UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABA CAPITAL MASTER FUND, LTD., Plaintiff, v. BLACKROCK ESG CAPITAL ALLOCATION TRUST, et al., Defendants.	No. 1:24-cv-01701-MMG

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In this action, Plaintiff Saba Capital Master Fund, Ltd. ("Saba") seeks an unprecedented interpretation of the Investment Company Act of 1940 (the "1940 Act") that would have sweeping effects across the closed-end fund ("CEF") industry, improperly federalize decades of state law regarding corporate internal affairs, and risk leaving millions of retail investors vulnerable to modern-day corporate raiders. This Court should decline that invitation. Saba's claims lack any basis in the 1940 Act's text, structure, or purposes, and they are independently barred by res judicata, laches, and the one-year statute of limitations that applies to claims, like these, brought pursuant to Section 47(b) of the 1940 Act's implied private right of action.

Defendant BlackRock ESG Capital Allocation Term Trust ("ECAT") is a listed CEF organized as a statutory trust under Maryland law. Maryland law provides that unless a statutory trust's governing documents provide differently, any act requiring shareholder approval, which includes the election of trustees, requires the affirmative vote of all the votes entitled to be cast on the matter. ECAT's bylaws (the "Bylaws") contain a provision that requires a majority of outstanding shares to elect trustees in a contested election (the "Majority Vote Bylaw"). Many CEFs have similar bylaw provisions in place. The Majority Vote Bylaw has been in the Bylaws since ECAT's inception, and was in place long before Saba purchased its shares.

Saba is an activist hedge fund that buys concentrated stakes in CEFs and then uses its outsized influence to cause those CEFs to take actions that would result in a short-term gain for itself at the expense of shareholders, many of them retail investors, with far longer term investment horizons. In recent years, Saba has used litigation as a tool to support its activist campaigns, advocating for novel and increasingly expansive interpretations of the 1940 Act that would further its arbitrage strategy.

This case is another iteration of that tactic. Saba claims that the Majority Vote Bylaw violates Section 16(a) and Section 18(i) of the 1940 Act and should be rescinded. However, neither Section 16(a) nor Section 18(i) says anything about the voting standard to be applied in director[1] elections, despite the fact that Congress clearly knew how to impose voting standards in appropriate contexts: other provisions of the 1940 Act expressly specify that a particular voting standard must apply in certain scenarios. And despite Saba's assertions that some of ECAT's directors were never "elected," all of the Trustee Defendants have been elected by ECAT's shareholders in accordance with Section 16(a). In addition, Section 18(i) generally provides that every share must enjoy equal voting rights unless otherwise required by law, and indeed, all ECAT shares have exactly the same right to vote for directors under the Majority Vote Bylaw. Saba's attempt to manufacture a 1940 Act claim based on the Majority Vote Bylaw has no basis in the statutory text, structure or purposes, and Saba's claims should accordingly be dismissed.

Furthermore, Saba's claims are independently barred by the statute of limitations, laches, and res judicata. The statute of limitations applicable to Section 47(b) claims for rescission under the 1940 Act is one year. Saba had full notice of the Majority Vote Bylaw's existence, along with every other fact necessary to bring its claims, as early as May 28, 2021—and certainly no later than March 28, 2022, when Saba first purchased shares in ECAT. Indeed, Saba had previously argued that a similar bylaw at an unrelated CEF violated the 1940 Act as early as August 2020, and challenged a similar bylaw at a different BlackRock-advised CEF on state-law grounds in 2019. Although Saba's claims accrued no later than March 28, 2022, Saba waited until March 6, 2024 to bring these claims. Thus, Saba's claims are barred by the statute of limitations.

[1] Under 15 U.S.C. 80a-2(a)(12), "director" is defined to include trustees. For the sake of clarity, this brief refers to ECAT's trustees as "directors."

Saba's claims also are barred by laches, because Saba delayed bringing these claims for years, with no excuse and to ECAT's prejudice. Nothing prevented Saba from raising these claims against ECAT long ago, and Saba's unjustifiable delay means that ECAT is now forced to defend against these claims on an expedited basis with only months remaining before its 2024 annual shareholder meeting (the "2024 Meeting"). Saba has launched a proxy contest to try to take over a majority of the seats on ECAT's board of directors (the "Board") at the 2024 Meeting.

Finally, Saba's claims are barred by res judicata. Saba previously brought an action against these Defendants seeking rescission on 1940 Act grounds of a different provision of the Bylaws relating to shareholder voting and was awarded a final judgment on the merits. Saba could have challenged the Majority Vote Bylaw in that action, as it has in litigation against other CEFs, but it elected not to. Res judicata is designed to prevent precisely this type of serial, piecemeal litigation.

At their core, Saba's arguments amount to nothing more than a self-serving play by an activist investor to make it easier to win its proxy contest against a CEF. Saba's reasons for wanting a more activist-friendly voting standard are clear, but nothing in the 1940 Act requires it. For all of these reasons, this action should be dismissed with prejudice.

BACKGROUND[2]

I. Registered Closed-End Funds and the Investment Company Act of 1940.

The primary difference between a listed CEF such as ECAT and an "open-end" fund (commonly known as a mutual fund) is that a CEF issues a fixed number of shares during an initial

[2] At the motion-to-dismiss stage, this Court may consider the "facts stated on the face of the complaint, documents appended to the complaint or incorporated in the complaint by reference, . . . matters of which judicial notice may be taken," and materials "integral" to the complaint. *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (cleaned up). This includes "legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

public offering, the shares trade in the secondary market on a stock exchange, and a CEF generally does not buy back (*i.e.*, redeem) shares from investors on a regular basis or on investors' demand. *Green v. Nuveen Advisory Corp.*, 295 F.3d 738, 740 n.1 (7th Cir. 2002). Because CEFs do not need to keep cash available for share redemptions, they are able to invest in a wider array of less-liquid and longer-term assets to seek higher returns over time. *See Saba Capital CEF Opps. 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 108 (2d Cir. 2023) (hereinafter, "*Nuveen*"). As such, CEFs are designed primarily to buy and hold assets that generate income for long-term investors seeking steady distributions.

The current net asset value ("NAV") of a CEF's underlying portfolio is calculated on a regular basis. However, the market price of the CEF's shares can fluctuate based on several factors, including market and investor sentiment, and as a result, "closed-end funds can trade at prices significantly below or above their NAV per share." *Nuveen*, 88 F.4th at 108. A CEF trading at a share price lower than its NAV per share is said to trade at a discount. Industry reports indicate that CEFs generally trade at a discount to NAV, and on average three-quarters of all CEFs trade at a discount in any given month. *See, e.g.*, Investment Company Institute, *Closed-End Fund Activism* (Oct. 2023), https://www.ici.org/system/files/2023-10/23-cef-activism.pdf. Although the presence of an NAV discount is not necessarily negative from the perspective of a CEF shareholder with a long-term investment horizon—because a significant contributor to investor returns is the generally higher and more consistent distributions that CEFs make to shareholders as compared to mutual funds—the NAV discount creates a short-term arbitrage opportunity for activist investors who do not share other shareholders' long-term goals.

CEFs are subject to the 1940 Act, which was enacted after the stock market crash of 1929 as part of a comprehensive effort to "eliminate certain abuses in the securities industry," *SEC v.*

Cap. Gains Rsch. Bureau, 375 U.S. 180, 186 (1963), and was informed by a congressionally ordered study by the SEC, *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 53 (1977); *see also* Report on Inv. Trusts & Inv. Cos., H.R. Doc. No. 707, 75th Cong., 3d Sess. (1939) ("SEC Report I"); H.R. Doc. No. 70, 76th Cong., 1st Sess. (1939) ("SEC Report II"); H.R. Doc. No. 279, 76th Cong., 1st Sess. (1940) ("SEC Report III"). After the 1929 crash, CEFs' shares traded at large discounts to NAV, and certain investors exploited the situation. *See* SEC Report III at 1019–21. In one common tactic, an investor would first gain control of a CEF by acquiring between 10% and 30% of its now-discounted shares. *Id.* at 1021–22; SEC Report II at 363, 365. The investor would use its concentrated position to influence the CEF's investment policies in its own self-interest, and then sell its shares for a quick profit. SEC Report III at 1019–22. These actions conflicted with the interests of non-concentrated, long-term shareholders, who were then left with depleted, unrecognizable investments. *Id.* But due to long-term shareholders' smaller holdings and dispersed nature, they generally were unable to fight back. *Id.* at 1024, 1026. The SEC expressed concern about the actions of concentrated investors, which it called "affiliated interests," SEC Report II at 403 n.69, noting that concentrated investors were as responsible as conflicted fund managers for "the development and continuance of abuses" that led to passage of the 1940 Act. SEC Report III at 32.

Accordingly, the policy purposes of the 1940 Act include ensuring that CEFs are operated in the interest of all shareholders and preventing the potentially negative effects of concentrated ownership. *Collins*, 432 U.S. at 53. When Congress enacted the 1940 Act, one of its motivating concerns was that "[i]nvestors are adversely affected . . . when the control of investment companies is unduly concentrated" and investment companies are controlled by "an affiliated person," defined

to mean those owning 5% or more of the company's shares.[3] 15 U.S.C. §§ 80a-1(b)(2), (4), 80a-2(a)(3). Congress required that the 1940 Act be interpreted "in accordance with" its policy and purpose "to mitigate, and so far as is feasible, to eliminate" the identified abuses. 15 U.S.C. § 80a-1(b).

This case involves Section 16(a) and Section 18(i) of the 1940 Act. Section 16(a) provides:

> No person shall serve as a director of a registered investment company unless elected to that office by the holders of the outstanding voting securities of such company, at an annual or a special meeting duly called for that purpose; except that vacancies occurring between such meetings may be filled in any otherwise legal manner if immediately after filling any such vacancy at least two-thirds of the directors then holding office shall have been elected to such office by the holders of the outstanding voting securities of the company at such an annual or special meeting. . . .

15 U.S.C. § 80a-16(a). Section 18(i) provides: "Except as provided in subsection (a) of this section, or as otherwise required by law, every share of stock hereafter issued by a registered management company . . . shall be a voting stock and have equal voting rights with every other outstanding voting stock." *Id.* § 80a-18(i).

II. **Saba's Activist Campaign Against Closed-End Funds.**

Saba's undisputed investment strategy generally focuses on buying up a CEF's shares at a discount, and then seeking a liquidity event so that Saba can make a quick profit. However, many CEFs have bylaws that defend against such actions and make it more difficult for Saba or other activists to exert concentrated influence from a minority position. Saba has challenged a number of those bylaw provisions in court. *See, e.g.*, Adrian D. Garcia, *From Tender Offers to Court Battles: One Activist's CEF Attacks*, BoardIQ (Mar. 5, 2024).

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[3] As of the filing of this action, Saba owns 25.89% of ECAT. Compl. ¶ 12. Notably, a shareholder whose stake in an investment company exceeds 25% is not merely an "affiliated person," but "shall be presumed to control" the company under the 1940 Act. 15 U.S.C. § 80a-2(a)(9).

A. Saba's Prior Litigation Involving a Majority Vote Bylaw.

This litigation is not the first time that Saba has challenged a majority vote bylaw under the 1940 Act.[4] In March 2020, the board of directors of the Eaton Vance Senior Income Trust (the "Eaton Vance Trust"), a Massachusetts business trust, amended its bylaws to adopt a new requirement that any nominee to the board of directors "receive the affirmative vote of a majority of all shares outstanding to be elected to the Board in a contested election." Complaint ¶ 3, *Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd.*, No. 2084-cv-01533-BLS2 (Mass. Super. July 15, 2020).[5] Saba, which already owned shares of the Eaton Vance Trust at the time of the amendment, threatened litigation. In response, the Eaton Vance Trust filed a complaint in Massachusetts state court in July 2020, seeking a declaratory judgment that the bylaw amendment was valid. *See id.* In August 2020, the Eaton Vance Trust again amended its bylaws to adopt a control share bylaw, which restricted a shareholder's right to vote shares over a 10% threshold absent approval of the other shareholders.

Saba counterclaimed, adding three other Eaton Vance-advised CEFs that had adopted similar bylaw amendments as counterclaim defendants. Verified Answer & Counterclaims ¶¶ 31, 34–36, *Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd.*, No. 2084-cv-01533-BLS2 (Mass. Super. Aug. 31, 2020). In its counterclaims, Saba challenged both the majority vote bylaws and the control share bylaws on state and federal grounds: Saba alleged that both bylaw provisions breached the terms of the trusts' declarations of trust, that the directors had violated their state-law

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[4] Saba first challenged a majority vote bylaw at a different BlackRock-advised CEF even earlier, in June 2019, but—notably—asserted only state-law claims for breach of fiduciary duty and breach of contract. Verified Class Action Complaint ¶¶ 72–84, *Saba Cap. Master Fund, Ltd. v. BlackRock Credit Allocation Income Tr.*, C.A. No. 2019-0416 (Del. Ch. June 4, 2019).

[5] These filings are public documents of which this Court can take judicial notice at the motion-to-dismiss stage. *See, e.g.*, *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004).

fiduciary duties by adopting them, and that the bylaw provisions violated Section 18(i) of the 1940 Act, among other things. *Id.* ¶¶ 41, 61–70, 79–92.

At summary judgment, the court dismissed Saba's counterclaim for breach of fiduciary duty and granted Saba's motion for summary judgment as to rescission of the control share bylaws, holding that they violated Section 18(i) of the 1940 Act. *Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd.*, No. 2084-cv-01533-BLS2, 2023 WL 1872102 (Mass. Super. Jan. 21, 2023). But Saba's challenge to the majority vote bylaw could not be resolved as a matter of law. *Id*. The litigation regarding that claim is ongoing and is currently scheduled for trial in September 2024.

B. Saba's Prior Litigation Against ECAT.

This litigation also is not the first time that Saba has brought claims against ECAT and the Trustee Defendants. On June 29, 2023, Saba brought an action in this Court against ECAT and fifteen other Maryland CEFs, challenging their control share restrictions. *Saba Cap. Master Fund Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc.*, No. 23-cv-5568-JSR (S.D.N.Y.) ("*ECAT I*"). Unlike *Eaton Vance*, which involved a CEF organized under Massachusetts law that adopted a control share bylaw, ECAT and its co-defendants had opted into the Maryland Control Share Acquisition Act ("MCSAA"), which imposes control share restrictions on participating funds as a matter of state law. *See* Md. Code, Corps. & Ass'ns § 3-702. Saba sought a declaratory judgment that the MCSAA-imposed control share restrictions were inconsistent with Section 18(i), and simultaneously moved for summary judgment. The defendants opposed, arguing that the control share restrictions were consistent with Section 18(i) because the MCSAA rendered the control share restrictions "otherwise required by law" within the meaning of Section 18(i). No. 23-cv-5568, ECF No. 98. Although ECAT and several of the other defendant funds had majority vote bylaws in effect at the time, Saba's complaint did not assert any challenges to those bylaws.

While *ECAT I* was pending, the Second Circuit decided *Nuveen*, holding that a control share restriction in the bylaws of a Massachusetts CEF was inconsistent with Section 18(i)'s requirement that every share have "equal voting rights." *Nuveen*, 88 F.4th at 117. The Second Circuit did not address Section 18(i)'s exception for restrictions "otherwise required by law." Nonetheless, based largely on *Nuveen*, the district court granted final judgment to Saba, declaring the control share restrictions unlawful and ordering their rescission. No. 23-cv-5568, ECF Nos. 124, 125 (Jan. 4, 2023). The district court's decision is currently on appeal. *Saba Capital Master Fund, LTD. v. ClearBridge Energy Midstream Opportunity Fund Inc.*, No. 23-8104 (2d Cir.). Because it is critical to have clarity on what bylaws will be applicable at the 2024 Meeting, ECAT sought and the Second Circuit granted an expedited appeal. Briefing on the appeal is complete and oral argument is scheduled for April 12, 2024. No. 23-8104, Dkt. No. 90 (2d Cir. Mar. 12, 2024).

III. <u>This Action.</u>

Much of Saba's case hinges on misconstruing how directors are elected at the time a CEF is formed. A sponsor forms a CEF under state law with one director, and after some organizational steps, the sponsor purchases the CEF's initial shares in exchange for a seed payment large enough to satisfy the 1940 Act's minimum funding amount. *See* 15 U.S.C. § 80a-14(a)(1). The sponsor, as the sole initial shareholder, then elects a slate of directors, either at a formal meeting or through a written consent that is for all purposes equivalent thereto under the CEF's governing documents. *See, e.g.*, Jean Gleason Stromberg, *Governance of Investment Companies*, *in* THE INVESTMENT COMPANY REGULATION DESKBOOK § 4.2 (Amy L. Goodman ed., 1998).

ECAT followed that standard procedure. ECAT was formed on May 12, 2021, and adopted its bylaws that day. *See* Bylaws, ECF No. 11-2.[6] ECAT's sponsor, BlackRock Financial Management, Inc. ("BFM"), purchased ECAT common shares. *See* ECAT Form N-2, Statement of Additional Information ("SAI"), at S-58.[7] Then BFM, in its capacity as the sole initial shareholder, elected a slate of directors (including all of the Trustee Defendants) to serve on the Board. *See* Written Consent of Sole Initial Shareholder at 1 (Aug. 12, 2021).[8] Under the Bylaws, such a written consent "shall be treated for all purposes as a vote taken at a meeting of shareholders." Bylaws, Art. I, § 15(a); *see* Md. Code, Corps. & Ass'ns § 12-306(b)(1). Thus, all of the Trustee Defendants were duly elected by ECAT's sole initial shareholder.

ECAT's Board is divided into three classes, in a manner consistent with Section 16(a). Compl. ¶ 30; *see also* ECF No. 11-1, Art. II, § 2.2 (ECAT's Declaration of Trust, the "Declaration of Trust").[9] The Declaration of Trust further provides that, except in cases of resignation or removal, "each Trustee elected shall hold office until his or her successor shall have been elected and shall have qualified." Declaration of Trust, art. II, § 2.2. Since ECAT's inception, the Bylaws have contained the Majority Vote Bylaw, which states that in a contested election, defined as an

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[6] Although the Bylaws are attached to Saba's motion for a preliminary injunction, rather than the Complaint, they are "integral" to the Complaint and therefore are appropriate for consideration on a motion to dismiss. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

[7] https://www.sec.gov/Archives/edgar/data/1864843/000119312521248042/d162257dn2a.htm.

[8] This document has been submitted in connection with Defendants' opposition to Saba's motion for a preliminary injunction. *See* Richardson Declaration Ex. A. Defendants respectfully suggest that if Saba does not object, the Court should take judicial notice of this document, "on consent of the parties." *In re Mylan N.V. Sec. Litig.*, No. 16-CV-7926 (JPO), 2018 WL 1595985, at *2 n.2 & n.3 (S.D.N.Y. Mar. 28, 2018).

[9] Like the Bylaws, the Declaration of Trust is "integral" to the Complaint, and therefore is appropriate for consideration at this stage. *See Chambers*, 282 F.3d at 153.

election where there are more candidates for director than open positions, "the affirmative vote of a majority of the Shares outstanding and entitled to vote with respect to such matter at such meeting shall be the act of the shareholders with respect to such matter." Bylaws, Art. I, § 11(b)(ii).

ECAT's initial public offering closed on September 27, 2021. ECF No. 11-3, at 74 (PDF p.71). ***Saba first purchased shares in ECAT on March 28, 2022, with full knowledge of the Majority Vote Bylaw***, and more than a year and a half after it had challenged a similar majority vote bylaw in *Eaton Vance*. ECF No. 10-1, at 22.[10] ECAT held its first annual shareholder meeting after its public offering on July 25, 2022, at which three directors were re-elected (Messrs. Fabozzi, Fairbairn, and Holloman), each with a supermajority of at least 86% of outstanding shares. ECF No. 11-4, at 118 (PDF p.107); Compl. ¶ 31 (characterizing 86% vote as "a plurality of the shares voted").

ECAT's 2023 annual shareholder meeting was originally scheduled for July 10, 2023. Compl. ¶ 41. On March 22, 2023, in connection with the 2023 annual shareholder meeting, Saba nominated four candidates to serve as directors of ECAT, meaning that it would be a contested election. *Id*. ECAT and Saba solicited proxies, but a quorum required to do business of "a majority of the Shares entitled to vote on any matter" was not reached. Bylaws, Art. I, § 12. ECAT adjourned the meeting until July 25, 2023, and then again to August 7, 2023, to permit more time for proxy solicitation. Compl. ¶¶ 44–46. Despite Saba's characterization, these adjournments constitute one meeting, and not "repeated" or "multiple" failed elections. *See id.* ¶¶ 3, 32, 48; *see also* Md. Code, Corps. & Ass'ns § 2-511(d)(1) ("A meeting of stockholders convened on the date for which it was called may be adjourned from time to time . . ."). Because there was no quorum

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[10] Saba's May 23, 2023 Proxy Statement is both "integral" to the complaint and a public SEC filing subject to judicial notice, and therefore is appropriate for consideration at this stage. *Supra* at n.5.

at the 2023 annual shareholder meeting, four directors continued to serve as holdovers pursuant to the Declaration of Trust and the Bylaws. Compl. ¶ 47. Saba never bothered to vote the shares for which it had been appointed as proxy, so there were no votes for Saba's nominees. ECAT 2023 Annual Report, Form N-CSR, at p. 112 (Dec. 31, 2023).[11]

On March 6, 2024, seven months after the 2023 annual shareholder meeting failed to obtain quorum, Saba brought this action. ECF No. 1. The Complaint seeks a declaration that the Majority Vote Bylaw violates Sections 16(a) and 18(i) and rescission of the Majority Vote Bylaw pursuant to Section 47(b). Compl. ¶¶ 58-59, 65. Saba also has sought a preliminary injunction to prohibit ECAT from enforcing the Majority Vote Bylaw at the 2024 Meeting. ECF No. 9 (the "PI Motion").

ARGUMENT

I. <u>The Majority Vote Bylaw Does Not Violate the 1940 Act.</u>

Saba challenges the Majority Vote Bylaw on two grounds: first, that it purportedly violates Section 16(a) of the 1940 Act, and second, that it purportedly violates Section 18(i). Both arguments are meritless and are not supported by the 1940 Act as a matter of law. Accepting either one would cause sweeping effects across the CEF industry on the basis of a novel theory that lacks any basis in the 1940 Act's text, structure, and fundamental principles of statutory interpretation.

As a preliminary matter, the voting standards that ECAT may employ in director elections are governed by Maryland law—not the 1940 Act, which is silent on the matter. "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). The presumption against preemption is especially strong when Congress legislates in a field, like this one, that is traditionally occupied

[11] https://www.sec.gov/Archives/edgar/data/1864843/000119312524060530/d632388dncsr.htm.

by the States. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) (noting that in areas relating to a state's historic powers, "the presumption that Congress did not intend to preempt state law . . . is particularly strong"). Under those well-established principles, the 1940 Act would need to make any purpose to preempt Maryland corporate law "clear and manifest." *Wyeth*, 555 U.S. at 565.

Neither Section 16(a) nor Section 18(i) says anything about the voting standard to be applied in director elections—much less make "clear and manifest" a congressional purpose to override state law. In contrast, Maryland law speaks directly to the question of voting standards for shareholder action, including trustee elections, and states that "[e]xcept as provided in this title or the governing instrument of a statutory trust, any act requiring the approval of the beneficial owners shall be approved by the affirmative vote of a majority of all the votes entitled to be cast on the matter." Md. Code, Corps. & Ass'ns § 12-306(d). ECAT's Majority Vote Bylaw simply applies that same default standard to contested director elections. Because the 1940 Act does not preempt Maryland's regulation of director elections, much less do so clearly and manifestly, Saba's challenge to the Majority Vote Bylaw must be dismissed. *Wyeth*, 555 U.S. at 565.

A. The Majority Vote Bylaw Does Not Violate Section 16(a).

1. Section 16(a) Does Not Require any Particular Voting Standard for Director Elections and Leaves That Issue to State Law.

Section 16(a) does not specify any particular voting standard for election of directors, much less the one that would be most favorable to Saba's activist investment strategies. Section 16(a) merely provides that "[n]o person shall serve as a director of a registered investment company unless elected to that office by the holders of the outstanding voting securities of such company, at an annual or a special meeting duly called for that purpose." 15 U.S.C. § 80a-16(a).

Nonetheless, Saba contends that the Majority Vote Bylaw violates Section 16(a) by "allowing incumbents who are not elected to that office to serve as trustees on ECAT's Board." Compl. ¶ 58. Saba claims that the Majority Vote Bylaw violates Section 16(a)'s requirement that "all directors be '***elected*** to that office by holders of the outstanding voting securities of such company.'" Compl. ¶ 6 (quoting 15 U.S.C. § 80a-16(a) (Saba's emphasis)). The Majority Vote Bylaw, however, is nothing more than a voting standard, requiring a majority of outstanding shares to elect directors in a contested election, in accord with Maryland law's default rule for statutory trusts. *Supra* at 13. And neither the term "elected" nor the context in which it appears in the 1940 Act requires any particular voting standard. Although Saba's reasons for preferring plurality voting in a contested election are obvious, the statutory text simply does not require it.

"In interpreting any statute, [courts] start with the plain meaning of the text." *Wilson v. United States*, 6 F.4th 432, 435 (2d Cir. 2021). An undefined term must be construed according to its "ordinary meaning found in contemporary dictionary definitions." *Mader v. Experian Info. Sols., Inc.*, 56 F.4th 264, 269 (2d Cir. 2023) (citation omitted). Dictionary definitions contemporary with the 1940 Act show that the word "elected" does not entail a particular voting standard. Elect, WEBSTER'S NEW INT'L DICTIONARY 825 (2d ed. 1934) (defining the transitive verb "elect" as "[t]o select," "[t]o determine by choice," or "[t]o select or take for an office by vote; as, to *elect* a representative, a president, or a governor"). Thus, the ordinary meaning of Section 16(a)'s requirement that directors be "elected" by shareholders cannot be read to require one voting standard or another.

The statutory context confirms that Section 16(a) does not require any particular voting standard. As other provisions of the 1940 Act illustrate, Congress knew how to specify a voting standard when it wished to do so. *See, e.g.*, 15 U.S.C. § 80a-13(a) (prohibiting a CEF from

changing its fundamental investment policy or taking other significant actions "unless authorized by the vote of ***a majority of its outstanding voting securities***").[12] In contrast, Section 16(a) requires that directors be "elected to that office *by the holders of the outstanding voting securities*," and does not specify any voting standard. 15 U.S.C. § 80a-16(a).[13] Congress "acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015). It would turn that principle on its head to read a particular voting standard—majority, plurality, or otherwise—into Section 16(a), where Congress chose to remain silent on the matter.

Meanwhile, as noted above, Maryland law *does* speak directly to the voting standards to be applied in a statutory trust's elections, stating that "[e]xcept as provided in this title or the governing instrument of a statutory trust, any act requiring the approval of the beneficial owners shall be approved by the affirmative vote of a majority of all the votes entitled to be cast on the

[12] *See also, e.g.*, 15 U.S.C. § 80a-15(a) (prohibiting serving as investment adviser to a CEF "except pursuant to a written contract" that was "approved by ***the vote of a majority of the outstanding voting securities of such registered company***" and must be "specifically approved at least annually by the board of directors or by vote of ***a majority of the outstanding voting securities***"); *id.* § 80a-18(a)(2)(D) (requiring, if a CEF issues senior stock, that "provision is made requiring approval by ***the vote of a majority of such securities***, voting as a class," for specified significant matters); *id.* § 80a-23(b) (prohibiting CEF from issuing stock at a price below the current NAV except in certain conditions, including "with the ***consent of a majority of its common stockholders***"); *id.* § 80a-31(a) (providing that certain matters relating to employing an independent public accountant be decided "by ***vote of a majority of the outstanding voting securities***"); *id.* § 80a-56(o) (defining "***required majority***" for approval of transactions with certain affiliates). Moreover, "the vote of a majority of the outstanding voting securities of a company" is defined in the 1940 Act to mean "the vote, at the annual or a special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities present at such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less." 15 U.S.C. § 80a-2(a)(42).

[13] Indeed, to the extent that Section 16(a) says anything about voting standards, its text would favor the Majority Vote Bylaw's larger electorate of "holders of the outstanding securities," rather than the smaller electorate of shares present and voting, as Saba would prefer.

matter." Md. Code Ann., Corps. & Ass'ns § 12-306(d). Saba's proposed interpretation of Section 16(a) would override that permissive statute, and instead require that a plurality of votes cast be sufficient in all director elections. To override applicable Maryland law, Congress has to make its purpose "clear and manifest." *Supra* at 12–13. Here, it is "clear and manifest" that Congress did *not* intend to impose a particular voting standard in Section 16(a).

Furthermore, as a factual matter, Saba's contention that some number of the Trustee Defendants have not been "elected" by ECAT's shareholders is simply not true. *Supra* at 10. All of the Trustee Defendants have been elected by shareholders, including through the written consent of ECAT's sole initial shareholder, which has the same force and effect as if done at a shareholder meeting. *Supra* at 10. That is all that Section 16(a) requires.[14]

Saba also contends that the Majority Vote Bylaw "contravenes the ICA's mandate" that "directors stand for election annually or, at minimum, that the term of office of at least one class [of directors] shall expire each year." Compl. ¶¶ 7, 58. But as Saba does not dispute, ECAT's directors are divided into three classes, one of which *does* stand for election "annually" or "at minimum," has its term expire "each year." Compl. ¶¶ 30–34.[15]

[14] Nothing in the 1940 Act requires that a fund's directors be elected by the fund's public shareholders, and, in fact, the SEC has long endorsed the practice of fund directors being elected by the sole initial shareholder. *See* Letter from Marianne Smythe, Director of the SEC's Division of Investment Management to Matthew P. Fink, President of the Investment Company Institute (Nov. 6, 1992) (stating that the SEC's Division of Investment Management does not require a fund to undertake to hold a public shareholder vote to elect its board of directors and that such a vote is not required under Section 16(a) after a fund's launch). *Inv. Co. Inst.*, SEC No-Action Letter, 1992 WL 400454 (Nov. 6, 1992). This statement by Director Smythe may be relied upon as the view of the Division of Investment Management. 17 C.F.R. § 202.1(d) ("[A]ny statement by the director . . . of a division can be relied upon as representing the views of that division.").

[15] Saba's suggestion that Section 16(a) requires a fund to hold an annual meeting is irrelevant—all of the Trustee Defendants were elected by shareholders at a shareholder meeting or its equivalent, as the 1940 Act requires. But it is also wrong: Section 16(a) does *not* require annual meetings. Section 16(a) only requires that directors be "elected," not that an annual meeting (or a

Saba also contends that the Majority Vote Bylaw "violates the ICA's mandate" that "at least two-thirds of the directors then holding office shall have been elected to such office by the holders of the outstanding voting securities of the company." Compl. ¶¶ 8, 58. This argument misreads Section 16(a); by its terms, that provision applies to filling vacancies that arise between meetings. It has no bearing on director elections, much less establish a mandatory voting standard. In any event, *all* of the Trustee Defendants, including the holdovers, have been "elected to such office by the holders of the outstanding voting securities of the company." *Supra* at 10.

Although Saba complains that the Majority Vote Bylaw has resulted in some of ECAT's directors serving as holdovers, there is nothing unusual, let alone unlawful, about directors continuing in office after a failed election until their successors can be elected and qualified. *See Badlands Tr. Co. v. First Fin. Fund, Inc.*, 65 F. App'x 876, 880 (4th Cir. 2003) (holding that "the holdover of the incumbent directors does not violate the [1940 Act]").[16] The *Badlands* court noted that "provisions allowing holdovers are common in state law as well as model corporation codes" and specifically cited Maryland's statutory provision permitting holdover directors. 65 F. App'x at 881 (citing Md. Code Ann., Corps. & Ass'ns § 2-405). The *Badlands* court explained that the 1940 Act "is silent about what to do in a failed election" and, "[b]ecause the [1940 Act] is silent on this point, the use of holdovers, authorized by Maryland law, does not directly conflict with federal law." *Id*. Thus, although Saba criticizes the Majority Vote Bylaw because it can result in holdover directors, such holdover directors are expressly permitted under Maryland law and ECAT's governing documents and—as Saba does not dispute—do not violate the 1940 Act.

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special meeting) occur each year. 15 U.S.C. § 16(a). SEC staff guidance, in a no-action letter, has said the same for decades. *See John Nuveen & Co.*, SEC No-Action Letter, 1986 SEC No-Act. LEXIS 2943, at *4–5 (Nov. 18, 1986).

[16] Saba abandons any challenge to "the concept of a 'holdover' director itself." PI Motion at 14.

2. *Saba's Policy-Based Arguments Have No Basis in the 1940 Act.*

Departing from the 1940 Act's text, Saba appears to claim that the 1940 Act requires that shareholders have a "real, meaningful opportunity to elect Trustees." Compl. ¶ 6, *see also* Compl. ¶¶ 2, 7, 35-36, 58. That standard does not appear anywhere in Section 16(a) or Section 18(i). In any event, ECAT's shareholders *do* have a meaningful opportunity to vote. And every shareholder of ECAT, Saba included, chose to buy shares in a CEF with a long-term investment strategy and governance features consistent with that long-term horizon. That includes the Majority Vote Bylaw, which has been in place since ECAT's inception. At the time each shareholder bought shares in ECAT, they understood that the fund had a structural bias favoring stability in strategy and governance. Accordingly, in contested elections, when dramatic change is on the table, the Majority Vote Bylaw ensures that any such change will be undertaken only with a broad consensus of shareholder support, and gives effect to the preferences of retail investors who support the status quo, which they can do by declining to submit their proxies. What Saba wants is not a "meaningful opportunity" for all shareholders to elect directors, but a *better* opportunity for a *certain type* of shareholder: concentrated minority shareholders who favor a change from the status quo. In other words, activist investors like Saba.

Indeed, the only case that Saba cites in favor of its "meaningful opportunity" principle is *Saba Capital CEF Opportunities 1 Ltd. v. Voya Prime Rate Trust*, 2020 WL 5087054 (Ariz. Super. Ct. June 26, 2020), in which Saba obtained preliminary injunctive relief against a bylaw, adopted in response to Saba's approach to a CEF organized as a Massachusetts business trust, that required 60% of outstanding shares to elect directors. PI Motion at 13. What Saba does not say is that *Voya* is not a 1940 Act case at all. Instead, Saba's claims in *Voya* were based entirely on Massachusetts law: breach of contract and breach of fiduciary duty, among other state law claims. *See Voya*, 2020 WL 5087054, at *3–4. Similarly, when Saba brought its 2019 challenge to a majority vote bylaw

at a different BlackRock-advised CEF, it challenged that bylaw only on Delaware breach-of-fiduciary duty and breach-of-contract grounds. *See* Verified Class Action Complaint ¶¶ 72–84, *Saba Cap. Master Fund, Ltd. v. BlackRock Credit Allocation Income Tr.*, C.A. No. 2019-0416 (Del. Ch. Ct. June 4, 2019). As these cases illustrate, and as Saba well understood when it brought them, Saba's "meaningful opportunity" standard sounds in state fiduciary law, if anywhere—not the federal securities law under which Saba chose to bring this action.[17]

Furthermore, permitting Saba to repackage a state-law fiduciary anti-entrenchment claim in the guise of a 1940 Act claim would run roughshod over the principle that plaintiffs may not bootstrap state-law fiduciary claims to the federal securities laws. *See, e.g.*, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478–80 (1977) (holding, in the § 10(b) context, that "[a]bsent a clear indication of congressional intent," courts should not "federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden," and that "federal fiduciary standards" "should not be supplied by judicial extension of § 10(b) . . . to [govern] the corporate universe"); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir. 1981) ("courts have consistently held that . . . a shareholder cannot . . . 'bootstrap' [a fiduciary claim] into a federal securities action"). It would also undo Congress's express choice to confer exclusive authority to bring fiduciary claims under the 1940 Act on the SEC, 15 U.S.C. § 35(a), creating a private right of action to enforce only a limited subset of fiduciary claims not applicable here, *id.* § 35(b).

[17] Any such fiduciary claim would be outside the limited scope of the 1940 Act's private right of action for fiduciary claims, *see* 15 U.S.C. § 80a-35(b); *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 115–17 (2d Cir. 2007), and in the absence of a claim under the federal securities laws, Saba's claims would have been routed to Maryland court. *See* Declaration of Trust § 12.4.

Saba also suggests that pragmatic considerations relating to the challenges of proxy solicitation should weigh in its favor. PI Motion 11–13. But Saba's fearmongering about shareholder non-voting is beside the point: the fact that proxy solicitation is difficult or expensive does not permit Saba to rewrite the statute that Congress enacted. Where it wished to address the issue of non-votes, Congress *did* address it, by creating a bifurcated voting standard in certain circumstances that permits shareholders to act with the power of a "majority of the outstanding voting securities" with either more than 50% of all outstanding shares or 67% of shares present, if more than 50% of shares are present—whichever is less. 15 U.S.C. § 80a-2(a)(42). Where it applies, that voting standard would permit action by a "majority of the outstanding voting securities" with as little as 33.51% of outstanding shares. But Congress chose not to apply that standard to director elections, and instead left the matter to state law. *Supra* at 13. This Court must respect that choice, even if Saba would prefer a different one.

B. The Majority Vote Bylaw Does Not Violate Section 18(i).

Saba's argument that the Majority Vote Bylaw violates Section 18(i) is similarly without merit. Section 18(i) provides that, except as otherwise required by law, every share in a registered investment company "shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i). Here, every share of ECAT has exactly the same right to vote in an election. Nevertheless, Saba claims that the Majority Vote Bylaw violates Section 18(i) because it "effectively gives the votes cast in favor of incumbent trustees more voting rights and power than votes cast for the challengers." Compl. ¶ 59.

Ironically, in arguing that the Majority Vote Bylaw violates Section 18(i) Saba disregards the fact that each ECAT share has equal voting power and, instead, asks the Court to focus on the relative voting power of shareholders based on how they intend to exercise their votes. This argument relies on a "share/shareholder distinction" that Saba opposed, and the Second Circuit

rejected, in *Nuveen*. 88 F.4th at 119–20. There, Saba argued that Section 18(i) mandates equal voting power among all *shares*, regardless of the identity or characteristics of the *shareholder*. *See id.* at 109. The Majority Vote Bylaw is consistent with that principle because all shares have the exact same right to vote, and Saba can argue otherwise only by differentiating between shareholders on the basis of their voting preferences. In *Nuveen*, Saba advocated the opposite position and won, and cannot now change its position to suit its current objectives. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

The fact that a voting standard may reflect a bias in favor of the status quo does not render any share's vote "unequal." *See Gray v. Town of Darien*, 927 F.2d 69, 72 (2d Cir. 1991) (holding, in evaluating a 60% supermajority requirement, that "[t]he fact that the provision makes it more difficult" to change the status quo than a simple-majority requirement is "irrelevant" to whether voters enjoy an equal right to vote); *see also Dudum v. Arntz*, 640 F.3d 1098, 1109 (9th Cir. 2011) (as between different voting standards, "no voter is denied an opportunity to cast a ballot at the same time and with the same degree of choice among candidates available to other voters"). Nor could that conclusion be squared with the 1940 Act as a whole: as noted above, numerous provisions of the Act mandate a "majority of the outstanding voting securities" to take certain significant steps, *deliberately* favoring the status quo unless the requisite percentage of shares vote for a different path. *Supra* at 14–15 & n.12. Saba's real complaint is that the Majority Vote Bylaw is less advantageous to *concentrated* shareholders who would prefer a plurality voting standard. But Section 18(i) does not mandate the voting standard most favorable to activist investors.

Saba also claims that the Majority Vote Bylaw violates Section 18(i)'s requirement that every share of stock be "voting stock," that is, stock that "presently entitl[es] the . . . holder thereof to vote for the election of directors of a company." Compl. ¶ 9. According to Saba, requiring a

majority of outstanding shares to elect directors in a contested election "effectively deprives any shareholder of the ability to vote for the election of directors." *Id.* That argument is untenable. As should be obvious, whether a plurality or majority standard is applied to ECAT's director election, all of ECAT's shares come with the "present[] entitle[ment]" to vote in that election, which means ECAT's shares are "voting stock" under Section 18(i). *Nuveen*, 88 F.4th at 117.

II. Saba's Claims Are Barred by the Statute of Limitations, Laches, and Res Judicata.

A. Saba's Claims Are Barred by the Statute of Limitations.

To the extent Section 47(b) confers a private right of action, the statute of limitations for such a claim is one year from discovery of the alleged violation or three years from the violation itself, whichever is earlier. *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05-cv-4837 (HB), 2006 WL 399396, at *5–6 (S.D.N.Y. Feb. 21, 2006). A court may consider a statute-of-limitations defense at the 12(b)(6) stage where "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Sewell v. Bernardin*, 795 F.3d 337, 339 (2d Cir. 2015). ECAT's Majority Vote Bylaw was adopted on May 12, 2021, and publicized when ECAT filed its Form N-2 registration statement with the SEC on May 28, 2021.[18] Saba's claim accrued on that date, but in any event no later than the date Saba first acquired shares in ECAT on March 28, 2022.[19] *Supra* at 11. This action was not filed until March 6, 2024, well outside the one-year limitations period from the time Saba was aware of the facts giving rise to its claims. ECF No. 1. Thus, this action is barred by the statute of limitations.

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[18] https://www.sec.gov/Archives/edgar/data/1864843/000119312521176825/d162257dex99b.htm.

[19] Saba's claims are not eligible for the two-year limitations period of 28 U.S.C. § 1658(b) because they do not "involve[] fraud, deceit, manipulation, or contrivance" within the meaning of that statute. *See Dekalb Cnty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 403, 408–09 (2d Cir. 2016). Even if that statute applied, it would not help Saba, which learned all the facts material to its claims no later than May 28, 2021. *Id.* at 411 (limitations period begins to run once the claim "could have been discovered in the exercise of reasonable diligence") (cleaned up).

B. Saba's Claims Are Barred by Laches.

Saba's claims are also barred by laches. To evaluate whether laches applies, courts consider a plaintiff's "unreasonable lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay." *King v. Innovation Books,* 976 F.2d 824, 832 (2d Cir. 1992). Both elements are satisfied here.

First, Saba has no excuse for its unreasonable delay in bringing this action. Saba knew about the Majority Vote Bylaw before it first purchased shares in ECAT on March 28, 2022. *Supra*, at 11. Indeed, the Majority Vote Bylaw has been in existence since ECAT's inception in May 2021, by which point Saba had already challenged Eaton Vance's majority vote bylaw as allegedly violating the 1940 Act. *Supra*, at 7–8. Saba still chose to purchase shares in ECAT, and then (1) waited *fifteen months* from its initial purchase to bring its first challenge to the Bylaws, in which Saba did not contest the Majority Vote Bylaw, and then (2) waited *another nine months* to challenge the Majority Vote Bylaw in this action. *See* ECF No. 1; 23-cv-5568, ECF No. 1.

Second, Saba's delay has significantly prejudiced ECAT. Saba brought this action only months before the 2024 Meeting, guaranteeing that orderly review of the merits of its claims would be impossible in the time left before the 2024 Meeting. That is to say nothing of the parties' appellate rights—if this Court were to grant the preliminary injunction, ECAT's as-of-right appeal could never be adjudicated before the 2024 Meeting. Instead, Saba's strategically chosen timing has essentially guaranteed that the *only* adjudication that can occur before the 2024 Meeting—other than dismissal of its complaint—would be a grant or denial of a preliminary injunction, followed by emergency briefing on a motion for stay (or injunction) pending appeal. ECAT should not have to defend against Saba's attempt to gain control over a majority of seats on the Board on such an extraordinarily expedited basis just because Saba sat on its hands for over two years. Had

Saba wished to challenge the Majority Vote Bylaw, it had a full and fair chance to do so in a timely fashion, but it chose not to. This action should be dismissed as barred by laches.

C. *Saba's Claims Are Barred by Res Judicata.*

Finally, the final judgment in *ECAT I* bars Saba's claims under the doctrine of res judicata, or claim preclusion, which prevents precisely this type of piecemeal litigation.[20] Under res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were ***or could have been*** raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (emphasis added). In other words:

> the doctrine of res judicata prevents litigation of a matter that could have been raised and decided in a previous suit, ***whether or not it was raised***. If a valid and final judgment has been entered on the merits of a case, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 196 (2d Cir. 2010) (cleaned up); *see also Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992) (res judicata "prevents litigation of a matter that ***could have been raised*** and decided in a previous suit, whether or not it was raised") (cleaned up) (emphasis added). "In this inquiry, the emphasis is not what was litigated previously, but what could have been litigated. This approach encourages litigants to bring all available claims in one action and prevents them from contesting a matter that they had a full and fair opportunity to litigate in a prior action." *O'Callaghan v. New York Stock Exch.*, No. 12–cv–7247, 2013 WL 3984887, at *9 (S.D.N.Y. Aug. 2, 2013) (cleaned up).

All of the elements of res judicata are easily met here. The parties in this case are identical to the parties in *ECAT I*. *See* No. 23-cv-5568. The judgment in *ECAT I* is a final judgment on the

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[20] "A court may consider a res judicata defense on a Rule 12(b)(6) motion to dismiss when the court's inquiry is limited to the plaintiff's complaint, documents attached or incorporated therein, and materials appropriate for judicial notice." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 498 (2d Cir. 2014).

merits, and "it is settled law, not just in the Second Circuit but also in the Supreme Court, that a district court judgment is imbued with preclusive effect while an appeal is pending." *United States v. Walker*, 239 F. Supp. 3d 738, 742 (S.D.N.Y. 2017). And Saba's claims in this case plainly could have been brought at the time it filed the complaint in *ECAT I*. Indeed, that is precisely what Saba did in *Eaton Vance*: there, Saba filed counterclaims simultaneously challenging both a control-share bylaw *and* majority vote bylaw. *Supra*, at 7–8. Nothing prevented Saba from doing the same in *ECAT I*. Because, on Saba's own theory, the Majority Vote Bylaw has been unlawful since its inception, Saba was obligated to bring its challenge to the Bylaw at the time it filed the complaint in *ECAT I* on June 29, 2023. No. 23-cv-5568, ECF No. 1. Saba has analogized this action for rescission to a breach-of-contract claim, and where "a contract was to be performed over a period of time and one party has sued for a breach but has not repudiated the contract, res judicata will preclude the party's subsequent suit for any claim of breach that had occurred prior to the first breach-of-contract suit." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996). Straightforward application of res judicata therefore calls for dismissal of this case with prejudice.

III. Saba Lacks a Private Right of Action.

Properly construed, Section 47(b) does not create a private right of action. This issue is foreclosed by *Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019), and this Court need not address it unless that precedent is undermined while this case is pending.

CONCLUSION

For any and all of the foregoing reasons, this action should be dismissed with prejudice.

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Respectfully submitted,

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