UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABA CAPITAL MASTER FUND, LTD., Plaintiff, v. BLACKROCK ESG CAPITAL ALLOCATION TRUST; R. GLENN HUBBARD, W. CARL KESTER, CYNTHIA L. EGAN, FRANK J. FABOZZI, LORENZO A. FLORES, STAYCE D. HARRIS, J. PHILLIP HOLLOMAN, CATHERINE A. LYNCH, ROBERT FAIRBAIRN, and JOHN M. PERLOWSKI, in their capacity as Trustees of the BlackRock ESG Capital Allocation Trust, Defendants.	Civil Action No. 1:24-cv-01701

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Court, in denying BlackRock ESG Capital Allocation Term Trust ("ECAT")'s motion to dismiss, held that "Saba has sufficiently alleged there is a point where the voting bylaws of ECAT operate to deprive shareholders of their right to select the trustees of the fund" in violation of "the ICA's requirement that trustees be 'elected' at shareholder 'meetings' and that a certain number of directors be submitted for shareholder approval each year." *Saba Cap. Master Fund, Ltd. v. Blackrock ESG Cap. Allocation Term Trust*, 24-CV-01701, 2024 WL 3162935, at *9 (S.D.N.Y. June 25, 2024) ("PI and MTD Op.").

That point has arrived. As Saba predicted, ***not one*** of the fourteen nominees competing for election to ECAT's Board at the 2024 annual meeting received the vote of a majority of shares outstanding, as required by ECAT's Bylaws to be elected in a contested setting. Joint Rule 56.1 Statement ("56.1") ¶ 47; *id.* ¶ 14, Ex. 1 ("ECAT Bylaws"), Art. I, § 11(b) (the "Majority Outstanding Provision"). As a result, seven incumbents, whose terms have expired, serve as unelected "holdovers." *Id.* ¶ 22, Ex. 4 ("Decl. of Trust"), Art II, § 2.2 (the "Holdover Provision"). Accounting for an additional director who was appointed to fill a vacancy, ***eighty percent*** of ECAT's directors have not been duly elected by ECAT's shareholders.

This state-of-affairs plainly contravenes Section 16 of the Investment Company Act ("ICA"). Section 16(a) requires that all directors "be elected to that office by the holders of the outstanding voting securities of such company" at an "annual or special meeting" called for such purpose. 15 U.S.C. § 80a-16(a). Section 16(a) further requires that the term of at least one class of directors must "***expire each year***"—*i.e.*, that at least one class of directors must actually be elected each year in order to continue serving in office. While Section 16 includes a stop-gap measure that allows vacancies between meetings to "be filled in any otherwise legal manner," at least ***two-thirds*** of the board must "have been elected to such office by the holders of the outstanding voting

securities of the company at such an annual or special meeting." *Id.* Moreover, if "at any time ***less than a majority*** of the directors . . . were so elected" by the shareholders, then the board must, "within sixty days" hold an actual election. *Id.*

ECAT is now operating well below all of the statutory thresholds for the number of directors who must actually be "elected" at an "annual or special meeting." After June 2024, just ***one-fifth*** of the Board has been duly elected by ECAT's shareholders. Seven directors undisputedly serve without having been elected by the shareholders after the expiration of their terms (the "Holdover Directors"). Another director undisputedly serves by appointment of the Board, and has never been elected by the shareholders (the "Board-Appointed Director"). Only two of the ten directors have any claim to being elected at an annual or special meeting—and even then, only in an uncontested election measured by a plurality voting standard (the "Plurality-Elected Directors"). These are the facts material to this Motion, and they are undisputed.

Defendants cannot reconcile the undisputed current composition of ECAT's Board with the plain text of Section 16(a) or this Court's motion to dismiss ruling. This Court has already rejected Defendants' argument that the appointment of the seven Holdover Directors by the sole initial shareholder renders them forever "elected" by the shareholders, let alone elected at an "annual or special meeting" as the statute requires; it is "simply not plausible" that having directors "selected by the sole initial shareholder who is affiliated with the investment advisor" forever absolves the fund of liability under the ICA. PI and MTD Op., 2024 WL 3162935, at *9. With that core defense gutted, ECAT must full back on an argument that cannot be squared with Section 16(a)'s mandate that the "term of office of at least one class ***shall expire each year***"—namely, the argument that Section 16(a)'s election thresholds apply only to vacancies, but the Holdover Directors supposedly never left their seats or otherwise created vacancies to be filled. Putting aside that this misreads

when Section 16(a)'s election thresholds apply, Defendants cannot be correct that the Holdover Directors' three-year terms extended without creating vacancies in those Directors' seats, because that would mean those Directors' terms did not "expire" at the time required by the ICA.

In two other respects, the undisputed operation of the Majority Outstanding and Holdover Provision at ECAT's 2024 election violated ICA Section 16(a) and Section 18(i) as a matter of law. *First*, by giving disproportionate voting rights to any minority of shares cast in favor of incumbents, over a majority of shares cast in favor of challengers, the application of the Majority Outstanding Provision at ECAT's 2024 election defied Section 18(i)'s requirement that all "voting stock" have "equal voting rights." 15 U.S.C. § 80a-18(i). As the undisputed election results reflect, 147,994,935 votes for the incumbents were able to defeat 237,552,523 votes for the challengers—effectively giving the votes cast for the incumbents 1.6 times more voting power than those cast for the challengers. And because, under the Holdover Provision, only incumbents can serve in office by virtue of a failed election generated by the Majority Outstanding Provision, only the shares voted for incumbents enjoy such disproportionate voting power. *Second*, as the result of ECAT's 2024 election reflects, the Majority Outstanding Provision in tandem with the Holdover Provision, necessarily operates only to maintain unelected trustees in office, in violation of both Section 16(a)'s requirement that directors actually be "elected" by the shareholders and Section 18(i)'s requirement that shareholders have an actual ability to "vote for the election of directors."

Respectfully, this Court can and should grant judgment for Saba as a matter of law, based on the undisputed results of ECAT's 2024 election, stemming from the undisputed operation and application of the Majority Outstanding and Holdover Provisions. While it remains true that the Majority Outstanding Provision is also unlawful because it sets a standard that is not realistically attainable and deprives ECAT's shareholders of a meaningful opportunity to elect their directors,

the Court need not reach that issue to decide this Motion. Regardless of whether the Majority Outstanding Provision ***theoretically might*** allow directors to ever be elected in a contested election in the future, seven of ECAT's directors ***have not been elected*** under the Majority Outstanding Provision after the ICA-mandated expiration of their terms. Now that the Majority Outstanding and Holdover Provisions have resulted in a supermajority of unelected directors occupying ECAT's Board, on the vote of a minority of the Fund's shares, those Provisions should be declared unlawful under ICA Section 16(a) and 18(i), and rescinded pursuant to ICA Section 46(b)(2).

STATEMENT OF FACTS

I. 2021: Directors Are Appointed by ECAT's Sole Shareholder and ECAT's Bylaws Set Different Voting Standards for Contested and Uncontested Elections

Since its inception in 2021, ECAT's Bylaws have imposed two different standards for director elections. When candidates run unopposed, they need only obtain a plurality of shares voted to be elected. *See* 56.1 ¶ 15; *id.* ¶ 14, Ex. 1, Art. 1, § 11(b)(i). By contrast, when candidates run in a contested election, they must win a majority of all ***outstanding*** shares, not just shares voted, to be elected. *See id.*

ECAT's first slate of thirteen directors, called "Trustees," were not "elected" under either of these voting standards. Rather, on August 12, 2021, over a month before ECAT listed on the New York Stock Exchange, ECAT's ***sole*** initial shareholder, BlackRock Financial Management, Inc.—an affiliate of ECAT's investment advisor—appointed thirteen directors to the Board, ten of whom remain on the now ten-person Board today. 56.1 ¶ 18, Ex. 2 ("Written Consent of Initial Shareholder"). Although BlackRock Financial Management purported to "elect" these directors, it did so by written consent, rather than through an annual shareholder meeting.[1] *See id.* (initial

[1] Tellingly, Defendants' claimed authority that the initial shareholder's written consent complies with ICA Section 16(a)'s requirement of "election" by the "shareholders" at an "annual or special meeting," is Section

shareholder consents to "resolutions," including "ratification and election of board of trustees," "***as if*** they had been adopted at a duly convened meeting of the shareholders of the Trust"); *see also* PI and MTD Op., 2024 WL 3162935, at *1.

On September 24, 2021, ECAT's thirteen directors signed into effect ECAT's Amended and Restated Agreement and Declaration of Trust. R. 56.1 ¶ 22, Ex. 4, at 31 (signature page). The Declaration of Trust includes a "Holdover Provision," that provides in relevant part, that "the Trustees shall be elected at an annual meeting of the Shareholders and . . . each Trustee elected *shall hold office until his or her successor shall have been elected* and shall have qualified." *Id.* at Art. II, § 2.2.

II. 2022: Three Incumbent Directors Are Elected Under a Plurality Vote Standard

ECAT's Board is divided into three classes. 56.1 ¶ 3; *see also id.* ¶ 22, Ex. 4, Art. II, § 2.2. The three classes take turns standing for election at the Fund's annual shareholder meeting. *Id.* ¶ 22, Ex. 4, Art. II, § 2.2. In July 2022, the "Class III Trustees"—Frank J. Fabozzi, J. Phillip Holloman, and Robert Fairbairn—garnered the plurality of shares voted required to be elected in an uncontested election. 56.1 ¶ 31.[2] Fabozzi retired in 2023 and the Board appointed an unelected director, Arthur Steinmetz, to fill the vacant seat. *Id.* ¶¶ 40, 41.

III. 2023: Four Incumbent Directors Serve as Holdovers After Failing to Be Elected

In July 2023, Cynthia L. Egan, Lorenzo A. Flores, Stayce D. Harris, and Catherine A. Lynch—the "Class I Trustees"—came up for election. 56.1 ¶ 34. This time, the election was

15(a) of the ECAT Bylaws, which were not even in existence yet, and by its own terms applies to actions that "may be taken ***without a meeting***." 56.1 ¶ 17.

[2] Although these directors also obtained the vote of a majority of outstanding shares, 56.1 ¶ 31, their election was uncontested, and brokers could vote in the stead of retail investors. In contested elections, by contrast, brokers cannot vote unless they are expressly authorized and instructed by the retail investor. *Id.* ¶ 30. In any event, the manner in which the Plurality-Elected Directors serve on the Board, and/or the number of votes they obtained in their uncontested election, is irrelevant and immaterial to this Motion.

contested. Saba nominated four individuals to replace the incumbent directors. *Id.* ¶ 35. This meant that the Majority Outstanding Provision would apply.

Despite twice adjourning the shareholder meeting—from July 10, to July 25, to August 7—ECAT never achieved a quorum of a "majority of Shares entitled to vote on any matter at a meeting present in person or by proxy." 56.1 ¶ 25. Necessarily, then, no candidate received the vote of 50% of the shares outstanding required to be elected under the Majority Outstanding Provision, and no candidate was elected to the Board. *Id.* ¶ 38. Instead, the four incumbents retained their seats as unelected "holdovers." *Id.* ¶ 39.

IV. 2024: Seven Incumbent Directors Serve as Holdovers After Failing to Be Elected

At ECAT's 2024 shareholder meeting, seven directors—the four "holdover" Class I Trustees and the Class II Trustees that had never been up for election—came up for election. Saba nominated its own slate of seven candidates. 56.1 ¶¶ 44, 45. This again meant that the Majority Outstanding Provision would apply. At the preliminary injunction stage, the Court remained curious whether the 2024 "shareholder meeting [would be] doomed to end in the same result as the three unsuccessful attempts at a shareholder election in 2023." PI and MTD Op., 2024 WL 3162935, at *4 n.7. Unfortunately, and all too predictably, it did.

While a quorum was reached in the 2024 election, not a single candidate—neither Saba's nominees nor ECAT's incumbent nominees—garnered enough votes to be elected under the threshold set by the Majority Outstanding Provision. 56.1 ¶¶ 46, 47. Out of 101,893,121 outstanding shares, only 59,292,791 shares—about 58.2% of outstanding—were even represented in person or by proxy at the annual meeting. *See Id.* ¶ 49, Ex. 7 ("First Coast Results"). Thus, for any candidate to win under the Majority Outstanding Provision, they needed to obtain nearly every

vote cast, as mere turnout for the vote was barely over fifty percent. That did not happen, even though each of Saba's proposed nominees received the majority of all shares voted. *See id.*

As a result, the four unelected holdovers from the 2023 contest serve as unelected holdovers for a second year, with three more unelected holdovers joining them. Collectively, eight out of the ten directors are now either holdovers or appointees. Since ECAT's inception, no director has prevailed in a contested election under the Majority Outstanding Provision.

PROCEDURAL HISTORY

In March 2024, Saba filed this lawsuit, predicting that "the application of the [Majority Outstanding Provision] has preordained the results of the 2024 election[:] No candidate will be able to obtain the votes of a majority of all outstanding shares, and the seven Trustee Defendants will retain their seats as holdovers." Dkt. 1, at ¶ 5. At the same time, Saba moved for a preliminary injunction, expressing fear that "[w]ithout relief from the Court, Saba [would] be unable to exercise its shareholder right to elect trustees at the [2024] shareholder meeting." Dkt. 9, at 3. Defendants opposed the motion and moved to dismiss Saba's complaint. Dkt. 25; Dkt. 27.

This Court denied Saba's motion for preliminary injunction, solely on the ground that Saba had "not met its burden of showing irreparable harm." PI and MTD Op., 2024 WL 3162935, at *6. The Court's ruling was based in part on the premise—initially advocated by Defendants—that Saba's harm could be remedied, after the 2024 election, by "ordering a prompt new election under new rules." *Id.* at *5-6 (citation omitted); *see also* Dkt. 25, at 26.

The Court also denied Defendants' motion to dismiss, remarking that:

- "[F]or purposes of the ICA, Saba's primary identity is that of 'shareholder,' entitled to no fewer rights than any other shareholder," and that the "[t]he fundamental governance right possessed by shareholders" like Saba "is the ability to vote for the directors the shareholder wants to oversee the firm." *Id.* at *9 n.11 & *9 (quoting *Pell v. Kill*, 135 A.3d 764, 794 (Del. Ch. 2016)).
- "[T]here is a point where the voting bylaws of ECAT operate to deprive shareholders of their right to select the trustees of the fund, and to circumvent the ICA's requirement that trustees be

'elected' at shareholder 'meetings' and that a certain number of directors be resubmitted for shareholder approval each year." *Id.* at *9.

- Defendants' argument—"that even where a fund fails to have successful elections for years and where a fund's board is composed primarily or entirely of holdovers selected by the sole initial shareholder who is affiliated with the investment advisor, even in perpetuity, there is no circumstance where such a fund could be found to be in violation of the ICA's requirements for shareholder elections and board composition"—was "simply not plausible." *Id.*

- If a violation of the ICA were found, "[t]he ICA provides for a right of rescission for contracts found to violate the statute, either on their face or in the performance of them; courts may also declare such contracts void." *Id.* at *8.

Following the Court's ruling, Defendants claimed that they needed discovery to defeat Saba's claims and support their affirmative defenses. Dkt. 47 ("Joint Letter"). Saba explained that discovery would not be needed for the Court to decide the pure question of law at issue; every court to have adjudicated Saba's ICA-based challenges to management-entrenching governing provisions has done so as a matter of law, without consideration of any discovery.[3] The Court permitted Saba to file this Motion for Summary Judgment, to which Defendants will respond by explaining their purported need for discovery. Dkt. 51, at 13-14 (Aug. 2, 2024 Transcript).

LEGAL STANDARD

Summary judgment must be granted upon a showing that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). On such motion, the Court "resolv[es] all ambiguities and draw[s] all factual inferences" in favor of the "non-moving party." *Mudge v. Zugalla*, 939 F.3d 72, 79 (2d Cir. 2019) (citation

[3] *See Saba Cap. Master Fund, Ltd. v. BlackRock Mun. Income Fund, Inc.*, No. 23-CV-5568, 2024 WL 43344, at *6 (S.D.N.Y. Jan. 4, 2024), *aff'd,* 2024 WL 3174971 (2d Cir. June 26, 2024); *Saba Cap. CEF Oppors. 1, Ltd. v. Nuveen Floating Rate Income Fund*, No. 21-CV-327, 2022 WL 493554, at *6 (S.D.N.Y. Feb. 17, 2022), *aff'd*, 88 F.4th 103 (2d Cir. 2023); *Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd.*, 2023 WL 1872102, at *6-8 (Mass. Super. Jan. 21, 2023) (granting ICA-based challenge to control share provisions as a matter of law; not addressing ICA-based challenge to voting standard, on which no party moved; leaving for trial a *forward-looking*, *state-law* challenge to the voting standard, unlike the *ICA-based challenge* at issue here, based on the *undisputed board composition* since the failed 2024 election)

omitted). "[W]here it is clear that the nonmoving party cannot defeat the motion by showing facts sufficient to require a trial for resolution, summary judgment may be granted notwithstanding the absence of discovery." *MCC Non Ferrous Trading Inc. v. AGCS Marine Ins. Co.*, 14-cv-8302 (JCF), 2015 WL 3651537, at *3 (S.D.N.Y. June 8, 2015) (citation omitted); *see also Saba Cap. CEF Opp. 1, Ltd. v. Nuveen Floating Rate Income Fund*, 21-CV-327, 2022 WL 493554, at *6 (S.D.N.Y. Feb. 17, 2022) (when a dispute is "limited to a pure question of law at the pre-discovery stage," summary judgment is appropriate without discovery).

ARGUMENT

I. On the Undisputed Facts, ECAT's Use of the Majority Outstanding and Holdover Provisions Have Violated ICA Section 16(a) and 18(i) As a Matter of Law

A. The Majority Outstanding and Holdover Provisions Have Resulted in an Undisputed Board Composition that Violates ICA Section 16(a)

At the preliminary injunction stage, the Court effectively asked: at what point does directors' service on a board, without affirmative election by the shareholders, violate the ICA? The ICA provides a clear answer: a violation occurs when a fund falls below the statutory thresholds for the proportion of directors who must actually be elected. As a matter of law, the undisputed current composition of ECAT's Board, an undisputed product of the Majority Outstanding and Holdover Provisions, violates Section 16(a)'s thresholds for the proportion of directors who must be "elected" by the shareholders at an "annual or special" meeting of the fund, and Section 16(a)'s mandate that the term of at least one class of directors must "expire each year."

1. ECAT's Board Has Indisputably Fallen Below Section 16(a)'s Thresholds for the Proportion of Directors Who Must Be Duly Elected

Section 16(a) is clear about the extent to which it tolerates filling board seats by means other than election, and the overall proportion of a board that can serve in office without being duly elected. Specifically, Section 16(a) contemplates that seats may be filled temporarily by

means other than election only to the extent "***two-thirds***" of the directors have been duly elected—*i.e.*, stop-gap measures may be used to fill no more than one-third of the seats on the board. Further, Section 16(a) prohibits a fund from operating "at any time" with "***less than a majority***" of directors having been duly "elected" by the shareholders. Where a fund falls below Section 16(a)'s requirement that at least a majority of directors be duly elected by the shareholders, the statute also specifies the remedy: the fund must, "within sixty days," hold an actual election to cure the defect.

ECAT is now operating well below both of the statutory thresholds. The math is simple. There is no dispute that no directors were elected in 2023, and that no director received the votes of 50% of the outstanding shares as needed to be elected under the Majority Outstanding Provision. There is no dispute that at that point, by operation of the Holdover Provision, four Holdover Directors served on the Board. There is no dispute that no directors were elected in 2024, and that no director received the votes of 50% of the outstanding shares as needed to be elected under the Majority Outstanding Provision.

All told, there is no dispute that, by operation of the Majority Outstanding and Holdover Provisions, ECAT's Board is currently comprised of seven Holdover Directors and one Board-Appointed Director. Only two out of ten of the directors on ECAT's Board have been duly elected. As neither two-thirds, nor even a majority, of the Board has been duly elected, the Fund is in violation of the ICA.

2. This Court Already Held that Appointment by the Initial Shareholder Affiliate of BlackRock Does Not Render Directors "Elected" in Perpetuity

Unable to otherwise defend the Board's current composition, Defendants appear primed to double down on their argument that the Holdover Directors were "elected" by the initial shareholder—an affiliate of BlackRock itself—even though that argument has already been rejected by this Court as a basis for avoiding liability under the ICA. Even if initial appointment

in some sense qualified as an "election" (though it does not[4]), this Court recognized such appointment could not, consistent with the plain terms of the ICA, qualify as election ***in perpetuity***. As the Court held: it is "simply not plausible" that having trustees "selected by the sole initial shareholder who is affiliated with investment advisor" forever absolves the fund of liability under the ICA. PI and MTD Op., 2024 WL 3162935, at *9.

The Court's prior ruling, now law of the case, is obviously correct and derives directly from the text of the statute. Section 16(a) does not permit directors to be installed by insiders at origination, never to be elected again. In fact, Section 16(a) expressly ***prohibits*** ECAT's classified Board from serving in perpetuity without further election; instead, it requires that "the term of office of at least one class ***shall expire each year***." 15 U.S.C. § 80a-16(a). If more were needed, even authorities previously cited by Defendants recognize that initial appointment is insufficient to install a director in perpetuity. *See* 2 Fletcher Cyc. Corp. § 344 (cited in ECAT's MTD Reply Br., Dkt. 37, at 4) ("officers who never were officially elected as directors after the corporation's inception do not qualify as holdover directors").

3. The Text and Structure of the ICA Confirm that Section 16's Director-Election Thresholds Impose a Limit on Holdover Directors

Defendants' only remaining answer to Section 16(a)'s director-election thresholds is again contrary to the Court's motion to dismiss opinion, and the text and structure of the ICA. According to Defendants, because holdovers merely continue to serve in their seats after a failed election, such that they do not create vacancies, the Section 16(a) thresholds do not apply to ECAT's supermajority of Holdover Directors. *See* Dkt. 28, at 23; Dkt. 37, at 8.

[4] The written consent approved "***the appointment***" of directors "***as if***" at "a duly convened meeting of the shareholders"—*i.e.*, there was no ***actual*** "election" at an "annual or special" meeting of the shareholders, contrary to Section 16(a)'s requirements. 56.1 ¶ 19; *see also id.* ¶ 18, Ex. 2.

Defendants' argument leads to the same logical end already deemed unacceptable by the Court: that holdover directors could continue to serve in perpetuity, until resignation or death, without affirmative election by the shareholders. For the same reasons the Court rejected Defendants' argument that an initially-appointed director never needs to be further "elected," so too must it reject Defendants' argument that a holdover director never needs to be further "elected" by the shareholders. At best, the practice of holding-over can be defended under Section 16(a) if holding-over is viewed as a temporary vacancy-filling mechanism, subject to Section 16(a)'s thresholds for the proportion of directors who must be elected by the shareholders.

The argument—that failed elections do not cause, and holdover directors do not fill, vacancies—also cannot be squared with the ICA. Even authorities Defendants have cited for the proposition that holding over does not create a vacancy (from the far-afield context of municipal corporations), recognize that the north-star in the inquiry is "legislative intent" which may well indicate that "the expiration of a term of office creates a vacancy, regardless of the fact that no successor has been immediately provided and that the former incumbent is attempting to hold over." 3 McQuillin Mun. Corp. § 12:165 (3d ed.) (cited in ECAT's MTD Reply Br., Dkt. 37, at 4). Here, such indications of Congress's intent in the ICA abound.

To start, the ICA's provision that one class of directors' terms must "expire ***each year***" would be rendered null if those same directors could, in the event of holding-over, rely on some ***prior year's*** appointment or election to qualify as having been "elected" by the shareholders at an annual meeting. A director who was at some prior point elected (a counterfactual in the case of ECAT's Holdover Directors) does not continue to be "elected" in perpetuity upon holding-over, otherwise her term would never "expire." *Cf. N. Fork Bancorp., Inc. v. Toal*, 825 A.2d 860, 862, 871 n.25 (Del. Ch. 2000), *aff'd sub nom. Dime Bancorp, Inc. v. N. Fork Bankcorporation, Inc.*,

781 A.2d 693 (Del. 2001) (noting that "five holdover directors" were "***not elected*** at the [shareholder] meeting" after failing to obtain "the affirmative vote of a majority of the voting power present at the meeting, not merely a plurality of the votes cast, as is more usually the case").

Other provisions of the ICA indicate that a fund cannot unilaterally extend the "expiring" term of a director by operation of a holdover provision. For example, in other provisions of the ICA, Congress expressly provides when regulated funds can extend expiring terms notwithstanding a defined statutory limit. Section 6(a)(2), for instance, provides exemptions from the ICA's provisions to investment companies if they have a certain writing on file with the SEC. 15 U.S.C. § 80a-6(a)(2). That writing "shall expire" at least "two years after the date of its filing," thus ending the exemption period. The exemption period can be extended, however, by making additional filings "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 16(a) to allow the extension of a director's term***. Read alongside Section 6(a)(2), the whole-text canon makes clear that Section 16(a) cannot be interpreted to allow a fund's holdover provision merely to extend an incumbent director's term of office. Congress knew how to provide for extensions where it wanted, and did not do so in Section 16(a). *See Simonoff v. Kaplan*, No. 10-CV-2923, 2010 WL 4823597, at *7 (S.D.N.Y. Nov. 29, 2010) (Where "Congress knows how to say something but chooses not to, its silence is controlling.").

The ICA also reflects that (1) Congress understood the term "vacancy" to encompass situations in which shareholders do not make the affirmative election required at an annual meeting, and (2) where Congress wanted to limit "vacancies" only to those created by "death or resignation," it did so expressly. *First*, § 80a-31(a)(2) requires a board's selection of an accountant to be "submitted for ratification or rejection" at the fund's annual meeting. But if that "selection"

is "***rejected***" by the shareholders at the annual meeting, the statute acknowledges the "***vacancy so occurring***," and specifies the manner in which it may be filled. § 80a-31(a) (paragraph after numbered provision (4)). So, too, when a director fails to be "elected" by the shareholders, the shareholders' refusal or failure to make that election leaves a vacancy in that director's seat. *Second*, Section 80a-31(a) specifies a difference in the manner of filling vacancies that occur "due to the death or resignation of the accountant," § 80a-31(a)(2), and those that occur due to the "rejection" of the accountant by the shareholders, § 80a-31(a) (paragraph after numbered provision (4)). While Defendants effectively seek to construe Section 16(a)'s reference to "vacancies occurring between such meetings" as being limited ***only*** to vacancies occurring by resignation or death, Section 80a-31(a) reflects that when Congress wanted to limit provisions to deal that specific type or cause of vacancy, it did so expressly. Section 16(a) contains no such limitations on the type of "vacancy" being referenced, and specifically lacks a limitation to vacancies occurring "due to the death or resignation" of directors present in Section 80a-31(a)(2), indicating that Congress intended no such limitation to apply in Section 16(a).

Even Defendants' favorite case on the topic of holding-over—*Badlands Tr. Co. v. First Fin. Fund, Inc.,* an unpublished, out-of-circuit precedent—implicitly recognizes that holding-over is an "only temporary" "stopgap measure" between elections to cover the open seat(s) at issue. 65 F.App'x 876, 881 (4th Cir. 2003). And while *Badlands* approved the practice of allowing directors to hold-over in the abstract, the case involved just ***two*** holdover directors who had previously been elected "at a prior shareholder meeting." *Id.* The case did not address or grapple with—nor does any party to that litigation appear to have raised—the question of whether unelected directors may hold over in such large numbers that the composition of the board falls below Section 16(a)'s thresholds for the proportion of directors who must be duly elected.

The ICA's text and structure thus indicate that, to the extent holding-over is actually permitted under the ICA, it is by virtue of the statute's permission that "vacancies occurring between such meetings may be filled in any otherwise legal manner." 15 U.S.C. § 80a-16(a). Section 16(a) tolerates board seats being filled by means other than an election, ***but only if*** no more than one-third of the board is unelected. And by that measure, ECAT's current Board composition does not pass muster. The terms of the four Class I Trustees "expired" in 2023. Neither those incumbents, nor the challenger candidates, were elected in 2023. So those seats were, by operation of the ICA's mandatory annual term expiration, rendered "vacant" and temporarily filled by virtue of ECAT's Holdover Provision. The term of another three Class II Trustees "expired" in 2024. Neither the seven incumbents with expired terms, nor the challenger candidates, were elected in 2024. Section 16(a) thus foreclosed filling the seats of those seven directors with expired terms—70% of the Board, well in excess of the one-third that the statute contemplates may be filled by means other than election—via the Holdover Provision.

B. The Majority Outstanding and Holdover Provisions Have Undisputedly Operated in a Manner that Violates ICA Section 16(a) and 18(i)

The Majority Outstanding and Holdover Provisions worked at ECAT's 2024 election to defy the ICA in two other material respects: they treated votes cast in favor of the incumbents preferentially, in violation of Section 18(i)'s requirement that each voting stock "have equal voting rights with every other outstanding stock," and ensured that only unelected trustees remained in office, in violation of Section 16(a) and 18(i)'s requirement that directors be "elected" and shareholders have an actual ability to "vote for the election" of their directors.

At ECAT's 2024 election, the Majority Outstanding and Holdover Provisions gave disproportionate voting rights to certain shares—specifically, the shares that vote in favor of the incumbents. As the undisputed election results reflect, 147,994,935 votes were cast in favor of the

incumbents, compared to 237,552,523 votes for the challengers. *See* 56.1 ¶ 49, Ex. 7. Even though the challengers received 1.6 times as many votes as the incumbents, the incumbents, not the challengers, serve on the Board. The shares voted for incumbents thus enjoyed disproportionate voting power, in violation of the ICA's requirement that each voting stock must "have equal voting rights with every other outstanding voting stock." 18 U.S.C. § 80a-18(i); *Saba Cap. CEF Oppors. 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F. 4th 103, 116 (2d Cir. 2023) (quoting 15 U.S.C. § 80a-18(i) (Section 18(i) includes a "guarantee of 'equal voting rights'")).

Further, as the result of ECAT's 2024 election reflects, the Majority Outstanding Provision operates only to cause a different result from the plurality voting standard when ***no candidate reaches the 50%-outstanding threshold to be elected***—i.e., when an election fails. If a candidate wins the vote of 50% of the shares outstanding in a contested election, that candidate has necessarily prevailed even under the plurality voting standard applicable to non-contested elections. Thus, as reflected in the 2024 election results, the Majority Outstanding Provision, in tandem with the Holdover Provision, operates only to maintain ***unelected*** trustees in office, in violation of both Section 16(a)'s requirement that directors actually be "elected" and Section 18(i)'s requirement that shareholders have an actual ability to "vote for the election of directors."

C. The ICA's Policy and Purposes Require Interpreting and Applying Sections 16(a) and 18(i) in Saba's Favor

Based on the plain text of Sections 16(a) and 18(i), this Court should invalidate ECAT's unlawful governing Provisions. But, to the extent there are any lingering doubts, the ICA's provisions must be construed in Saba's favor, consistent with this Court's duty to interpret the statute to further "Congress's policy considerations," which the Second Circuit recently held "lean in Saba's favor." *Nuveen*, 88 F.4th at 120; *id.* (Congress "instructed courts to interpret the statute

with its 'policy and purposes' section in mind—Section 1(b) mandates that 'the provisions of [the ICA] shall be interpreted' 'in accordance with' its stated policies" (citing 15 U.S.C. § 80a-1)).

The ICA was "enacted for the benefit of investors," like Saba, "not fund insiders," like ECAT's incumbent directors. *Id.* (citation omitted). Here, as in *Nuveen*, Saba seeks to vindicate the ICA's purpose to prevent ECAT from being "organized, operated, and managed" in the interest of its "directors, officers, investment advisers, depositors, or other affiliated persons thereof," *id.* (citing 15 U.S.C. § 80a–1(b)(2)), and, to that end, ensure that ECAT's shareholders have the "voting rights [that] are *fundamental* to the equitable operation of investment companies," *Boulder Total Return Fund, Inc.*, 2010 WL 4630835, at *6 (S.E.C. No-Action Letter Nov. 15, 2010). As this Court acknowledged, "[t]he text of the ICA, its history and purpose, and wide swaths of corporate law" all "center the voting rights of shareholders." PI and MTD Op., 2024 WL 3162935, at *9; *see also Boulder Total Return Fund*, 2010 WL 4630835, at *6 (noting the "suffrage-based system" at the heart of the ICA). Sections 16 and 18 must therefore be construed in the manner that "center[s]" those voting rights and "protect[s] the preferences and privileges of the holders of [ECAT's] outstanding securities." *Nuveen*, 88 F.4th at 120 (citing 15 U.S.C. § 80a-1(b)(3)).

II. The Majority Outstanding and Holdover Provisions Must Be Declared Unlawful and Rescinded, Without Any Need for Further Factual Development

As this Court has recognized, "[t]he ICA provides for a right of rescission for contracts found to violate the statute, either on their face or in the performance of them; courts may also declare such contracts void." PI and MTD Op., 2024 WL 3162935, at *8 (citing 15 U.S.C. §§ 80a-46(b)(1)-(2)); *see also Nuveen*, 88 F. 4th at 117 (affirming rescission of control share provision as a matter of law); *accord BlackRock*, 2024 WL 43344, at *6.

Given the undisputed outcome of ECAT's 2023 and 2024 elections, this Court should declare that the Majority Outstanding and Holdover Provisions violate §§ 16 and 18(i) of the ICA,

and are void and must be rescinded, insofar as the performance of those Provisions has (a) resulted in Board composed of a supermajority of unelected directors, and (b) given unequal voting power to the minority of shares voted for incumbent directors. *See* 15 U.S.C. § 80a-46(b)(3) ("unlawful portion" of contract, the performance of which involves violation of the ICA, may be severed).

Defendants cannot explain what additional facts are required to decide this Motion, let alone what facts are ***unavailable to Defendants*** such that they need discovery. Fed. R. Civ. P. 56(d) (nonmovant must show facts "essential" to its opposition that are "unavailable" such that nonmovant "cannot present" them without discovery). Specifically, Defendants have identified the following areas on which they supposedly need discovery:

> (1) Saba's efforts to solicit retail and institutional shareholder voting at ECAT; (2) industry practices regarding effective shareholder outreach; (3) the reasons for shareholder 'non-voting'; (4) Saba's own knowledge of and views about the bylaw at the time it purchased shares in ECAT; and (5) Saba's selection of nominees and their qualifications, among other things. Defendants also are entitled to depositions of Saba's existing fact witnesses, as well as any others whose testimony may prove relevant. Defendants also intend to submit additional fact and expert testimony, including regarding shareholder voting patterns at closed-end funds, among other things. Further, Defendants will be asserting several fact-heavy affirmative defenses, not only the equitable balancing required by Section 47(b) but other independent defenses that turn on Saba's unclean hands and the lawfulness of Saba's conduct in amassing its stake in ECAT.

Dkt. 47, at 3. Each of these topics, however, is either irrelevant or immaterial to resolution of this Motion, and none provides a basis to deny Saba's requested relief. Defendants' baseless requests for discovery on the legal questions at issue in this Motion should be viewed as part of their continued efforts to prevent Saba from vindicating its shareholder rights under the ICA.

A. The Court Has Already Rejected Two of Defendants' Topics for Discovery

As the Court noted, "[t]he list of items in defendants' proposal of the subject areas in which they need discovery is very much overbroad and includes things that are, in [the Court's] view, plainly irrelevant in light of the decision on the PI." Dkt. 51, at 3 (August 2, 2024 Transcript).

Specifically, the Court indicated that topics (4) and (5) in Defendants' list are either irrelevant or have already been resolved by the Court, and provide no basis for allowing discovery. *Id.* The Court is correct, and Saba will not further belabor the point.

B. Defendants' Proposed Discovery on Proxy Solicitation Issues Is Irrelevant and Immaterial to this Motion

Defendants also cannot justify their requests for discovery on issues related to proxy solicitation—topics (1) through (3) in their letter, and the stated need for discovery on "shareholder voting patterns at closed-end funds." Putting aside that Defendants could present the Court with evidence on these topics using information in the public domain or already available to them, Defendants' requests for proxy-solicitation discovery were, at most, relevant to issues before the Court at the preliminary injunction stage, but are not relevant or material to this Motion.

At the preliminary injunction stage, Saba sought relief on the basis of the Majority Outstanding Provision's ***expected effects*** at ECAT's then-upcoming 2024 election. Accordingly, Saba presented evidence in support of its prediction that the Provision would cause the election to fail and allow ECAT's directors to remain in office unelected. *E.g.,* Dkt. 10 (Decl. of John Grau), ¶ 7 (presenting evidence probative of "whether it is realistically feasible for a candidate to obtain the votes of a majority of all outstanding shares in ECAT's ***upcoming*** election"). Defendants' current requests for proxy-solicitation discovery are all focused on testing that preliminary injunction stage evidence about the predicted effects of the Majority Outstanding Provision.

Now, Saba seeks relief on the basis that the 2024 election ***already failed*** and resulted in an ***undisputed*** composition of ECAT's Board on which a supermajority of directors now sit without having been duly elected. Thus, the question at issue is not whether the Majority Outstanding Provision is realistically attainable or practically impossible to meet in some ***future*** election but, rather, whether the application of those Provisions have ***already*** resulted in election results and a

supermajority-unelected Board that, as a matter of law, violate Sections 16(a) and 18(i). Neither ECAT's or Saba's efforts to "solicit retail and institutional shareholder voting," nor "industry practice regarding effective shareholder outreach," nor the testimony of any fact or expert witness on "shareholder voting patterns, Dkt. 47, at 3, are relevant to that inquiry. Regardless of whether Saba or ECAT could have done more to try to turn out the vote (which Saba does not concede[5]), the Board cannot continue to exist in a state that violates the ICA. *See Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd.*, 2023 WL 1872102, at *8 (Mass. Super. Jan. 21, 2023) (quoting 15 U.S.C. § 80a-46(b)(2)) (court cannot deny rescission if there is a violation of "a fundamental requirement of the statute," like the statute's protections for shareholder voting rights).

Defendants' requests for proxy solicitation discovery are meant to probe whether the Majority Outstanding Provision ***theoretically might*** allow directors to be elected at some future election, but that question is irrelevant and immaterial to this Motion. By virtue of the Majority Outstanding and Holdover Provisions, seven of ECAT's ten directors ***currently have not been elected*** after the ICA-mandated expiration of their terms, yet continue to serve on ECAT's Board despite receiving only a ***minority*** of the votes cast at the 2024 election. Saba asks the Court to determine whether that undisputed state of affairs comports with the ICA as a matter of law—and it plainly does not. No further discovery is relevant or required.

C. Defendants' Affirmative Defenses Fail as a Matter of Law, Cannot Justify Denying Rescission of ICA-Offending Provisions, and Require No Discovery

Defendants lastly cannot delay entry of judgment against them based on their affirmative defenses. *Contra* Dkt. 47, at 3. Defendants assert eleven affirmative defenses, *see* Dkt. 48 (Defendants' Answer), five of which this Court has already rejected as a matter of law. Defendants'

[5] Even ECAT conceded, in its Answer to Saba's complaint, that ECAT "engaged in a diligent proxy solicitation campaign in 2023," Dkt. 48, ¶ 42, but still could not even get 50% of the shares outstanding to vote, let alone get 50% of the shares outstanding to vote in favor of its candidates.

first affirmative defense—that Saba fails to state a claim—has no merit because this Court already denied Defendants' motion to dismiss. *See* Dkt. 43. Defendants' second affirmative defense, that Saba "lacks a private right of action," was apparently asserted for purposes of issue preservation; Defendants' recognize that "[this] issue is foreclosed by *Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019)." PI and MTD Op., 2024 WL 3162935, at *8 n.9. Defendants' ninth, tenth, and eleventh affirmative defenses—res judicata, statute of limitations, and laches—have also been raised, considered, and rejected by this Court. *See id.* at *10-12.

Defendants' other affirmative defenses are similarly non-viable, turn on information readily available to Defendants, or otherwise cannot justify taking discovery before resolution of this Motion. Defendants, for example, assert that Saba has not "suffered any harm or injury that was proximately caused by any act or omission by Defendants" and that "the alleged harm or injury that Saba claims to have experienced is speculative." Dkt. 48, at 15. But as this Court already recognized, there is a wide body of caselaw allowing shareholders to maintain suit in federal court to remedy harms to their voting rights. *See* PI and MTD Op., 2024 WL 3162935, at *9. And, as already discussed, the harms at issue are entirely concrete and non-speculative, given that this Motion is premised on the fact that the Majority Outstanding and Holdover Provision ***have already*** deprived Saba, and all of ECAT's shareholders, of the electoral and voting rights assured to them under Sections 16(a) and 18(i) of the ICA.

The remainder of Defendants' affirmative defenses turn on equitable considerations that courts—including the Second Circuit, ***twice***—have repeatedly and uniformly rejected as a basis for denying rescission of ICA-offending Provisions or otherwise declaring such Provisions unlawful and void. *E.g.*, Dkt. 48, at 14 (fourth affirmative defense alleging "a decision to deny rescission would produce a more equitable result than a decision to grant rescission and would not

be inconsistent with the purposes of the 40 Act."); *id.*, at 13 (third affirmative defense: alleging "unclean hands" because Saba has supposedly "acquired shares of ECAT in excess of the [3% limit] under Section 12(d)(1) of the [ICA]"); *see* Dkt. 51, at 9-10 (Aug. 2, 2024 Transcript) (describing "unclean hands" as an equitable consideration).

As the Second Circuit stated in *Nuveen*, and again in *ECAT I*, equitable balancing is not a precondition to granting rescission, and should not stand in the way of invalidating ICA-offending provisions as a matter of law. "[A] court may not *deny* rescission . . . unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter. Equitable balancing is not required to *grant* recission," as Saba requests. *Nuveen*, 88 F.4th at 120, n.16 (quoting 15 U.S.C. § 80a-46(b)(2)); *see also Saba Cap. Master Fund, Ltd. v. BlackRock ESG Cap. Allocation Trust ("ECAT I")*, 2024 WL 3174971, at *4 (2d Cir. June 26, 2024) (rejecting Funds' argument that "discovery was necessary" because "[e]quitable balancing is not required to *grant* rescission").

Further, Section 46(b)(2) provides that a court can only deny rescission if so doing "would not be inconsistent with the purposes of this chapter." 15 U.S.C. § 80a-46(b)(2).[6] The Majority Outstanding and Holdover Provisions are directly inconsistent with the ICA's purpose of preventing investment companies from being run "in the interest of" entrenched fund management. 15 U.S.C. § 80a-1(b)(2); *see also* PI and MTD Decision, 2024 WL 3162935, at *9 (citing *Nuveen*, 88 F.4th at 120) ("the ICA was enacted for the benefit of investors and shareholders, and is meant

[6] 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)). 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)).

to correct self-dealing by investment company management"). Each of *Nuveen*, *BlackRock*, and *Eaton Vance* held that defensive tactics which "discriminat[ed] against an investment company shareholder" and served to entrench incumbent management were "inconsistent with the purposes of" the ICA. *Nuveen*, 2022 WL 493554, at *3; *BlackRock*, 2024 WL 43344, at *6; *Eaton Vance*, 2023 WL 1872102, at *8. Because the defensive tactics at issue were inconsistent with the purposes of the ICA, those courts properly concluded they lacked discretion to deny rescission. *See BlackRock*, 2024 WL 43344, at *6 n.13 ("[e]ven if the Court permitted discovery, defendants cannot show that 'the denial of rescission would not be inconsistent' with the ICA's purposes" because Congress passed the ICA "for the benefit of investors, not fund insiders, and . . . primarily to correct the abuses of self-dealing"); *Nuveen*, 2022 WL 493554, at *4 (following statutory directive that the Court "may not deny rescission" of offending Control Share Amendment, after finding the Amendment "flatly inconsistent with the purposes" of Section 18(i)); *Eaton Vance*, 2023 WL 1872102, at *8 (same; "Section 46(b) does not permit the Court to sanction actions that are 'inconsistent with the purposes of this subchapter"). Saba seeks to vindicate the same policies and purposes of the ICA here. The ICA thus ***mandates*** rescission of ECAT's offending Provisions.

To the extent Defendants seek to evade judgment based on tired arguments about the size of Saba's holdings, or the supposedly negative effects of shareholder activism, courts have uniformly refused to countenance such arguments as justification for a fund's use of defensive measures that violate the ICA. *See* PI and MTD Op., 2024 WL 3162935, at *9 n.11 ("Defendants have attempted . . . to make much of the characterization of Saba as an 'activist investor.' The Court gives no weight to those characterizations; for purposes of the relevant sections of the ICA, Saba's primary identity is that of 'shareholder,' entitled to no fewer rights than any other shareholder."); *Nuveen*, 88 F.4th at 120-21 & n.17 (rejecting closed-end fund's citations to SEC

reports and characterization of Saba as an "affiliated person" under the ICA); *Nuveen*, 2022 WL 493554, at *6 (granting summary judgment despite Defendants' accusations about the purported need to protect "long-term investors" from the "strategies" of concentrated activist investors, and other supposed "purpose[s]" of the ICA), *aff'd Nuveen*, 88 F.4th at 120–21 & nn. 16, 18; *BlackRock*, 2024 WL 43344, at *6 n.13 ("that Saba may become a concentrated shareholder who negatively impacts the funds' respective values -- would not mean that the control share resolutions support the ICA's 'policy objectives by stripping shares of voting rights unequally.'" (quoting *Nuveen*, 88 F.4th at 120)); *Saba Cap. CEF Oppor. 1 Ltd. v. Voya*, 2020 WL 5087054, at *2 n.2 (Ariz. Super. June 26, 2020) ("There was significant dispute between the parties at hearing as to whether a tender offer would, on balance, be a positive event for the Trust and its shareholders or a negative one. For purposes of the analysis herein, the Court need not resolve this dispute.").[7]

Accordingly, even putting aside the fact that Defendants' equitable defenses appear to turn on information entirely in the public domain and thus cannot justify discovery, those equitable defenses are immaterial to this Motion because they do not and cannot stand in the way of granting Saba's requested relief under the ICA as a matter of law.[8]

[7] Defendants' defense that Saba has violated Section 12(d)(1) of the ICA by accumulating a beneficial ownership stake in ECAT of greater than 3% is especially baseless, irrelevant, and fails as a matter of law. If Saba's beneficial ownership of ***more than 3%*** of a fund's shares somehow excused a fund's non-compliance with the ICA, the Second Circuit could not have held, ***twice***, that the ICA protected Saba's right to vote shares ***in excess of 10%***. Moreover, the ICA is clear that "funds with common advisers," like the Saba Capital-advised hedge funds, "are not subject to the 3% limit of § 12(d)(1)(A)(i)." *meVC Draper Fisher Jurvetson Fund I, Inc. v. Millennium Partners, L.P.*, 260 F. Supp. 2d 616, 630 (S.D.N.Y. 2003).

[8] Additionally, even if Defendants' equitable-balancing defenses had any bearing on whether the Court should grant rescission pursuant to the ICA (they do not), Defendants cannot argue that equitable balancing is a precondition to declaratory judgment. There is nothing in 28 U.S.C. § 2201 that makes equitable balancing a precondition to a declaration of the parties' relative "rights" and "legal relations."

III. The Court Should Order Defendants to Hold a New Election Within 60 Days Under a Standard that Will Bring the Fund into Compliance with the ICA

The Court, lastly, should order Defendants to hold a new election within 60 days, as required by Section 16(a) whenever less than a majority of a registered fund's directors have been duly elected. ECAT has blown past this statutory deadline—which, running 60 days from the failed election on June 26, 2024, required a new election to be held no later than August 25, 2024. Defendants themselves resisted issuance of a preliminary injunction on the basis that this Court could order a new election if a violation occurred at the June 2024 election. *See* Dkt. 25, at 26. This Court agreed. *See* PI and MTD Op., 2024 WL 3162935, at *4. Unfortunately, but predictably, the Majority Outstanding and Holdover Provisions resulted in an unequivocal violation of the ICA, with a supermajority of ECAT's Board now serving without being duly elected. Consistent with Section 16(a), that severe deficit should be remedied as promptly as possible.

CONCLUSION

Respectfully, this Court should grant Saba's Motion for Summary Judgment.

Dated: New York, New York
August 30, 2024

Respectfully submitted,

/s/ Mark Musico

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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/ Mark Musico