UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABA CAPITAL MASTER FUND, LTD., and SABA CAPITAL MANAGEMENT, L.P., Plaintiffs,	:	24-cv-00690 (JGLC)
v.	:	**ORAL ARGUMENT REQUESTED**
ASA GOLD AND PRECIOUS METALS, LTD., MARY JOAN HOENE, BRUCE HANSEN, WILLIAM DONOVAN, and AXEL MERK, Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants ASA Gold and Precious Metals, Ltd. ("ASA" or the "Fund"), Mary Joan Hoene, William Donovan, Bruce Hansen, and Axel Merk respectfully submit this Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

PRELIMINARY STATEMENT

Shareholder rights plans (sometimes referred to as "poison pills") were developed in the 1980s to address an anomaly in corporate law. Before the advent of such plans, an entity seeking control of a target company could buy up enough of the target company's shares and use the voting power of those shares to effectively exercise control over the company and take actions that are in the control-seeking entity's particular self-interest. Those actions might include forcing a merger or replacing the board of directors with hand-selected candidates who would direct corporate actions that are in the control-seeking entity's particular interests. Obtaining this so-called "creeping control" of a company through share ownership allowed so called "corporate raiders" to bypass typical corporate protections designed to ensure changes in corporate control are in the best interest of the company, including that they be (i) reviewed by the board consistent with its fiduciary duties, (ii) recommended by the board to the shareholders, and (iii) approved by the shareholders. Shareholder rights plans were developed to provide boards with a "bargaining tool" to force the control-seeking entity to the negotiating table or deter altogether the effort to take control of the target company through share acquisition if it was not in the best interests of the company and its shareholders.

Shareholder rights plans generally operate to make the company a less attractive target to a control-seeking entity. While there are several types, under the quintessential structure, a shareholder rights plan grants each outstanding share the right to purchase a certain number of newly issued shares at a discounted price. The right to purchase additional shares can be

exercised at a later date in particular circumstances. Specifically, a shareholder rights plan is "triggered" when an entity accumulates a specified percentage of the company's shares. At that point, all shareholders, except the control-seeking entity that triggered the plan, may exercise the right to purchase additional shares.[1] The purchase of additional shares by other shareholders results in the control-seeking entity's shares becoming economically diluted.

Shareholder rights plans thus have the effect of ensuring that, to avoid the risk of economic dilution, a control-seeking entity will not accumulate enough shares to trigger the plan and thus not accumulate enough shares to exert control over the company. That, in turn, incentivizes the control-seeking entity to engage with the board directly if it seeks to gain control of the company, allowing the board to consider whether any proposal is in the company's best interests and, if not, to "negotiate actively" to, among other things, "obtain higher value from the bidder, or present an alternative transaction of higher value to stockholders." *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 97 (Del. Ch. 2011). Thus, courts routinely hold that shareholder rights plans are "reasonable response[s]" to and protect *all* shareholders from being "stampeded" by harmful attempts to seize control. *E.g.*, *Harv. Indus., v. Tyson*, 1986 WL 36295, at *2 (E.D. Mich. Nov. 25, 1986).

Predatory hedge funds like Plaintiff Saba Capital Master Fund Ltd. ("Saba Master Fund," together with Plaintiff Saba Capital Management, L.P. ("Saba Capital"), "Saba"), have borrowed the tactics of corporate raiders to seize control of closed-end funds listed on stock exchanges.[2] Saba has incrementally purchased minority percentages of numerous listed closed-end funds and

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[1] The board typically maintains the ability to redeem, *i.e.*, take back, the rights before the plan is triggered.

[2] Listed closed-end funds are investment companies that, like the more-prevalent open-end funds, sell shares to investors and invest the proceeds in a portfolio of securities. Relevant here, however, investors in open-end mutual funds purchase and sell (redeem) mutual fund shares by transacting directly with the fund at a price equal to the fund's net asset value ("NAV") (essentially the per-share value of a fund's portfolio holdings minus expenses).
(cont'd)

proven that, with the voting power associated with a significant, but still minority, position, it can exert control over funds and advance its self-interested goals. Among other things, Saba has previously been successful in using its voting power from a significant minority position in listed closed-end funds to (i) force funds to liquidate; (ii) elect its own candidates to fund boards; (iii) have its hand-picked board appoint Saba as the fund's investment adviser, which allows Saba to change the fund's investment strategy; and (iv) otherwise force the funds to take actions that allow Saba to reap a profit. These actions, however, are often contrary to the interests of the majority of shareholders, including those who invest in closed-end funds for long-term returns or consistent cash dividends.

Thus, when Saba took steps that appeared to be the initiation of this creeping control strategy against ASA, including by accumulating a significant minority percentage of 16.87% of ASA's outstanding shares, nominating a slate of candidates to the board and stating its belief that ASA should terminate its current investment adviser, the then-board determined it was in the best interests of ASA and its shareholders to adopt a limited-duration shareholder rights plan. The board adopted a second, successive plan for similar reasons.

Instead of engaging with ASA's board, Saba filed this lawsuit. In the Amended Complaint ("Complaint"), Saba argues that the shareholder rights plans violate Sections 18(d) and 23(b) of the Investment Company Act of 1940 ("ICA"), which regulates investment companies, including mutual funds and closed-end funds (like ASA). The ICA imposes a strict regulatory scheme to, among other things, regulate the structure and operation of investment companies and require disclosure of information to the investing public. Critically, Saba does not

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In contrast, listed closed-end funds issue a pre-determined number of shares at the fund's inception (which are listed and traded on a stock exchange) and, investors in listed closed-end fund transact with other buyers on the market at prices that reflect current willingness to purchase and sell the shares. Those trading prices may be at a premium or discount to the fund's NAV.

allege any facts that the ASA board acted unreasonably or otherwise breached their fiduciary duties in adopting the shareholder rights plans. Saba claims only that the terms of the plans, as adopted, violate the ICA. Saba seeks rescission of the shareholder rights plans, a declaration that the plans violate the ICA, and an injunction preventing ASA from adopting shareholder rights plans in the future. The Complaint, however, fails to state a claim and should be dismissed.

First, shareholder rights plans are consistent with the plain and unambiguous language of Sections 18(d) and 23(b) of the ICA, which permit any right to purchase a security in an investment company that is "*issued* exclusively and *ratably* to a class or classes of such company's security holders" and that "expir[e] not later than one hundred and twenty days after their issuance." 15 U.S.C. § 80a-18(d) (emphasis added); *see also* § 80a-23(b). Pursuant to ASA's shareholder rights plans, each and every outstanding share of ASA's common stock was *issued* one corresponding, non-transferrable right, *i.e.*, the rights were issued "ratably." Each of ASA's shareholder rights plans was a separate, distinct issuance that expired or will expire within 120 days. Sections 18(d) and 23(b) do not require more, as the only federal court to consider this precise issue has already held.[3]

Faced with the plain language of the ICA and federal precedent upholding shareholder rights plans under the ICA, Saba will argue that this Court should look to *Saba Capital CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103 (2d Cir. 2023) ("*Nuveen*"). There, Saba successfully argued that a *completely different* corporate defensive mechanism (control share provisions[4]) violated a *completely different* provision of the ICA

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[3] *See Neuberger Berman Real Est. Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 342 F. Supp. 2d 371, 374-76 (D. Md. 2004) ("*Neuberger I*"); *Neuberger Berman Real Est. Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 485 F. Supp. 2d 631, 637 (D. Md. 2007) ("*Neuberger II*"). *See also infra* Section II.C.

[4] A control share provision generally prohibits shareholders from exercising voting rights associated with shares they own above a specific percentage (in certain shareholder votes) unless they secure the authorization of a majority of the other shareholders. Control share provisions are not expressly provided for in the ICA.

(Section 18(i)[5]) that concerns a *completely different* shareholder interest (shareholder voting rights). *Nuveen*, and similar cases, do not apply here, including because, as the Second Circuit recognized in *Nuveen*, the "key distinction" between shareholder rights plans and control share provisions is that shareholder rights plans "affect[] investors' economic interests by differentiating their ability to purchase discounted shares—it did not impair their ability to vote the shares they owned," which was a crucial part of *Nuveen*'s holding. *See id.* at 119-20. Simply put, Saba's attempt to stretch *Nuveen* to the different issues presented here should be rejected.

Second, the Complaint should be dismissed as against the Individual Defendants for the additional reason that Saba fails to state a claim of individual liability against them.

BACKGROUND[6]

A. The Parties

1. ASA And The Individual Defendants

ASA is a non-diversified, closed-end investment company, registered under the ICA and listed on the New York Stock Exchange under the ticker symbol "ASA."[7] (¶¶ 9, 17.) ASA "seeks long-term capital appreciation primarily through investing in companies engaged in the exploration for, development of projects [for,] or mining of precious metals and minerals."

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5 Section 18(i) provides that "every share of stock . . . shall be a voting stock and have equal voting rights with every other outstanding voting stock. . . ." 15 U.S.C. § 80a-18(i).

6 The facts are drawn from the Complaint (ECF. No. 12), together with documents incorporated therein by reference and public documents filed with the Securities and Exchange Commission ("SEC"). "Where public documents filed with the [SEC] are attached to a defendant's motion to dismiss, the court may consider them without converting a motion to dismiss into a summary judgment motion." *Ashland Inc. v. Morgan Stanley & Co.*, 700 F. Supp. 2d 453, 461 n.4 (S.D.N.Y. 2010), *aff'd*, 652 F.3d 333 (2d Cir. 2011). Citations to "¶ __" are to the Complaint (ECF No. 12). Citations to "Ex. __" are to the exhibits accompanying the Declaration of Scott D. Musoff filed in support of Defendants' Motion.

7 ASA is a limited liability company formed in Bermuda that operates in the United States under an SEC exemptive order issued pursuant to Section 7(d) of the ICA, 15 U.S.C. § 80a-7(d), which authorizes the SEC to permit a company organized under the laws of another country to register under the ICA. (Ex. 9, at 21-22.)

(Ex. 9, at 17.) ASA's investment adviser is Merk Investments LLC (the "Adviser"), which is responsible for ASA's investment advisory and portfolio management operations "in accordance with policies and procedures that have been approved by" ASA's board. (Ex. 9, at 17.)

The board oversees ASA and, during the relevant time period, was comprised of three independent directors and one interested director (*i.e.*, three of the four directors were unaffiliated with the Adviser).[8] Defendants Mary Joan Hoene and William Donovan have been independent members of the board since 2014 and 2020, respectively (together, the "Current Directors"). (¶¶ 10, 12.) Defendant Bruce Hansen was an independent board member from 2014 until April 2024. (¶ 11.) Defendant Axel Merk was an interested board member from 2022 until April 2024 (with Hansen, "Former Directors," with Current Directors, "Former Board"). (¶ 13.)

2. <u>Saba</u>

Plaintiff Saba Capital is a limited partnership organized under the laws of Delaware, with its principal place of business in New York. (¶ 7.) Saba Capital is the investment manager of Plaintiff Saba Master Fund, a Cayman Islands company. (¶¶ 7-8.) Saba's "flagship" strategy is "credit relative value," which focuses largely in investments in debt securities such as bonds and loans.[9] Saba also specializes in a very different strategy that involves buying up shares in listed closed-end funds trading at a discount to NAV with the goal of exercising its voting power to exert control over the fund and force the fund to take actions in Saba's self-interest like: (i) forcing funds to liquidate; (ii) electing its own candidates to fund boards; (iii) having its hand-selected board appoint Saba as the fund's investment adviser and changing the fund's investment

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[8] The ICA provides that an "interested" director is one who is "affiliated" with the fund or the funds' adviser. 15 U.S.C. § 80a-2(a)(19)(A)(i).

[9] *See* Saba Capital, *Our Strategies*, https://www.sabacapital.com/our-strategies/.

strategy; and (iv) otherwise forcing the funds to take actions that allow Saba to reap a profit.[10] *See Eaton Vance Sr. Income Tr. v. Saba*, 2023 WL 1872102, at *2 (Mass. Super. Ct. Jan. 21, 2023) ("Saba engages in what it refers to as a closed-end fund 'arbitrage strategy' . . . ."). Due to certain unique aspects of listed closed-end funds, Saba has demonstrated that it is able to exert control and carry out its predatory agenda after acquiring a significant, but still, minority percentage of a listed closed-end fund's shares.

B. Saba Begins To Obtain Creeping Control Of ASA

In June 2023, Saba began obtaining creeping control of ASA. Specifically, Saba increased its stake in ASA from 5.28% in June 2023, to 10.32% in October, to 13.74% in November, to 16.85% in December and 16.87% by January 2024.[11] On October 13, 2023, Saba filed a Schedule 13D, indicating it acquired shares "with the purpose [] or . . . effect of changing or influencing . . . control of" ASA. 17 C.F.R. § 240.13d-1. Saba indicated intent to change:

> [W]ithout limitation, matters concerning the [ASA's] business, operations, board appointments, governance, performance, management, capitalization, trading of the Common Shares at a discount to the Issuer's net asset value and strategic plans and matters relating to the open or closed end nature of [ASA] and timing of any potential liquidation of [ASA].

(Ex. 2, at 6.) In December 2023, Saba provided ASA notice of its intent to nominate a full slate of candidates, hand-selected by Saba, for election to ASA's board at the 2024 Annual General Meeting of Shareholders. (Ex. 8, at 5.)

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[10] Investment Company Institute, "Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses," at 5–14, 41–47 (available at https://www.skadden.com/-/media/files/publications/2020/10/impact-of-rule-14a-8/20_ltr_cef.pdf?rev=1fcba58fc5494291a00c169bcc4c9d78&hash=6C85F0813863520B935287230DB8D9D4) (March 2020). The Investment Company Institute ("ICI") is a leading fund industry trade association that published and submitted to the SEC this white paper documenting the practices of Saba and other "activists," and the substantial harms these practices cause to closed-end funds and their shareholders.

[11] Consistent with SEC rules requiring concentrated share ownership of more than 5% to be reported, Saba disclosed its stake in ASA on SEC Schedules 13G and 13D. (Ex. 1; Ex. 2; Ex. 3; Ex. 4; Ex. 8.)

C. The Former Board Adopts The Shareholder Rights Plans

On December 31, 2023, the majority-independent Former Board authorized and adopted a limited-duration shareholder rights plan (the "December Plan"), to "prevent Saba's unilateral attempt to obtain creeping control of [ASA]," which the Former Board "believe[d] would undermine ASA's strategic focus on long-term capital appreciation in the global gold mining industry," an investment strategy in which Saba has no apparent experience. (Ex. 6, at 1.) The Former Board also expressly stated that the Plan was "not intended to deter offers or preclude the Board from taking action . . . it believes is in the best interest of [ASA] and its shareholders."

The basic components of the December Plan are as follows:

- The December Plan granted to each outstanding share of ASA's common stock as of January 12, 2024, one Right. (Ex. 7 § 3; Ex. 5, at 2.) Each Right, when exercisable, entitles the registered holder to purchase, at a later date from ASA one newly issued common share of ASA at a discounted price of $1.00/share. (Ex. 7 § 7; Ex. 5, at 2.)
- The Rights are not exercisable until the Distribution Date, which is ten business days after a Triggering Event. A Triggering Event occurs upon the public announcement that a person or group of affiliated persons "has acquired beneficial ownership of fifteen percent (15%) or more of the outstanding Common Shares" and has therefore become an "Acquiring Person." (Ex. 5, at 2; Ex. 7 §§ 1(a),(n), (pp), 3(a).) A shareholder who, like Saba, already owned more than 15% of the outstanding common shares of ASA at the time the December Plan was adopted does not become an Acquiring Person unless they additionally acquire more than 0.25% of the outstanding common shares of ASA. (Ex. 7 §§ 1(a); Ex. 5, at 2, 4.)
- On the Distribution Date—the date upon which the Rights become exercisable—the

record holder of each Right may exercise the Right and purchase one common share of ASA for $1.00/share. (Ex. 7 § 7; Ex. 5, at 2.)

- An Acquiring Person's Rights (*i.e.*, the Rights of the control-seeking entity causing the Triggering Event) "will be null and void and any holder of such Rights . . . will be unable to exercise or transfer any such Rights" on the Distribution Date. (Ex. 5, at 3; Ex. 7 § 11(a).)
- Shareholders who already owned more than 15% of ASA's shares at the time the Plan was adopted (like Saba) are not Acquiring Persons and may exercise or transfer their rights unless they additionally acquire more than 0.25% of the outstanding common shares of ASA, thereby becoming an Acquiring Person. (Ex. 7 §§ 1(a); Ex. 5, at 2, 4.)
- Until the Distribution Date, the Rights "will be transferred with, and only with, such Common Shares" and the sale of any share will also constitute a sale of the attached Right. (Ex. 5, at 2-3; Ex. 7 § 3.)
- The board maintains the authority to redeem "all but not less than all" of the then-outstanding Rights any time before the Distribution Date or the Plan's expiration. (Ex. 7 § 23; Ex. 5, at 3.) After a person becomes an Acquiring Person, the board may "exchange all or part of the then outstanding and exercisable Rights . . . for Common Shares." (Ex. 7 § 24; Ex. 5, at 3.)
- The Plan expired April 29, 2024, 120 days after its adoption. (Ex. 7 § 1(s); Ex. 5, at 3.)

On January 31, 2024, Saba filed a complaint against ASA and the Current and Former Directors alleging that the December Plan violated Sections 18(d) and 23(b) of the ICA. ¶¶ 2-3, 40. On February 13, 2024, Saba filed a proxy statement seeking shareholder support for the

election of four Saba-selected nominees, as well as stating its belief that ASA should terminate its investment adviser. (Ex. 10, at 7) Saba's proxy noted that Saba would "offer its services to the Board to act as an interim or long-term manager." (*Id.*)

On April 26, 2024, the Former Board determined that it was in the best interests of ASA and its shareholders to adopt a new shareholder rights plan (the "April Plan," with the December Plan, the "Shareholder Rights Plans" or the "Plans"). (Ex. 12; Ex. 14; Ex. 13.) The April Plan issued each share of ASA's common stock outstanding as of May 9, 2024, one Right with terms substantively identical to the December Plan. The April Plan expires August 23, 2024, 120 days after its adoption. (Ex. 14 § 1(s).)

D. Two Of Saba's Nominees Are Elected To The ASA Board At The 2024 Annual General Meeting Of Shareholders

On April 26, 2024, ASA convened its 2024 Annual General Meeting of Shareholders, at which shareholders were asked to consider, among other things, the election of directors to the board. (Ex. 11, at 2.) All four members of the Former Board were up for re-election and Saba selected and nominated four additional individuals. (Ex. 11, at 2.) Two of Saba's four nominees (both of whom are affiliated with Saba) were elected over two of the incumbents, resulting in the current ASA board being comprised of the two independent Current Directors (Hoene and Donovan) and two Saba-nominated directors.

E. The Complaint

On May 6, 2024, Saba filed the operative Complaint which alleges that both Shareholder Rights Plans violate Sections 18(d) and 23(b) of the ICA. (¶¶ 2-3, 40.) In Count I, Saba seeks rescission of the Shareholder Rights Plans and in Count II Saba seeks a declaratory judgment that the Shareholder Rights Plans violate the ICA. (¶¶ 37-45.) Saba also asks the Court to enjoin Defendants from adopting additional shareholder rights plans.

ARGUMENT

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. lqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Court "accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor . . . it does not credit 'mere conclusory statements' or 'threadbare recitals of the elements of a cause of action.'" *In re IAC/InterActiveCorp Sec. Litig.*, 695 F. Supp. 2d 109, 115 (S.D.N.Y. 2010) (quoting *Ashcroft*, 556 U.S. at 678).

I. SHAREHOLDER RIGHTS PLANS ARE IMPORTANT, JUDICIALLY APPROVED TOOLS FOR BOARDS TO UTILIZE IN PROTECTING COMPANIES AND THEIR SHAREHOLDERS

Shareholder rights plans were developed primarily to provide companies with a tool to protect their shareholders against the threat of control-seeking entities buying up enough shares in the market that would allow that entity to control the company through the voting power of those shares. Courts have consistently recognized that shareholder rights plans are legally permissible and reasonable corporate defensive measures.

Changes in control are "'extraordinary' transactions," typically subject to corporate protections to ensure they are in the best interests of the company, including that they typically must be (i) reviewed and approved by the board, (ii) recommended by the board to shareholders and (iii) approved by shareholders. *See Air Prods.*, 16 A.3d at 95. Courts recognized that a control-seeking entity's accumulation of enough shares to control a company was "functionally similar to merger transactions with respect to the critical question of control over the corporate enterprise," but was treated differently vis-à-vis the role of the board and shareholders. *See id.* A control-seeking entity could circumvent corporate protections because owning enough shares

would afford that entity sufficient voting power to force actions in that entity's self-interest. Shareholder rights plans were "born . . .to address th[at] flaw.'" *Id.*

In light of those principles, the basic objective of a shareholder rights plan is "to deter abusive takeover tactics" by making such tactics "expensive" to the control-seeking entity if they choose to acquire shares above the specified threshold. *See* Lipton & Steinberger*, Takeovers & Freezeouts*, § 6.03 (2023). That, in turn, has the effect of encouraging control-seeking entities to "negotiate with the board of directors of the target rather than to attempt a hostile takeover." *See id.* The key feature of a shareholder rights plan is to impose provisions, the effect of which, in specified future circumstances, could result in the economic value of a control-seeking entity's shares being diluted if that entity attempts to gain creeping control. *See id.* The risk of economic dilution gives a control-seeking entity "a powerful incentive to negotiate with the target's board" to secure control rather than seeking to do so by buying up additional shares. *See id.* Shareholder rights plans thus protect the value of *all* shareholders' interests by deterring harmful attempts to bypass corporate protections and seize control without consideration of the company's best interests. *See Air Prods.*, 16 A.3d at 95.

The Delaware Supreme Court first upheld shareholder rights plans as a valid takeover defense in *Moran v. Household International, Inc.*, 490 A.2d 1059, 1076 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985). In *Moran*, the court upheld a board's adoption of a shareholder rights plan as an "appropriate exercise of managerial judgment" under the business judgment rule (which creates a "presumption" that a board has acted in good faith absent proffered evidence of fraud or bad faith sufficient to rebut that presumption). *Id.* at 1083. The court explained that the business judgment rule "afford[s] protection to directors in pre-planned [defensive] strategies as well as reactive [defensive] devices adopted on an *ad hoc* basis." *Id.* at 1076. Since *Moran*,

courts have universally approved of shareholder rights plans as a valid exercise of the board's business judgment when adopted as a reasonable response to a takeover threat.[12]

The shares of a listed closed-end fund, like the shares of an operating company, trade among individual buyers and sellers on the open market. *See supra* note 2. Listed closed-end funds are, therefore, equally vulnerable to the same threat of a control-seeking entity gaining creeping control through buying up shares and using the voting power of those shares to control the fund. Indeed, given the unique attributes of closed-end funds, Saba has demonstrated that the voting power associated with even a minority position is sufficient to control a fund. Thus, the principles underlying the decades of operating company precedent holding that shareholder rights plans are "reasonable response[s]" to and "protect the shareholders from being stampeded" by harmful attempts to exert control apply equally to closed-end funds and the Shareholder Rights Plans at issue here. *See Harvard Indus.*, 1986 WL 36295, at *2. This was recognized by *Neuberger I* and *II*. *See infra* Section II.C.

II. THE SHAREHOLDER RIGHTS PLANS DO NOT VIOLATE THE ICA

Faced with overwhelming precedent upholding a board's ability to adopt a shareholder rights plan in response to an identified threat, Saba does not allege that the Former Board breached its fiduciary duties here.[13] Saba alleges only that the terms of the Shareholder Rights Plans violate two provisions of the ICA. Not so. As the only other federal court to consider this precise issue held in *Neuberger I* and *II*, the Shareholder Rights Plans are consistent with

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[12] *See, e.g.*, *Harvard Indus., Inc. v. Tyson*, No. 86-CV-74639-DT, 1986 WL 36295, at *1 (E.D. Mich. Nov. 25, 1986) (upholding shareholder rights plans under Michigan law); *Realty Acquisition Corp. v. Prop. Tr. of Am.*, No. CIV. JH-89-2503, 1989 WL 214477, at *2 (D. Md. Oct. 27, 1989) (same under Maryland law); *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 718 (7th Cir. 1986) (same under Indiana law).

[13] A closed-end fund board, like the board of an operating company, owes fiduciary duties to manage and act in the best interests of the fund. *See* 15 U.S.C. § 80a-35(a)(1). Saba conclusorily states that the Former Board adopted the Shareholder Rights Plans for entrenchment purposes, but does not allege any *facts* in support of that unsupported legal conclusion or otherwise allege any claim that challenges the facts and circumstances surrounding the Former Board's exercise of business judgment in adopting the Shareholder Rights Plans.

Sections 18(d) and 23(b) of the ICA. The Complaint should be dismissed.[14]

A. The Shareholder Rights Plans Are Consistent With The Plain Language Of Section 18(d) And Section 23(b) Of The ICA

1. The Shareholder Rights Plans Are Consistent With The Plain Language Of Section 18(d)'s Requirement That Rights Be "Issued . . . Ratably" Because Each Share Was Issued One Right

The Shareholder Rights Plans each "issued" their respective Rights "ratably": each Plan issued each and every outstanding share of ASA's common stock one corresponding Right. That is all Section 18(d) requires. Section 18(d) provides that:

> It shall be unlawful for any registered management company to issue any warrant or right to subscribe to or purchase a security of which such company is the issuer, ***except in the form of warrants or rights*** . . . ***issued exclusively and ratably to a class or classes of such company's security holders***.

15 U.S.C. § 80a-18(d) (emphasis added).

The Court need go no further than the statutory text because the requirements of Section 18(d) are plain and unambiguous: Section 18(d) allows a registered investment company, like ASA, to issue warrants or rights to subscribe as long as such warrants or rights are "issued exclusively and ratably" to a single class or classes of shareholders. *See, e.g.*, *Nat'l Ass'n of Mfrs. V. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (holding that where statutory language is "unambiguous," the "inquiry begins with the statutory text, and ends there as well"). The plain and unambiguous meaning of the term "ratably" is "[p]roportionate[ly]." *See* Ratable, Black's Law Dictionary (11 ed. 2019). The plain and unambiguous meaning of the term "issued" is "[t]o

[14] Saba brings its rescission claim under Section 47(b) in reliance on *Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019). That case conflicts with long-standing precedent from, among others, the Third Circuit in *Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co.*, 677 F.3d 178 (3d Cir. 2012). *See also Smith v. Franklin/Templeton Distrib., Inc.*, No. 09-cv-4775 PJH, 2010 WL 2348644, at *7 (N.D. Cal. June 8, 2010); *Stegall v. Ladner*, 394 F. Supp. 2d 358, 378 (D. Mass. 2005). Defendants maintain that, consistent with the Third Circuit's analysis, Section 47(b) provides for rescission of a contract that otherwise violates the ICA, but does not provide a private right of action. Nevertheless, in light of the binding nature of the *Oxford University* decision on this Court, Defendants do not argue here that Saba lacks a private right of action for its rescission claim, but reserve their rights to raise that argument later (including on appeal).

be put forth officially" or "[t]o send out or distribute officially." *See* Issue, Black's Law Dictionary (11 ed. 2019). The plain and unambiguous terms of Section 18(d) thus require only that, at the time rights are officially put forth or sent out, they must be proportionate. Each of the Shareholder Rights Plans satisfies that requirement.

Saba alleges that the Rights were not "issued . . . ratably" because each Shareholder Rights Plan may later prohibit a shareholder that elects to become an Acquiring Person from exercising their Rights when the Plan is triggered. *See* ¶¶ 19, 25. That argument ignores the text of Section 18(d), which addresses only the *issuance* of rights, not the later *exercise* of those rights. *See Neuberger I*, 342 F. Supp. 2d at 376.

Congress, in other provisions of the ICA, has expressly distinguished between the point in time at which rights and warrants are *issued* and the point in time at which they are *exercised*. Specifically, in Section 23(b)—which is discussed further *infra* Section II.A.2—Congress stated that shares could be sold below NAV "upon the *exercise* of any warrant outstanding on August 22, 1940, or *issued* in accordance with the provisions of Section 18(d)." § 80a-23(b) (emphasis added). Section 23(b), therefore, acknowledges that the issuance of a right or warrant is distinct from its exercise. Had Congress intended Section 18(d) to include the point in time at which shares were either *issued* or *exercised*, it would have so stated, as it did in Section 23(b). But Congress did not do that and Section 18(d) focuses only on the point in time at which rights are *issued*. *See, e.g.*, *Alvarez v. Garland*, 33 F.4th 626, 641 (2d Cir. 2022) ("[Where] Congress uses language in one part of a statute that it omits from another—particularly a closely adjacent other—well-established principles of statutory construction instruct courts to assume that the choice was deliberate and indicative of a different intent.").

When the Former Board adopted each of the Shareholder Rights Plans, every outstanding

share of common stock—including every share owned by Saba—was *issued* one corresponding, non-transferrable Right, in conformance with Section 18(d). Were Saba to trade any of its shares today, each share would be traded with the attached Right that it was issued. And, if any other shareholder other than Saba became an Acquiring Person and triggered the Shareholder Rights Plan, Saba would be able to exercise the Rights associated with each and every one of its shares.

2. The Shareholder Rights Plans Are Consistent With The Plain Language Of Section 23(b) Because They Fall Within An Express Statutory Exception

The Shareholder Rights Plans do not violate Section 23(b)'s prohibition on selling stock at a price below NAV because the Plans fall within the plain language of the exceptions in Section 23(b)(1) and (b)(4). Section 23(b) provides that:

> No registered closed-end company shall sell any common stock of which it is the issuer at a price below the current net asset value of such stock . . . ***except*** (1) in connection with an offering to the holders of one or more classes of its capital stock. . . [or] (4) upon the exercise of any warrant outstanding on August 22, 1940, or issued in accordance with the provisions of [Section 18(d)] of this title.

15 U.S.C. § 80a-23(b) (emphasis added).

First, Section 23(b)(1) permits a closed-end fund to sell common stock at below NAV "in connection with an offering to the holders of one or more classes of its capital stock." § 80a-23(b)(1). The Shareholder Rights Plans issued Rights only to existing shareholders, consistent with the exception in Section 23(b)(1). *Second*, Section 23(b)(4) permits the "exercise" of a right to purchase stock at below NAV when that right was "issued in accordance" with Section 18(d). § 80a-23(b)(4). The Shareholder Rights Plans were "issued in accordance" with Section 18(d), and, therefore, fall within Section 23(b)(4)'s exception.

B. Sections 18(d) and 23(b) Do Not Prohibit The Successive Issuance Of Shareholder Rights Plans

In addition to requiring that rights be issued "ratably," Section 18(d) also requires that

such rights must "expir[e] not later than [120] days after their issuance." § 80a-18(d). The plain text of Section 18(d) addresses only the length of time any single issuance may be in effect and is unambiguous: any single issuance of rights must expire within 120 days. Section 18(d) does not limit successive issuances or otherwise address the total number of issuances permitted. *See Carcieri v. Salazar*, 555 U.S. 379, 392 (2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The Rights issued pursuant to each of the Shareholder Rights Plans expire within 120 days, consistent with Section 18(d).

Saba alleges that the April Shareholder Rights Plan was, in effect, an extension of the December Plan. *See* ¶ 26. But each Shareholder Rights Plan, though similar, is a distinct and separate offering issued by the Former Board based on its business judgment of the then-existing circumstances. *See Neuberger II*, 485 F. Supp. 2d at 637 ("It is undisputed that each of the serial rights agreements issued by [the fund] . . . though similar, is a distinct and separate offering, both in form and substance."). The Rights issued pursuant to the December Plan were issued to common shares of ASA outstanding as of January 12, 2024 and expired 120 days later, on April 29, 2024. The Rights issued pursuant to the April Plan were issued to common shares of ASA outstanding as of May 9, 2024 and will expire 120 days later, on August 23, 2024. Both Shareholder Rights Plans satisfy Section 18(d).[15]

C. The Court Should Adopt The Reasoning Of *Neuberger*, Which Upheld Similar Shareholder Rights Plans Under Sections 18(d) and 23(b) Of The ICA

The only precedent that considers the precise issue presented to this Court—whether shareholder rights plans are consistent with the ICA—supports Defendants' arguments. The

[15] To the extent Saba espouses concerns about infinite issuances of successive shareholder rights plans, those facts are not currently before the Court. The reasonableness of such an eventuality could, in any event, be challenged by alleging that a board acting in such a manner is in breach of its fiduciary duties. Again, Saba does not allege any breach of fiduciary duty here.

Court here is faced with an identical legal question and similar facts and, therefore, should apply the reasoning of *Neuberger I* and *II* to similarly hold that ASA's Shareholder Rights Plans do not violate the ICA and dismiss the Complaint.

1. The Court Should Adopt The Reasoning Of *Neuberger I*, Which Held That A Shareholder Rights Plan Is Consistent With Sections 18(d) and 23(b)

Neuberger I focused on the plain and unambiguous meaning of Sections 18(d) and 23(b) to hold that a shareholder rights plan was permissible under the ICA. In *Neuberger I*, a closed-end fund adopted a shareholder rights plan in response to a partial tender offer by two investment trusts to purchase shares from other shareholders. Like Saba here, the trusts sought to engage in self-interested arbitrage activities. *See* 342 F. Supp. 2d at 374. The trusts filed a Schedule 13D stating that they had acquired ~10.05% of the outstanding shares and intended to (i) acquire up to 50.01% via the partial tender offer, (ii) consider changing or expanding the investment objectives of the fund, and (iii) replace the board and investment adviser. *Id.* at 373.

The board concluded that the partial tender offer, which would have allowed the trusts to bypass corporate protections and gain control of the fund, was not in the best interests of the fund. *See id.* at 373-74. The board enacted several defensive measures, including adopting a shareholder rights plan. *Id.* at 373-74. The *Neuberger I* shareholder rights plan operated similarly to the ASA Plans. Under the *Neuberger I* plan, the board declared a dividend of one "right" for each outstanding share of common stock. *Id.* at 374. Each right entitled the holder to purchase from the fund three shares of common stock equal to the par value ($.0001) of those shares on the distribution date. *Id.* The distribution date occurred when an "acquiring person" acquired 11% or more of outstanding shares of common stock. Prior to the distribution date, the rights were transferable with and only with the shares to which they were attached. On the distribution date, the acquiring person was prohibited from exercising rights associated with their shares in

excess of 11%.[16] *Id.*

As Saba argues here, the trusts in *Neuberger I* argued that the shareholder rights plan violated Sections 18(d) and 23(b) of the ICA.[17] The court held that the *Neuberger I* rights plan "unambiguously satisfie[d] § 18(d)'s requirement that rights be issued proportionately to a class or classes of shareholders." *Id.* at 375. The court reasoned that, pursuant to the plan, "[o]ne right is attached to each share," which is all that Section 18(d) requires. *See id.* The court further reasoned that, although "[w]hen triggered, [the plan] allows all shareholders, except the Acquiring Person, to exercise their rights," "[a] voluntary act of a shareholder to acquire holdings above the . . . trigger does not violate § 18(d)'s requirement that rights be issued *ratably*." *Id.* at 375 (emphasis in original). Because the rights were issued ratably pursuant to Section 18(d), the court also held that they did not violate Section 23(b). *See id.* at 376.

2. The Court Should Adopt The Reasoning Of *Neuberger II*, Which Held That The Successive Adoption Of Shareholder Rights Plans Is Consistent With Sections 18(d) and 23(b)

The court held in *Neuberger II* that the Neuberger fund's successive adoption of separate and distinct 120-day shareholder rights plans for more than a year was permissible under the plain language of the ICA. The trusts argued that a closed-end fund could not issue more than one shareholder rights plan in respect to a single takeover threat because it would frustrate the purpose of Section 18(d)'s 120-day expiration requirement. *Neuberger II*, 485 F. Supp. 2d at 637. The court held that the "plain language" of Section 18(d) did not preclude the successive adoption of shareholder rights plans, reasoning that the language of Section 18(d) shows that

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[16] The ASA Plan provides that an Acquiring Person will be unable to exercise any rights beneficially owned by the Acquiring Person on the Distribution Date, whereas the *Neuberger I* plan provides that an acquiring person will be unable to exercise rights associated with shares in excess of the triggering percentage. This distinction has no impact on the ratable *issuance* of rights in both circumstances and is immaterial for purposes of the Court's analysis.

[17] The trusts also argued that the plan violated Section 18(i), which Saba does not allege here.

Congress was "concerned only with the *duration* of any particular [shareholder rights plan]" and "if Congress intended to limit a board's defensive options, it could easily have phrased the prohibition in terms of *duration and number*, rather than in terms of duration *simpliciter*." *Id.* (emphasis in original). The court noted that it was "telling[]" that there was "no challenge . . . to the business judgment of the [board of] directors" in adopting the successive shareholder rights plans. *Id.* at n.7. Similarly, here, Saba "tellingly" does not allege that the Former Board breached its fiduciary duties in adopting the Shareholder Rights Plans. Like in *Neuberger II*, this Court should hold that the adoption of separate and distinct shareholder rights plans, each expiring within 120 days, does not violate the ICA.

3. Caselaw Interpreting A Different Defensive Mechanism Under A Different Provision Of The ICA Does Not Undermine *Neuberger*

In its Opposition, Saba will endeavor to expand the holdings of recent cases—including *Nuveen* and *BlackRock*[18]—to argue that this Court should disregard *Neuberger I* and *II*. But *Nuveen* and *BlackRock*, unlike *Neuberger I* and *II*, ***did not consider*** whether a shareholder rights plan is consistent with Sections 18(d) and 23(b) of the ICA. As explained below, those cases considered whether a *different* corporate defensive mechanism violated a *different* provision of the ICA that concerns a *different* shareholder interest.

Both *Nuveen* and *BlackRock* involved certain listed closed-end funds' adoption of a control share provision—a different defensive mechanism, not expressly provided for in the ICA, that prohibits shareholders from exercising the voting rights associated with shares they own above a specific percentage (in certain shareholder votes) unless they secure the authorization of a majority of the other shareholders. In both *Nuveen* and *BlackRock*, Saba alleged that control

[18] *Saba Capital Master Fund, Ltd. v. BlackRock Municipal Income Fund, Inc.*, No. 23-cv-5568 (JSR), 2024 WL 43344 (S.D.N.Y. Jan. 4, 2024), *appeal filed sub nom. Saba Capital Master Fund, Ltd. v. Clearbridge Energy Midstream Opportunity Fund*, No. 23-8104 (2d Cir. Jan. 8 2024).

share provisions violate Section 18(i) of the ICA—not at issue in this case—which provides that "every share of stock . . . shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i).

In *Nuveen*, the Second Circuit held that the control share provision adopted by the Nuveen-managed fund "illegally strip[ped] some of Nuveen's shares of voting rights" in violation of Section 18(i). *Nuveen*, 88 F.4th at 117. Nuveen argued that a shareholder's inability to vote certain shares was a result of a restriction on the *shareholder*, not the *shares* and, because Section 18(i) speaks in terms of voting restrictions on "stock," not shareholders, the control share provision did not violate Section 18(i). *Id.* at 118.

The Second Circuit rejected *Nuveen*'s argument. The court explained that, although the ICA did not define "voting stock," it did define "voting security" and because it found that a "security" encompasses a "stock," the court applied the definition of a "voting security" to the term "voting stock," as used in Section 18(i). *Id.* at 117. In particular, the court held that the ICA defined "voting stock" with "reference to its *function*," by defining it as stock "***presently*** entitling the owner or holder thereof to vote for the election of directors of a company." *Id.* (emphasis in original). Thus, the court held that any distinction between restrictions on shares and shareholders was "immaterial" in the context of Section 18(i) because a shareholder's "present" ability to vote stock was a necessary condition to that stock being considered "voting stock." *Id.* In other words, the Second Circuit's reasoning was that Section 18(i) hinged on whether a voting right could be "presently" exercised. Because the control share provision prevented certain shareholders from being "presently" able to vote their shares above the specified percentage, the court held that the provision violated Section 18(i).

Saba will argue that *Nuveen* rejected any distinction between restrictions on shares and

shareholders and, therefore, *Nuveen* undermines *Neuberger* to the extent it relies on the application of a similar distinction. Saba's argument fails for several reasons.[19]

First, *Nuveen* did not broadly reject a distinction between shares and shareholders in every corporate context. *Nuveen* did not even reject a distinction between shares and shareholders in the context of the ICA as a whole. The Second Circuit's reasoning in *Nuveen* is confined to rejecting a distinction specifically between shares and shareholders *in the context of Section 18(i)*. The Second Circuit emphasized that Section 18(i) itself rejected any distinction between shares and shareholders by using the term "voting stock," defined with reference to the stock's function, *i.e.*, whether the *holder* of the stock was "presently" entitled to vote. Any attempt by Saba to expand *Nuveen* beyond Section 18(i) is unsupported and should be rejected.

Second, *Neuberger I*'s holding—that Section 18(d)'s requirement that rights be "issued" "ratably" does not prohibit restrictions on a shareholder's ability to exercise those rights—is derived from and compelled by the plain and unambiguous language of Section 18(d), not a generalized application of a distinction between shares and shareholders. As explained above, *supra* Section II.A.1., in Section 18(d) Congress spoke only in terms of the *issuance* of rights, without any reference to a shareholder's ability to exercise or "presently" act (like *Nuveen* held Section 18(i) provides) with respect to those rights.

Third, in *Nuveen*, the Second Circuit itself expressly distinguished *Neuberger,* explaining that the shareholder rights plan in *Neuberger* "affected investors' *economic* interests by differentiating their ability to purchase discounted shares—it did not impair their ability to vote the shares they owned." *Id.* at 119; *see Neuberger I*, 342 F. Supp. 2d at 376 ("Although the triggering of the [shareholder rights plan] will result in a reduction of the Acquiring Person's

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[19] *BlackRock* relied upon and applied *Nuveen* and is inapplicable here for the same reasons.

ownership interest, this is an issue of dilution of economic interest and corresponding voting power and has nothing to do with the voting rights of the shares themselves."). The Second Circuit emphasized the "key difference" was that the shareholder rights plan in *Neuberger* "did not 'change the fact that all shares were granted equal voting rights,' but rather, the reduced ownership interest was 'an issue of dilution of economic interest and corresponding voting power.'" *Nuveen*, 88 F.4th at 119 (cleaned up). Economic dilution, the court explained, has "nothing to do with the voting rights of the shares themselves." *Id. Nuveen*, therefore, does not undermine the reasoning of *Neuberger* or its application here. Indeed, by the Second Circuit's own express language, *Nuveen* has no application here.[20]

D. The Shareholder Rights Plans Are Consistent With The ICA's Purpose

Where, as here, the language of the statute is clear and unambiguous, the Court's inquiry ends. *See Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016) ("[P]olicy arguments cannot supersede the clear statutory text . . . ."). Although the Court must interpret the ICA with its "policy and purposes" in mind, 15 U.S.C. § 80a-1(b), such policy and purposes cannot overcome the plain meaning of the statutory text. *See, e.g.*, *SEC v. Nat'l Presto Indus., Inc.*, 486 F.3d 305, 310 (7th Cir. 2007) (interpreting ICA and noting "courts had better not depart from [the statute's] words without strong support for the conviction that, under the authority vested in them by the 'context' clause, they are doing what Congress wanted").

The Shareholder Rights Plans are consistent with both the plain language of the relevant

[20] The Second Circuit's reasoning is *Nuveen* is also consistent with how other courts have upheld corporate shareholder rights plans. *See Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 718 (7th Cir. 1986) (Posner, J.) ("Delaware courts have distinguished between discrimination among shares and discrimination among shareholders and have allowed corporations to engage in the latter form of discrimination as a concomitant to the deployment of defensive measures." (Posner, J.); *Ga.-Pac. Corp. v. Great N. Nekoosa Corp.*, 728 F. Supp. 807, 809-10 (D. Me. 1990) (upholding a shareholder rights plan, finding that Maine would follow Delaware law, which has "long distinguished between discrimination among shareholders and discrimination among shares, finding the former permissible"); *Harvard Indus.*, 1986 WL 36295, at *1 (holding a shareholder rights plans' restrictions on shareholders, rather than shares, was "not forbidden" under Michigan law).

statutory provisions and the purpose of the ICA. One of the ICA's stated purposes is to prevent funds from being operated in the interest of a few select persons—including those "affiliated persons" that own more than 5% of a fund's shares—"rather than in the interest of all classes of such companies' security holders." § 80a-1(b)(2); § 80a-2(a)(3)(A). Shareholder rights plans protect shareholders by disincentivizing concentrated minority shareholders, like Saba (who accumulated 16.87% of ASA), from circumventing corporate protections and gaining creeping control of funds without regard to the best interests of the fund and its other shareholders.[21]

Saba claims, in a conclusory manner, that the Former Board enacted the Shareholder Rights Plans for entrenchment purposes in violation of the ICA's policy of ensuring that funds are operated for the benefit of their shareholders rather than for management. Saba's argument is unpersuasive. *First*, the plain and unambiguous language of the ICA cannot be set aside based on policy interpretations. *Second*, Saba's claim of entrenchment is a legal conclusion. *Third*, Saba's claim of entrenchment is undermined by the facts of this case, including that (i) while the Shareholder Rights Plans were in effect, Saba successfully elected *two* candidates (who were selected by and are affiliated with Saba) to ASA's board; (ii) the Former Board expressly stated that it adopted the Shareholder Rights Plans for non-entrenchment purposes; and (iii) Saba has alleged no facts in support of its entrenchment claim or otherwise challenged the Former Board's business judgment in enacting the Plans.

[21] In *Nuveen*, the court held that the plain language of Section 18(i) was unambiguous and could not be overridden by policy considerations. *Nuveen*, 88 F.4th at 117. The court went on to explain that "[e]ven if Section 18(i) were so ambiguous as to make Congress's policy considerations determinative," the policy considerations leaned in Saba's favor in that case because the control share provision "stripp[ed] shares of voting rights unequally." *Id.* at 120-21. The court also mentioned in a passing footnote that it was not persuaded that "affiliated persons" included those, like Saba, who owned more than 5% of the voting power. *Id.* at 121 n. 17. That statement overlooks that the ICA expressly provides that an "affiliated person" includes "any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person . . . ." § 80a-2(a)(3)(A). In any event, *Nuveen*'s weighing of policy considerations were in a different context and are not relevant here where the shareholder interests at stake are economic and do not restrict voting rights.

III. THE CURRENT AND FORMER DIRECTORS SHOULD BE DISMISSED BECAUSE THE AMENDED COMPLAINT STATES NO CLAIM OF INDIVIDUAL LIABILITY

The Complaint should be dismissed in its entirety for the reasons explained above. The Complaint should also be dismissed as against the Current and Former Directors for the independently sufficient reason that Saba fails to allege any claim of individual liability. The Complaint alleges that the Current and Former Directors were members of the Former Board and authorized the Shareholder Rights Plans. ¶ 18. Those allegations are unrelated to the claims Saba brings in the Complaint; namely, a claim for declaratory judgment that the Shareholder Rights Plans, as adopted, violate the ICA and a claim to rescind the Plans on that same basis. Neither of those claims involve any consideration of the Former Board's adoption of the Plans.

Relatedly, the Current and Former Directors are not indispensable parties, including because the Court could "accord complete relief" in the absence of them being joined. *See Neuberger I*, 342 F. Supp. 2d at 372. To the extent Saba claims that the Current and Former Directors are indispensable because Saba seeks an injunction prohibiting ASA from adopting future shareholder rights plans, such an injunction, were it warranted (and it is not) would be as effective if entered against ASA, as this would prevent the board from enacting such a plan for ASA. Additionally, the two Former Directors are no longer members of the ASA board, and the two Saba-nominated directors are not defendants and would not be subject to any individual injunctive relief imposed by the Court. Thus, the prospect of injunctive relief provides no basis for the Current and Former Directors' individual liability.

CONCLUSION

For the foregoing reasons, the Court should enter an Order dismissing the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and granting such other and further relief as the Court deems just and proper.

Dated: May 24, 2024
New York, New York

Respectfully Submitted,

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