APPENDIX

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APPENDIX A

23-8104-cv(L)

Saba Capital Master Fund, LTD. v. BlackRock ESG Capital Allocation Trust

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of June, two thousand twenty-four.

Present:

WILLIAM J. NARDINI,
STEVEN J. MENASHI,
EUNICE C. LEE,
Circuit Judges.

SABA CAPITAL MASTER FUND, LTD., SABA CAPITAL MANAGEMENT, L.P.,	
Plaintiffs-Appellees,	
v.	23-8104(L), , 24-79 (CON),
BLACKROCK ESG CAPITAL ALLOCATION TRUST, MUNICIPAL INCOME FUND, INC., ROYCE GLOBAL VALUE TRUST, INC., TORTOISE MIDSTREAM ENERGY FUND, INC., TORTOISE ENERGY INDEPENDENCE FUND, INC., TORTOISE PIPELINE & ENERGY FUND, INC., TORTOISE ENERGY INFRASTRUCTURE CORP., ECOFIN SUSTAINABLE AND SOCIAL IMPACT TERM FUND, ADAMS DIVERSIFIED EQUITY FUND, INC., ADAMS NATURAL RESOURCES FUND, FS CREDIT OPPORTUNITIES CORP.,	24-80 (CON), 24-82 (CON), 24-83 (CON) 24-116 (CON), 24-189 (CON)
Defendants-Appellants[*]	

For Plaintiffs-Appellees :	MARK MUSICO (Jacob W. Buchdahl, Brandon H. Thomas, *on the brief*), Susman Godfrey L.L.P., New York, NY
For Defendants-Appellants BlackRock ESG Capital Allocation Trust and Municipal Income Fund, Inc.:	TARIQ MUNDIYA (Sameer Advani, Vanessa C. Richardson, Aaron E. Nathan, *on the brief*), Willkie Farr & Gallagher LLP, New York, NY
For Defendant-Appellant Royce Global Value Trust, Inc.:	EAMON P. JOYCE (Alex J. Kaplan, Charlotte K. Newell, *on the brief*), Sidley Austin LLP, New York, NY
For Defendants-Appellants Tortoise Midstream Energy Fund, Inc., Tortoise Energy Independence Fund, Inc., Tortoise Pipeline & Energy Fund, Inc., Tortoise Energy Infrastructure Corp., and Ecofin Sustainable and Social Impact Term Fund:	JOHN T. PRISBE (Lawrence H. Cooke, II, Jessie F. Beeber, *on the brief*), Venable LLP, Baltimore, MD and New York, NY

[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

For Defendants-Appellants Adams Diversified Equity Fund, Inc. and Adams Natural Resources Fund:	BRIAN D. KOOSED (Tre A. Holloway, *on the brief*), K&L Gates LLP, Charleston, SC and Washington, DC
For Defendant-Appellant FS Credit Opportunities Corp.:	Scott D. Musoff, Eben Colby, Marley Ann Brumme, Skadden, Arps, Slate, Meagher & Flom LLP, Boston, MA and New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendants-Appellants appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*), entered on January 4, 2024, denying Defendants-Appellants' motions to dismiss and granting Plaintiffs-Appellees' motion for summary judgment. Defendants-Appellants are eleven closed-end funds ("CEFs") (collectively, the "Funds") organized under Maryland law.[1] Each Fund adopted a resolution to opt in to a

[1] The Defendant-Appellant funds are (1) BlackRock ESG Capital Allocation Term Trust ("ECAT") and BlackRock Municipal Income Fund, Inc.; (2) Royce Global Value Trust, Inc. ("RGT"); (3) Tortoise Midstream Energy Fund, Inc., Tortoise Energy Independence Fund, Inc., Tortoise Pipeline & Energy Fund, Inc., Tortoise Energy Infrastructure Corp., and Ecofin Sustainable and Social Impact Term Fund (collectively, the "Tortoise

provision of the Maryland Control Share Acquisition Act ("MCSAA") (the "Control Share Provision"), which provides that "[h]olders of control shares of the corporation acquired in a control share acquisition have no voting rights with respect to the control shares" unless approved by a two-thirds vote of the other shareholders. Md. Code Ann., Corps. & Ass'ns § 3-702(a)(1). Thus, under the Control Share Provision, shares that would place the holder of the shares at 10% or more of a Fund's voting power are presumptively not given voting rights.

On June 29, 2023, Plaintiffs-Appellees Saba Capital Master Fund, LTD. and Saba Capital Management, L.P. (collectively, "Saba"), a hedge fund that owns shares in each of the Funds, sued the Funds seeking (1) a declaratory judgment that the Funds' resolutions violate the equal voting rights mandate of Section 18(i) of the Investment Company Act of 1940 ("ICA"), 15 U.S.C. § 80a18(i), and (2) rescission of the resolutions pursuant to Section 47(b) of the ICA, *id.* § 80a-46(b)(2). On the same day that Saba filed suit, it also moved for summary judgment. As relevant here, the Funds moved to dismiss for lack of standing, lack of personal jurisdiction, and failure to state a claim. The district court denied the Funds' motions to dismiss and granted Saba's motion for summary judgment, "declar[ing] that the control share resolutions at issue violate Section 18(i) of the ICA and order[ing] that those resolutions be rescinded forthwith." *Saba Cap. Master Fund, Ltd. v. BlackRock Mun. Income Fund, Inc.*, No. 23-cv-5568 (JSR), 2024 WL 43344,

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Funds"); (4) Adams Diversified Equity Fund, Inc. and Adams Natural Resources Fund (collectively, the "Adams Funds"); and (5) FS Credit Opportunities Corp

at *7 (S.D.N.Y. Jan. 4, 2024). The Funds appealed. We assume the parties' familiarity with the case.

I. Standing

The Funds argue that Saba lacks Article III standing to sue them because Saba does not have a 10% stake in most of the Funds, which is the threshold at which the Control Share Provision takes effect, and therefore Saba will not imminently suffer any injury from the Control Share Provision.[2] We address the issue of standing first because "standing is jurisdictional under Article III" and is thus "a threshold issue in all cases." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 117 (2d Cir. 1991).[3] Here, the Funds' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction was "fact-based" because they "proffer[ed] evidence beyond the [p]leading." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016). "On appeal, if the district court resolved disputed facts, we will accept the court's findings unless they are clearly erroneous. We review *de novo* the district court's conclusions of law, as well as findings that are based on undisputed facts evidenced in the record and decisions in which the district court engaged in no fact-finding in support of its dismissal order." *Id.*

"To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete,

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[2] Ten of the eleven defendant Funds join the standing argument. ECAT concedes that, at the time of suit, Saba had over a 10% stake in ECAT

[3] Unless otherwise indicated, case quotations omit all internal quotation marks, alteration marks, footnotes, and citations.

particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 540 (2020). The primary question here is whether the concrete and particularized injury that Saba alleges will occur—namely, that it will not be able to vote its shares if it acquires more than a 10% stake—is sufficiently imminent.

Saba avers that "[a]s of [June 29, 2023], and given current market conditions, Saba would acquire more than a 10% beneficial ownership stake in the Funds (to the extent it has not already) were it not for the Funds' Control Share Provisions and the imminent risk that those Control Share Provisions will strip Saba of its equal voting rights." J. App'x 44, ¶ 27. "When an Article III injury hinges on a party's intent to take some future action, the Constitution requires more than mere 'some day intentions.'" *Saba Cap. Cef Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 111 (2d Cir. 2023) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992)). "A plaintiff's few words of general intent, without substantial evidence of plans, do not support a finding of an actual or imminent injury." *Id.* "That said, the standing requirement does not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Id.* "Rather, an allegation of future injury is sufficient where … there is a substantial risk that the harm will occur." *Id.* To survive a fact-based challenge under Rule 12(b)(1), a plaintiff may either "rely on the allegations in the [p]leading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show

standing," or "come forward with evidence of [its] own to controvert that presented by the defendant if the affidavits submitted on a 12(b)(1) motion reveal the existence of factual problems in the assertion of jurisdiction." *Carter*, 822 F.3d at 57. Whether Article III standing exists is a "highly fact-specific" inquiry. *Nuveen*, 88 F.4th at 111 (quoting *Carney v. Adams*, 592 U.S. 53, 63 (2020)).

Considering the totality of the unique factual circumstances presented here, we determine that Saba has Article III standing to sue each of the Funds. Saba has averred that it "would acquire more than a 10% beneficial ownership stake in the Funds (to the extent it has not already)" absent the Control Share Provisions. J. App'x 44, ¶ 27. This sworn testimony amounts to more than "some day intentions," *Nuveen*, 88 F.4th at 111, because it is supported by evidence of investment planning. Saba has already acquired sizable stakes in many of the Funds and has a "track record" of acquiring large stakes in CEFs. *See id.* at 112. As the Funds acknowledge, part of Saba's financial strategy is to buy "concentrated" stakes in what Saba perceives to be underperforming CEFs. *See* BlackRock Br. at 12–13 ("Saba buys a concentrated stake in a CEF and then uses its outsized influence to cause that CEF to take [certain] actions."). Thus, Saba's sworn testimony, in combination with Saba's past actions and concrete plans, establishes that, in this case, Saba intends to acquire at least a 10% stake in each of these particular Funds.

Further, the Funds have not presented any facts to cast doubt on Saba's intent or ability to acquire at least a 10% stake in each of the Funds. The Funds presented evidence that for the Fund in which Saba

owns the lowest stake, RGT at 2%, it would realistically take Saba over three months to obtain a 10% stake in RGT. But the fact that it might take a few months to reach the 10% threshold does not mean that Saba will not or cannot reach that threshold. Accordingly, there exists a substantial risk that the injury will occur here, and that is sufficient to establish Article III standing.

II. Personal Jurisdiction

Two of the groups of Funds, the Adams and Tortoise Funds, argue that the district court could not exercise personal jurisdiction over them. The district court held that it could exercise personal jurisdiction under the ICA or, in the alternative, under New York's long-arm statute. "We review a district court's legal conclusions concerning its exercise of personal jurisdiction *de novo*, and its underlying factual findings for clear error." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 128 (2d Cir. 2013).

We agree with the district court that it could exercise personal jurisdiction over the Adams and Tortoise Funds under the ICA, and therefore do not address its alternative holding. The Adams and Tortoise Funds argue that although the ICA provides for nationwide service of process, *see* 15 U.S.C. § 80a-43—meaning that minimum contacts with the United States suffices to establish personal jurisdiction, *see, e.g., Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974)—such nationwide service of process is permitted only if the plaintiff complies with the ICA's venue provision, *accord Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 424–25 (2d Cir. 2005). Assuming (without deciding) that the Adams and Tortoise Funds' interpretation of the ICA is correct, venue was

proper in the Southern District of New York ("SDNY").

The ICA provides that venue is proper "in the district wherein the defendant is an inhabitant or transacts business." 15 U.S.C. § 80a-43. "The Supreme Court has construed the phrase 'transacts business' … to refer to 'the practical, everyday business or commercial concept of doing business or carrying on business of any substantial character.'" *Daniel*, 428 F.3d at 428 (quoting *United States v. Scophony Corp.*, 333 U.S. 795, 807 (1948)). Therefore, "the propriety of venue turns on the nature of the corporate defendant's business." *Id.* at 429. In other words, "the determination whether a defendant transacted business in a district depend[s] on a realistic assessment of the nature of the defendant's business and of whether its contacts with the venue district could fairly be said to evidence the practical, everyday business or commercial concept of doing business or carrying on business of any substantial character." *Id.*

As CEFs, the Adams and Tortoise Funds are "engaged primarily in the business of investing in securities." *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 625 n.11 (1971). In that context, the Adams and Tortoise Funds concede certain contacts with SDNY, including listing their shares on the New York Stock Exchange and using New York brokers to carry out their investment transactions. The Adams Funds also concede making payments to "certain data resources, such as Bloomberg and S&P Global Market, for purposes of accessing financial and market data." J. App'x at 376. Viewed as a whole, these contacts relate to "the practical, everyday business or commercial concept of doing business" as a CEF. *Daniel*, 428 F.3d at 428.

Accordingly, venue was appropriate in SDNY, and the district court could exercise personal jurisdiction over the Adams and Tortoise Funds based on their minimum contacts with the United States.

III. The Control Share Provision

Lastly, we turn to the merits of Saba's claim, that is, whether the Control Share Provision violates Section 18(i) of the ICA. "We review a district court's grant of summary judgment *de novo*, and will affirm when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Kasiotis v. N.Y. Black Car Operators' Inj. Comp. Fund, Inc.*, 90 F.4th 95, 98 (2d Cir. 2024).

The ICA provides, in relevant part, that "[e]xcept as provided in subsection (a) of this section, or as otherwise required by law, every share of stock hereafter issued by a registered management company … shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i). Although the ICA does not define "voting stock," the ICA defines a "voting security" as "any security presently entitling the owner or holder thereof to vote for the election of directors of a company," *id.* § 80a-2(a)(42), and a "security" to include "stock," *id.* § 80a-2(a)(36).

In *Nuveen*, Saba challenged under the ICA a provision substantially similar to the Control Share Provision at issue here. *See* 88 F.4th at 109. Specifically, the amended bylaws of Nuveen, a CEF, "included a Control Share Amendment (the 'Amendment') that limited the ability of shareholders with holdings greater than 10% in any particular fund, like Saba, to vote any additional shares purchased." *Id.* This Court held that Nuveen's control share provision

violated the ICA in two ways: (1) it violated Section 80a-2(a)(42) "because under [the Amendment], if an owner of Nuveen stock cannot 'presently' vote their stock, the stock loses its function and is not 'voting' stock," *id.* at 117; and (2) it also violated "Section 80a-18(i) because it deprives *some* shares of voting power but not others—contrary to the provision's guarantee of 'equal voting rights,'" *id.* (quoting 15 U.S.C. § 80a-18(i)).

The Funds' only argument to distinguish the present case from *Nuveen* is that here, the Control Share Provision does not violate the ICA because it is "otherwise required by law," 15 U.S.C. § 80a-18(i), that is, Maryland law. The Funds argue that although opting into the Control Share Provision was a voluntary act, once they did so, the Control Share Provision became required by Maryland law. But the Funds cannot simply disregard the optional nature of that portion of the MCSAA because the MCSAA does not require a CEF to opt into the Control Share Provision. Rather, as stated expressly in the MCSAA, the Control Share Provision does not apply to a CEF unless its "board of directors adopts a resolution to be subject to" it. Md. Code Ann., Corps. & Ass'ns § 3-702(c); *accord* Boulder Total Return Fund, Inc., SEC No-Action Letter, 2010 WL 4630835, at *4 n.17 (Nov. 15, 2010) ("A CEF is not *required* to opt in to the [MCSAA]'s provisions; the MCSAA is an optional defensive device, and there is no requirement under Maryland law that a CEF avail itself of its protection."). Thus, the Control Share Provision is not "required by law," and consistent with *Nuveen*, violates Section 18(i) of the ICA.

The Funds further argue that even if the Control Share Provision violates the ICA, the district court

abused its discretion by granting summary judgment—and ordering rescission of the offending resolutions—without first allowing for discovery under Federal Rule of Civil Procedure 56(d). The Funds argue that discovery was necessary to show that the district court should deny rescission on equitable grounds under Section 47(b)(2) of the ICA. "We review the denial of Rule 56(d) discovery for abuse of discretion." *Elliot v. Cartagena*, 84 F.4th 481, 493 (2d Cir. 2023).

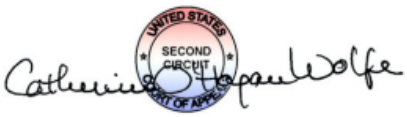
Section 47(b)(2) of the ICA provides that if a contract, including a corporation's bylaws, violates the ICA, then "a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter." 15 U.S.C. § 80a-46(b)(2). Thus, 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." *Nuveen*, 88 F.4th at 120 n.16. Accordingly, the district court did not abuse its discretion by granting rescission of the Funds' resolutions without first allowing for discovery.

* * *

We have considered all of the Funds' remaining arguments and find them unpersuasive. For the reasons stated above, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABA CAPITAL MASTER FUND, LTD., and SABA CAPITAL MANAGEMENT, L.P., Plaintiffs, -v- BLACKROCK MUNICIPAL INCOME FUND, INC., et al., Defendants.	23-cv-5568 (JSR) OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.:

On June 29, 2023, plaintiffs Saba Capital Master Fund, Ltd. and its investment manager Saba Capital Management, L.P. (collectively, "Saba") filed this suit against 16 funds organized under Maryland law and 11 individual trustees, alleging that the 16 funds each adopted a resolution that violates the "one share, one vote" mandate of the Investment Company Act of 1940. See ECF No. 1. The same day that Saba filed the complaint, it moved for summary judgment. See ECF No. 22. On August 15, 2023, defendants moved to dismiss under forum non conveniens because of forum selection clauses in the bylaws of 14 of the funds that, defendants argued, required this suit to be brought in state or federal court in Maryland. See

ECF No. 58. On September 26, 2023, the Court granted that motion in part, dismissing the claims against 5 of the 16 funds (including claims against the individual trustees relating to those 5 funds), but denying the motion to dismiss the claims against the remaining defendants.[1] See ECF No. 79.

On October 31, 2023, various groups of defendants filed various motions to dismiss, raising arguments about lack of standing, lack of personal jurisdiction, failure to state a claim, and misjoinder.[2] See ECF Nos. 87, 90, 93, 106. After full briefing on each of those motions and oral argument on Saba's motion for summary judgment, the Court, on December 5, 2023, issued a "bottom-line" order denying defendants' motions to dismiss and granting summary judgment for Saba, declaring that the resolutions at issue violate Section 18(i) of the Investment Company Act and ordering rescission of the offending resolutions. This Opinion explains the reasons for those rulings.

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[1] On October 27, 2023, Saba voluntarily dismissed one of the individual trustee defendants, P. Bradley Adams. ECF No. 83. The remaining defendants are BlackRock Municipal Income Fund, Inc. ("MUI"); BlackRock ESG Capital Allocation Term Trust ("ECAT"); Royce Global Value Trust, Inc. ("RGT"); Tortoise Midstream Energy Fund, Inc. ("NTG"); Tortoise Pipeline & Energy Fund, Inc. ("TTP"); Tortoise Energy Independence Fund, Inc. ("NDP"); Tortoise Energy Infrastructure Corp. ("TYG"); Ecofin Sustainable and Social Impact Term Fund ("TEAF"); Adams Diversified Equity Fund, Inc. ("ADX"); Adams Natural Resources Fund ("PEO"); FS Credit Opportunities Corp. ("FSCO"); and 10 individual trustees of ECAT: 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.

[2] One defendant, ECAT, filed an answer. ECF No. 95.

I. Factual Background

The relevant facts are undisputed. Saba Capital Master Fund, Ltd. holds shares in each of the defendant funds, all of which are closed-end funds organized under Maryland law and covered by the Investment Company Act of 1940. ECF No. 23-1 ("Saba 56.1"), at ¶¶ 1-19. Each defendant fund has adopted a resolution opting into a provision of the Maryland Control Share Acquisition Act that allows a fund to strip the voting rights of any "control shares … acquired in a control share acquisition," meaning those shares that would place the holder at 10% or more of a given fund's voting power. Md. Code Ann., Corps. & Ass'ns §§ 3-701, 3-702; Saba 56.1 ¶¶ 24-40 (the "control share resolutions").

II. Legal Background

"The Investment Company Act of 1940 [ICA], 54 Stat. 789, 15 U.S.C. § 80a-1 et seq., regulates investment companies, including mutual funds." Jones v. Harris Assocs. L.P., 559 U.S. 335, 338 (2010). "Congress adopted the [ICA] because of its concern with the potential for abuse inherent in the structure of investment companies." Id. at 339. "Unlike most corporations, an investment company is typically created and managed by a pre-existing external organization known as an investment adviser." Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984). "Recognizing that the relationship between a fund and its investment adviser was fraught with potential conflicts of interest, the [ICA] created protections for mutual fund shareholders." Jones, 559 U.S. at 339.[3]

[3] Here and elsewhere, internal alterations and quotation marks are omitted unless otherwise indicated.

In relevant part, the ICA provides: "Except as provided in subsection (a) of this section, or as otherwise required by law, every share of stock hereafter issued by a registered management company … shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i).[4] The ICA defines a "[v]oting security" as "any security presently entitling the owner or holder thereof to vote for the election of directors of a company." Id. § 80a-2(a)(42). A "[s]ecurity" includes "any … stock." Id. § 80a-2(a)(36).

"[A] court may not deny rescission" of a contract that violates the ICA "at the instance of any party 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 the ICA. Id. § 80a-46(b)(2). This rescission provision "creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract." Oxford Univ. Bank v. Lansuppe Feeder, LLC, 933 F.3d 99, 109 (2d Cir. 2019). The parties agree that under Maryland law, the bylaws of a corporation or statutory trust constitute a contract between the corporation or statutory trust and its shareholders. See Tackney v. U.S. Naval Acad. Alumni Ass'n, Inc., 971 A.2d 309, 318 (Md. 2009) ("A corporation's bylaws are construed under the principles governing contract

[4] Subsection (a) provides an exception that is not here relevant, for the allowance of a senior security – "any stock of a class having priority over any other class as to distribution of assets or payment of dividends" – under certain conditions. 15 U.S.C. § 80a-18(a), (g).

interpretation."); Chevy Chase Sav. & Loan, Inc. v. State, 509 A.2d 670, 678 (Md. Ct. App. 1986).

III. Analysis

A. Standing

"Article III of the Constitution confines the federal judicial power to 'Cases' and 'Controversies.'" United States v. Texas, 599 U.S. 670, 675 (2023). "Under Article III, a case or controversy can only exist if a plaintiff has standing to sue." Id. "To establish Article III standing," a plaintiff must show that its claimed injury is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

"A concrete injury is real, and not abstract." Saba Capital CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, 88 F.4th 103, 114 (2d Cir. 2023). In determining whether a claimed injury is concrete enough for Article III, "[c]ourts must assess whether the alleged injury to the plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." Id. And "[f]or an injury to be particularized, it must affect the plaintiff in a personal and individual way," even if it also affects many others in a similar way. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 & n.7 (2016).

"When an Article III injury hinges on a party's intent to take some future action, the Constitution requires more than mere 'some day intentions.'" Nuveen, 88 F.4th at 111. "A plaintiff's few words of general intent, without substantial evidence of plans, do not support a finding of an actual or imminent injury." Id. "That said, the standing requirement does not uniformly require plaintiffs to demonstrate that it

is literally certain that the harms they identify will come about." Id. "Rather, an allegation of future injury is sufficient where the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." Id.

Saba has standing to pursue its claims against each of the remaining defendants. Three defendants – Royce Global Value Trust, Inc. ("RGT"), FS Credit Opportunities Corp. ("FSCO"), and BlackRock Municipal Income Fund, Inc. ("MUI") – argue otherwise.[5] According to RGT, FSCO, and MUI, Saba lacks standing to sue any fund in which it does not already hold 10% or greater of the voting power because its voting rights only become affected – and, the argument runs, its injury-in-fact only materializes – at that threshold.

But in Nuveen, a similar suit brought by another Saba entity against closed-end funds under the same provision of the ICA, the Second Circuit rejected this very argument. See 88 F.4th at 110-17. The Second Circuit explained that "Saba's injury," "that its shares' voting rights will be encumbered," is sufficiently concrete for Article III purposes because it "is at the very least analogous to a property-based injury." Id. at 116. The injury is also "particularized" because it individually affects Saba's voting rights based on the shares that Saba itself holds or would otherwise hold. Spokeo, 578 U.S. at 339. Nor is it any bar to standing

[5] Because the Court has "an independent obligation to examine" its subject-matter jurisdiction under Article III, the Court must assure itself that a plaintiff has standing even in the absence of any argument to the contrary by a defendant. Nuveen, 88 F.4th at 109 n.3. Here, rejecting the arguments made against standing by RGT, FSCO, and MUI also establishes Saba's standing to sue the other defendants.

that, for some of the defendant funds, "Saba has not yet purchased any shares affected by the" control share resolutions because Saba holds less than a 10% stake in those funds. Nuveen, 88 F.4th at 116 n.11. A plaintiff's standing is tied to the specific form of relief sought for the specific injury invoked. See TransUnion LLC v. Ramirez, 594 U.S. 413, 431 (2021) ("[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)."). And here, "Saba is not suing for retrospective damages, Saba is suing for rescission and a declaratory judgment – forward-looking relief to prevent the harm from occurring." Nuveen, 88 F.4th at 116 n.11. Consistent with Article III, "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." Id.

To be sure, the imminence of Saba's injury with respect to some of the funds here is not quite so apparent as it was in Nuveen. There, "Saba was the beneficial owner of at least 9.9% of each of the Nuveen fund's outstanding shares." Id. at 111 (emphasis omitted). As a result, Saba was right on the precipice of triggering those funds' control share provisions, which, like those at issue here, "limited the ability of shareholders with holdings greater than 10% in any particular fund … to vote any additional shares purchased." Id. at 109. By contrast, although Saba holds shares in each of the defendant funds, it owns, for instance, only about 2.0% of the outstanding common shares of RGT. ECF No. 1-1 ("Kazarian Decl."), at ¶

16; Saba 56.1 ¶ 14.[6] But here, as in Nuveen, Saba submitted a declaration that it "would have acquired additional shares in the [defendant funds] but for the [control share resolutions]," which "is sufficient to establish imminence." Nuveen, 88 F.4th at 113.[7]

In a sworn declaration submitted as an exhibit to the complaint (and thereby effectively incorporated in it), the portfolio manager for plaintiff Saba Capital Management, L.P. (the investment adviser to co-plaintiff Saba Capital Master Fund, Ltd.), explained that "Saba has been, over time, building investment stakes in the defendant Funds." Kazarian Decl. ¶ 20. But "[t]he Funds' Control Share Provisions prevent Saba from acquiring voting shares with knowledge

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[6] Saba owns higher percentages of the outstanding common shares of the remaining defendant funds. See Kazarian Decl. ¶¶ 4-19; Saba 56.1 ¶¶ 2-17. Saba holds more than 10% of the voting power only of BlackRock ESG Capital Allocation Term Trust ("ECAT"), in which it holds approximately 12.8% of the voting shares. Saba 56.1 ¶¶ 2-17.

[7] The Court rejects Saba's alternate theory of standing, that it has suffered an actual and concrete injury merely because it is a "party to an illegal contract – the Funds' bylaw provisions adopting the Control Share Provisions." ECF No. 104, at 2-3. Saba has not articulated how being a party to an illegal contract imposes on its own a concrete harm. The Supreme Court "has rejected the proposition that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." TransUnion, 594 U.S. at 426. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." Id. Saba's "party to an illegal contract" argument runs headlong into that principle, seeking to divine standing from a mere statutory violation alone. Instead, Saba's standing is grounded in the encumbrance of its voting rights and investment strategy, which is caused by defendants' conduct and is redressable by the Court.

that it will be able to acquire enough voting shares to have a meaningful, and in this case rightful (i.e., commensurate with its economic stake), say in matters pertaining to the management of shareholder capital by the defendant Funds." Id. ¶ 21.[8] As a result, "Saba has not acquired, and will not acquire, as many additional shares in the Funds, even at levels below a 10% beneficial ownership stake, as it would were the Control Share Provisions not in effect." Id. ¶ 22. Of critical relevance here, "Saba would acquire more than a 10% beneficial ownership stake in the Funds (to the extent it has not already) were it not for the Funds' Control Share Provisions and the imminent risk that those Control Share Provisions will strip Saba of its equal voting rights." Id. ¶ 27. "Saba's proof amounts to more than mere 'some day intentions' to buy enough future shares to trigger" the control share resolutions. Nuveen, 88 F.4th at 113. "Because Saba's risk of harm is sufficiently imminent and substantial, and that harm is concrete, it meets Article III's requirements" and Saba has standing to pursue its claims. Id. at 116 n.11.[9]

B. Personal Jurisdiction and Venue

Seven of the defendant funds – Adams Diversified Equity Fund, Inc. ("ADX") and Adams Natural

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[8] "For standing purposes," the Court "accept[s] as valid the merits of" Saba's claims. Fed. Election Comm'n v. Cruz, 596 U.S. 289, 298 (2022).

[9] "A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." TransUnion, 594 U.S. at 431. The sworn declaration that Saba submitted as an exhibit to its complaint and again as an exhibit in support of its motion for summary judgment suffices for both the motion-to-dismiss and summary judgment stages.

Resources Fund, Inc. ("PEO") (together, the "Adams Funds"), along with Tortoise Midstream Energy Fund, Inc. ("NTG"), Tortoise Energy Independent Fund, Inc. ("NDP"), Tortoise Pipeline & Energy Fund, Inc. ("TTP"), Tortoise Energy Infrastructure Corp. ("TYG"), and Ecofin Sustainable and Social Impact Term Fund ("TEAF") (together, the "Tortoise Funds") – have moved to dismiss for lack of personal jurisdiction, contending that they neither transact business in New York nor otherwise possess sufficient relevant contacts with the State.[10] That argument begins from the incorrect premise that the Court's personal jurisdiction hinges on those funds' ties to New York, rather than to the United States as a whole.

The ICA is a federal statute that authorizes nationwide service of process. See 15 U.S.C. § 80a-43. "[W]hen a civil case arises under federal law and a federal statute authorizes nationwide service of process, the relevant contacts for determining personal jurisdiction are contacts with the United States as a whole." Broumand v. Joseph, 522 F. Supp. 3d 8, 19 (S.D.N.Y. 2021); see, e.g., Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) ("[W]here, as here, the defendants reside within the territorial boundaries of the United States, the minimal contacts, required to justify the federal government's exercise of power over them, are present.").

Defendants' only real rebuttal to that statement of the law is that Saba did not specifically invoke this

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[10] Unlike Article III's standing requirement or other constraints on the Court's subject-matter jurisdiction, "personal jurisdiction is a personal defense that may be waived or forfeited." Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 144 (2023) (emphasis omitted).

basis for personal jurisdiction in the complaint. Instead, the complaint states that "the exercise of jurisdiction over Defendants by this Court [is] permissible under traditional notions of due process and the law of the State of New York, including N.Y. C.P.L.R. § 302." ECF No. 1 ("Complaint"), ¶ 35. But there is no authority for the proposition that a complaint must make legal arguments about every possible source of personal jurisdiction. For personal and subject-matter jurisdiction alike, it suffices that the complaint alleges facts that would establish such jurisdiction. Because both the Adams and Tortoise Funds are organized under Maryland law, they are both "at home" in the United States and have inherently sufficient contacts for the Court to fairly exercise jurisdiction over them. Daimler AG v. Bauman, 571 U.S. 117, 122 (2014).

The parties agree that under the ICA's venue provision, suit may be brought "in the district where the defendant … transacts business." 15 U.S.C. § 80a-43. The Adams and Tortoise Funds argue that venue is nevertheless improper in this District because, while the complaint alleges that both funds list their shares on the New York Stock Exchange, see Complaint ¶¶ 11–16, 20, neither "transacts business" here. The Court rejects that argument.

The Adams and Tortoise Funds rely on Gilson v. Pittsburgh Forgings Co., 284 F. Supp. 569 (S.D.N.Y. 1968), which held that a defendant's shares being listed on the New York Stock Exchange did not itself satisfy the "transacts business" requirement for venue under the federal securities laws. See id. at 570-71. According to Gilson, "[a] defendant 'transacts business' in a district within the meaning of Section 27 [of the Securities Exchange Act] only when, among other

things, its activities within the district constitute a substantial part of its ordinary business." Id. at 570. The principle from Gilson, which interprets statutory language that is akin to the ICA's venue provision, may arguably have some force when a defendant is an operating company that has some "ordinary business" of which to speak. Id. For instance, the defendant in Gilson was "a maker of steel forgings for railroad cars and motor vehicles," and all of its plants were located in Pennsylvania and Michigan. Id. As a result, "[t]he trading of its shares [was] not really a part of its ordinary business and represent[ed] no activity so far as it is concerned." Id. at 570-71.

Here, however, the defendants are mutual funds that have no "ordinary business" other than to invest the capital provided to them by investors. In service of that business, the Adams Funds concede that they use a New York transfer agent to maintain their registration on the New York Stock Exchange and use New York-based "data resource providers (like Bloomberg) and brokers, all as part of internally managing [their] respective portfolios." ECF No. 87 ("Adams Mem."), at 11. The Tortoise Funds similarly concede that they are listed and trade on the New York Stock Exchange and that, "[f]or execution of investment transactions undertaken by the Funds, the Tortoise Funds use brokers" that have offices in New York. ECF No. 85-1 (declaration of Chief Compliance Officer of the investment adviser to each of the Tortoise Funds), at ¶¶ 2, 6.[11] The Court thus holds that the Adams and Tortoise

[11] Although, in resolving a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court is confined to the complaint, any incorporated or integral documents, and matters of judicial notice, the Court is not so limited in resolving a motion to dismiss for lack of personal jurisdiction (or subject-matter

Funds indeed "transact business" in this District by listing their shares on the New York Stock Exchange and by using New York brokers to carry out their own investment transactions.[12] Accordingly, venue under the ICA is proper here.

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jurisdiction). For such jurisdictional questions, the Court may properly consider any declarations submitted by the parties. See Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 84 (2d Cir. 2013) (explaining that "in deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway" and thus "may determine the motion on the basis of affidavits").

[12] For that reason, the Court could also properly exercise specific personal jurisdiction over the Adams and Tortoise Funds even under the traditional approach of assessing those defendants' contacts with New York, the forum State. New York's long-arm statute allows claims against a defendant who "transacts any business within the state." N.Y. C.P.L.R. § 302(a). The Adams and Tortoise Funds' transactions of business in New York – including listing on the New York Stock Exchange and relying on New York brokers to manage their portfolios and execute transactions – are "act[s] by which" they "purposefully avail[]" themselves "of the privilege of conducting activities within the forum State." Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021). Those contacts are the results of the defendants' "own choice[s] and [are] not random, isolated, or fortuitous." Id. at 1025. Indeed, the funds "deliberately reached out beyond [their] home" State of Maryland by "entering a contractual relationship centered" "in the forum State" with their New York listing agents and brokers. Id. Moreover, Saba's claims "arise out of or relate to" the Adams and Tortoise Funds' "contacts with the forum" because – as Saba contends and defendants do not dispute – Saba purchased its shares of the funds on the New York Stock Exchange. Id.; see ECF No. 103 ("Saba Opp. to Mems. of Adams and Tortoise Funds"), at 16. And because this suit concerns Saba's rights as a shareholder, there is "an affiliation between the forum and the underlying controversy" sufficient for the fair exercise of specific personal jurisdiction over the Adams and Tortoise Funds. Ford Motor Co., 141 S. Ct.

C. The Individual Trustees' Motion to Dismiss

The ten remaining individual trustee defendants have moved to dismiss for failure to state a claim and misjoinder, arguing that the complaint's allegations pertain only to the funds and not to the conduct of any trustees. But the complaint alleges that each of the individual defendants was a trustee of defendant BlackRock ESG Capital Allocation Term Trust ("ECAT") at the time ECAT adopted its control share resolution. Complaint ¶¶ 24-33. The complaint further alleges that "all defendants have adopted Control Share Provisions in their governing documents," in violation of the ICA. Id. ¶¶ 40, 42. The natural inference from these allegations is that the individual trustees participated in ECAT's adoption of its control share resolution. Moreover, the complaint seeks relief from the trustees as well as the funds, because it asks for an injunction against all "[d]efendants, their agents and representatives, and all other persons acting in concert with them, from applying the Control Share Provisions." Id. at 12 (Prayer for Relief). As a result, the complaint states a claim against the funds and the individual trustees alike for the same conduct. Because it does so, there is no joinder problem. See Fed. R. Civ. P. 20(a)(2) ("Persons … may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or

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at 1025. Indeed, given that this suit involves the application of federal law by a federal court in New York to shares that were purchased in New York, there is little reason to worry that other potential concerns, such as a concern for "protecting interstate federalism," change the calculus. Id.

occurrences; and (B) any question of law or fact common to all defendants will arise in the action.").

D. Summary Judgment

Proceeding now to the merits, the Court grants summary judgment for Saba on its claims against each of the remaining defendants. Indeed, this result is compelled by the Second Circuit's decision in Nuveen, which held that similar control share resolutions adopted by closed-end mutual funds violate the ICA's requirement "that every share of common stock issued by a regulated fund be 'voting stock' and 'have equal voting rights' with other shares." 88 F.4th at 117 (quoting 15 U.S.C. § 80a-18(i)).

Section 18(i) of the ICA states that, "[e]xcept as provided in subsection (a) of this section, or as otherwise required by law, every share of stock … issued by a registered management company … shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i). In turn, the ICA "defines the term 'voting security' as 'any security presently entitling the owner or holder thereof to vote for the election of directors of a company.'" Nuveen, 88 F.4th at 117 (quoting 15 U.S.C. § 80a-2(a)(42)). And, as noted earlier, the ICA further clarifies that "'security' encompasses 'stock.'" Id. (quoting 15 U.S.C. § 80a-2(a)(36)). As the Second Circuit explained, the ICA's "language is plain and unambiguous." Id. "In addition to requiring that all investment company stock be voting stock, the statute defines it with reference to its function – that it 'presently entitles' the owner to vote it." Id. (quoting 15 U.S.C. § 80a-2(a)(42)).

Defendants' control share resolutions – which strip the voting rights of shares that would otherwise

place any holder at or above 10% of a given fund's voting power – violate the ICA in two distinct ways. First, "if an owner of [defendants'] stock cannot 'presently' vote their stock, the stock loses its function and is not 'voting' stock." Id. Second, the control share resolutions "deprive[] some shares of voting power but not others – contrary to [Section 18(i)'s] guarantee of 'equal voting rights.'" Id.

The only argument defendants make here that the Second Circuit did not specifically consider and reject in Nuveen is that, because the control share resolutions at issue are permissible under Maryland law, they are "otherwise required by law" and thus safe from Section 18(i)'s mandate of equal voting rights. 15 U.S.C. § 80a-18(i). The fatal flaw in that argument is rather easy to spot. The fact that Maryland law allows funds to adopt such control share resolutions does not in any way mean that Maryland law requires as much.

Because the control share resolutions plainly violate Section 18(i) of the ICA, the Court orders that each of the offending resolutions be, and hereby is, rescinded. When a contract, including a provision of the bylaws of a corporation or statutory trust, violates the ICA, "a court may not deny rescission at the instance of any party 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" the ICA. Id. § 80a-46(b)(2); see Nuveen, 88 F.4th at 115 & n.10. Rescission of the offending resolutions is thus mandatory under the ICA unless two conditions are both met: (1) leaving the offending provisions in place "would produce a more equitable result" than rescission and (2)

denying rescission would not be "inconsistent" with the ICA's aims. 15 U.S.C. § 80a-46(b)(2). Defendants argue that discovery is needed so they may make those two showings. The Court disagrees. Although "a court may not deny rescission" unless those showings have been met, "[e]quitable balancing is not required to grant rescission." Nuveen, 88 F.4th at 120 n.16. Moreover, the ICA unambiguously allows a court to grant rescission even if those showings have indeed been met. Accordingly, the Court declines defendants' invitation to prolong this litigation for the mere chance at making a showing that would not change the result.[13]

IV. Conclusion

For the reasons explained above, the Court denies each of the motions to dismiss, and grants summary judgment for Saba on all claims against the remaining defendants. The Court declares that the control share

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[13] Even if the Court permitted discovery, defendants cannot show that "the denial of rescission … would not be inconsistent" with the ICA's purposes. 15 U.S.C. § 80a-46(b)(2). Indeed, "Congress passed the ICA to provide a comprehensive regulatory scheme to correct and prevent certain abusive practices in the management of investment companies for the protection of persons who put money to be invested by such companies on their behalf, i.e., the shareholders." Nuveen, 88 F.4th at 120. "These corrections were enacted for the benefit of investors, not fund insiders, and passed primarily to correct the abuses of self-dealing." Id. (citation omitted). "The ICA's statements of policy reflect Congress's apprehension about certain practices employed by investment companies." Id. The facts that defendants assert discovery could reveal – 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." Id. at 121.

resolutions at issue violate Section 18(i) of the ICA and orders that those resolutions be rescinded forthwith. The Clerk is respectfully directed to enter final judgment and close this case.

New York, NY
January 4, 2024

JED S. RAKOFF, U.S.D.J

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SABA CAPITAL MASTER FUND, LTD., and SABA CAPITAL MANAGEMENT, L.P., Plaintiffs, v. CLEARBRIDGE ENERGY MIDSTREAM OPPORTUNITY FUND INC., CLEARBRIDGE MLP AND MIDSTREAM TOTAL RETURN FUND INC., CLEARBRIDGE MLP AND MIDSTREAM FUND INC., WESTERN ASSET INTERMEDIATE MUNI FUND INC., TORTOISE MIDSTREAM ENERGY FUND, INC., TORTOISE ENERGY INDEPENDENCE FUND INC., TORTOISE PIPELINE & ENERGY FUND INC., TORTOISE ENERGY INFRASTRUCTURE CORP., ADAMS DIVERSIFIED EQUITY FUND, INC., ADAMS NATURAL	Civil Action No. __Civ.__ **COMPLAINT** **JURY TRIAL DEMANDED**

RESOURCES FUND, MUNICIPAL INCOME FUND, INC, FS CREDIT OPPORTUNITIES CORP., ECOFIN SUSTAINABLE AND SOCIAL IMPACT TERM FUND, BLACKROCK ESG CAPITAL ALLOCATION TRUST, BLACKROCK INNOVATION AND GROWTH TERM TRUST, ROYCE GLOBAL VALUE TRUST, INC.; 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 and BlackRock Innovation and Growth Term Trust; and P. BRADLEY ADAMS, in his capacity as Trustee of the Ecofin Sustainable and Social Impact Term Fund,

Defendants.

Plaintiffs Saba Capital Management, L.P. ("Saba Capital") and Saba Capital Master Fund, Ltd. ("Saba Master Fund") (together, "Saba"), for their Complaint against defendants ClearBridge Energy Midstream Opportunity Fund Inc. ("EMO"), ClearBridge MLP and Midstream Total Return Fund Inc. ("CTR"), ClearBridge MLP and Midstream Fund Inc. ("CEM"), Western Asset Intermediate Muni Fund Inc. ("SBI"), Tortoise Midstream Energy Fund, Inc. ("NTG"), Tortoise Energy Independence Fund, Inc. ("NDP"), Tortoise Pipeline & Energy Fund, Inc. ("TTP"), Tortoise Energy Infrastructure Corp. ("TYG"), Adams Diversified Equity Fund, Inc. ("ADX"), Adams Natural Resources Fund ("PEO"), Municipal Income Fund, Inc. ("MUI"), FS Credit Opportunities Corp. ("FSCO"), Royce Global Value Trust, Inc. ("RGT"), Ecofin Sustainable and Social Impact Term Fund ("TEAF," or the "Ecofin Trust"), BlackRock ESG Capital Allocation Trust ("ECAT," or the "Blackrock ECAT Trust"), BlackRock Innovation and Growth Term Trust ("BIGZ," or the "BlackRock BIGZ Trust," and collectively with the BlackRock ECAT Trust, the "BlackRock Trusts," and together with the Ecofin Trust, the "Trusts") (together, the "Funds"); P. Bradley Adams, in his capacity as trustee of the Ecofin Trust (the "Ecofin Trustee"); 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 Trusts (the "BlackRock Trustees," and collectively with the Ecofin Trustee, the "Trustees"; and the Trustees, collectively with the Funds, "Defendants"), state as follows:

NATURE OF THE ACTION

1. This civil action arises from the Funds' adoption of provisions in their governing documents purporting to opt-in to the Maryland Control Share Acquisition Act ("MCSAA"), Md. Code Ann., Corps. & Ass'ns §§ 3-701 *et seq.*, which strips voting rights from shares acquired in a "Control Share Acquisition," defined to include the acquisition of shares constituting as little as 10% of the voting power of the Funds, id. §§ 3-701(d)(1), (e)(1), 3-702(a)(1). *See* Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts ¶¶ 29–48 (collectively, the "Control Share Provisions").

2. The Control Share Provisions violate the Investment Company Act of 1940 (the "40 Act"), pursuant to which all common shares "shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i).

3. As the beneficial owner of sizable holdings of the outstanding common shares of each of the Funds, Saba Capital and the funds it manages, including Saba Master Fund, have been harmed by the Control Share Provisions.

4. Saba seeks rescission of the Control Share Provisions pursuant to Section 47(b)(2) of the 40 Act. *Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 109 (2d Cir. 2019) ("ICA § 47(b)(2) [15 U.S.C. § 80a-46(b)(1)] creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract.").

PARTIES

5. Plaintiff Saba Capital is a limited partnership organized under the laws of Delaware with its principal place of business located at 405 Lexington Avenue,

New York, New York. It is the investment manager of Saba Master Fund and other investment funds, which are collectively the beneficial owners of 17.7% of the outstanding shares of EMO, 12.9% of the outstanding shares of CTR, 10.6% of the outstanding shares of CEM, 6.2% of the outstanding shares of SBI, 9.1% of the outstanding shares of NTG, 9.1% of the outstanding shares of NDP, 7.9% of the outstanding shares of TTP, 3.7% of the outstanding shares of ADX, 6.6% of the outstanding shares of TEAF, 12.8% of the outstanding shares of ECAT, 3.5% of the outstanding shares of TYG, 2.7% of the outstanding shares of PEO, 2.7% of the outstanding shares of MUI, 3.2% of the outstanding shares of FSCO, 2.0% of the outstanding shares of RGT, and 7.7% of the outstanding shares of BIGZ.

6. Plaintiff Saba Master Fund is a Cayman Islands exempted company that currently beneficially holds common shares of each of the Funds.

7. Defendant ClearBridge Energy Midstream Opportunity Fund Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "EMO," which conducts substantial business in New York.

8. Defendant ClearBridge MLP and Midstream Total Return Fund Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "CTR," which conducts substantial business in New York.

9. Defendant ClearBridge MLP and Midstream Fund Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "CEM," which conducts substantial business in New York.

10. Defendant Western Asset Intermediate Muni Fund Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "SBI," which conducts substantial business in New York.

11. Defendant Tortoise Midstream Energy Fund, Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "NTG," which conducts substantial business in New York.

12. Defendant Tortoise Energy Independence Fund, Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "NDP," which conducts substantial business in New York.

13. Defendant Tortoise Pipeline & Energy Fund, Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "TTP," which conducts substantial business in New York.

14. Defendant Tortoise Energy Infrastructure Corp. is a Maryland corporation listed on the New York Stock Exchange under ticker symbol "TYG," which conducts substantial business in New York.

15. Defendant Adams Diversified Equity Fund, Inc. is a Maryland corporation, listed on the New York Stock Exchange under ticker symbol "ADX," which conducts substantial business in New York.

16. Defendant Adams Natural Resources Fund is a Maryland corporation listed on the New York Stock Exchange under ticker symbol "PEO," which conducts substantial business in New York.

17. Defendant Municipal Income Fund, Inc. is a Maryland corporation listed on the New York Stock Exchange under ticker symbol "MUI," which conducts substantial business in New York.

18. Defendant FS Credit Opportunities Corp. is a Maryland corporation listed on the New York Stock Exchange under ticker symbol "FSCO," which conducts substantial business in New York.

19. Defendant Royce Global Value Trust, Inc. is a Maryland corporation listed on the New York Stock Exchange under ticker symbol "RGT," which conducts substantial business in New York

20. Defendant Ecofin Sustainable and Social Impact Term Fund is a Maryland business trust, listed on the New York Stock Exchange under ticker symbol "TEAF," which conducts substantial business in New York.

21. Defendant BlackRock ESG Capital Allocation Trust is a Maryland business trust, listed on the New York Stock Exchange under ticker symbol "ECAT," which conducts substantial business in New York.

22. Defendant BlackRock Innovation and Growth Term Trust is a Maryland business trust, listed on the New York Stock Exchange under ticker symbol "BIGZ," which conducts substantial business in New York.

23. Defendant P. Bradley Adams is a citizen of Kansas, a current trustee of the Ecofin Trust, and has been its sole trustee since 2018.

24. Defendant R. Glenn Hubbard is a citizen of New York, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2007.

25. Defendant W. Carl Kester is a citizen of Massachusetts, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2007.

26. Defendant Cynthia L. Egan is a citizen of Florida, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2016.

27. Defendant Frank J. Fabozzi is a citizen of Maryland, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2007.

28. Defendant Lorenzo A. Flores is a citizen of California, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2021.

29. Defendant Stayce D. Harris is a citizen of California, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2021.

30. Defendant J. Phillip Holloman is a citizen of Ohio, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2021.

31. Defendant Catherine A. Lynch is a citizen of Virginia, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2016.

32. Defendant Robert Fairbairn is a citizen of New York, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2018.

33. Defendant John M. Perlowski is a citizen of New Jersey, a current trustee of the BlackRock Trusts, and has been a trustee of the BlackRock Trusts since 2015.

JURISDICTION AND VENUE

34. This Court has jurisdiction over the subject matter of this action pursuant to Section 44 of the 40

Act, 15 U.S.C. § 80a-43, 28 U.S.C.A. § 1331, and 28 U.S.C. § 1391(b).

35. This Court has personal jurisdiction over the Funds because each of the Funds has sufficient minimum contacts within the District as to render the exercise of jurisdiction over Defendants by this Court permissible under traditional notions of due process and the law of the State of New York, including N.Y. C.P.L.R. § 302, including by conducting continuous and systematic business in this District and causing harm to Saba in this District.

36. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)-(c) because a substantial part of the events giving rise to the claim occurred in this District, Saba has been harmed in this District, and the Defendants are subject to personal jurisdiction in this District.

FACTUAL BACKGROUND

37. The Funds are diversified, closed-end management investment companies registered under the 40 Act.

38. The MCSAA, which applies "only" to "Maryland corporation[s]," strips voting rights from shares acquired in a "Control Share Acquisition," which is defined to include the acquisition of shares constituting as little as 10% of the voting power of the company. Md. Code Ann., Corps. & Ass'ns §§ 3-701(d), 3-709.

39. Closed-end funds registered under the 40 Act are exempt from the requirements of the MCSAA, unless they voluntarily choose to "opt-in" to the statutory scheme. Md. Code Ann., Corps. & Ass'ns § 3-702(c)(3) (this "subtitle does not apply to … [a] corporation registered under the Investment Company Act of 1940 as

a closed end investment company unless its board of directors adopts a resolution to be subject to this subtitle").

40. The defendant Maryland corporations (namely, EMO, CTR, CEM, SBI, NTG, NDP, TTP, ADX, TYG, PEO, MUI, FSCO, and RGT), have opted-in to the MCSAA pursuant to Section 3-702(c)(3). The defendant Maryland trusts (namely, TEAF, ECAT, and BIGZ) have likewise purported to opt-in to the MCSAA, even though they are not eligible corporations. In any event, all defendants have adopted Control Share Provisions in their governing documents that effectively incorporate the vote-stripping provisions of the MCSAA.

41. By purporting to opt-in to Maryland's Control Share Acquisition Act, the Control Share Provisions strip voting rights from shares acquired in a "Control Share Acquisition." *See* Md. Code Ann., Corps. & Ass'ns §§ 3-701 *et seq*. In doing so, the Control Share Provisions deny "voting rights with respect to the control shares" acquired "in a control share acquisition," except "to the extent approved by stockholders … by the affirmative vote of two-thirds of all the votes entitled to be cast on the matter, excluding all interested shares." *Id.* § 3-702(a)(1).

42. The Control Share Provisions are unlawful under the 40 Act, including the "one-share, one-vote" principle enshrined in the 40 Act. Under the 40 Act, all common shares "shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i).

43. The Control Share Provisions directly conflict with the 40 Act's stated policies and purposes, including to prevent discrimination among or against

shareholders, and to prevent entrenched management by insiders, by ensuring that every stock be voting stock and have equal voting rights.

44. The Funds' adoption of binding resolutions opting in to the MCSAA, as reflected in, but not limited to, their various Amended and Restated Bylaws and Declarations of Trust are binding contracts between the Funds and Saba.

45. As the beneficial owner of sizable holdings of the outstanding common shares of each of the Funds and a party to the illegal contracts made by the Funds, Saba Capital and the funds it manages, including Saba Master Fund, have been and continue to be harmed by the Control Share Provisions.

46. Saba's ownership interest in EMO, CTR, CEM, and ECAT is over 10%. Because of the Control Share Provisions, none of Saba's incremental shares over 10% in these Funds has voting rights. Accordingly, EMO, CTR, CEM, and ECAT have issued unequal voting stock, and Saba is unable to buy any additional shares that have equal voting rights with all other shares.

47. Funds managed by Saba, including Saba Master Fund, have not acquired, and will not acquire, as many additional shares in the Funds as they would were the Control Share Provisions not in effect, and the Control Share Provisions have prevented Saba from acquiring voting shares in the Funds with equal voting rights as required by the 40 Act.

48. The Control Share Provisions are harmful to the value of Saba's investment in the Funds, and to Saba's trading activity and business practices, well before Saba approaches accumulating a 10% beneficial stake in any given Fund.

49. The Funds trade at a substantial discount to their net asset value (in other words, the market value of each Fund is less than the combined value of the assets held by that Fund). By interfering with shareholders' ability to hold underperforming fund managers to account, the Control Share Provisions decrease the value of Saba's shares in the Funds. By entrenching the Funds' management, the Control Share Provisions create an agency cost wherein expense ratios, director compensation levels, and managerial advisor fees are higher than they would be absent the Control Share Provisions, decreasing the value of Saba's shares in the Funds.

50. One of Saba's business practices is to exercise the voting rights rightfully associated with Saba's economic stake, in order to make its voice heard in matters pertaining to the management of shareholder capital by the defendant Funds, as well as informing the Funds' directors that shareholders have a means of holding them accountable in votes for the election of directors, approval of advisory agreements, and other governance matters. The Control Share Provisions prevent Saba from trading in the Funds' shares with knowledge that it will be able to acquire sufficient shares to accomplish those goals.

51. Saba cannot determine whether it will be a worthwhile investment to accumulate or maintain more than a 10% beneficial ownership without clarity as to what its voting rights will be if it in fact triggers the Funds' Control Share Provisions. Because Saba develops its position in funds over a number of months and years, and is currently developing positions in the defendant Funds (each of which has an upcoming annual meeting), Saba's trading activity is currently

being impeded and harmed by the Funds' Control Share Provisions.

52. Given current market conditions, Saba would acquire more than a 10% beneficial ownership stake in the Funds (to the extent it has not already) were it not for the Funds' Control Share Provisions and the imminent risk that those Control Share Provisions will strip Saba of its equal voting rights.

FIRST CLAIM FOR RELIEF
(Recission Under the Investment Company Act)

53. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 52 above as if set forth in full herein.

54. The 40 Act provides a private right of action for a party to a contract that violates the 40 Act to seek rescission of that violative contract. *Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 109 (2d Cir. 2019) ("ICA § 47(b)(2) [15 U.S.C. § 80a-46(b)(1)] creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract.").

55. The Funds' adoption of binding resolutions opting in to the MCSAA, as reflected in, but not limited to, their Amended and Restated Bylaws and Declarations of Trust constitute binding contracts between the Funds and Saba.

56. The Control Share Provisions are unlawful under the 40 Act, rendering so much of the Amended and Restated Bylaws, Declarations of Trust, or other binding resolutions of the Funds as include the Control Share Provisions illegal under the 40 Act. For example, under the 40 Act, all common shares "shall be a voting stock and have equal voting rights with

every other outstanding voting stock." 15 U.S.C. § 80a-18(i). Absent relief from the Court, Saba will be irreparably harmed in its ability to beneficially own, hold, and/or acquire shares having the equal voting rights required by the 40 Act and in its ability to exercise its right to vote shares in the Funds.

57. Saba has no adequate remedy at law.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment)

58. Saba repeats and realleges each of the allegations contained in paragraphs 1 through 57 above as if set forth in full herein.

59. The Control Share Provisions prevent funds managed by Saba Capital, including Saba Master Fund, from acquiring voting stock in the Funds with the "equal voting rights" to which such shares are entitled under 15 U.S.C. § 80a-18(i).

60. By adopting bylaws, declaring a trust, and/or otherwise adopting binding resolutions stripping such shares of their voting rights, the Funds have created a substantial and immediate controversy between the parties, of sufficient immediacy and reality to warrant declaratory relief, as to whether doing so violates § 80a-18(i).

61. Accordingly, Saba seeks a declaratory judgment under 28 U.S.C. § 2201 et seq. to determine its rights and obligations, including whether the Control Share Provisions are illegal under 15 U.S.C. § 80a-18(i), and void pursuant to 15 U.S.C. § 80a-46.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

a. Declaring that the Control Share Provisions violate the 40 Act, 15 U.S.C. § 80a18(i);

b. Rescinding the Control Share Provisions, pursuant to 15 U.S.C. § 80a-46;

c. Declaring the Control Share Provisions void, pursuant to 15 U.S.C. § 80a-46;

d. Permanently enjoining Defendants, their agents and representatives, and all other persons acting in concert with them, from applying the Control Share Provisions;

e. Awarding Saba costs and disbursements, including a reasonable allowance for Saba's attorneys' fees and experts' fees and pre- and post-judgment interest; and

f. Such other and further relief as the Court may deem necessary and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury as to all issues so triable.

Dated: June 29, 2023

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* Motion to appear *pro hac vice* pending.

Attorneys for Plaintiff

APPENDIX D

State Statutory Provisions Protecting Ordinary Investors from Concentrated Investors Exerting Inequitable Control

State	Provisions
Arizona	Rev. Stat. Ann. §§ 10-2721–2727
Delaware	Code. Ann. Tit. 12, §§ 3881–3887
Florida	Stat. Ann. § 607.0902
Hawai'i	Rev. Stat. § 414E-2
Idaho	Code Ann. §§ 30-1603, 30-15607
Indiana	Code §§ 23-1-42-5, 23-1-42-9
Kansas	Stat. Ann. §§ 17-1286–1299
Maryland	Code Ann., Corps. & Ass'ns §§ 3-701–710
Massachusetts	Gen. Laws Ann. ch. 110D, §§ 1–8 Gen. Laws Ann. ch. 110E, §§ 1–7
Minnesota	Stat. Ann. § 302A.671
Mississippi	Code Ann. §§ 79-27-1–79-27-11
Missouri	Rev. Stat. § 351.407
Nebraska	Rev. Stat. § 21-2451
Nevada	Rev. Stat. §§ 78.378–78.3793

North Carolina	Gen. Stat. Ann. §§ 55-9A-01–55-9A-09
Ohio	Rev. Code Ann. § 1701.831
Oklahoma	Stat. Ann. tit. 18, §§ 1149–1155
Oregon	Rev. Stat. Ann. § 60.807
Pennsylvania	15 Cons. Stat. §§ 2561–2568
South Carolina	Code Ann. §§ 35-2-101–35-2-111
South Dakota	Codified Laws §§ 47-33-8, 47-33-12
Tennessee	Code Ann. §§ 48-103-305–48-103-310
Utah	Code Ann. §§ 61-6-6–61-6-12
Virginia	Code Ann. §§ 13.1-728.1–13.1-728.9
Wyoming	Stat. Ann. §§ 17-18-301–17-18-309

APPENDIX E

15 U.S.C. § 80a–6. Exemptions

(a) Exemption of specified investment companies

The following investment companies are exempt from the provisions of this subchapter:

(1) Any company which since the effective date of this subchapter or within five years prior to such date has been reorganized under the supervision of a court of competent jurisdiction, if (A) such company was not an investment company at the commencement of such reorganization proceedings, (B) at the conclusion of such proceedings all outstanding securities of such company were owned by creditors of such company or by persons to whom such securities were issued on account of creditors' claims, and (C) more than 50 per centum of the voting securities of such company, and securities representing more than 50 per centum of the net asset value of such company, are currently owned beneficially by not more than twenty-five persons; but such exemption shall terminate if any security of which such company is the issuer is offered for sale or sold to the public after the conclusion of such proceedings by the issuer or by or through any underwriter. For the purposes of this paragraph, any new company organized as part of the reorganization shall be deemed the same company as its predecessor; and beneficial ownership shall be determined in the manner provided in section 80a–3(c)(1) of this title.

(2) Any issuer as to which there is outstanding a writing filed with the Commission by the Federal Savings and Loan Insurance Corporation stating that exemption of such issuer from the provisions of this subchapter is consistent with the public interest and the protection of investors and is necessary or appropriate by reason of the fact that such issuer holds or proposes to acquire any assets or any product of any assets which have been segregated (A) from assets of any company which at the filing of such writing is an insured institution within the meaning of section 1724(a)[1] of title 12, or (B) as a part of or in connection with any plan for or condition to the insurance of accounts of any company by said corporation or the conversion of any company into a Federal savings and loan association. Any such writing shall expire when canceled by a writing similarly filed or at the expiration of two years after the date of its filing, whichever first occurs; but said corporation may, nevertheless, before, at, or after the expiration of any such writing file another writing or writings with respect to such issuer.

(3) Any company which prior to March 15, 1940, was and now is a wholly-owned subsidiary of a registered face-amount certificate company and was prior to said date and now is organized and operating under the insurance laws of any State and subject to supervision and examination by the insurance commissioner thereof, and which prior to March 15, 1940, was and now is engaged, subject to such laws, in business substantially all

[1] See References in Text note below.

of which consists of issuing and selling only to residents of such State and investing the proceeds from, securities providing for or representing participations or interests in intangible assets consisting of mortgages or other liens on real estate or notes or bonds secured thereby or in a fund or deposit of mortgages or other liens on real estate or notes or bonds secured thereby or having outstanding such securities so issued and sold.

(4)(A) Any company that is not engaged in the business of issuing redeemable securities, the operations of which are subject to regulation by the State in which the company is organized under a statute governing entities that provide financial or managerial assistance to enterprises doing business, or proposing to do business, in that State if—

(i) the organizational documents of the company state that the activities of the company are limited to the promotion of economic, business, or industrial development in the State through the provision of financial or managerial assistance to enterprises doing business, or proposing to do business, in that State, and such other activities that are incidental or necessary to carry out that purpose;

(ii) immediately following each sale of the securities of the company by the company or any underwriter for the company, not less than 80 percent of the securities of the company being offered in such sale, on a classby-class basis, are held by persons who reside or who have a substantial business presence in that State;

(iii) the securities of the company are sold, or proposed to be sold, by the company or by any underwriter for the company, solely to accredited investors, as that term is defined in section 77b(a)(15) of this title, or to such other persons that the Commission, as necessary or appropriate in the public interest and consistent with the protection of investors, may permit by rule, regulation, or order; and

(iv) the company does not purchase any security issued by an investment company or by any company that would be an investment company except for the exclusions from the definition of the term "investment company" under paragraph (1) or (7) of section 80a–3(c) of this title, other than—

(I) any debt security that meets such standards of credit-worthiness as the Commission shall adopt; or

(II) any security issued by a registered open-end investment company that is required by its investment policies to invest not less than 65 percent of its total assets in securities described in subclause (I) or securities that are determined by such registered open-end investment company to be comparable in quality to securities described in subclause (I).

(B) Notwithstanding the exemption provided by this paragraph, section 80a–9 of this title (and, to the extent necessary to enforce section 80a–9 of this title, sections 80a–37 through 80a–50 of this title) shall apply to a company described in this

paragraph as if the company were an investment company registered under this subchapter.

(C) Any company proposing to rely on the exemption provided by this paragraph shall file with the Commission a notification stating that the company intends to do so, in such form and manner as the Commission may prescribe by rule.

(D) Any company meeting the requirements of this paragraph may rely on the exemption provided by this paragraph upon filing with the Commission the notification required by subparagraph (C), until such time as the Commission determines by order that such reliance is not in the public interest or is not consistent with the protection of investors.

(E) The exemption provided by this paragraph may be subject to such additional terms and conditions as the Commission may by rule, regulation, or order determine are necessary or appropriate in the public interest or for the protection of investors.

(b) Exemption of employees' security company upon application; matters considered

Upon application by any employees' security company, the Commission shall by order exempt such company from the provisions of this subchapter and of the rules and regulations hereunder, if and to the extent that such exemption is consistent with the protection of investors. In determining the provisions to which such an order of exemption shall apply, the Commission shall give due weight, among other things, to the form of organization and the capital structure of such company, the persons by whom its voting securities, evidences of indebtedness, and other

securities are owned and controlled, the prices at which securities issued by such company are sold and the sales load thereon, the disposition of the proceeds of such sales, the character of the securities in which such proceeds are invested, and any relationship between such company and the issuer of any such security.

(c) Exemption of persons, securities or any class or classes of persons as necessary and appropriate in public interest

The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this subchapter or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter.

(d) Exemption of closed-end investment companies

The Commission, by rules and regulations or order, shall exempt a closed-end investment company from any or all provisions of this subchapter, but subject to such terms and conditions as may be necessary or appropriate in the public interest or for the protection of investors, if—

(1) the aggregate sums received by such company from the sale of all its outstanding securities, plus the aggregate offering price of all securities of which such company is the issuer and which it proposes to offer for sale, do not exceed

$10,000,000, or such other amount as the Commission may set by rule, regulation, or order;

(2) no security of which such company is the issuer has been or is proposed to be sold by such company or any underwriter therefor, in connection with a public offering, to any person who is not a resident of the State under the laws of which such company is organized or otherwise created; and

(3) such exemption is not contrary to the public interest or inconsistent with the protection of investors.

(e) Application of certain specified provisions of subchapter to otherwise exempt companies

If, in connection with any rule, regulation, or order under this section exempting any investment company from any provision of section 80a–7 of this title, the Commission deems it necessary or appropriate in the public interest or for the protection of investors that certain specified provisions of this subchapter pertaining to registered investment companies shall be applicable in respect of such company, the provisions so specified shall apply to such company, and to other persons in their transactions and relations with such company, as though such company were a registered investment company.

(f) Exemption of closed-end company treated as business development company

Any closed-end company which—

(1) elects to be treated as a business development company pursuant to section 80a–53 of this title; or

(2) would be excluded from the definition of an investment company by section 80a–3(c)(1) of this title, except that it presently proposes to make a public offering of its securities as a business development company, and has notified the Commission, in a form and manner which the Commission may, by rule, prescribe, that it intends in good faith to file, within 90 days, a notification of election to become subject to the provisions of sections 80a–54 through 80a–64 of this title,

shall be exempt from sections 80a–1 through 80a–52 of this title, except to the extent provided in sections 80a–58 through 80a–64 of this title.

…

APPENDIX F

15 U.S.C. § 80a–18. Capital structure of investment companies

…

(i) Future issuance of stock as voting stock; exceptions

Except as provided in subsection (a) of this section, or as otherwise required by law, every share of stock hereafter issued by a registered management company (except a common-law trust of the character described in section 80a–16(c) of this title) shall be a voting stock and have equal voting rights with every other outstanding voting stock: *Provided*, That this subsection shall not apply to shares issued pursuant to the terms of any warrant or subscription right outstanding on March 15, 1940, or any firm contract entered into before March 15, 1940, to purchase such securities from such company nor to shares issued in accordance with any rules, regulations, or orders which the Commission may make permitting such issue.

…

APPENDIX G

15 U.S.C. § 80a–29. Reports and financial statements of investment companies and affiliated persons

(a) Annual report by company

Every registered investment company shall file annually with the Commission such information, documents, and reports as investment companies having securities registered on a national securities exchange are required to file annually pursuant to section 13(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(a)] and the rules and regulations issued thereunder.

(b) Semi-annual or quarterly filing of information; copies of periodic or interim reports sent to security holders

Every registered investment company shall file with the Commission—

(1) such information, documents, and reports (other than financial statements), as the Commission may require to keep reasonably current the information and documents contained in the registration statement of such company filed under this subchapter; and

(2) copies of every periodic or interim report or similar communication containing financial statements and transmitted to any class of such company's security holders, such copies to be filed not later than ten days after such transmission.

Any information or documents contained in a report or other communication to security holders filed

pursuant to paragraph (2) of this subsection may be incorporated by reference in any report subsequently or concurrently filed pursuant to paragraph (1) of this subsection.

(c) Minimizing reporting burdens

(1) The Commission shall take such action as it deems necessary or appropriate, consistent with the public interest and the protection of investors, to avoid unnecessary reporting by, and minimize the compliance burdens on, registered investment companies and their affiliated persons in exercising its authority—

(A) under subsection (f); and

(B) under subsection (b)(1), if the Commission requires the filing of information, documents, and reports under that subsection on a basis more frequently than semiannually.

(2) Action taken by the Commission under paragraph (1) shall include considering, and requesting public comment on—

(A) feasible alternatives that minimize the reporting burdens on registered investment companies; and

(B) the utility of such information, documents, and reports to the Commission in relation to the costs to registered investment companies and their affiliated persons of providing such information, documents, and reports.

(d) Reports under this section in lieu of reports under other provisions of law

The Commission shall issue rules and regulations permitting the filing with the Commission, and with any national securities exchange concerned, of copies

of periodic reports, or of extracts therefrom, filed by any registered investment company pursuant to subsections (a) and (b), in lieu of any reports and documents required of such company under section 13 or 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. 78m or 78*o*(d)].

(e) Semiannual reports to stockholders

Every registered investment company shall transmit to its stockholders, at least semiannually, reports containing such of the following information and financial statements or their equivalent, as of a reasonably current date, as the Commission may prescribe by rules and regulations for the protection of investors, which reports shall not be misleading in any material respect in the light of the reports required to be filed pursuant to subsections (a) and (b):

(1) a balance sheet accompanied by a statement of the aggregate value of investments on the date of such balance sheet;

(2) a list showing the amounts and values of securities owned on the date of such balance sheet;

(3) a statement of income, for the period covered by the report, which shall be itemized at least with respect to each category of income and expense representing more than 5 per centum of total income or expense;

(4) a statement of surplus, which shall be itemized at least with respect to each charge or credit to the surplus account which represents more than 5 per centum of the total charges or credits during the period covered by the report;

(5) a statement of the aggregate remuneration paid by the company during the period covered by the report (A) to all directors and to all members of any advisory board for regular compensation; (B) to each director and to each member of an advisory board for special compensation; (C) to all officers; and (D) to each person of whom any officer or director of the company is an affiliated person; and

(6) a statement of the aggregate dollar amounts of purchases and sales of investment securities, other than Government securities, made during the period covered by the report:

Provided, That if in the judgment of the Commission any item required under this subsection is inapplicable or inappropriate to any specified type or types of investment company, the Commission may by rules and regulations permit in lieu thereof the inclusion of such item of a comparable character as it may deem applicable or appropriate to such type or types of investment company.

(f) Additional information

The Commission may, by rule, require that semi-annual reports containing the information set forth in subsection (e) include such other information as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(g) Certificate of independent public accountants

Financial statements contained in annual reports required pursuant to subsections (a) and (e), if required by the rules and regulations of the Commission, shall be accompanied by a certificate of

independent public accountants. The certificate of such independent public accountants shall be based upon an audit not less in scope or procedures followed than that which independent public accountants would ordinarily make for the purpose of presenting comprehensive and dependable financial statements, and shall contain such information as the Commission may prescribe, by rules and regulations in the public interest or for the protection of investors, as to the nature and scope of the audit and the findings and opinion of the accountants. Each such report shall state that such independent public accountants have verified securities owned, either by actual examination, or by receipt of a certificate from the custodian, as the Commission may prescribe by rules and regulations.

(h) Duties and liabilities of affiliated persons

Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of outstanding securities (other than short-term paper) of which a registered closed-end company is the issuer or who is an officer, director, member of an advisory board, investment adviser, or affiliated person of an investment adviser of such a company shall in respect of his transactions in any securities of such company (other than short-term paper) be subject to the same duties and liabilities as those imposed by section 16 of the Securities Exchange Act of 1934 [15 U.S.C. 78p] upon certain beneficial owners, directors, and officers in respect of their transactions in certain equity securities.

(i) Disclosure to church plan participants

A person that maintains a church plan that is excluded from the definition of an investment company

solely by reason of section 80a–3(c)(14) of this title shall provide disclosure to plan participants, in writing, and not less frequently than annually, and for new participants joining such a plan after May 31, 1996, as soon as is practicable after joining such plan, that—

(1) the plan, or any company or account maintained to manage or hold plan assets and interests in such plan, company, or account, are not subject to registration, regulation, or reporting under this subchapter, the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], or State securities laws; and

(2) plan participants and beneficiaries therefore will not be afforded the protections of those provisions.

(j) Notice to Commission

The Commission may issue rules and regulations to require any person that maintains a church plan that is excluded from the definition of an investment company solely by reason of section 80a–3(c)(14) of this title to file a notice with the Commission containing such information and in such form as the Commission may prescribe as necessary or appropriate in the public interest or consistent with the protection of investors.

(k) Data standards for reports

(1) Requirement

The Commission shall, by rule, adopt data standards for all reports required to be filed with the Commission under this section, except that

the Commission may exempt exhibits, signatures, and certifications from those data standards.

(2) Consistency

The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 5334 of title 12, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 5334.

…

APPENDIX H

15 U.S.C. § 80a–35. Breach of fiduciary duty

(a) Civil actions by Commission; jurisdiction; allegations; injunctive or other relief

The Commission is authorized to bring an action in the proper district court of the United States, or in the United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person who is, or at the time of the alleged misconduct was, serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts, or at the time of the alleged misconduct, so served or acted—

(1) as officer, director, member of any advisory board, investment adviser, or depositor; or

(2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company.

If such allegations are established, the court may enjoin such persons from acting in any or all such capacities either permanently or temporarily and award such injunctive or other relief against such person as may be reasonable and appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 80a–1(b) of this title.

(b) Compensation or payments as basis of fiduciary duty; civil actions by Commission or security holder; burden of proof; judicial consideration of director or shareholder approval; persons liable; extent of liability; exempted transactions; jurisdiction; finding restriction

For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. With respect to any such action the following provisions shall apply:

(1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.

(2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or other

arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given such consideration by the court as is deemed appropriate under all the circumstances.

(3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payment received from such investment company, or the security holders thereof, by such recipient.

(4) This subsection shall not apply to compensation or payments made in connection with transactions subject to section 80a–17 of this title, or rules, regulations, or orders thereunder, or to sales loads for the acquisition of any security issued by a registered investment company.

(5) Any action pursuant to this subsection may be brought only in an appropriate district court of the United States.

(6) No finding by a court with respect to a breach of fiduciary duty under this subsection shall be made a basis (A) for a finding of a violation of this subchapter for the purposes of sections 80a–9 and 80a–48 of

this title, section 78*o* of this title, or section 80b–3 of this title, or (B) for an injunction to prohibit any person from serving in any of the capacities enumerated in subsection (a) of this section.

(c) Corporate or other trustees performing functions of investment advisers

For the purposes of subsections (a) and (b) of this section, the term "investment adviser" includes a corporate or other trustee performing the functions of an investment adviser.

…

APPENDIX I

15 U.S.C. § 80a–41 Enforcement of subchapter

(a) Investigation

The Commission may make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subchapter or of any rule, regulation, or order hereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under this subchapter against a particular person or persons, or with respect to a particular transaction or transactions. The Commission shall permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated.

(b) Administration of oaths and affirmations, subpena of witnesses, etc.

For the purpose of any investigation or any other proceeding under this subchapter, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) Jurisdiction of courts of United States

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Action for injunction

Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States, or the

proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 80a–7 of this title, the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive jurisdiction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter.

(e) Money penalties in civil actions

(1) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 80a–9(f) of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper

showing, a civil penalty to be paid by the person who committed such violation.

(2) Amount of penalty

(A) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit,

manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(3) Procedures for collection

(A) Payment of penalty to Treasury

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u–6 of this title.

(B) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(C) Remedy not exclusive

The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(D) Jurisdiction and venue

For purposes of section 80a–43 of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this subchapter.

(4) Special provisions relating to a violation of a cease-and-desist order

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 80a–9(f) of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

…

APPENDIX J

15 U.S.C. § 80a–46. Validity of contracts

(a) Waiver of compliance as void

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.

(b) Equitable results; recission; severance

(1) A contract that is made, or whose performance involves, a violation of this subchapter, or of any rule, regulation, or order thereunder, is unenforceable by either party (or by a nonparty to the contract who acquired a right under the contract with knowledge of the facts by reason of which the making or performance violated or would violate any provision of this subchapter or of any rule, regulation, or order thereunder) unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this subchapter.

(2) To the extent that a contract described in paragraph (1) has been performed, a court may not deny rescission at the instance of any party 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.

(3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it may be severed from the unlawful portion of the contract, or

(B) to preclude recovery against any person for unjust enrichment.

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