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)

REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Defendants' opposition does little more than rehash arguments already repeatedly rejected by this Court and the Second Circuit. Consistent with the ICA's clear commands—and in the wake of the Second Circuit's decisions in *Nuveen* and, just last month, *BlackRock*—there is no room left for federally-regulated funds to discriminate against shareholders, like Saba, via defensive mechanisms like ASA's Poison Pill. *See* 15 U.S.C. § 80a-1(b)(3) ("inequitable or discriminatory provisions . . . fail to protect the preferences and privileges of the holders of their outstanding securities"); *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; *Saba Cap. Master Fund, Ltd. v. BlackRock Mun. Income Fund, Inc.*, 23-cv-5568 (JSR), --- F. Supp. 3d ---, 2024 WL 43344, at *6 (S.D.N.Y. Jan. 4, 2024), *aff'd*, No. 23-8104, 2024 WL 3174971 (2d Cir. June 26, 2024) (summary order).[1]

Distilled down, Defendants' latest brief amounts to: (1) tired complaints about Saba's role as an "activist investor," *see* Dkt. 26 1–9, which courts have time and again rejected as a basis for depriving Saba of its federally-protected shareholder rights;[2] (2) reliance on inapplicable decisions upholding poison pills under ***state law*** regimes, *id*. at 9–10—the same cases, in fact, considered and rejected by the Second Circuit;[3] and (3) predictable reliance on a decades-old, out-of-circuit district court opinion now fundamentally discredited by the Second Circuit, *id*. at 15–24.

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[1] Notably, in the time since Saba submitted its opposition to the pending motion to dismiss, *see* Dkt. 25, Judge Rakoff's decision granting summary judgment to Saba and rescinding the Control Share Provisions at issue in *BlackRock* was affirmed by the Second Circuit. *See* 2024 WL 3174971.

[2] *See Nuveen*, 88 F.4th at 108–09, 118–20; *Saba Cap. Master Fund, Ltd. v. BlackRock ESG Cap. Allocation Term Trust*, 24-cv-1701 (MMG), 2024 WL 3162935, at *9 n.11 (S.D.N.Y. June 25, 2024) ("Defendants have [made] much of the characterization of Saba as an 'activist investor.' The Court gives no weight to those characterizations . . . ***Saba's primary identity is that of 'shareholder,' entitled to no fewer rights than any other shareholder.***") (emphasis added).

[3] *See Nuveen*, Br. for Appellant, 2022 WL 2179666, at *29–30, 46–51 (defendant funds raising same decisions); 88 F.4th at 118–19 (Second Circuit rejecting them).

Defendants' only "new" arguments fare no better. First, Defendants blow out of proportion one stray use of the word "pill" in Saba's opening brief to suggest Saba mischaracterized *Nuveen*. Dkt. 26 at 3 & n.4, 18. To the contrary, Saba repeatedly and candidly explained that *Nuveen* concerned Control Share Provisions challenged under Section 18(i), not poison pills; Saba's point is, and always has been, that the ***rationale*** of *Nuveen* (and *BlackRock* and *Eaton Vance*) forecloses ASA's analogous, unequal treatment of shareholders via non-ratable subscription rights issued in violation of Section 18(d). *See* Dkt. 16 at 1–2, 9–17; Dkt. 25 at 2–4, 7–18. Next, Defendants' suggestion that the ICA permits discrimination against shareholders owning more than 5% of a regulated fund, Dkt. 26 at 20, was flatly rejected by the Second Circuit, *Nuveen*, 88 F.4th at 221 n.17. Last, while Defendants would of course prefer to delay judgment, every court to consider the question has determined that where a shareholder seeks rescission of a contract violating the ICA's plain terms and purposes, summary judgment is warranted without discovery. *See Nuveen*, 2022 WL 493554, at *6, *aff'd* 88 F.4th at 117 (this is a "pure question of law at the pre-discovery stage"); *BlackRock*, 2024 WL 3174971, at *3–4, *aff'd*, 2024 WL 433344, at *6–7 (same).

ARGUMENT

I. Judgment Should Enter that the Poison Pill Violates Section 18(d) of the ICA.

Saba has established as a matter of law that ASA's Poison Pill violates Section 18(d) of the ICA, which prohibits regulated funds from issuing "any warrant or right to subscribe to or purchase a security," except where such rights are: (1) "issued exclusively and ***ratably***" to the fund's shareholders, and (2) "expire[] ***not later than one hundred and twenty days*** after their issuance." 18 U.S.C. § 80a-18(d). The Poison Pill here fails on both counts. First, the Pill's subscription rights are not ratable. As Defendants' press releases, *see* Dkts. 19-6, 19-9, and even their briefing openly admit, *see* Dkt. 26 at 5–8, the Pill is ***specifically designed*** to target Saba for unequal treatment. Its 15% threshold wasn't pulled out of thin air, but is instead plainly pegged to Saba's ownership

interest of 16.87%. *See* R56.1 ¶ 2. Shareholders owning less than fifteen percent of ASA's shares (<15%)—*i.e.* every shareholder other than Saba—are granted subscription rights, while those owning more than fifteen percent (>15%)—*i.e.* Saba— are denied the same. *See* Dkt. 19-5 §§ 1, 3; Dkt. 19-8 §§ 1, 3. The Pill thus denies Saba ratable subscription rights on a basis proportionate to its ownership. *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. 19-9 § 1(s), unlawfully "later than" 120 days after issuance, 15 U.S.C. § 80a-18(d).

Rescission is thus mandatory because ASA's Poison Pill violates Section 18(d) of the ICA, and judgment should enter in Saba's favor. *See Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106–09 (2d Cir. 2019); *see also Nuveen*, 88 F.4th at 121 (affirming mandatory rescission of provisions adopted in violation of ICA); *BlackRock*, 2024 WL 314971, at *5 (same). As set forth below, each of the arguments Defendants raise in their opposition are without merit.

Rights That Cannot Actually Be Exercised are Not Ratable at Issuance. Defendants again lean into the hyper-technical argument that subscription rights voided in practice are nevertheless "issued" ratably on paper at the outset. *See* Dkt. 26 at 11–14. Not so. The Second Circuit has rejected any such effort to elevate form over substance, and this Court should likewise reject it here. In *Nuveen*, the "issuance" of voting rights which could not actually be exercised was tantamount to the issuance of no rights at all, and such rights thus were not "equal" under the terms of Section 18 of the ICA. 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."). So too here. The issuance of subscription rights that—***by design***—can ***never*** 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," as required by

Section 18(d). As Defendants openly trumpeted in public statements, Dkts. 19-6, 19-9, and again highlight in their briefing before this Court, Dkt. 26 at 5–8, the Poison Pill was specially crafted such that its subscription rights could not be exercised by shareholders, like Saba, with a >15% ownership in the fund once they acquired a *de minims* number of additional shares. Such "rights" thus ***necessarily*** are therefore not ratable, even at issuance. *See* Dkts. 19-5 §§ 1, 3; 19-8 §§1, 3. As the SEC has concluded, it would make a mockery of the ICA if funds were able to give shareholders federally-protected rights at issuance, only to turn around and deprive them of their ability to exercise those rights in practice. *See Boulder*, 2010 WL 4630835, at *7 n.31.[4]

State Law Treatment of Poison Pills Cannot Justify Defendants' Violation of Federal Rights Guaranteed by the ICA. Defendants' repeated citations to ***state law*** decisions upholding anti-takeover provisions have no bearing whatsoever on the interpretation or application of ***federal*** shareholder rights and cannot justify ASA's violation of rights guaranteed by the ICA.[5] Congress expressly enacted the ICA 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), recognizing—in full view of state law regimes at the time—that is was necessary "to provide a comprehensive regulatory scheme to correct and prevent certain abusive practices in the management of

[4] Courts have rightly rejected Defendants' attempt to discredit the *Boulder* Letter, Dkt. 26 at 19 n.17, merely because the SEC, under a new administration in 2020, issued an unreasoned statement changing enforcement recommendations. *See Nuveen*, 2022 WL 493554, at *3 (SEC's "2020 Statement, by its own terms, has 'no legal force or effect'" while *Boulder* Letter "examined [ICA] in detail"); *BlackRock*, 2024 WL 3174971, at *4 (Second Circuit citing *Boulder* Letter); *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); *see Gryl ex rel. Shire Pharms Grp. PLC v. Shire Pharms. Grp. PLC*, 298 F.3d 136, 145 (2d Cir. 2002) (SEC no-action letters "entitled to no deference beyond whatever persuasive value they might have").

[5] *See* Dkt. 26 at 9, 10 (yet again citing *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011); *Harvard Indus., Inc. v. Tyson*, 86-cv-74639 (DT), 1986 WL 36295 (E.D. Mich. Nov. 25, 1986)); Dkt. 25 at 13 n.5 (collecting Defendants' state law citations).

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. Defendants' citations to the ***very same*** state law decisions rejected by the Second Circuit in *Nuveen*—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)—cannot justify deviating from Section 18(d)'s command that subscription rights for federally-regulated investment companies be issued ratably.

The Second Circuit Has Twice Fundamentally Discredited *Neuberger I*. Defendants' ***sole*** federal authority is a twenty-year-old, out-of-Circuit district court opinion now repeatedly discredited by the Second Circuit. *See* Dkts. 21 at 18–23, 26 at 15–19 (citing *Neuberger Berman Real Est. Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 342 F. Supp. 2d 371 (D. Md. 2004) ("*Neuberger I*")). The misguided logic of that decision should be rejected with ease. It centered on a "share-shareholder" distinction—the notion that a poison pill is permissible as merely a restriction on shareholders, rather than one on shares—now discredited by the Second Circuit in both *Nuveen*, 88 F.4th at 118–20, and *BlackRock*, 2024 WL 3174971, at *4. In this Circuit, any such distinction is dead letter. *See Nuveen*, 88 F.4th at 120 (where fund "harms its shareholders by encumbering the shares they own . . . any distinction between the two is immaterial"); *Boulder*, 2010 WL 4630835, at *11 nn. 42, 45 (despite "share/shareholder distinction" recognized under the laws of certain states, Congress "determined to regulate investment companies differently").

Nor did *Nuveen* turn solely on the definition of "voting security," let alone that definition's use of the word "presently" in isolation, as Defendants now appear to suggest. *Contra* Dkt. 26 at 17 n.15, 19 n.17. To be sure, the "plain and unambiguous" meaning of "voting security" under the ICA—which is "define[d] with reference to its *function*"—was cited by the Circuit to bolster the conclusion that the Control Share Provisions ran afoul of Section 18(i). *Nuveen*, 88 F.4th at 117.

But the Circuit also rejected any "share-shareholder distinction" as to rights allocation as fundamentally inconsistent with the ICA, *id*. at 118–19 ("***the share-shareholder distinction does not carry the day***"), underscoring that ICA-regulated funds may not "issue securities containing inequitable or discriminatory provisions," *id*. at 120 (citing 15 U.S.C. § 80a-1(b)).

Defendants' Arguments that the Poison Pill is Consistent with the ICA's Purposes Have Been Rejected by the Second Circuit. To combat the argument that the Poison Pill's discriminatory targeting of Saba for unequal treatment is incompatible with the ICA, Defendants perplexingly argue that the ICA's purposes of preventing funds from being operated to the detriment of their shareholders somehow justifies ***discriminating*** against "shareholders owning more than 5% of a fund's shares." *See* Dkt. 26 at 20. Nonsense. The Second Circuit specifically considered and rejected that argument in *Nuveen*. *See* 88 F.4th 221 n.17 ("We are not persuaded by Nuveen's attempt to characterize any shareholder owning more than 5% of a fund's outstanding shares, like Saba, as an 'affiliated person[] thereof' under Section 80a-1(b)(2) and 80a-2 . . . [t]he fairest reading of affiliates 'thereof' in this context ***means affiliates of management***, not of other shareholders.") (emphasis added). This Court must do the same.[6]

Saba is Plainly in Compliance with Section 12(d)(1). In a parting shot, Defendants insinuate that because Saba holds 16.87% of ASA's shares, it is somehow in violation of ICA Section 12(d)(1), which limits regulated funds from owning 3% of another fund's shares, unless they limit how their shares are voted. Dkt. 26 at 25 n.27. But this Court long ago held, after a detailed analysis of the ICA and SEC guidance, that "funds with common advisers are ***not*** subject to the 3% limit of § 12(d)(1)(A)(i)." *meVC Draper Fisher Jurvetson Fund I, Inc. v. Millennium*

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[6] Defendants' suggestion that the Second Circuit "overlook[ed]" other provisions of the ICA, Dkt. 26 at 20 n.18, is wrong, and, in any event, cannot displace *Nuveen*'s binding effect on this Court.

Partners, L.P., 260 F. Supp. 2d 616, 625–30 (S.D.N.Y. 2003). And, despite their drive-by final footnote, counsel for Defendants ***know as much***, and have themselves represented to the SEC that "section 12(d)(1)(A)(i)'s 3% limitation on ownership of registered fund voting securities by a private fund ***does not*** expressly require multiple similar private funds having the same or affiliated investment advisers to aggregate their positions."[7] In any event, even any purported violations of Section 12(d)(1) obviously would not permit the issuance of non-ratable subscription rights, nor would they allow ASA to evade mandatory rescission for a contract issued in violation of the ICA's plain terms and purposes. *See Nuveen*, 88 F.4th at 120 n.16.

The Poison Pill Has Unlawfully Been in Continuous Effect for More than 120 Days. Defendants' Poison Pill also violates Section 18(d)'s plain-text prohibition on subscription rights "expiring ***not later than one hundred twenty days after*** their issuance," 15 U.S.C. § 80a-18(d)—an independently sufficient basis for judgment in Saba's favor. ASA's Poison Pill will be in continuous operation for ***at least 236 days***: it was issued on December 31, 2023, has remained in effect since, and is nominally set to expire on August 23 if not further extended. Dkt. 19-8 § 1(s). Defendants' position that Section 18(d) "addresses only the length of time any single issuance may be in effect," Dkt. 26 at 21, is undermined both by the statute's plain text and by the fact that, elsewhere in the ICA, Congress expressly provided when regulated funds could extend expiring terms notwithstanding a defined statutory limit. Section 6 of the Act, for instance, provides for additional filings made "***before, at, or after the expiration***" of the "two year[]" period set by the ICA. 15 U.S.C. § 80a-6(a)(2). ***No such language appears in Section 18(d)***. Read alongside Section 6, the whole-text canon makes clear that Section 18(d) cannot be interpreted to provide for

[7] Ltr. from Skadden, Arps, Slate, Meagher & Flom LLP to V. Countryman, Acting Sec., U.S. Sec. & Exch. Comm'n, re: File No. S7-27-18—Fund of Funds Arrangements (Release Nos. 33-10590; IC-33329) (May 2, 2019), at 5, https://www.sec.gov/comments/s7-27-18/s72718-5444941-184862.pdf.

extensions beyond the 120-day limit—Congress knew how to provide for extensions where it wanted, and did not do so in Section 18(d). *See Simonoff*, 2010 WL 4823597, at *7 (Where "Congress knows how to say something but chooses not to, its silence is controlling.").

Nor does *Neuberger II* offer any authority compelling the Court to disregard the plain text of Section 18(d)'s maximum duration period. *Contra* Dkt. 26 at 22–24 (citing *Neuberger Berman Real Est. Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 485 F. Supp. 2d 631 (D. Md. 2007) ("*Neuberger II*")). Even setting aside that it is a decades-old, out-of-Circuit decision, that court acknowledged ambiguity as to whether the language prohibiting subscription rights extending beyond 120 days permitted successive subscription issuances. *See* 485 F. Supp. 2d at 638. Any such statutory ambiguity must be resolved by this Court in light of the Second Circuit's articulation of the ICA's purposes, which "lean in Saba's favor." *Nuveen*, 88 F.4th at 120. *Nuveen* and *BlackRock*—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. Guided by those purposes, this Court cannot follow *Neuberger II*'s erroneous holding here.

II. Recission of the Pill is Mandatory: No Discovery Is Required.

Defendants also cannot demonstrate that discovery is required before summary judgment in Saba's favor. Because Defendants' adoption of the Pill is facially inconsistent with the letter and purposes of the ICA, rescission is required as a matter of law. 15 U.S.C. § 80a-46(b)(2).

<u>The Complaint Raises a Pure Question of Law</u>. Whether defensive mechanisms violate the ICA's terms—thereby warranting rescission and a declaration of voidness—"is a pure question of law at the pre-discovery stage." *Nuveen*, 2022 WL 493554, at *6; *aff'd*, 88 F.4th at 117; *BlackRock*, 2024 WL 43344, at *6–7, *aff'd*, 2024 WL 3174971, at *3–4

<u>Rescission is Mandatory</u>. The ICA issues a directive against courts denying rescission of

contracts that offend the ICA. 15 U.S.C. § 80a-46(b)(2) ("a court ***may not deny*** rescission" of a contract "that is made, or whose performance involves, a violation" of the ICA (emphasis added)).[8] It then creates a limited exception—specifically, it identifies two conditions that ***both*** must be met before courts may deviate from the statutory command to rescind ICA-offending contracts. *Id.* (court may deny rescission of ICA-offending contract ***only*** if it "[1] finds that under the circumstances the denial of rescission would produce a more equitable result than its grant ***and*** [2] would not be inconsistent with the purposes" of the ICA (emphasis added)). As the Second Circuit explained again last month, "although 'a court may not *deny* rescission" unless it finds that the two conditions of Section 47(b)(2) have been satisfied, "[e]quitable balancing is not required to *grant* rescission.'" *BlackRock*, 2024 WL 3174971, at *4 (quoting *Nuveen*, 88 F.4th at 120 n.16).

Because Defendants' adoption of the Poison Pill is inconsistent with the letter and purposes of the ICA, the ICA ***requires*** this Court to order its rescission. Defendants' scare-mongering that activists can "force[]" actions detrimental to fund shareholders is likewise a red herring. Dkt. 26 at 5. At issue is simply whether an ICA-regulated fund may issue subscription rights on a non-ratable basis. (And whether such subscription rights may have continuous effect for more than 120 days.) Hypothetical future actions cannot justify Defendants' unlawful Pill granting rights to acquire shares to some shareholders while denying them to others. Whatever tools the ICA might give registered investment companies to address concentrated shareholding, such blatant discrimination with respect to issued subscription rights unequivocally is not among them.

<u>The Second Circuit Has Rejected the Argument that Discovery is Required Prior to Rescission</u>. The defendant funds in both *Nuveen* and *BlackRock* raised the same last-ditch argument that summary judgment could not be granted, and the ICA-offending provisions

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[8] Section **47**(b)(2) of the ICA is codified at 15 U.S.C. § 80a-**46**(b)(2).

rescinded, without discovery first taking place. *See Nuveen*, 21-cv-327 (JPO), Dkt. 49 at 1–6; *BlackRock*, No. 23-cv-5568 (JSR), Dkt. 98 at 4–6. This Court fully ***rejected*** those arguments. *See Nuveen*, 2022 WL 493554, at *4, *6 ("this one of those rare cases—one limited to a pure question of law at the pre-discovery stage"); *BlackRock*, 2024 WL 43344, at *6 ("[E]quitable balancing is not required to grant rescission."). And those determinations were affirmed by the Second Circuit. *Nuveen*, 88 F.4th 120 n.16 (concluding "[e]quitable balancing is not required to *grant* rescission" of ICA-offending contracts); *BlackRock*, 2024 WL 3174971, at *4 (same).

Defendants' insinuations about supposed issues of material fact, *see* Dkt. 26 at 24–25; Dkt. 28, Musoff Decl. ¶¶ 8–19, are likewise the same as those rejected before. The *Nuveen* court granted summary judgment despite Defendants' accusations about the need to protect "long-term investors" from the "strategies" of concentrated activist investors, and other supposed "purpose[s]" of the ICA. 2022 WL 493554, at *6; *see also Nuveen*, 88 F.4th at 120–21 & nn. 16, 18. *BlackRock* rejected any dispute existed as to whether rescission would "be inconsistent with the ICA's aims." 2024 WL 43344 at *6, *aff'd*, 2024 WL 3174971, at *4. And *Eaton Vance* found immaterial the arguments about activism and concentrated shareholding. 2023 WL 1872102, at *3–4 & n.6, *8.

III. Judgment Should Enter Against the Individual Defendants.

Saba has established that judgment should be entered against Individual Defendants to declare the illegality of their conduct, and to prohibit their implementation or extension of the Pill in the future. *See Nuveen*, 88 F.4th at 116 n.11. Investment company directors in *BlackRock* similarly attempted to skirt accountability for violating shareholders' ICA rights, and their arguments were soundly rejected. *See* 2024 WL 43344, at *6, *aff'd*, 2024 WL 3174971, at *5 (judgment against "individual trustees [who] participated in [] adoption of" the ICA-offending provisions); *see also* Dkt. 25 at 21–23 (collecting ICA cases involving judgment against individual directors). The Court should similarly reject the Individual Defendants' arguments here.

Dated: July 12, 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

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 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