 (the SEC's Statement was an important factor in adopting the Control Share Amendment); 196:10 – 200:8 (Park understood he had a fiduciary duty to the funds and their shareholders to act in good faith in adopting the Bylaw Amendments, believed he and the Board acted in good faith, and acted in consultation with outside counsel); Ex. 43 (Quinton) at 55:16 – 56:8 (the problem with the plurality standard was that it allowed a minority of shareholders to drive change that might be to the benefit of that minority but not for the good of the majority shareholders as a whole; the amendment was to ensure the majority of shareholders supported a change); 73:6-10 (Quinton was not aware of any contested closed-end fund elections where a board candidate received 50% of the outstanding shares); 73:11 – 75:2, 77:9-14 (Quinton understood he had fiduciary duties to the fund and their shareholders, including a duty to act in good faith, and believes he acted in good faith in adopting the majority vote standard, in part because he consulted with outside counsel); 90:7-12, 92:7-10 (Quinton acted in good faith in adopting the Control Share Amendment; Board sought the advice of counsel in connection with amendment).

also testified that she was "going off the board" and that self-preservation was "not my consideration," id. at 79:12-14, and tempered her support of the Board by noting that the Board took "its fiduciary duties very seriously." Id. at 47:1 - 50:13.[25]

The email from Faust also fails to support Saba's claim. The email was sent in January 2020 and makes comments to Faust's colleagues in a context other than the Bylaw Amendments about "protect[ing] ourselves against the doomsday scenario of an activist forcing an early fund termination or advisor replacement." Ex. 132. But there is no evidence that the Faust email was shared with the independent trustees or that it had anything to do with the Bylaw Amendments.

In sum, the evidence Saba cites does not provide evidence that the primary aim of the Trustees was to benefit their personal interests or that they otherwise acted in bad faith. Accordingly, it is not sufficient to overcome the presumption of the business judgment rule and present a jury question.

Lastly, Saba contends that the Court should "take into account" the EV Parties' "discovery gamesmanship" and "specifically [their] use of attorney-client privilege as both a sword to show Trustees' purported good faith and a shield to hide critical evidence." Saba Opp. at 12. See also Saba Memo. in Support at 15-20. It essentially argues that the Court should conclude that the EV Parties have committed an at-issue waiver of the privilege and are therefore unreasonably withholding their communications with the Funds' special counsel (Ropes & Gray) and counsel to the Independent Trustees (Goodwin Proctor).

[25] She also explained that the Majority Rule Amendment was to prevent activist investors from promoting their own interest "which may or may not be the interest of other shareholders;" that the 50% standard was chosen so that when Board seats were contested, the majority would rule; and that although it was possible the Majority Rule Amendment made it more difficult to get nominees elected in a contested election, this was not the Board's purpose and she did not focus on that at the time. See id. at 47:1 - 50:13, 78:6 - 79:14, 94:10-19, 95:14 - 99:9, 102:14 - 103:19, 132:8 - 133:1.

Although the EV Parties have invoked the attorney-client privilege, they are not using the privilege as both sword and shield. The EV Parties have merely pointed to the fact the Trustees consulted counsel, rather than rely on the substance of the consultation, to argue that the Trustees acted in good faith. Accordingly, the EV Parties have not put counsel's advice at-issue and are not invoking the privilege inappropriately. See Brauner v. Valley, 101 Mass. App. Ct. 61, 69–70, review denied, 490 Mass. 1105 (2022) (describing at-issue waiver doctrine). Cf. Clean Harbors Env't Servs., Inc. v. Sheppard, No. SUCV20172013BLS2, 2018 WL 7437046, at *1 (Mass. Super. Dec. 20, 2018) (Sanders, J.) ("The mere fact that the [complaint] referenced the investigation [by in-house counsel] does not put the investigation 'at issue.'").[26]

ORDER

For the foregoing reasons:

1. Eaton Vance Senior Income Trust's Motion for Partial Summary Judgment is **ALLOWED** as to Saba Capital Master Fund, Ltd.'s counterclaim for breach of fiduciary duty (Count III in Docket No. 11) but otherwise **DENIED**;
2. Saba Capital Master Fund, Ltd.'s Motion for Partial Summary Judgment is **ALLOWED** as to its counterclaims for recission and declaratory judgment (Counts IV and VII in Docket No. 11), in so far as they relate to the Control Share Amendment, and as to the third-party counterclaim for declaratory judgment brought by Eaton Vance Senior Floating-Rate Trust, Eaton Vance Floating-Rate Income Trust, and Eaton Vance Limited-Duration Income Fund (Count II in Docket No. 29), but otherwise **DENIED**; and

[26] The Court notes that on September 15, 2021, Saba served a motion to compel on the Eaton Vance Parties seeking documents that had been withheld on the basis of privilege and asserted that the advice had been placed "at issue" and thus privilege was waived, but withdrew its the motion after the parties exchanged briefs.

3. The Court **DECLARES** and **ADJUDGES** that the Control Share Amendment violates Section 18 (i) of the Investment Company Act and must be rescinded.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Dated: January 21, 2023