UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABA CAPITAL MASTER FUND, LTD., and SABA CAPITAL MANAGEMENT, L.P.,	:	
Plaintiffs,	:	1:24-cv-00690 (JGLC)
v.	:	**ORAL ARGUMENT REQUESTED**
ASA GOLD AND PRECIOUS METALS, LTD., MARY JOAN HOENE, BRUCE HANSEN, WILLIAM DONOVAN, and AXEL MERK,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN
FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT[1]

The Plans issued every ASA shareholder—including Saba—one conditional Right for each share of ASA that it owned as of a specified date. Those Rights expire within 120 days. The Plans thus comply with the requirements of Section 18(d). The Complaint should be dismissed.

Saba's Opposition relies on various forms of misdirection and mischaracterization. *First*, the thrust of Saba's Opposition is that the Rights issued pursuant to the plans "cannot ever be ratable" because a triggering shareholder may not exercise its Rights. This conflates the *issuance* of a right *by the fund* with the later *exercise* of that right *by a shareholder*. Section 18(d) requires only that rights be *issued* ratably by a fund; it is silent as to the substance of any rights or the *exercise* of any rights by shareholders. *Second*, Saba paints *Nuveen* in broad strokes to avoid the factually and legally distinguishable nature of the very specific and limited holding in that case. *Nuveen* is about restrictions on a shareholder's "present" ability to vote shares in violation of a specific textual requirement of Section 18(i). This case has ***nothing to do*** with restrictions on voting rights in violation of Section 18(i) and there is no corresponding component of Section 18(d) requiring that a shareholder has a "present" ability to exercise any ratably issued rights.

REPLY ARGUMENT

I. THE PLANS ISSUED RIGHTS RATABLY AS REQUIRED BY SECTION 18(D)

A. Saba Ignores The Plain Text Of The Plans And Section 18(d)

1. Saba Mischaracterizes The Plans And ASA's Press Releases By Claiming That Some Rights Were Void When Issued (They Were Not)

Saba's claim that the Plans "by design" grant rights to "some shareholders" while

[1] Capitalized terms not defined herein have the meanings ascribed in Defendants' Memorandum of Law in Support of Their Motion to Dismiss, cited as "MTD." (ECF No. 21.) Saba's Memorandum of Law in Opposition to Defendants' MTD is cited as "MTD Opp." (ECF No. 25.) Citations to: (i) "MTD Ex. __" are to the exhibits to the Declaration of Scott D. Musoff, filed with Defendants' MTD (ECF No. 22); (ii) "MSJ Opp. __" are to Defendants' Memorandum of Law in Opposition to Plaintiffs' MSJ (ECF No. 26); any (iii) "MSJ Opp. Ex. __" are to the exhibits to the Declaration of Scott D. Musoff, filed with Defendants' Opposition to Plaintiffs' MSJ (ECF No. 28).

"denying those same rights to others" is wrong. (MTD Opp. at 1, 9, 11.) All ASA shareholders were issued Rights and, under the April Plan, currently hold one Right for every share they owned as of the specified record date. (MTD at 14-20; *see also* MSJ Opp. at 10-13.) If the Plan is triggered, all shareholders, except an Acquiring Person, may exercise their Rights and purchase an additional share of ASA for every Right held. (MTD at 14-20.) Shareholders who, like Saba, already owned >15% of ASA at the time the Plans were adopted were "grandfathered" in at their ownership levels (16.87% for Saba) and do not become an Acquiring Person unless they acquire an additional 0.25% of ASA. (*Id.*) Saba was thus issued and currently owns one Right for each of its 16.87% shares of ASA and *does not dispute* that if another shareholder becomes an Acquiring Person, Saba will be entitled to exercise each of its issued Rights.[2] This is an inherent—but inescapable—admission that Saba was, in fact, issued Rights proportionate to its holdings.

Saba mischaracterizes statements in ASA's press releases as "admi[ssions] that the rights to acquire additional shares contemplated by the [Plans] are non-ratable." Specifically, Saba claims that ASA "openly celebrated that the Pill prevented Saba from acquiring additional shares" because it holds >15% of ASA and, according to Saba, >15% holders are flatly "denied" the ability to exercise their Rights. (MTD Opp. at 9.) This rhetoric is simply incorrect. The ASA press releases simply stated the Board's basis for issuing the Rights: to disincentivize Saba from gaining creeping control of ASA to the detriment of ASA's other shareholders. (MTD Ex. 6, 13; *see also* MTD at 8.) Adopting a shareholder rights plan to deter a specific threat posed by a specific control-seeking shareholder that seeks to gain creeping control is consistent with the well-accepted use and fundamental purpose of shareholder rights plans. *See e.g.*, Lipton & Steinberger, *Takeovers & Freezeouts*, § 6.03 (2023) ("basic objective[]" of a rights plan is to

[2] Saba also does not dispute that it is entirely Saba's *choice* as to whether or not it becomes an Acquiring Person by choosing to purchase additional ASA shares on the market. (*See generally* MTD Opp.)

make it expensive "to ***the*** raider;" discussing caselaw upholding rights plans adopted in response to specific takeover threats by specific shareholders (emphasis added)); (*see also* MTD at 11-13). The press releases' identification of Saba's control-seeking activities as the basis for the Plans' adoption has nothing to do with whether the Plans issued Rights ratably under Section 18(d). And Saba does not identify any other provision of the ICA (or other law) suggesting a fund cannot protect itself from a control-seeking entity through adopting this economic deterrent.

Saba's claims boil down to a complaint that it is unable to purchase an unlimited number of shares—the only activity potentially curtailed by the Plans. Again, Saba cites no provision in the ICA (or any other law) that entitles it to engage in such activity. There is none. The governing documents of several funds subject to the ICA and registered with the SEC have (or previously had) caps on the percentage of their outstanding shares that any one shareholder can own (*i.e.*, 4.99%).[3] Indeed, ownership caps are embedded in the ICA itself. Section 12(d)(1) generally limits a fund to owning 3% of another fund's shares. *See* 15 U.S.C. § 80a-12(d)(1).[4]

2. Saba Incorrectly Reads Section 18(d) As Requiring That Ratably Issued Rights Also Must Always Be Ratably Exercisable

Saba argues that the Rights "cannot ever be 'ratable'" because a triggering shareholder may not, under certain circumstances created by its own voluntary actions, later be able to exercise its issued Rights. (MTD Opp. at 10.) Saba's argument conflates the *issuance* of a right by a fund with its future *exercise* by a shareholder. These are two completely different things. *Compare Issue*, *Black's Law Dictionary* (11th ed. 2019) ("[t]o be put forth officially" or "[t]o send out or distribute officially"), *with Exercise*, *id.* ("[t]o implement the terms of; to execute

[3] (*See, e.g.*, MSJ Opp. Ex. 27 Art. II, § 12(c)(i); Ex. 28 Art. V § 4(c)(i); Ex. 29 Art. VI § 6.8(a)(i); Ex. 30 Art. V § 4(c)(i); Ex. 31 Art. III § 10(c)(i).)

[4] This statutory limit embodies one of the ICA's basic purposes, *i.e.,* protecting registered funds from the concentrated voting power of large shareholders. *See* 15 U.S.C. § 80a-1(b)(2)); *see also id.* § 80a-2(a)(3)(A).

<exercise the option to buy the commodities>"). Section 18(d) requires only that the *issuance* of rights be ratable; it is silent as to the substance or exercisability of such rights by those to whom the rights were issued. In short, nothing in the ICA prohibits restrictions on a shareholder's ability to exercise rights, so long as those rights were ratably issued.

Saba labels the distinction between issuance and exercise as "hyper-technical" (MTD Opp. at 11), but that rhetoric ignores that Congress itself distinguished between the "issuance" of a right by a fund and the "exercise" of a right by a shareholder in Section 23(b) of the ICA.[5] *See* 15 U.S.C. § 80a-23(b).[6] In contrast, Congress drafted Section 18(d) to apply ***only*** to the issuance of rights. Saba itself argues that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." (MTD Opp. at 19 (citing *United States v. Papagno*, 639 F.3d 1093, 1099 (D.C. Cir. 2011)).)

Saba also contradicts canons of construction and grammar by divorcing the modifier "ratably" from the term "issued" to argue that rights must, in all circumstances and for all purposes, be ratable from issuance to exercise. (MTD Opp. at 10.) This ignores the text of Section 18(d), where "ratably" modifies only the term "issued," not generally the terms "warrant or right." 15 U.S.C. § 80a-18(d) (prohibiting the issuance of rights and warrants, "except in the form of warrants or rights to subscribe . . . issued exclusively and ratably").

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[5] Section 23(b) states that shares can be sold below NAV "upon the ***exercise*** of any warrant outstanding on August 22, 1940, or ***issued*** in accordance with the provisions of section 80a-18(d)." 15 U.S.C. § 80a-23(b) (emphasis added). (*See* MTD at 15-16.) Saba does not dispute that Section 23(b) distinguishes between the point in time at which a right is issued by a fund and the point in time at which that right is exercised by a shareholder.

[6] Section 60(a)(4)(A) of the ICA likewise distinguishes between issuance and exercise. *See* 15 U.S.C. § 80a-60(a)(4)(A) (governing issuance and exercise of rights in business development companies). Congress has also distinguished between the point in time at which a right is issued and the point in time at which it is exercised in other statutes. *See id.* § 77(b)(3) (in defining the terms "sale" or "sell" in the Securities Act of 1933, providing that the "issue or transfer of a right or privilege, when originally issued or transferred with a security . . . giving a right to subscribe" is not a "sale" but that a "sale" but a "sale" may occur "upon the exercise" of such right); *accord* 26 U.S.C. § 83 (for income taxation purposes, an employee who receives a non-statutory stock option is not taxed when the option is granted but is taxed when the option is exercised).

Section 18(d) itself recognizes that ratably issued rights need not be exercised ratably—or at all—by requiring that unexercised rights expire within 120-days. *See id.* Indeed, a shareholder need not and may decide not to exercise their rights for any number of individualized reasons. Issued rights need not *ever* be exercised, much less ratably exercised.

3. *Nuveen* Is Limited To Section 18(i) And Shareholder Voting Rights And Is, Therefore, Factually And Legally Distinguishable

Saba argues that *Nuveen* holds that the potential future inability to *exercise* an issued right is tantamount to the right never having been issued, rendering such issuance not ratable. (MTD Opp. at 2, 10-12.) *Nuveen* is not so broad. In *Nuveen*, the Second Circuit held that Section 18(i)—which states that "every share of stock . . . shall be a voting stock and have equal voting rights with every other outstanding voting stock,"—requires that every share of stock in a fund must always (*i.e.*, from issuance to exercise) carry with it the present ability to be voted equally with all other shares. (MTD at 20-23.) The *Nuveen* court's conclusion *specifically hinged* on the ICA's definition of the term "voting security." The court looked to the definition of "voting security" to interpret Section 18(i)'s use of the term "voting stock." Under the ICA, a "voting security" is one which "presently" enables the holder to exercise the voting rights associated with that share of stock. 15 U.S.C. § 80a-2(a)(42). The Second Circuit held that a "voting stock" could only have "equal voting rights" consistent with Section 18(i) if the holder always had the "present" ability to exercise the share's right to vote. *Nuveen*, 88 F.4th at 117.

Saba's Opposition spends pages and pages straining to analogize *Nuveen* to this case. (*See generally* MTD Opp. (citing to and relying on *Nuveen passim*).) Not once does Saba acknowledge *Nuveen*'s extended discussion of and reliance on the definition of "voting stock" (as "voting security") and the "present" ability of a shareholder to vote shares it owns. Instead, Saba describes *Nuveen* only in broad terms and incorrectly suggests that *Nuveen* relied on the use

of the word "issued" in Section 18(i). (*Id.* at 10-11.) The term "issued" played *no role* in the Second Circuit's analysis. If the word "issued" alone compelled the conclusion in *Nuveen* that stock had to be "presently" votable, the court would not have needed to look to the definition of "voting security," as it did. Here, there is no component of Section 18(d)—or any definition of a term used in that section—that speaks to the "present" ability of a right holder to do anything. Congress could have used the same language in Section 18(d) as it did in Section 18(i), but it did not. The Court should reject Saba's attempt to read into Section 18(d) language that Congress did not use. *See Carcieri v. Salazar*, 555 U.S. 379, 392 (2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.")

Nuveen does not hold that any issued "right" must be exercisable ratably at all times and under all circumstances. But Saba tries so hard to apply *Nuveen* here that it expressly—and incorrectly—suggests that the issue in both cases is exactly the same: restrictions on a shareholder's present ability to exercise the voting rights of shares it owns. Specifically, Saba asserts that the Plans violate Section 18(d) because they "do not provide 'ratable' voting rights." (*Id.* at 2-3.) But Section 18(d) and this case have nothing at all to do with present voting rights or restrictions on such rights—much less "'ratable' voting rights" as Saba suggests.[7]

B. *Neuberger I* Is Not Undermined By *Nuveen*'s Discussion Of Section 18(i)

Saba cannot distinguish *Neuberger I*—the only case to consider the precise issue before this Court in similar factual circumstances. (*See* MTD at 17-20; MSJ Opp. at 15-20). Instead,

[7] Saba's reliance on the SEC Staff's no-action letter in *Boulder* (MTD Opp. at 12, 15) is also inappropriate. *Boulder* was expressly withdrawn in 2020. *See* SEC Staff, Division of Investment Management, *Control Share Acquisition Statutes*, SEC, https://www.sec.gov/investment/control-share-acquisition-statutes (May 27, 2020). Even if *Boulder* had not been withdrawn it is of no persuasive value because: (i) as a no-action letter, *Boulder* was only a staff viewpoint on the facts presented in that matter, not an SEC decision or rule; (ii) *Boulder* discussed only Section 18(i) and control share provisions' restrictions on voting rights, and says nothing about the SEC Staff's views on shareholder rights plans or Section 18(d); and (iii) whatever persuasive value SEC no-action letters may have previously had, following the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, Nos. 22-451, 22-1219, 144 S. Ct. 2244, 2024 WL 3208360 (June 28, 2024), courts need not defer to agency interpretations of statutory provisions. *Id.* at *21-22.

Saba argues that *Neuberger I* was "fundamentally discredited" by *Nuveen*'s supposed rejection of a broad share-shareholder distinction. (MTD Opp. at 4.) Not so. *First*, Saba is wrong in suggesting that *Nuveen* broadly rejected a distinction between restrictions on shares and shareholders in every context. As explained above (*see supra* pp. 5-6) and in Defendants' MTD (MTD at 20-23), *Nuveen*'s holding is confined to rejecting restrictions on a shareholder's "present" ability to vote shares it owns in the context of Section 18(i). *Second*, Saba's statement that *Neuberger I* relied "***exclusively***" on state law is also flatly incorrect and simply ignores the reasoning of the *Neuberger I* court. (*See* MTD Opp. at 15 (emphasis added).) *Neuberger I* held that "the [shareholder rights plan] unambiguously satisfies § 18(d)'s requirement that rights be issued proportionately to a class or classes of shareholders." 342 F. Supp. 2d at 375-76. The court relied on the ***text*** of Section 18(d), not "exclusively" on state law, as Saba argues.[8]

C. <u>The Plain Text Of Section 18(d) Cannot Be Overridden By Policy</u>

Invoking *Nuveen*, Saba argues that the Plans should be rescinded and declared unlawful because they are contrary to the policy and purposes of the ICA. (MTD Opp. at 20-21.) Saba is wrong. *First*, *Nuveen*'s weighing of policy related to Section 18(i) and restrictions on present shareholder voting rights is irrelevant here where Section 18(d) applies and Saba does not contend that the Plans restrict any present voting rights attached to any shares. (*See supra* pp. 5-6; *see also* MTD at 20-23.) *Second*, as Saba itself has repeatedly urged courts in other cases, policy and purpose cannot overcome the plain meaning of the ICA's text. *See, e.g.*, *SEC v. Nat'l Presto Indus., Inc.*, 486 F.3d 305, 310 (7th Cir. 2007) ("[C]ourts had better not depart from [the ICA's] words without strong support for the conviction that, under the authority vested in them

[8] The portion of *Neuberger I* that discussed Section 18(i) and voting rights held that shareholder rights plans survive Section 18(i) not based on a generalized distinction between shares and shareholders but because shareholder rights plans place no restrictions on voting rights. *See Neuberger I*, 342 F. Supp. 2d at 377.

by the 'context' clause, they are doing what Congress wanted . . . .").[9]

Likewise, Saba's attempts to recast Defendants' plain text arguments as relying on state law should be ignored. (MTD Opp. at 12-14.) Defendants' references to state law demonstrate the long-standing history of judicial case law upholding shareholder rights plans as reasonable and legally permissible defensive measures. Although Defendants maintain that state law provides a robust legal backdrop for this Court's consideration of the legal issue before it, Defendants' argument is based firmly in the plain text of Section 18(d).[10]

II. THE PLANS WERE DISTINCT, 120-DAY ISSUANCES, NOT EXTENSIONS OF ONE ANOTHER AS SABA CLAIMS WITHOUT SUPPORT

Saba does not dispute that Section 18(d) does not prohibit successive issuances of rights. (*Id.* at 17-20) Instead, Saba misconstrues the April Plan as an extension of the December Plan and says Section 18(d) does not provide for such extensions. Saba's argument fails.

First, Saba's attempt to characterize the April Plan as an extension of the December Plan ignores the distinct characteristics of each issuance. (*Id.* at 17.) Each Plan was a distinct and separate offering of separate Rights. Indeed, due to active ongoing trading of ASA, the shareholders of ASA are always changing, meaning that the shareholders of ASA as of January 12, 2024, who were issued Rights under the December Plan are different from the shareholders of ASA as of May 9, 2024, who were issued Rights under the April Plan.[11] Only the Rights issued pursuant to the April Plan are outstanding; the December Plan Rights are expired and may no longer be exercised by any shareholder. (MTD Ex. 7 at § 1(s); *see also* MSJ Opp. at 21-22.)

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[9] Additionally, as explained in Defendants' MTD, the Shareholder Rights Plans are *consistent with* the ICA's stated purposes and policies, including, for example, by preventing funds from being operated in the interests of "affiliated persons" like concentrated shareholders such as Saba "rather than in the interest of all classes of such companies' security holders." (MTD at 23-24 (quoting 15 U.S.C. § 80a-1(b)(2)); *see also id.* § 80a-2(a)(3)(A).)

[10] The ICA regulates investment companies that are organized pursuant to and subject to state law or the law of other jurisdictions. *See Burks v. Lasker*, 441 U.S. 471, 479 (1979) (ICA does not entirely displace state law). Thus, Saba's argument that state law is "irrelevant" (MTD Opp. at 14) is, at best, overstated.

[11] *See* ASA Gold and Precious Metals, Ltd., Yahoo Finance, finance.yahoo.com/quote/ASA/key-statistics/.

Second, Saba's arguments are undermined by *Neuberger II*, where the court held that a fund's successive adoption of separate shareholder rights plans with substantively identical terms for more than a year was permissible under Section 18(d). *Neuberger II*, 485 F. Supp. 2d at 637-39. That is on all-fours with the Plans here. Saba argues that *Neuberger II* is unpersuasive because it misapplied policy considerations. (MTD Opp. at 20.) Not so. *Neuberger II* is based on a plain text analysis of Section 18(d), holding that the shareholder rights plans were consistent with Section 18(d) "[a]s a matter of law" because "each of the rights agreements adopted . . . indeed expired in less than 120 days." *Id.* at 637. (MTD at 19-20; *see also* MSJ Opp. at 22-23.)

Third, Saba's reliance on Section 6 of the ICA to argue that "Congress knew how to provide for extensions in the ICA when it meant to do so" and did not in Section 18(d) does nothing to advance Saba's argument. (MTD Opp. at 18.) Section 6 has nothing to do with this case. That provision allows certain companies to be exempt from some or all of the ICA based on certain criteria, as certified every two-years. It says nothing about an investment company's issuance of limited-duration subscription rights to its shareholders.

Fourth, Saba fails to grapple with the implications of its own argument. Under Saba's interpretation of Section 18(d), either a fund may only ever issue rights on one occasion or there is some undefined point in time or set of circumstances where an issuance becomes separate and allowable. That reading finds no support in the ICA's text and identifies no guiding principles for enforcement (*e.g.*, whether hours, days, or more must pass for two issuances to be separate).

Finally, Saba's case citations are inapposite. In *SEC v. Imperiali, Inc.*,[12] unlike here, there was *no expiration date* for the rights issuance. *SEC v. Sloan*, 436 U.S. 103, 106-08 (1978), is likewise distinguishable. It involved the SEC suspending the trading of a stock without a hearing

[12] No. 12-80021-Civ-Ryskamp/Hopkins, 2013 WL 12080193, at *6 (S.D. Fla. Sept. 25, 2013), *adopted*, No. 12-CV-80021-RYSKAMP/HOPKINS, 2013 WL 12080173 (S.D. Fla. Oct. 8. 2013).

through a series of suspensions pursuant to Section 12(k) of the Securities Exchange Act of 1934, which authorizes the SEC "summarily to suspend trading . . . for a period not exceeding 10 business days." 15 U.S.C. § 78*l*(k). Section 18(d) does not indicate the total "period" that cannot be "exceed[ed]." *See id* § 80a-18(d); *Neuberger II*, 485 F. Supp. 2d at 638 (distinguishing *Sloan*).

III. SABA'S OPPOSITION WAIVES ANY ARGUMENT THAT THE PLANS VIOLATE SECTION 23(B)

Saba does not respond to Defendants' argument that Saba's claims under Section 23(b) should be dismissed. (*See* MTD at 16-20.) Saba's failure to respond is tantamount to a concession that the Plans do not violate that provision. *See, e.g.*, *Curry Mgmt. Corp. v. JPMorgan Chase Bank, NA*, 643 F. Supp. 3d 421, 426 (S.D.N.Y. 2022).

IV. SABA HAS FAILED TO ALLEGE ANY BASIS FOR INDIVIDUAL LIABILITY

Saba argues that it has alleged claims against the Former Board because it seeks to "establish the illegality of their conduct, and to prohibit their implementation" of the Plans in the future. (MTD Opp. at 21.) Saba does not identify any misconduct by the Former Board. *See Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d. Cir. 2001) (dismissing complaint where the plaintiff "lump[ed] defendants together"). Additionally, Saba's argument that the Former Board members must be parties so that they may be enjoined from implementing shareholder rights plans in the future makes no sense because: (i) ASA and its current Board would be subject to any decision by this Court; (ii) Defendants Hansen and Merk are no longer members of the Board and cannot enact shareholder rights plans on behalf of ASA moving forward; and (iii) the two Saba-nominated current directors of ASA are not named as defendants.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint.

Dated: July 12, 2024
New York, New York

Respectfully Submitted,

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