UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABA CAPITAL MASTER FUND, LTD., and SABA CAPITAL MANAGEMENT, L.P., Plaintiffs, v. ASA GOLD AND PRECIOUS METALS, LTD., MARY JOAN HOENE, BRUCE HANSEN, WILLIAM DONOVAN, and AXEL MERK, Defendants.	)	No. 24-cv-690 (JGLC)

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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Plaintiffs Saba Capital Master Fund, Ltd. and Saba Capital Management L.P. (collectively, "Saba") have established as a matter of law that Defendants' Poison Pill violates Section 18(d) of the ICA—as set forth in Saba's motion for summary judgment, *see* Dkt. 16. Saba's claims are supported by the plain text of the ICA, the policies and purposes behind its enactment, and recent decisions from both the Second Circuit and this Court. Saba, accordingly, more than plausibly states a claim for relief, and the claims should not be dismissed. Because this action presents a pure question of law not implicating any dispute of material fact, Saba is entitled to rescission of the Poison Pill, a declaratory judgment that it violates Section 18(d), and an injunction preventing Defendants from further extending it in the future. *See Saba Capital Master Fund, Ltd. v. BlackRock Municipal Income Fund, Inc.*, 23-cv-5568 (JSR), --- F. Supp. 3d ---, 2024 WL 43344, at *6 (S.D.N.Y. Jan. 4, 2024) (granting Saba summary judgment before discovery for rescission of a defensive mechanism violating Section 18(i) of the ICA).

Section 18(d) unambiguously prohibits regulated funds, like Defendant ASA Gold and Precious Metals, Ltd. ("ASA"), from issuing "any warrant or right to subscribe to or purchase a security," except where certain conditions are met. 15 U.S.C. § 80a-18(d). Such subscription rights must be: (1) "issued exclusively and ***ratably***" to the fund's shareholders, and (2) "expir[e] ***not later than one hundred and twenty days*** after their issuance." *Id*.

ASA's Poison Pill here flunks both tests. *First*, the Pill's subscription rights are not ratable. As Defendants' own press releases openly admit, the Pill targets Saba for unequal treatment. *See* Dkt. 19-6, ASA Press Release (Jan. 2, 2024); Dkt. 19-9, ASA Press Release (Apr. 29, 2024). While shareholders owning less than fifteen percent of ASA's outstanding shares (<15%) are granted rights to acquire additional shares, those owning more than fifteen percent (>15%), like Saba, are expressly denied the same. *See* Dkt. 19-5, Dec. 31, 2023 Rights Agmt. §§ 1, 3; Dkt. 19-8, Apr. 26,

2024 Rights Agmt. §§ 1, 3. The Pill thus denies Saba subscription rights that are ***ratable***—*i.e.*, on a basis proportionate to its ownership stake—as the ICA requires. *See* Dkt. 16 at 10–17. *Second*, the Pill has remained in continuous operation since December 31, 2023, and is nominally set to expire on August 23, 2024—***236*** days after it took effect. *See* Dkt. 19-8 § 1(s). It thus will impermissibly expire "later than" 120 days after issuance. 15 U.S.C. § 80a-18(d). Saba's claims that the Pill violates the ICA, in short, are straightforward and not amenable to dismissal.

Faced with the simple reality that that the Poison Pill violates the ICA's clear commands, Defendants raise several red-herring arguments in a futile attempt to rebut Saba's claims. Each argument is without merit and should be rejected with ease.

First, Defendants' say that the rights offered by the Pill are ICA-compliant because every shareholder was "issued" rights in some hyper-technical sense, even though those rights would be voided and could never actually be exercised by certain shareholders, like Saba. *See* Dkt. 21 at 15–16. The ICA, however, does not condone such hollow formalism. As the Second Circuit recently held, the purported "issuance" of rights which cannot be exercised by shareholders in practice is tantamount to the issuance of no rights at all. *See Saba Capital CEF Opportunities I, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 117 (2d Cir. 2023). Specifically, in *Nuveen*, the Second Circuit held that voting rights provided to the class of common shareholders when "issued," but which could not actually be exercised by certain shareholders depending on the size of their ownership stake, did not provide "equal" voting rights. *Id.*; *accord Boulder Total Return Fund, Inc.*, 2010 WL 4630835, at *7 n.31 (S.E.C. No-Action Letter Nov. 15, 2010) (requirements relating to rights issuances are "continuous," given that "any other interpretation would render [them] meaningless"). So too, subscription rights provided to the class of common shareholders when "issued," but which cannot actually be exercised by certain shareholders depending on the size of

their ownership stake, do not provide "ratable" voting rights.

Next, Defendants improperly ask this Court to ignore the plain terms of ***federal*** law prohibiting their non-ratable rights plan merely because ***state*** law regimes may tolerate such poison pills in some circumstances. *See* Dkt. 21 at 2, 11–13 & n.12 (citing cases decided under Delaware, Indiana, Maryland, and Michigan law). But Congress expressly enacted the ICA in full view of deficient state law at the time, *see* 15 U.S.C. § 80a-1(a)(5), after specifically determining that additional federal protections were necessary "to correct the abuses of self-dealing, which led to the wholesale victimizing of shareholders from fantastic abuses of trust by investment company management," *Nuveen*, 88 F.4th at 120 (internal citation omitted). In fact, the Second Circuit in *Nuveen* considered and rejected incumbent management's attempt to rely on exactly the same lines of state law precedent to justify discriminatory tactics that, the Court held, were unlawful under the plain terms of the ICA. *Id*. at 118–20. Some states may tolerate use of poison pills by public operating companies or other entities not subject to the federal ICA, but that has no bearing on the proper interpretation and application of the ICA's additional protections for shareholders in federally regulated investment companies. *See Option Advisory Serv., Inc. v. SEC*, 668 F.2d 120, 121 (2d Cir. 1981) ("The purpose of the Act is to remedy certain abusive practices in the management of investment companies, for protection of persons whose money is invested by such companies.").

Lastly, Defendants' all-too-predictable invocation *Neuberger* gets them nowhere. *See* Dkt. 21 at 17–19 (citing *Neuberger Berman Real Est. Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 342 F. Supp. 2d 371 (D. Md. 2004) ("*Neuberger I*")). As Saba explained in detail in its motion for summary judgment, *see* Dkt. 16 at 15–17, the reasoning of *Neuberger I*—a non-binding, twenty-year-old, out-of-Circuit district court opinion—cannot carry weight here and must be rejected by

this Court, given that it relies entirely on a "share-shareholder distinction" that has now been fundamentally discredited by the Second Circuit. *See Nuveen*, 88 F.4th at 118–20.

Defendants' arguments regarding the Pill's impermissible extension beyond the proscribed expiration period are equally misplaced. They again rely on the same out-of-Circuit district court's finding that subscription rights may be issued on a successive, *ad seriatim* basis. *See* Dkt. 21 at 19–20 (citing *Neuberger Berman Real Est. Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 485 F. Supp. 2d 631 (D. Md. 2007) ("*Neuberger II*")). But that decision failed to resolve acknowledged statutory ambiguity in light of the ICA's policies and purposes. *See* 485 F. Supp. 2d at 638. Guided by *Nuveen*'s instruction that the statute was enacted for "the benefit of investors, not fund insiders," 88 F.4th at 120, this Court should not follow *Neuberger II*'s erroneous holding permitting continuous subscription rights despite Section 18(d)'s prohibition. *See* Dkt. 16 at 19–21. Congress knew how to provide for the extension of expiration periods in the ICA where it meant to do so. *See, e.g.*, 15 U.S.C. § 80a-6(a)(2) (specifying the circumstances in which an expired exemption from the ICA may be extended or re-issued). And the absence of any such language in Section 18(d) confirms that Congress did not authorize similar extensions or re-issuances beyond the 120-day limit on subscription rights. *See, e.g., Simonoff v. Kaplan, Inc.*, 10-cv-2923 (LMM), 2010 WL 4823597, at *7 (S.D.N.Y. Nov. 29, 2010) (Where "Congress knows how to say something but chooses not to, its silence is controlling.").

All told, just like with other funds where Saba has successfully challenged ICA-offending defensive schemes, ASA cannot deploy "discriminatory provisions" or otherwise allow the fund to be run "the interest of" entrenched fund management rather than for benefit "all classes" of "security holders." 15 U.S.C. §§ 80a-1(b)(2), (3); *see Saba Capital CEF Opportunities I, Ltd v. Nuveen Floating Rate Income Fund*, 21-cv-327 (JPO), 2022 WL 493554, at *4, *6 (S.D.N.Y. Feb.

17, 2022), *aff'd*, 88 F.4th 103; *BlackRock*, 2024 WL 43344, at *6 & n.13; [1] *see also Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.*, 2084-cv-1533-BLS2, 2023 WL 1872102, at *8 (Mass. Super. Ct. Jan. 21, 2023).

Saba more than plausibly alleges violations of the ICA as needed to state a claim for relief. Saba has established as a matter of law that the Poison Pill violates the ICA's plain requirements and these clear statutory purposes. *See* 15 U.S.C. § 80a-18(d). Defendants' motion to dismiss should be denied.

STATEMENT OF FACTS

Defendants do not dispute any of the facts alleged in the Amended Complaint, which are also set forth in detail in Saba's recent motion for summary judgment. *See* Dkt. 21 at 5–10; Dkt. 16 at 4–8. Those allegations, briefly summarized again here, must be accepted as true and construed in Saba's favor for purposes of Defendants' motion to dismiss.

Plaintiff Saba Capital Management is a New York-based manager for certain investment funds, including Plaintiff Saba Capital Master Fund, Ltd. Am. Compl., Dkt. 12 ("Compl.") ¶ 7. Saba holds shares in ASA, a federally registered closed-end fund subject to the requirements of the ICA. Compl. ¶ 17; Dkt. 16 at 4–5 (describing attributes of closed-end funds). ASA trades at a chronic discount to its NAV. Compl. ¶ 33. In the last fiscal year, for instance, the fund traded, on average, at a rate more than 14% below NAV. *Id*. Recognizing the potential to improve the fund's performance—and thereby unlock value for all of ASA's shareholders—Saba acquired significant beneficial ownership interests throughout 2023. Compl. ¶¶ 21, 25; Dkt. 21 at 7 & n.10 (tracing

[1] An appeal of the *BlackRock* judgment by the defendant funds remains pending, and was submitted for review following argument on April 12, 2024. *See Saba Capital Master Fund, Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc.*, No. 23-08104 (2d Cir. 2023), Dkt. 101.

Saba's ownership stake increasing from 5.28% in June to 16.87% by the year's end).[2]

In view of Saba's increasing ownership, Defendants adopted the Poison Pill on December 31, 2023, with the express aim of discriminating against Saba and preventing its efforts to advocate for new fund governance and measures to increase shareholder value. Compl. ¶¶ 1, 20. Defendants' adoption of the Pill was a transparent attempt to entrench incumbent management. *See* Dkt. 21 at 8 (Defendants acknowledging the Pill was designed to prevent a Board takeover).

The Pill declares a dividend distribution of one "right" for each outstanding common share in the fund. Compl. ¶¶ 19, 39; Dkt. 19-5, Dec. 31, 2023 Rights Agmt. §§ 1, 3; Dkt. 19-8, Apr. 26, 2024 Rights Agmt. §§ 1, 3. After a shareholder acquires 15% or more of ASA's common shares (or a shareholder with pre-existing ownership of 15% or more acquires additional shares representing 0.25% of ASA's shares), each right allows for the acquisition of an additional common share in ASA at a purchase price of $1.00 per share. Compl. ¶ 19; Dkts. 19-5, 19-8. Any such "rights" held by an investor who has acquired "ownership of 15% or more of ASA's outstanding common shares," however, become "void." Dkts. 19-5, 19-6, 19-8, 19-9.

The Pill thus prevents Saba from increasing its ownership interest from its current holdings of 16.87% of ASA's outstanding shares without triggering the Poison Pill. Were Saba to do so, all other shareholders would be able to acquire additional shares, significantly diluting Saba's ownership. Compl. ¶ 21. The Pill issues subscription rights which thus deprive Saba of the opportunity to acquire shares on a ratable basis—that is, in a manner proportionate to its ownership

[2] Defendants' motion is littered with citations to materials outside the pleadings which may not be considered in deciding a motion to dismiss. *See Nakahata v. N.Y.-Presbyterian Healthcare Sys.*, 723 F.3d 192, 202 (2d Cir. 2013). Those citations, however, do not purport to contradict the well-pleaded allegations in Saba's Amended Complaint. Saba maintains that no genuine dispute of fact exists in this action, which presents a pure question of law and may be decided without the need for any discovery. *See* Dkt. 16 (Saba's motion for summary judgment).

stake. *See* Dkt. 16 at 5–7 (explaining the Pill's operation in additional detail). The Pill has remained continuously effective since December 31, 2023; it is now nominally set to expire on August 23, 2024. Compl. ¶ 6; Dkts. 19-5, 19-8.

Saba brought this action seeking to rescind the Poison Pill, a declaration regarding its unlawfulness, and an order enjoining Defendants from implementing or further extending the Pill. It filed a motion for summary judgment on May 24, *see* Dkt. 16; that same day, Defendants filed a motion to dismiss, *see* Dkt. 21, which Saba now opposes.

LEGAL STANDARD

"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. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A plaintiff is not required to provide 'detailed factual allegations' in the complaint, but must assert 'more than labels and conclusions.'" *Volkswagen Grp. Of Am., Inc. v. GPB Cap. Holdings, LLC*, 20-cv-1043 (AT), 2021 WL 431443, at *2 (S.D.N.Y. 2021) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The court must "accept[] all factual allegations in the complaint and draw[] all reasonable inferences in the plaintiff's favor." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

ARGUMENT

I. The Poison Pill Violates the ICA.

Saba establishes as a matter of law that rescission is mandatory because ASA's Poison Pill plainly violates Section 18(d) of the ICA, 15 U.S.C. § 80a-18(d). *See Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106–09 (2d Cir. 2019) (confirming private right of action under 15 U.S.C. § 80a-46(b)); *Nuveen*, 88 F.4th at 121 (affirming mandatory rescission of

provisions adopted in violation of ICA).[3] Saba also establishes as a matter of law that it is entitled to a declaratory judgment that the Poison Pill violates Section 18(d), and an order enjoining Defendants from implementing or further extending the Pill. *See* Dkt. 16 at 23–25 (collecting cases demonstrating that such relief amounts to "customary legal incidents" of rescission).

In relevant part, Section 23(b) of the ICA permits closed-end funds to issue subscription rights to sell common stock at a price below NAV, but only, as relevant here, where such issuance is "in accordance with the provisions of section 80a-18(d)." 15 U.S.C. § 23(b)(4). In turn, Section 18(d) provides:

> 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 to subscribe ***expiring not later than one hundred and twenty days after*** their issuance ***and issued exclusively and ratably*** to a class or classes of such company's security holders . . . .

15 U.S.C. § 80a-18(d) (emphases added).[4] This language is not complicated, and it is unambiguous. *See Hess v. Cohen & Slamowitz LLP*, 637 F.3d 117, 120 (2d Cir. 2011) (Where "called upon to interpret the meaning of a federal statute, [courts] look first to the language of the statute itself," and "[w]hen the language of [the] statute is unambiguous, judicial inquiry is complete."). The Amended Complaint more than plausibly alleges that the Poison Pill violates each of Section 18(d)'s requirements for the issuance of subscription rights—in fact, it establishes such claims as a matter of law, *see* Dkt. 16—because the Pill (A) issues rights on a non-ratable basis and (B) has remained continuously operative for a period greater than 120 days.

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[3] Although Defendants "reserve their rights" to appeal whether *Oxford* was correctly decided, they agree that *Oxford* is binding on this Court and accordingly "do not argue" in their present motion "that Saba lacks a private right of action for its rescission claim." *See* Dkt. 21 at 14 n.14.

[4] The ICA further permits such rights to be issued "in connection with a plan of reorganization." 15 U.S.C. § 80a-18(d). No party disputes that ASA underwent no such reorganization here.

A. The Poison Pill Issues Subscription Rights on a Non-Ratable Basis.

Defendants' Poison Pill violates simple, unambiguous language of the ICA which requires that any "right to subscribe to or purchase a security" from a regulated fund must be "issued exclusively and ***ratably***" to the fund's existing shareholders. 15 U.S.C. § 80a-18(d).

1. Defendants Admit the Pill's Subscription Rights Are Not Ratable.

Defendants' own admissions confirm their violation of the ICA. Defendants recognize that "the unambiguous meaning of the term 'ratably' is '[p]roportionate[ly]'" Dkt. 21 at 14 (quoting Ratable, BLACK'S LAW DICTIONARY (2d ed.); *see also Ratable*, MERRIAM WEBSTER (11th ed. 2003) ("made or calculated according to a proportionate rate, *i.e. pro rata*"). And Defendants do not dispute that—***by design***—the Pill grants rights to some shareholders (those owning <15% of ASA's shares) while denying those same rights to others (those owning >15% of ASA's shares). *See* Dkt. 21 at 8–9. Nor could they. In public statements made both at the time the Pill was adopted and extended, ASA openly ***celebrated*** that the Pill prevented Saba from acquiring additional shares. *See* Compl. ¶ 20; Dkt. 19-6, ASA Press Release (Jan. 2, 2024); Dkt. 19-9, ASA Press Release (Apr. 29, 2024).

Defendants thus admit that the rights to acquire additional shares contemplated by the Poison Pill are non-ratable, as shareholders like Saba are prevented from exercising such rights in a manner proportionate to their ownership stake in ASA. *See* Dkt. 21 at 9 (acknowledging that Saba, unlike shareholders with <15% ownership, may not "exercise or transfer [its] rights" where it acquires 0.25% of outstanding common shares). The Court's analysis can and should end here. *See Nat'l Assn of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 127 (2018) (where statutory language is "unambiguous," the "inquiry begins with the statutory text and ends there as well").

2. The Pill's Subscription Rights Are, By Design and Even at Issuance, Not Ratable.

Defendants' hyper-technical argument that subscription rights which are voided in practice

are nevertheless "issued" ratably on paper at the outset, *see* Dkt. 21 at 14–16, is wholly without merit.

The Pill, necessarily and by design, deprives shareholders of ratable subscription rights proportionate to their ownership stake in the fund. The subscription rights offered by the Pill come into effect only ***after*** a shareholder crosses the 15% threshold, or one with a pre-existing 15% ownership acquires additional shares amounting to 0.25% of ASA. *See* Dkts. 19-5, 19-8 §§ 1, 3. That means the Pill's subscription rights are, necessarily and by design, ***unavailable*** to any shareholder (Saba or otherwise) who accumulates a large enough stake to actually trigger the Pill and give effect to the subscription rights it supposedly provides. Thus, even at issuance, the subscription rights provided by the Pill are not and cannot ever be "ratable." The essential purpose and operation of the Pill is to provide subscription rights that come into effect only when they are ***void*** as to certain shareholders and ***cannot*** actually be exercised by those shareholders—*i.e.*, when those rights are ***not ratable*** among the shareholders.

In *Nuveen*, the Second Circuit recently rejected a similar effort by entrenched fund management to elevate form over substance, and this Court should likewise reject Defendants' hollow reading of Section 18(d) with ease. There, the Circuit considered whether "Control Share Provisions" violate the ICA's equal-voting-rights mandate. *See* 88 F.4th at 117. Pursuant to such Provisions, shareholders lost the ability to vote their shares when they acquired ownership of more than 10% of a fund's outstanding shares (unless the shareholder undertakes a costly, labyrinthine, and inevitably futile process of seeking to reinstate such voting rights). *See id*. at 109. And the Nuveen funds' Provisions, much like Defendants' Poison Pill, were adopted to prevent Saba and other shareholders who might try to unseat incumbent management from acquiring a greater ownership stake in the defendant funds. Saba sued for rescission based upon a violation of Section

18(i) of the ICA, which requires that stock "issued" be voting stock with equal voting rights, akin to Section 18(d)'s requirement that subscription rights "issued" by a regulated fund be "ratable." *See id.*; *compare* 15 U.S.C. § 80a-18(i), *with id.* § 80a-18(d).

Much like Defendants here, the defendant funds in *Nuveen* advanced the hyper-technical argument that their Control Share Provisions complied with the ICA because shareholders' voting rights technically were equal at the time they were issued. The Second Circuit disagreed. The "issuance" of voting rights which could not be exercised in practice was tantamount to the issuance of no rights at all, and such rights thus were not "equal." *See Nuveen*, 88 F.4th at 117 ("A single share acquired by an investor owning 1% of a Nuveen fund's outstanding shares can be voted, but a single share acquired by an investor taking her to 10% ownership could not."); *accord Nuveen*, 2022 WL 493554, at *2, *4. So too here, Defendants' issuance of subscription rights that, by design, cannot be exercised by shareholders owning more than 15% of ASA's shares is tantamount to the issuance of no rights at all, and such rights thus are not "ratable."

For much the same reason, the Court should reject Defendants' attempt to overread the provisions of Section 23(b) to mean that "the issuance of a right or warrant" must always be considered "distinct from its exercise." *Contra* Dkt. 21 at 15. Far from providing any carveout from Section 18(d)'s commands, Section 23(b) simply provides, as relevant here, that a regulated fund may issue rights to acquire stock below NAV ***so long as*** such issuance is "in accordance with the provisions of section 80a-18(d)." 15 U.S.C. § 80a-23(b)(4). And as already discussed, § 18(d)—much like § 18(i)—does not bless a nominal "issuance" of rights that can never actually be exercised. Or, put differently, subscription rights that—by design—are ***never*** actually available to the entire class of shareholders are not ratable as to that class of shareholders, even at issuance. *See supra* at 9–10; Dkts. 19-5 §§ 1, 3; 19-8 §§1, 3. As the SEC staff has long recognized, it would

make a mockery of the ICA if funds were able to purportedly give shareholders federally-protected rights at issuance, only to turn around and deprive shareholders of their ability to exercise those rights in practice. *See Boulder*, 2010 WL 4630835, at *7 n.31 ("[W]e believe that this is a continuous requirement; any other interpretation would render the provision meaningless, as investment companies might, for example, issue stock with voting rights that expire shortly after issuance.").

3. Congress Provided Investment Company Shareholders Greater Protections Under the ICA than Were Often Available Under State Law.

Defendants note that anti-takeover provisions like poison pills are in some circumstances upheld under ***state law***, *see* Dkt. 21 at 11–13 & n.12, but those state law decisions have no bearing on the interpretation or application of ***federal*** shareholder rights, and cannot justify Defendants' violation of the ratable subscription rights plainly guaranteed to shareholders by the ICA.

Once again, Defendants' arguments are foreclosed by *Nuveen*. There, the Second Circuit rejected the argument that state law permitting the defensive mechanisms at issue there had any bearing on its reading of Section 18(i). *See* 88 F.4th at 118 (observing that *Providence & Worcester Co. v. Baker*, 378 A.2d 121, 122–24 (Del. 1977), "was concerned only with whether a certificate of incorporation's provisions resembling Nuveen's Amendment were permissible under *state* law," "did not recognize a freestanding and universal share-shareholder distinction applicable beyond the laws of Delaware," and "must be read within the context of state law"). Because "Nuveen [did] not point to a similar provision of the ICA expressly allowing" the Control Share Provisions, the Circuit found reliance on state law permitting the same to be inapt. *Id*. at 118–19.

The same logic applies with equal force here. Defendants' many citations to decisions permitting poison pills under ***state*** law—in fact, the very same state law decisions considered and

rejected by the Second Circuit in *Nuveen,*[5] 88 F.4th at 118–19; *see also Nuveen*, Br. for Appellant, 2022 WL 2179666, at *29–30, 46–51 (defendant funds unsuccessfully citing the same cases)—do not and cannot justify deviating from Section 18(d)'s plain command that subscription rights be issued ratably.

The *Nuveen* court's refusal to countenance state law regimes less protective of shareholder rights when interpreting the ICA's more robust shareholder protections flows directly from the text, policies, and purposes of the ICA itself. In enacting the ICA, Congress expressly codified its recognition that its protections were necessary given that it was "difficult, if not impossible, [for] effective State regulation of such companies in the interest of investors." 15 U.S.C. § 80a-1(a)(5). In full view of state law regimes at the time, "Congress passed the ICA 'to provide a comprehensive regulatory scheme to correct and prevent certain abusive practices in the management of investment companies for the protection of persons who put up money to be invested by such companies [on] their behalf,' i.e., the shareholders." *Nuveen*, 88 F.4th at 120 (quoting *Indep. Inv. Protective League v. Sec. & Exch. Comm'n*, 495 F.2d 311, 312 (2d Cir. 1974)); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts "assume that Congress is aware of existing law when it passes legislation"). The ICA was adopted, in other words, to fill legal interstices for the protection of shareholders faced with the powerful insider interests of entrenched fund management and rampant corporate abuse. *See Option Advisory Serv.*, 668 F.2d at 121 ("The purpose of the Act is to remedy certain abusive practices in the management of

[5] *See* Dkt. 16 at 2, 11–13 & n.12 (citing *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 97 (Del. Ch. 2011) (Delaware law); *Harv. Indus. v. Tyson*, 86-cv-74639 (DT), 1986 WL 36295, at *2 (E.D. Mich. Nov. 25, 1986) (Michigan law); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1076 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985) (Delaware law); *Realty Acquisition Corp. v. Prop. Tr. of Am.*, CIV-JH-89-2503, 1989 WL 214477, at *2 (D. Md. Oct. 27, 1989) (Maryland law); *Dyanmics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 718 (7th Cir. 1986) (Indiana law)).

investment companies, for protection of persons whose money is invested by such companies."); *see also Reeves v. Continental Equities Corp.*, 912 F.2d 37, 41 (2d Cir. 1990) ("[T]he legislative history and case law indicates that the ICA was enacted for the benefit of investors, and not employees of investment companies.").

At bottom, it is irrelevant that state law—generally applicable to corporate entities in the state, not specific to investment companies—may tolerate poison pills in certain circumstances. In the ICA, Congress enacted a regime specific to investment companies designed to combat such incumbent-protecting behavior, and that is expressly more protective of shareholders' ratable subscription rights. *See Nuveen*, 88 F.4th at 120 ("These corrections were 'enacted for the benefit of investors,' not fund insiders, and passed primarily to 'correct the abuses of self-dealing,' which led to the 'wholesale victimizing' of shareholders from 'fantastic abuse[s] of trust by investment company management.'"); *see also Mathers Fund, Inc. v. Colwell Co.*, 564 F.2d 780, 783 (7th Cir. 1977) (the Act's intention was "to protect against self-dealing" by regulated funds); *Herpich v. Wallace*, 430 F.2d 792, 815–16 (5th Cir. 1970) (same).

4. Defendants' Lone Authority Has Been Discredited by the Second Circuit.

Defendants' only remaining support for arguing that Saba fails to state a claim that the Pill issues rights non-ratably is a single, twenty-year-old, out-of-Circuit district court opinion already discredited by the Second Circuit. *See* Dkt. 21 at 18–23. For the reasons Saba articulated in its motion for summary judgment, the reasoning of *Neuberger I* should be rejected. *See* Dkt. 16 at 11–17. As an out-of-Circuit district court opinion, it is "obviously not binding" on this Court. *See City of Providence, Rhode Island v. Bats Glob. Markets, Inc.*, 14-cv-2811 (JMF), 2022 WL 3018090, at *2 (S.D.N.Y. July 29, 2022). And because *Neuberger I* centered on a "share-shareholder" distinction—the misguided notion that a poison pill is permissible as merely a

restriction on ***shareholders***, rather than one on ***shares***—that has now been discredited by *Nuveen*, *see* 88 F.4th at 118–20, Defendants' reliance on that case is entirely without merit.

In *Neuberger I*, a poison pill adopted by the defendant fund created a subscription "right" for each outstanding share of common stock, enabling the purchase of additional shares at par value after any investor obtained ownership of 11% of the fund's shares. *See* 342 F. Supp. 2d at 374. All purchasing rights attached to shares held by an investor who crossed the 11% ownership mark, however, immediately became void. *See id*. The Maryland district court reasoned that this did not violate Section 18(d) because "[o]ne right is attached to each share," and a "voluntary act of a shareholder to acquire holdings above the poison pill trigger does not violate § 18(d)'s requirement that rights be issued *ratably*." *Id*. at 375. In crediting the share-shareholder distinction, the *Neuberger I* relied exclusively on decades-old opinions decided under state law. *Id*. (citing state law decisions upholding poison pills).

In this Circuit, after *Nuveen*, the "share-shareholder distinction"—which underpins the *Neuberger I* court's interpretation of Section 18(d)—is dead letter. *Nuveen*, 88 F.4th at 118–20; *see also Boulder*, 2010 WL 4630835, at *11 nn. 42, 45 (noting the "share/shareholder distinction" recognized under the laws of certain states, and the "freedom traditionally afforded corporate management under state law," but concluding that Congress "determined to regulate investment companies differently"). The *Nuveen* court concluded that any "share-shareholder distinction does not carry the day," reasoning that, to the extent a regulated fund "harms its shareholders by encumbering the shares they own . . . any distinction between the two is immaterial." *Id*. at 119–20. And, indeed, in finding that the share-shareholder distinction was an empty one, the Second Circuit specifically considered the very same state law decisions relied upon by *Neuberger I*—and cited again by Defendants here, *see supra* note 5—and flatly ***rejected*** their applicability to the ICA.

See Nuveen, 88 F.4th at 118–19. One way or another, the court made clear that a fund's differential provision of rights based on the identity of the shareholder is not permissible under the ICA. *See Nuveen*, 88 F.4th at 117 (ICA did not tolerate scheme in which "[a] single share acquired by an investor owning 1% of a Nuveen fund's outstanding shares can be voted, but a single share acquired by an investor taking her to 10% ownership could not").

The Second Circuit's rejection of the share/shareholder distinction for purposes of interpreting and applying the ICA's shareholder-protective provisions reflects the consensus view since *Neuberger I* was (incorrectly) decided. Earlier in the *Nuveen* litigation, for instance, Judge Oetken explained he was "unconvinced" by the argument that Control Share Provisions were permissible because they stripped "rights from *shareholders* but not from *shares*." *Nuveen*, 2022 WL 493554, at *4. Finding any such distinction to be "meaningless" based upon the structure and purpose of the ICA, Judge Oetken found it "irrelevant" that "a control shareholder can transfer some of her stock to a different holder, who can vote the stock without restriction if his newly acquired stock" did not put him over the 10% ownership threshold. *Id.* "Any interpretation of Section 18(i) that envisages personal discrimination against an investment company shareholder would be flatly inconsistent with the purposes of Section 18(i)." *Id*. (quoting *Boulder*, 2010 WL 4630835, at *11, similarly rejecting any distinction between stripping rights from shares and shareholders); *see also BlackRock*, 2024 WL 43344, at *6; *Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.*, 2084-cv-1533-BLS2, 2021 WL 2785120, at *6 (Mass. Super. Ct. Apr. 7, 2021). These authorities confirm that *Neuberger I*, and the share-shareholder distinction on which it is premised, cannot save Defendants' Poison Pill.

Especially after *Nuveen*, nothing in *Neuberger I* helps Defendants to escape the reality that their Poison Pill denies shareholders the ratable subscription rights to which they are entitled under

the ICA. An investor owning less than 15% of ASA is given rights to acquire additional shares, while one owning 15% or more of ASA is not. Just as Saba's "equal voting rights" guaranteed by Section 18(i) of the ICA were denied by the Control Share Provisions in *Nuveen*, *BlackRock*, and *Eaton Vance*, its ratable rights to acquire shares—on a basis "ratabl[e]" to its ownership, as guaranteed by Section 18(d)—are denied by the Poison Pill here.

B. The Poison Pill Has Been Continuously Effective for More than 120 Days.

Defendants' Poison Pill also violates Section 18(d)'s plain-text prohibition that subscription rights may not be issued by regulated funds "except in the form of warrants or rights to subscribe expiring ***not later than one hundred twenty days after*** their issuance." 15 U.S.C. § 80a-18(d).

Contrary to the ICA's 120-day limit, Defendants' Poison Pill will be in continuous operation for *at least* 236 consecutive days. Defendants issued the Poison Pill on December 31, 2023, and it has remained in continuous effect since that date; it is now nominally set to expire on August 23, 2024 if not further extended. Compl. ¶¶ 6, 18, 28; Dkt. 19-8 § 1(s). And because the Pill was extended on April 26, ***before*** it was set to expire on April 29, there has never been even a moment since its adoption when Saba has not been denied equal, ratable subscription rights. *Id.* This violates both a plain-text reading of Section 18(d)'s time limitation and Congress's stated purposes in the ICA to protect shareholders against entrenchment measures designed to prop up incumbent fund managers. *See, e.g.,* 15 U.S.C. § 80a-1; *Indep. Inv. Protective League*, 495 F.2d at 312; *Option Advisory Serv.*, 668 F.2d at 121.

1. Defendants' Lone Authority for Successive Issuances Failed to Resolve Statutory Ambiguity According to the ICA's Policies and Purposes.

Neuberger II offers no authority compelling the Court to disregard the plain text of Section 18(d)'s maximum duration period. *Contra* Dkt. 21 at 19–20; *see* Dkt. 16 at 19–21. Even setting

aside that it is a decades-old, out-of-Circuit decision, that court purported to identify ambiguity as to whether the language prohibiting subscription rights extending beyond 120 days permitted successive subscription issuances. *See* 485 F. Supp. 2d at 638 (analogizing to another case, reasoning that it was "***not an impossible reading*** of the 120 day limitation in 18(d) to interpret the statutory language as unconcerned with the *number* of poison pills, but rather, as the language suggests, only with the *duration* of any particular pill") (internal quotation marks omitted). Accordingly, it looked to the ICA's purposes to resolve the supposedly identified ambiguity. *Id*.

But even if this Court were to find any ambiguity about whether Section 18(d) somehow allows for the successive issuance of defensive mechanisms like the Poison Pill on an *ad seriatim* basis ***beyond*** 120 days, it would be bound to resolve such ambiguity in Saba's favor given the Second Circuit's articulation of the ICA's purposes. *See United States v. Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 720 (1975) (courts "must interpret the Investment Company Act in a manner most conducive to the effectuation of its goals"). *Nuveen*—like a half-dozen decisions of the Second Circuit before, *see* Dkt. 16 at 17–18 (collecting cases)—instructs that the statute was enacted to prevent "abusive practices in the management of investment companies" for "***the benefit of investors, not fund insiders***." 88 F.4th at 120 (internal citation omitted). Guided by those purposes as elucidated by the Court of Appeals, this Court cannot follow *Neuberger II*'s erroneous holding here.

2. Congress Knew How to Provide for Extensions in the ICA When It Meant to Do So.

Defendants' position that Section 18(d) tolerates *ad seriatum* extensions of its Poison Pill is further undermined by the fact that, elsewhere in the ICA, Congress expressly provided when regulated funds could extend expiring terms notwithstanding a defined statutory limit.

In Section 6 of the Act, for instance, investment companies are "exempt[e]d from the

provisions" of the ICA, provided that they make a filing with the Federal Savings and Loan Insurance Corporation certifying certain conditions are met in the public interest. 15 U.S.C. § 80a-6(a)(2). The statute then specifies that "[a]ny such writing shall expire . . . two years after the date of its filing," and goes on to provide: "but ***said corporation may, nevertheless, before, at, or after the expiration of*** any such writing ***file another*** writing or writings with respect to such issuer." *Id*.

Notably, ***no such language appears in Section 18(d)***, which says only that "warrants or rights to subscribe" are prohibited "except" where they "expir[e] not later than one hundred and twenty days after their issuance and [are] issued exclusively and ratable to a class or classes of such company's security holders." 15 U.S.C. § 80a-18(d).

Read alongside Section 6, the whole-text canon of statutory interpretation (also referred to as the canon of "meaningful variation") makes clear that Section 18(d) cannot be interpreted to provide for extensions beyond the proscribed 120-day period. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012). Congress knew how to provide for an extension where it wanted, and did not do so in Section 18(d). "[W]hen Congress includes particular language in one section of a statute but omits it in other section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Papagno*, 639 F.3d 1093, 1099 (D.C. Cir. 2011) (citing *Kucana v. Holder*, 558 U.S. 233, 249 (2010)); *see also Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 185 (2022) (looking to how "nearby statutory provisions" used a phrase); *United States v. Pate*, 84 F.4th 1196, 1202 (11th Cir. 2023) (same). Put differently: If "Congress knows how to say something but chooses not to, its silence is controlling." *Simonoff*, 2010 WL 4823597, at *7. Here, Congress left little doubt that it knew how to provide for permissible extensions of statutory expiration dates when it intended to do so. *See* 15 U.S.C. § 80a-6(a)(2).

The absence of such a provision in Section 18(d) is thus "controlling" and makes plain that the proscribed 120-day period is to be interpreted—contrary to Defendants' reading—as absolute, without the possibility for *ad seriatim* extension.

If it reaches the question, the Court should therefore find that the Poison Pill also violates Section 18(d) by issuing subscription rights extending beyond 120 days—at, at minimum, Saba has plausibly alleged as much, meaning Defendants' motion to dismiss must be denied. *See SEC v. Imperiali, Inc.*, 12-80021-cv, 2013 WL 12080193, at *6 (S.D. Fla. Sept. 25, 2013), *report and recommendation adopted*, No. 12-cv-80021, 2013 WL 12080173, *aff'd*, 594 F. App'x 957 (11th Cir. 2014) (granting summary judgment on a Section 18(d) claim where defendants "failed to offer any evidence to refute" that shares were issued without an expiration date within 120 days of issuance); *see also SEC v. Sloan*, 436 U.S. 103, 111–12 (1978) (rejecting notion that repeatedly reissued trade suspensions did not violate an analogous statute, which permitted such suspensions "for a period not exceeding ten days").

C. The ICA's Policies and Purposes Require Interpreting and Applying Section 18(d) in Saba's Favor.

While the motion to dismiss does not argue that the ICA's plain terms are ambiguous, *see* Dkt. 21 at 17 (Defendants arguing the statute is "unambiguous"), to the extent the Court finds that Section 18(d), or its application to ASA's Poison Pill, is in any way ambiguous, the Court must interpret the statute to further "Congress's policy considerations," which "lean in Saba's favor." *Nuveen*, 88 F.4th at 120; *see* Dkt. 16 at 17–18 (articulating these purposes in detail).

Congress specifically "instructed courts to interpret the statute with its 'policy and purposes' section in mind—Section 1(b) mandates that 'the provisions of [the ICA] shall be interpreted' 'in accordance with' its stated policies." *Nuveen*, 88 F.4th at 120 (quoting 15 U.S.C. § 80a-1(b)); *see Nat'l Ass'n of Securities Dealers*, 422 U.S. at 720; *Chabot v. Empire Trust Co.*,

301 F.2d 458, 461–62 (2d Cir. 1962) ("Section 1 of the [ICA] . . . instructs the courts to interpret the provisions of the act in a manner that will 'mitigate, and, so far as is feasible, . . . eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.'" (quoting 15 U.S.C. § 80a-1)). "Congress passed the ICA 'to provide a comprehensive regulatory scheme to correct and prevent certain ***abusive practices in the management*** of investment companies for the ***protection of persons who put up money to be invested*** by such companies [on] their behalf,' *i.e.*, the shareholders." *Nuveen*, 88 F.4th at 120 (quoting *Indep. Inv. Protective League*, 495 F.2d at 312). These purposes have been recognized and reaffirmed over several decades by Courts of Appeals throughout the nation. *See, e.g., Option Advisory Serv.*, 668 F.2d at 121; *Mathers Fund,* 564 F.2d at 783; *Herpich*, 430 F.2d at 815–16.

Just as in *Nuveen*, Saba seeks to vindicate these policy purposes of protecting shareholders against defensive schemes employed by fund insiders. *See* 88 F.4th at 120. Because the ICA was "***enacted for the benefit of investors***," like Saba, and "***not fund insiders***," like ASA's trustees, this action seeks to vindicate the ICA's purpose to prevent a regulated fund from being "organized, operated, and managed" in the interest of its "directors, officers, investment advisers, depositors, or other affiliated persons thereof." *Id.* (citing 15 U.S.C. § 80a-1(b)(2)).

II. Saba Establishes Claims Against the Individual Defendants

Saba has also established claims against the Individual Defendants to declare the illegality of their conduct, and to prohibit their implementation or further extension of the Pill in the future. *See Nuveen*, 88 F.4th at 116 n.11 (describing Saba's causes of action "for rescission and a declaratory judgment" as "forward-looking, injunctive relief to prevent [] harm from occurring"); *Transamerica Mortgage Advisors (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979) ("[T]he customary legal incidents of voidness . . . include the availability of a suit for rescission ***or for an injunction***

against continued operation of the contract."); *Oxford*, 933 F.3d at 107 (relying on *TAMA* in finding a private right of action under § 80a-46(b)).

Defendants argue, in terse and conclusory fashion, that Saba's claims against the Individual Defendants are somehow wholly "unrelated" to its allegations that the Poison Pill violates the ICA. *Id*. Nonsense. Rejecting a substantively identical argument made by other scofflaw investment company directors, Judge Rakoff had little difficulty finding that Saba appropriately sought declaratory and injunctive relief against "the individual trustees [who] participated in [the] adoption of" the ICA-offending provisions at issue. *BlackRock*, 2024 WL 43344, at *6. Citing to Rule 20's permissive standard for joinder, he reasoned that, because the complaint "states a claim against the funds and the individual trustees alike for the same conduct," Saba had appropriately stated causes of action for relief against the individual trustees as well. *Id*. (citing FED. R. CIV. P. 20(a)(2) ("Persons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.")). That logic also accords with prior cases granting injunctions against individual defendants in cases brought under the ICA by the SEC. *See SEC v. S&P Nat. Corp.*, 360 F.2d 741, 743, 753 (2d Cir. 1966); *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 42 (S.D.N.Y. 1968); *see also SEC v. Advance Growth Cap. Corp.*, 470 F.2d 40, 54–55 (7th Cir. 1972); *SEC v. Midland Basic, Inc.*, 283 F. Supp. 609, 619 (D. S.D. 1968).

To justify dismissal of the Individual Defendants, the motion to dismiss again cites only the *Neuberger I*. *See* Dkt. 16 at 15–17. But—even setting aside that the case has been discredited by the Second Circuit, *see supra* at § I(A)(4)—that decision says absolutely nothing about dismissal of any claims against the individual named trustees. *See* 342 F. Supp. 2d at 372. Indeed,

because only the defendant ***trusts*** there brought counterclaims seeking declaratory judgment, the question of whether claims were stated against the individual defendants was never raised. *See id*. The case thus offers no support for dismissing claims against the Individual Defendants.

This Court should reject the Individual Defendants' attempt to escape being held accountable for their role in adopting and implementing ASA's unlawful Poison Pill. Saba is of course entitled to seek declaratory relief against the directors, both current and former, who were the individuals responsible for adopting and implementing ASA's unlawful Poison Pill. And Saba is entitled to seek injunctive relief against the Individual Defendants to prevent them from further extending or readopting the offending Poison Pill in the future. Each form of relief, moreover, will put investment company directors on notice that adoption of non-ratable subscription rights via poison pills designed to further entrenchment of fund insiders runs contrary to the ICA's "comprehensive regulatory scheme to correct and ***prevent*** [] abusive practices in the management of investment companies" for the "***protection*** of" their shareholders. *Indep. Inv. Protective League*, 495 F.2d at 312. Saba appropriately seeks declaratory relief against, and an injunction to enjoin, the Individual Defendants from denying ratable subscription rights by implementing or further extending the Poison Pill.

CONCLUSION

The Poison Pill deprives ASA's shareholders of ratable subscription rights and has extended beyond the 120-day maximum duration period, in plain violation of ICA Section 18(d). Given the absence of any factual disputes and purely legal issues to be resolved, this Court can and should, as a matter of law, grant Saba's requests for rescission of the Pill, a declaratory judgment that the Pill violates the ICA and is void, and an injunction enjoining Defendants from implementing or further extending the operation of the Pill. At minimum, Saba has more than

plausibly alleged claims for relief from Defendants' unlawful conduct under the ICA. The motion to dismiss should be denied.

Dated: June 24, 2024

/s/ Mark Musico
Jacob W. Buchdahl
Mark Musico
Zach Fields
SUSMAN GODFREY LLP
One Manhattan West, 50th Floor
New York, NY 10001
Tel: 212-336-8330
jbuchdahl@susmangodfrey.com
mmusico@susmangodfrey.com
zfields@susmangodfrey.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ Zach Fields
Zach Fields