SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PUBLIC SECTOR PENSION INVESTMENT BOARD,	:	
Plaintiff,	:	Index No. 653216/2015 (Singh, J.)
- against -	:	Motion Seq. 005
SABA CAPITAL MANAGEMENT, L.P., SABA CAPITAL OFFSHORE FUND, LTD., SABA CAPITAL, LLC and BOAZ WEINSTEIN,	:	ORAL ARGUMENT REQUESTED
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SABA CAPITAL OFFSHORE FUND LTD.'S MOTION FOR SUMMARY JUDGMENT

SUSMAN GODFREY L.L.P.
Jacob W. Buchdahl
Arun Subramanian
Mark Musico
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
Phone: (212) 336-8330
jbuchdahl@susmangodfrey.com
asubrama@susmangodfrey.com
mmusico@susmangodfrey.com

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
Eric Corngold
Anne E. Beaumont
Mona V. Mehta
7 Times Square
New York, New York 10036
Phone: (212) 833-1100
ecorngold@fklaw.com
abeaumont@fklaw.com
mmehta@fklaw.com

Attorneys for Defendant

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Saba Capital Offshore Fund, Ltd. (the "Fund')[1] moves pursuant to CPLR 3212 for summary judgment against PSP on its sole remaining claim, an alleged breach of contract.

PRELIMINARY STATEMENT

In January 2015, PSP informed the Fund that it wished to "redeem" (*i.e.*, liquidate) its entire $500 million investment at the end of the first quarter. Saba provided PSP detailed estimates of the costs and risks associated with unwinding its large position of illiquid securities so quickly, but PSP, a sophisticated investor, insisted on redeeming immediately. Among twenty investors that redeemed in March 2015, PSP is the only one that has contested Saba's valuations.

As the March 31 redemption date approached, Saba Management engaged in its monthly exercise of determining the net asset value ("NAV") of the Fund's assets, which required the valuation of more than 1,200 securities. Saba used a bid-wanted-in-competition ("BWIC") auction to generate redemption proceeds and to find accurate, external valuations for 30 illiquid securities. This lawsuit is about just two of those securities—corporate bonds issued by the McClatchy Company with maturity dates in 2027 and 2029 (the MNI "27s" and "29s"; collectively, the "MNI bonds").

The evolution of PSP's allegations is striking. Initially, PSP faulted Saba for failing to use quotes from contractually permissible external sources to value the MNI bonds. (*See* Dkt. 29 at 31-32 (MR. SCHWARTZ: "So Saba could have gone ahead and contacted people on the street and said, give me your best bid for these bonds.…I didn't see any evidence submitted here that Goldman Sachs had anything to do with this").) When that allegation turned out to be false—in

[1] As in prior filings, "PSP" refers to plaintiff "Public Sector Pension Investment Board"; "Saba Management" refers to the Investment Manager, "Saba Capital Management, L.P."; and "the Fund" refers to defendant "Saba Capital Offshore Fund, Ltd." "Saba" means "the Fund, acting through Saba Management," or "Saba Management, acting on behalf of the Fund." "Ex." refers to the exhibits to the accompanying Affirmation of Mark Musico, executed on February 3, 2017.

fact, Goldman Sachs provided the high bid used to price the MNI bonds—PSP's fallback allegation was that the BWIC auction soliciting Goldman Sachs's bid was "rigged." (Dkt. 102 ¶ 25.)[2] But, as described below, even PSP has conceded (and discovery has confirmed) that Saba's BWIC methodology was capable of generating reliable marks for illiquid securities like the MNI bonds.

Ultimately, we are here because PSP simply disagrees with Saba about the value of the MNI bonds in March 2015. That is no basis for suit under the parties' contract. Saba offered to sell the bonds to reputable dealers in the bonds who, after relaying the offer to their clients, responded with firm offers to buy. Saba then used the highest bid it received to price the bonds. This approach to valuing the bonds complied with the valuation guidelines set forth in the parties' contract (the Offering Memorandum ("OM")), as even PSP now admits. And in valuing the bonds the way it did, Saba acted in accord with the advice of its professional advisors. Saba's valuations of the MNI bonds are, therefore, "**final and conclusive**" as to PSP and all other Fund shareholders. That ends the matter.

PSP tries to prop up its claim by alleging Saba acted in bad faith. But Saba's good faith is beyond material dispute, because Saba has well-documented, rational, and non-arbitrary reasons for the valuation decisions PSP now attacks. In these circumstances courts should, and routinely do, grant judgment as a matter of law; to do otherwise would be to strip the contract's "final and conclusive" language of meaning. Indeed, allowing PSP's claim to proceed would upset not just the parties' reasonable expectations under the terms of their contract, but the reasonable

[2] PSP's use of the term "rigged" was itself unduly inflammatory. PSP did not allege that Saba somehow colluded with market participants to provide fixed bids as the term "rigged" implies but, rather, PSP has lodged plain vanilla objections to the size and timing of the BWIC that allegedly depressed the bids. PSP's Simon Fournier, for example, believed Saba acted in bad faith in part because it ran the BWIC "on a late Friday afternoon on the last day of the month"—a mundane allegation that also happens to be false (the March BWIC fell midday on a Tuesday). (*See* Ex. 32 (Fournier Dep. 55:13-64:17); Ex. 6 (Lanthier Dep. 64:14-65:5); Dkt. 102 ¶ 24.)

expectations of sophisticated parties everywhere. It would tell them that express provisions in their contracts designed to protect the exercise of discretion are for naught, and subject every act of business discretion to hindsight second-guessing by a judge or jury regardless of the parties' efforts to prevent exactly that. This is not good public policy and, fortunately, it is not the law. The Court should grant summary judgment against PSP on its breach of contract claim.

FACTUAL AND LEGAL BACKGROUND

I. STATEMENT OF FACTS

In 2012 and 2013, PSP invested $500 million in the Fund. (Exs. 1-2.) On January 22, 2015, PSP informed the Fund that it wished to redeem its entire investment at the end of the first quarter. (Ex. 3 (SABA00145629); Ex. 4 (SABA00002046).) Saba was required to sell more than half of the Fund's assets in a short timeframe to generate cash to satisfy PSP's and other investors' redemption requests. Saba proposed that PSP redeem in three installments rather than all at once, suggesting that it would obtain a higher value if it did so. (Ex. 5 (SABA00022941).) PSP rejected Saba's proposal. (Ex. 6 (Lanthier Dep. 89:17-90:5).)

From late February through March 2015, as Saba worked diligently to sell the MNI bonds (among over 1,200 other securities), it found that "the pricing services [were] off market" for 30 particularly illiquid securities, including the MNI bonds—*i.e.*, the market quotes for MNI bonds provided by services like Reuters or Bloomberg did not represent buyers willing to transact at or near those levels. (Ex. 7 (SABA00002588-89); Ex. 8 (SABA00002593) ("During the liquidation process, it became apparent that a portion of the Fund's portfolio could not be sold at pricing levels sourced from independent pricing services.").[3]) For example, on March

[3] In January 2015, Saba had marked the MNI bonds using pricing reported by a Bloomberg pricing service and, in February 2015, using pricing provided to Saba by independent pricing service Duff & Phelps. (Ex. 9 (SABA00002551); Ex. 10 (SABA00002571).)

30—just one day before PSP's redemption date—the best bid Saba received on an offer of $1.5 million of MNI 29s to thousands of potential buyers on the MarketAxess trading platform[4] was only 19.94.[5] (Ex. 12 (SABA00071745).) Reuters, nevertheless, quoted a mid-level of 61.5 at March month-end. (Ex. 14 (SABA00002606). The explanation?: market realities not reflected in the levels reported by external pricing sources. A Guggenheim dealer, for example, thought there was so little market interest in the MNI bonds in early 2015 that offering them was "useless," and he told Saba that reducing the offering price would not "do us any [good]." (Ex. 15 (SABA00043371).)

In order to generate redemption proceeds and find reliable valuations for its illiquid securities, at the end of March 2015 Saba conducted a BWIC auction for 30 securities in its portfolio—including the MNI bonds and other similarly illiquid corporate bonds issued by New Albertsons and MBIA.[6] (Ex. 14 (SABA00002606); Ex. 16 (SABA00002078).) In the March BWIC auction, Saba offered $31 million face amount of the MNI 27s and $23 million face amount of the MNI 29s to eight reputable dealers.[7] Those dealers then reached out to their vast network of clients; indeed, the BWIC was so widely disseminated that PSP itself received it from two different dealers. (Ex. 17 (Cashin Dep. 41:7-15.) Just as with the other illiquid securities offered on the BWIC, Saba's offering of MNI bonds reflected the percentage of the position that would need to be sold to ensure the bonds comprised the same percentage of the Fund's portfolio

[4] MarketAxess is the "leading electronic bond brokerage platform." (Ex. 13 (Weinstein Dep. 199:23-25).) "Over 1000 investor and broker-dealer firms are active users of the MarketAxess trading platform." (Ex. 11.)

[5] As is standard in the industry, prices are expressed as a percentage of the "face value" of the bonds. "Face value" or "face amount" refers to the bond issuer's actual debt obligation. Mid-level pricing ("mid") refers to the midpoint between an offer to sell ("ask") and an offer to buy ("bid").

[6] A BWIC is an industry-standard auction process that involves soliciting bids from multiple dealers in an effort to obtain the highest transactable bid. (Ex. 17 (Cashin Dep. 31:17-32:5).)

[7] Ex. 18 (SABA00015046); Ex. 19 (SABA00014885); Ex. 20 (SABA00014887); Ex. 21 (SABA00014890); Ex. 22 (SABA00015045); Ex. 23 (SABA00015044); Ex. 24 (SABA00014883); Ex. 25 (SABA00014892).

after satisfying investor redemptions. (Ex. 13 (Weinstein Dep. 182:20-183:5).) Three dealers returned bids on the MNI bonds, including a high bid of 31 from Goldman Sachs ("Goldman") for both the MNI 27s and 29s. (Ex. 26 (SABA00002623).) Saba received additional bids from Citibank and Barclays ranging from 22.5 to 29.77. (Ex. 26 (SABA00002624-25).) After reaching out to their clients, the other dealers Saba contacted could not provide any firm bids whatsoever. (*E.g.*, Ex. 23 (SABA00015044); Ex. 24 (SABA00014883); Ex. 13 (Weinstein Dep. 185:16-186:8).)

In the days that followed, Saba's Valuation Committee met, as it does every month, before finalizing the March month-end NAV. After everything Saba had learned about the market while "attempting to sell corporate bonds back to the [issuing] company, offering out to large institutions and using anonymous queries on electronic platforms like Market Axess" (Ex. 8 (SABA00002593)), Saba knew that "the pricing services [were] off market" (Ex. 7 (SABA00002588-89).) There was thus no way Saba could, consistent with the OM, mark the MNI bonds at the levels being reported by those pricing services, because they did not reflect fair value. The "bids obtained from dealers [via the BWIC]," by contrast, were "firm offers to buy and better represent[ed] fair value as compared to other dealer runs and market data (pricing services)." (Ex. 7 (SABA00002588).) The Valuation Committee concluded that "the max bids [obtained in the BWIC] can be used" to mark illiquid securities like the MNI bonds. (*Id*.)

The Valuation Committee also consulted with Saba's independent auditors at Ernst & Young ("E&Y"), the Fund's independent Board of Directors, and the independent Fund Administrator's accounting and valuation teams ("GlobeOp"). (Ex. 8 (SABA00002596-98).) Consistent with its own analysis and the advice of these professional advisors, Saba used Goldman's high bid of 31 to mark both of the MNI bonds. (Ex. 14 (SABA00002606).)

At the end of April 2015, Saba Management again used a BWIC auction to sell or value the illiquid securities in its portfolio, including the MNI bonds. The April BWIC for the MNI bonds was materially identical to the March BWIC in terms of size, timing, and dealers solicited. (*See* Ex. 27 (SABA00001839); Ex. 28 (SABA00002715); Ex. 29.) Saba received bids from Goldman, Citi, and Bank of America indicating that the market had rebounded to a certain extent, and again marked the MNI bonds at the highest bids received—49.5 for the MNI 27s, and 52 for the MNI 29s. (Ex. 30 (SABA00001852); Ex. 27 (SABA00001839).)

II. THE OFFERING MEMORANDUM PRESCRIBES THE GOVERNING VALUATION GUIDELINES AND SAFE HARBORS

PSP's remaining claim in this action is, nominally, a breach of contract claim against the Fund.[8] PSP argues the Fund is liable for Saba Management's valuation of the MNI bonds because Saba Management acts as the Fund's agent in determining the NAV, which the Fund, in turn, used to set the amount of PSP's redemption. (*See* Dkt. 18 at 9-10.)

The Fund's OM sets forth Saba Management's obligations with respect to the "Determination of Net Asset Value":

> The **Investment Manager** and the Administrator will determine the Net Asset Value of the Fund and the Master Fund **in accordance with the guidelines set forth below**. **All matters** concerning valuation of securities and the allocation of liabilities **not expressly provided for below may be determined by** the Administrator in consultation with **the Investment Manager, whose determination is final and conclusive as to all shareholders**.

[8] The Fund's contractual duties to PSP stem from the parties' Subscription Agreement, pursuant to which PSP acquired shares in the Fund upon the terms of: (a) the Offering Memorandum; (b) the Articles of Association of the Fund ; and (c) PSP's Side Letter with Saba Management. (Ex. 1 (SABA00002082).) Although the Subscription Agreement is governed by Cayman law, PSP previously argued that the Court should apply New York law for convenience, due to the absence of any conflict of laws. (Dkt. 18 at 8 n.3.) The Court applied New York law to PSP's breach of contract claim. (Dkt. 35 at 5.) Absent a conflict presented by the arguments raised by PSP in its opposition, Saba will continue to cite New York law for purposes of this motion.

(Ex. 31 (SABA00152799) (emphasis added)).) Because the OM makes Saba's valuation determinations "final and conclusive as to all shareholders" when made in accordance with the "guidelines set forth" in the OM, investors have no rights to challenge such valuations. (Ex. 31 (SABA00152801).)

The guidelines provide that securities like the MNI bonds "are valued by the Investment Manager after considering, among other factors,…External Pricing Sources, recent trading activity or other information that, in the opinion of the Investment Manager, may not have been reflected in pricing obtained from such external sources." (Ex. 31 (SABA00152801).) "External Pricing Sources" are defined as "independent pricing services or dealer quotations from a market maker or financial institution regularly engaged in the practice of trading in or pricing such securities." (Ex. 31 (SABA00152801-02).) For "subscription or redemption purposes" Saba Management will not "value assets other than in accordance with [Generally Accepted Accounting Principles]." (Ex. 31 (SABA00152800).)

The OM also provides that Saba Management may be held liable only if it both fails to obtain professional advice about its actions *and* acts in bad faith. Saba Management is not liable "to the Fund or any shareholder of the fund for any acts or omissions arising out of or in connection with the Fund…unless such action or inaction was performed or omitted fraudulently or in bad faith or constituted gross negligence (as interpreted under the laws of the State of Delaware USA) or willful misconduct." (Ex. 31 (SABA00152759).) Furthermore, "[e]ach of the Investment Manager and its Affiliates may consult with counsel and accountants in respect of the Fund's affairs and, with respect to shareholders of the Fund and the Fund, will be fully protected and justified in any action or inaction that is taken in accordance with the advice or opinion of

such counsel or accountants, provided that they were selected in accordance with the [good faith] standard above." (*Id.*)

Stunningly, after basing its initial complaint on Saba's alleged failure to abide by an express term of the OM, PSP now cannot show that Saba breached any term of these contractual provisions, but instead must allege a generalized breach of the implied covenant of good faith.

III. SUMMARY JUDGMENT STANDARD

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact." *Melendez v. Parkchester Med. Servs., P.C.,* 76 A.D.3d 927, 927 (1st Dep't 2010) (internal citations omitted). "[F]actual disputes," moreover, "are not enough; they must relate to *material* issues." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312 (2004) (emphasis in original). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to generate a dispute of material fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980).

ARGUMENT

There is no dispute that Saba complied with the valuation guidelines set forth in the Offering Memorandum—PSP has admitted that Saba did. Moreover, the uncontested evidence shows that Saba acted in accordance with the advice of its professional advisors. The valuations of the MNI bonds are, therefore, "final and conclusive" as to PSP and all other Fund shareholders. There also can be no genuine dispute that Saba acted in good faith given the undisputed evidence that Saba Management had rational, non-arbitrary reasons for the valuation decisions that PSP contends constituted bad faith. PSP's disagreement with the resulting

valuation of the MNI bonds does not present a material factual dispute for trial. The Fund, moreover, is not the proper target of PSP's breach of contract claim. The Fund is therefore entitled to judgment in its favor.

I. SABA MANAGEMENT'S VALUATION OF THE MNI BONDS WAS "FINAL AND CONCLUSIVE" AND "FULLY PROTECTED AND JUSTIFIED"

Because there is no genuine dispute that Saba's March 2015 valuation of the MNI bonds complied with the Offering Memorandum's valuation guidelines and came within Saba's contractual safe harbors, the Fund cannot be liable for breach of contract.

A. Saba's Guidelines-Compliant Valuation of the MNI Bonds Was "Final and Conclusive" as to PSP and All Other Investors

Under the OM's Valuation Guidelines, the MNI bonds are to be "valued by the Investment Manager after **considering**, among other factors, [1] **External Pricing Sources**, [2] **recent trading activity** or [3] **other information** that, in the opinion of the Investment Manager, **may not have been reflected in pricing obtained from such external sources**." (Ex. 31 (SABA00152801).) Saba followed these guidelines to the letter.

First, Saba undisputedly considered "External Pricing Sources" when valuing the MNI bonds. After Saba's Valuation Committee evaluated the "results of the BWIC process and **compared the marks obtained to primary sources**"—namely, pricing services Reuters and Bloomberg—Saba concluded that "**the pricing services are off market** and therefore the max bids [from the BWIC] can be used." (Ex. 7 (SABA00002589).)[9]

Second, there is no dispute that, in determining which external pricing source to use—as it must do every single month—Saba considered MNI's "trading history and volumes" and

[9] Moreover, there can be no genuine dispute that Goldman Sachs, provider of the high bid in the March BWIC, is also an External Pricing Source, because it is a "financial institution regularly engaged in the practice of trading in or pricing such securities." Again, PSP admitted as much. *See infra* Part II.B.

"recent trades and prices traded." (Ex. 8 (SABA00002594).) In doing so, Saba once again considered External Pricing Sources, observing that there had been "**minimal trading** of small quantities [of MNI bonds] in recent months and, of those trades, **executable prices well below levels reported by our usual pricing sources**." (*Id.*)

Third, Saba also considered an abundance of "other information" like "market and portfolio perception of liquidity and fair value," and the fact that the "Portfolio Management team [attempted] to liquidate large portions of the Fund's MNI holdings on numerous occasions prior to month end…without being able to do so at the appropriate levels." (Ex. 8 (SABA00002593-94).) This included the data Saba had obtained by "attempting to sell corporate bonds back to the [issuing] company, offering out to large institutions and using anonymous queries on electronic platforms like MarketAxess." (*Id.*) Saba also, as a complement to its own analysis, consulted with and acted according to the advice of various professional advisors. (Ex. 8 (SABA00002596-98); *see also infra* Part I.B.)

Where Saba complies with the Offering Memorandum's valuation guidelines, as just described, the parties agreed to foreclose any attempts to second-guess the resulting valuations—making them "final and conclusive as to all shareholders." Ex. 31 (SABA00152801).) Even Simon Fournier, a Senior Director at PSP and its primary contact with Saba, admitted that the parties' contract allowed Saba to value the MNI bonds as it did:

> [Ms. Beaumont]: **Do you believe that the pricing method that Saba used was permitted by the Offering Memorandum?**
>
> [Mr. Fournier]: **Yes.**

(Ex. 32 (Fournier Dep. 56:8-11).) That is the end of the matter according to the express terms of the OM.

B. Saba Was "Fully Protected and Justified" in Marking the MNI Bonds in Accordance with the Advice of Its Professional Advisors

The Offering Memorandum's "Exculpation and Indemnification" provision also assures that Saba will be "fully protected and justified in any action or inaction that is taken in accordance with the advice or opinion of [its] accountants," provided they were retained in good faith. (Ex. 31 (SABA00152759).) Put differently, so long as the initial step of retaining accountants was undertaken in good faith, the parties' contract defines actions taken in accordance with the advice of those accountants to be taken in good faith as well. "Under New York law, such contractual clauses providing for reliance on the advice of [professional advisors] as a defense to liability for acts taken or omitted in good faith are fully enforceable." *First Nat'l. Bank of Boston v. Manufacturers Hanover Trust Co.*, No. 90 CIV. 7569 (LBS), 1991 WL 125188, at *5 (S.D.N.Y. July 2, 1991). There being no dispute that Saba valued the MNI bonds consistent with the advice of accountants at Ernst & Young (and PSP having made no suggestion that Saba selected E&Y in bad faith), the Fund cannot be held liable under its contract with PSP as a matter of law.

A summary of Saba's consultations with its professional advisors comes directly from the Appendix to Minutes prepared by Saba's Valuation Committee—specifically, by then-CFO Muqu Karim. (Ex. 8 (SABA00002596-98).) The record leaves no dispute that, far from orchestrating a devious plan to deprive PSP of a full and fair redemption, Saba openly consulted in good faith with E&Y, GlobeOp, and the Fund's independent directors about its March 2015 valuation decisions. After obtaining discovery not only from Saba, but also from all of these advisors, PSP cannot dispute that Saba acted in accordance with their advice.

More specifically, before finalizing the March NAV, Saba Management sent E&Y a "pack on MNI that has dealer runs, trace screens, [Saba's] historical trades, etc." in order to

discuss E&Y's "view on fair value being marked to bid." (Ex. 33 (EY-SABCAP-GUM-EM-013078-91).) In addition to relevant market color about MNI, the "pack" included all relevant details about Saba's BWIC auction, including the size, timing, presentation to dealers, and bids received. (*E.g.*, Ex. 33 (EY-SABCAP-MGUM-EM-013080-82).) Mike Zuckerman, a member of Saba's accounting team, discussed with E&Y the "disparity between the result of the BWIC and the other pricing sources that we had" and "what was the appropriate price to use." (Ex. 34 (Zuckerman Dep. 45:25-46:18).) And Muqu Karim, Saba's then-CFO, similarly confirmed he consulted with E&Y about the propriety of Saba's marking the MNI bonds at bid—*i.e.*, the high bids from the BWIC. (Ex. 35 (Karim Dep. 128:22-129:9).) Saba explained "the BWIC methodology for pricing," and "the rationale behind…the portfolio subset" chosen for BWIC auction, and "E&Y advised that marking to bid was appropriate under GAAP for long positions as long as it was representative of fair value." (Ex. 8 (SABA00002596).)[10]

PSP has adduced no evidence to the contrary. PSP subpoenaed E&Y, and E&Y produced documents consistent with its involvement in the process of valuing the MNI bonds as described in the Valuation Committee's minutes. The record thus leaves no dispute that Saba consulted E&Y and acted in accordance with its advice regarding the MNI bonds. The Fund, therefore, cannot be held liable under its contract with PSP as a matter of law.

C. PSP Cannot Invoke the Covenant of Good Faith and Fair Dealing

Lacking any argument based on the words of the contract, PSP invokes the implied covenant of good faith—but this is "especially" inappropriate where, as here, it sues on a

[10] In addition to the undisputed evidence about Saba's consultations with E&Y, there is no dispute Saba received GlobeOp's "sign off" on the March month-end valuations. (Ex. 36 (SABA00002621.) And there is no dispute that the Fund's Directors signed off on the March 2015 valuation after being briefed and receiving satisfactory answers to questions about, for example, fair treatment of remaining investors, whether Saba could truly transact at the bid levels received by BWIC, and whether marking to the bids obtained by BWIC was consistent with the Saba's Valuation Policy. (Ex. 37 (SABA00002681).)

"commercial contract between two sophisticated commercial parties represented by counsel." *Ninth St. Associates v. 20 E. Ninth St. Corp.*, 39 Misc. 3d 1239(A) at *4 (Sup. Ct. N.Y. Cnty. 2013) (Singh, J.) (internal quotations and citations omitted); *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 136 A.D.3d 1, 6 (1st Dep't 2015) ("A contractual provision that is clear on its face must be enforced according to the plain meaning of its terms. This rule applies with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." (internal quotations and citations omitted)).

1. The Covenant Cannot Save PSP's Non-Viable Breach of Contract Claim

Given Saba's undisputed compliance with the parties' contract, PSP's claim for breach of the implied covenant of good faith is "an invalid substitute for [a] nonviable breach of contract claim" and violates the "well-established principle that the implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract." *Phoenix Capital Invs. LLC v. Ellington Mgmt. Grp., L.L.C.*, 51 A.D.3d 549, 550 (1st Dep't 2008) (plaintiff could not argue defendant acted in bad faith when exercising contractually-protected discretion to terminate contract; the "stark inconsistency between the claim and the negotiated terms of the contract requires that the claim be dismissed").

To permit PSP now to argue that Saba allegedly discharged its valuation duties in "bad faith" would be "inconsistent with other terms of the contractual relationship," as it would nullify the "final and conclusive" valuation that the contract guaranteed to Saba. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (internal quotations and citations omitted) (cited Dkt. 35 at 5). The law is clear that "the obligation of good faith and fair dealing does not negate" contractual provisions allowing "a party to exercise its discretion, unless that clause imposes a limit on the discretion to be exercised or explicitly states that the duty of good faith and fair dealing applies." *Valentini-Shamsky v. Deloitte, LLP*, No. 154142/2014, 2015 WL 2127109, at *4 (Sup. Ct. N.Y.

Cnty. May 5, 2015) (Singh, J.) (applying *Moran v. Erk*, 11 N.Y.3d 452 (2008); citing *Paxi, LLC v. Shiseido Americas Corp.*, 636 F. Supp. 2d 275, 286 (S.D.N.Y. 2009)).[11]

PSP cannot use the implied covenant as an end-run around the parties' clear contractual provisions. The OM's valuation guidelines impose no conditions on Saba's "final and conclusive" discretion to value the Fund's assets beyond compliance with the guidelines themselves. Because there is no dispute that Saba complied, PSP's breach of contract claim fails as a matter of law.

2. PSP's Application of the Covenant Upsets the Parties' Reasonable Expectations

PSP's claim under the implied covenant of good faith also violates the principle that the covenant cannot be invoked when it would "unjustifiably frustrate the expectations of the parties as made explicit in the contract." *Phoenix*, 51 A.D.3d 549 at 550; *Interallianz Bank AG v. Nycal Corp.*, No. 93 CIV. 5024 (RPP), 1994 WL 177745, at *8 (S.D.N.Y. May 6, 1994) (covenant protects the "reasonable expectations of the other party which arise out of the agreement entered into" but "does not create duties which are not fairly inferable from the express terms of that contract"); *Middle Vill. Assocs. v. Pergament Home Ctrs., Inc.*, 184 Misc. 2d 552, 557, 708 N.Y.S.2d 840, 844 (Sup. Ct. Nassau Cnty. 2000) (parties "cannot invoke the covenant of fair dealing…to achieve a result contrary to the intention of their negotiated agreement").

[11] *See also Overseas Private Inv. Corp. v. Gerwe*, No. 12-CV-5833(RA), 2016 WL 1259564, at *7 (S.D.N.Y. Mar. 28, 2016) (granting summary judgment dismissing claim for breach of covenant of good faith because, under *Moran*, which courts have "interpreted…broadly," court will not "read implied limitations into unambiguously worded contractual provisions designed to protect contracting parties") (internal quotations and citations omitted); *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, No. 03-CV-8843, 2010 WL 3155176, at *13 (S.D.N.Y. July 30, 2010), *aff'd*, 694 F.3d 155 (2d Cir. 2012) ("While *Moran*'s holding was confined to attorney approval clauses in real estate contracts, other courts have extended *Moran*'s logic to other types of discretionary clauses."); *Stokes v. Lusker*, No. 08 CIV. 3667, 2009 WL 612336, at *8 (S.D.N.Y. Mar. 4, 2009), *aff'd*, 425 F. App'x 18 (2d Cir. 2011) ("Following [*Moran*'s] logic, a discretionary contingency clause does not carry with it an implied duty of good faith, unless it was explicitly part of the bargain.").

The reasonable expectations of PSP and Saba are set forth in their contract, and PSP cannot claim to have expected to have a contractual remedy in the circumstances of this case. The OM put PSP on notice that the "market prices, if any" for illiquid securities like the MNI bonds "tend to be volatile and may not be readily ascertainable." (Ex. 31 (SABA00152779).) "An investment in the Fund involves a high degree of risk," specifically when it comes to illiquid securities like MNI bonds: "Investments in illiquid securities…may create special risks and substantially increase the impact of adverse price movements on the Fund's portfolio." (Ex. 31 (SABA00152743-44).) PSP itself identified the possibility that "liquidity dries up" as among the "Key Risks" of investing in the Fund. (Ex. 32 (Fournier Dep. 97:16-100:22).) There is no dispute that the MNI bonds were illiquid when PSP redeemed. (*E.g.*, Ex. 6 (Lanthier Dep. 130:12-22).)

"[S]ubstantial redemptions of Shares within a limited period of time," the Offering Memorandum further cautioned, could result in a "lower redemption price for the redeeming shareholders." Ex. 31 (SABA00152764) And in no uncertain terms, the Offering Memorandum warned PSP that investment in the fund was "SUITABLE ONLY FOR SOPHISTICATED INVESTORS…WHO DO NOT REQUIRE IMMEDIATE LIQUIDITY FOR THEIR INVESTMENTS." (Ex. 31 (SABA00152714, 2764, 2780).) Saba specifically warned PSP about the potential costs associated with a one-period redemption, but PSP *rejected* Saba's suggestion that PSP liquidate its shares in the Fund over time.[12] (Ex. 6 (Lanthier Dep. 89:17-90:5).)

PSP knew exactly what it was doing and what the risks were when it asked for a full redemption in a single period. The undisputed evidence shows that PSP identified this risk in

[12] Despite PSP's refusal to take its advice, Saba actually *outperformed* the estimates it provided to PSP about the potential amount of its redemption. Saba had warned PSP that redeeming even across two or three quarters could result in costs between $10.7 and $36.9 million (SABA00022941). In this lawsuit, PSP alleges Saba's redemption resulted in losses of $10.7 to $13.2 million. (Ex. 38.) Thus, even by PSP's own view of the redemption amount it should have received, Saba obtained in just one period a redemption amount that, *ex ante*, had seemed possible only over two to three quarters.

advance, and that Saba reemphasized it upon receiving PSP's redemption notice. When a sophisticated party like PSP can "reasonably foresee[]" contingencies affecting its rights, it is incumbent on that party to protect itself. *Ninth St.*, 39 Misc. 3d 1239(A) at *4 (Singh, J.); *Willsey v. Gjuraj*, 65 A.D.3d 1228, 1230 (2d Dep't 2009) (internal quotations and citations omitted) (courts will not imply contractual term when the parties "must have foreseen the contingency at issue and the agreement can be enforced according to its terms[]"). Despite the well-known complexities, contingencies, and risks associated with valuing illiquid securities, PSP agreed to Saba's "final and conclusive" valuation authority as long as it followed the OM's valuation guidelines—which Saba undisputedly did.

The valuation guidelines protect Saba's discretion precisely *because* the valuations of illiquid securities, like the MNI bonds, "tend to be volatile and may not be readily ascertainable." (Ex. 31 (SABA00152779).) To give Saba the necessary leeway to value notoriously difficult-to-value securities, the parties' contract precludes a *post hoc* assessment of the legitimacy of Saba's valuations. In this manner, the parties' contract is designed to protect Saba from exactly the claim PSP asserted here—a challenge to the valuation of an illiquid security for which experts for both sides have arrived at disparate estimates of fair value. (*See infra* Part II.C.) Saba did nothing to upset PSP's reasonable expectations under the parties' contract, but allowing its contract claim to proceed would upset Saba's, and those of an entire industry.

II. THERE IS NO GENUINE DISPUTE THAT SABA ACTED IN GOOD FAITH

Even if the Court were to permit PSP's claim to proceed despite the express contractual protections afforded to Saba's valuation, there still is no genuine dispute that Saba acted in good faith, and the Fund is entitled to judgment as a matter of law.

To prevent parties from "rewrit[ing] their agreement" under the guise of the implied covenant of good faith and fair dealing, "[w]here a contract grants a party broad discretion, that

party can breach the implied covenant of good faith only by exercising that discretion **arbitrarily or irrationally**." *Ralco, Inc. v. Citibank, N.A.*, 2005 WL 6234576 (Sup. Ct. N.Y. Cnty. June 22, 2005) (citing *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384 (1995) (emphasis added)). "For an act to be 'arbitrary' it must be without sound basis in reason and generally taken without regard to the facts." *Toledo Fund, LLC v. HSBC Bank USA, Nat'l Ass'n*, No. 11 CIV. 7686, 2012 WL 2850997, at *6 (S.D.N.Y. July 9, 2012) (internal quotations and modification omitted).

Applying this demanding standard of arbitrariness, as long as "**some basis** existed" for a defendant's exercise of its contractual discretion, courts will find it did not breach the implied covenant as a matter of law. *Gettinger Assocs., L.P. v. Abraham Kamber Co. LLC*, 83 A.D.3d 412, 415 (1st Dep't 2011) (emphasis added); *Suthers v. Amgen Inc.*, 441 F. Supp. 2d 478, 485 (S.D.N.Y. 2006) ("courts have refused attempts to impose liability on a party that engaged in conduct permitted by a contract, even when such conduct is allegedly unreasonable"). Saba's alleged "motivation" for its exercise of discretion is irrelevant. *Citibank, N.A. v. United Subcontractors, Inc.*, 581 F. Supp. 2d 640, 645 (S.D.N.Y. 2008).

There can be no genuine dispute that Saba's valuation of the MNI bonds was rational and non-arbitrary when: (1) PSP's own experts admit that the very pricing services PSP argues Saba was required to use to mark the MNI bonds were reporting prices that exceeded fair value; (2) Saba marked the MNI bonds using a high bid from Goldman Sachs, exactly the sort of "External Pricing Source" PSP initially claimed Saba was required to use to mark the MNI bonds; and (3) PSP cannot explain how the March 2015 BWIC could have been "rigged" when the materially-identical April 2015 BWIC generated prices for MNI that PSP itself falsely alleged came from pricing services like Reuters or Bloomberg. PSP's experts' *post hoc*

disagreement about the fair value of the MNI bonds cannot create a material factual dispute about Saba's good faith, and PSP's claim cannot survive summary judgment.

A. PSP's Expert Concedes Pricing Services Overstated the Value of MNI Bonds

PSP cannot argue that Saba's rejection of valuations from external pricing services was "arbitrary or irrational" when even PSP agrees those valuations did not reflect the fair value of the MNI bonds. PSP's expert, Brian Bouchard, has opined that the fair value range was 60.9-66.3 for the MNI 27s, and 54.9-62.0 for the MNI 29s. (Ex. 39 ¶ 56).) But at the end of March 2015, the pricing services were reporting mid-market levels *above* those ranges:

	PSP's Asserted Fair Value Range (Bouchard ¶ 56)	*Pricing Services Exceeding Fair Value (Bouchard ¶ 33)*
27s	60.9-66.3	**Bloomberg: 68.19** **Reuters: 69** **Duff: 72.47**
29s	54.9-62.0	Bloomberg 57.94 Reuters 61.5 **Duff: 64.22**

Accordingly, PSP's own expert concedes that Reuters, Bloomberg, and Duff & Phelps—the very pricing services that PSP originally argued Saba was "required" to use to value the MNI bonds (*see* Dkt. 86 at 8)—did not reliably capture fair value as of March month-end 2015.

PSP's expert thus endorses the fundamental premise of Saba's valuation of the MNI bonds in March 2015: "the pricing services [were] off market," and therefore Saba could not use them to mark the bonds. (Ex. 7 (SABA00002589).)[13] PSP accordingly concedes that Saba

[13] PSP's concession is unsurprising given the ample evidence in the record that the publicly available quotes being reported by dealers in MNI were unreliable throughout March 2015. For example, on March 17, Bank of America quoted a bid of 64 and ask of 65 for the MNI 29s. (Ex. 40 (SABA00175801).) When Saba requested a firm bid, however, the best that Bank of America would bid was just 50 for $2MM face value of the MNI 29s. (Ex. 41 (SABA00006295).) Nevertheless, the next day, Bank of America still quoted a bid of 63 and an ask of 64 for the MNI 29s. Ex. 42 (SABA00176904). This demonstrates the potentially stark difference between an indicative quote from a dealer and where the dealer would actually buy an illiquid security. The pricing services, in turn, relied on these off-market dealer quotations. Ex. 43 (SABA00210685); Ex. 44 (SABA00213125). For the pricing services, it was garbage in, garbage out.

had a non-arbitrary basis for concluding that the highest bids it obtained from dealers via the BWIC "better represent[ed] fair value as compared to other dealer runs and market data (pricing services)." (Ex. 7 (SABA00002588-89).) This is a case-ending concession. *See Schweizer v. Sikorsky Aircraft Corp.*, 634 F. App'x 827, 830 (2d Cir. 2015) ("If the defendant had a genuine and colorable business justification for its decision, then its actions will not have been arbitrary, and thus will not have violated the implied covenant." (internal quotations and citations omitted)).

B. Saba's Use of an External Pricing Source, a High Bid from Goldman Sachs, Cannot Constitute Bad Faith

PSP also cannot argue that Saba acted in bad faith by turning to a BWIC auction to obtain transactable bids from active dealers in the MNI bonds, when the undisputed facts show those bids were an "External Pricing Source" which is explicitly permitted by the Offering Memorandum. *Maxon Int'l Inc. v. Int'l Harvester Co.*, 82 A.D.2d 1006, 1007 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 879 (1982) ("[W]here, as here, defendant did precisely what the contract permitted, any question of bad faith as claimed by plaintiff is irrelevant.").

1. Goldman Sachs' Bid for MNI Bonds Provides a Rational, Non-Arbitrary Basis for Saba's Valuation

As PSP admitted during discovery, Saba did not simply "pluck the price of 31 [for the MNI bonds] from thin air." (Ex. 32 (Fournier Dep. 60:15-17).) Rather, **Goldman Sachs** provided the high bid Saba used to mark the MNI bonds in March 2015. (Ex. 26 (SABA00002623).) There can be no dispute that Goldman's high bid was an "External Pricing Source" as that term is defined in the OM: "independent pricing services **and/or dealer quotations from a market maker or financial institution regularly engaged in the practice of trading or pricing**" over-the-counter securities like the MNI bonds. (Ex. 31 (SABA00152800-801 (emphasis added)).) Simon Fournier, a Senior Director at PSP, conceded that Goldman is a "well-known financial

institution" that is "regularly engaged in the trading of corporate bonds" and "high yield bonds" like MNI. (Ex. 32 (Fournier Dep. 41:15-42:8); *see also* Ex. 17 (Cashin Dep. 39:9-20 (listing Goldman Sachs among dealers that regularly quote bonds like MNI)).)[14] The undisputed evidence thus shows that Saba used an External Pricing Source to value the MNI bonds. As a result, PSP cannot deny that Goldman's bid provided at least "some basis" and a "genuine and colorable business justification" for Saba's marking of the MNI bonds. *Gettinger*, 83 A.D.3d at 415; *Schweizer*, 634 F. App'x at 830 (internal quotations and citations omitted).

2. PSP's Endorsement of the April BWIC Leaves No Dispute that the Identical March BWIC Was Rational and Non-Arbitrary

Given the undisputed legitimacy of Saba's chosen pricing source—the highest bid from reputable and regular dealers in MNI bonds—PSP is left only to allege that Saba conducted the March BWIC itself in bad faith. Specifically, PSP alleges that Saba's sizing, timing, and presentation of the BWIC for the MNI bonds were calculated to depress the bids for the MNI bonds—and no others—and reduce PSP's redemption proceeds. (*E.g.*, Dkt. 102 ¶ 24.) PSP, of course, has no evidence that the BWIC was conducted in bad faith[15]—instead, it relies entirely on an expert. And as to PSP's alleged inference of bad faith, Saba's BWIC "need not be perfect to be consistent with the covenant of good faith and fair dealing." *HLT Existing Franchise Holding LLC v. Worcester Hosp. Grp. LLC*, 994 F. Supp. 2d 520, 538 (S.D.N.Y. 2014). Rather,

[14] Faced with otherwise incontrovertible evidence that Saba marked the MNI bonds using an External Pricing Source, PSP now asserts, without evidence, that "dealer quotations" are limited to those "containing bid and ask prices that are emailed daily to institutional investors such as Saba." (Dkt. 86 at 9.) One searches in vain for any such limitation in the parties' contract. In any event, PSP's made-for-litigation definition of "dealer quotations" is belied by its own testimony. Mr. Fournier equated bids received by BWIC with broker quotes, describing the BWIC as a process by which "managers go to brokers and ask for **bids** on particular positions with the potential of maybe trading or not on those **quotes**." (Ex. 32 (Fournier Dep. 28:11-15 (emphasis added)).) So did PSP's Anik Lanthier: "Q. Right. You understand that asking for a BWIC means requesting **bids** for the bonds, correct? A. Requesting a **quote**, yeah." (Ex. 6 (Lanthier Dep. 65:14-17) (emphasis added).)

[15] If anything, the evidence that Saba wanted to "hel[p]" BWIC participants "**get the bid up**" only proves Saba ran the BWIC in good faith. (Ex. 21 (SABA00014892) (emphasis added).)

the process needed "only be rational and non-arbitrary," *id.*, and there can be no genuine dispute that it was.

PSP cannot dispute that Saba conducted the March BWIC in good faith because **PSP has conceded that Saba's April BWIC generated appropriate valuations of the MNI bonds**. The size, timing, and presentation of the April BWIC were identical in all material respects to the March BWIC, but PSP does not dispute that the April BWIC generated bids that were consistent with the fair value of the MNI bonds. (Ex. 27 (SABA00001839); Ex. 28 (SABA00002715); Ex. 29.) In fact, the April 2015 BWIC results were such that in PSP's original complaint, PSP falsely alleged that Saba *abandoned* the BWIC as a pricing source after March 2015—even though Saba in fact continued to use BWIC auctions to mark illiquid securities like the MNI bonds for several months. (Dkt. 2 ¶ 21 (alleging Saba "abandon[ed] the BWIC as [the] source for valuing the MNI Bonds" and that "in April 2015, defendants once again used External Pricing Sources to mark the bonds back up to prices in the 50s").) PSP's endorsement of the April BWIC results establishes Saba's use of a virtually identical BWIC in March was not "arbitrary or irrational."

PSP's acquiescence to the size and timing of the March BWIC for securities other than MNI also undermines any argument that the BWIC was undertaken in bad faith. Saba offered all of its illiquid securities on the same timeframe, and used the same approach to set the quantities for *all* of the bonds it priced using a BWIC—including other illiquid corporate bonds, which it also offered in face amounts of tens of millions of dollars. (Ex. 13 (Weinstein Dep. 182:20-183:5).) That PSP does not take issue with Saba's valuations of the other securities priced using the BWIC bids—apparently accepting that those bids reflected fair value—confirms that the conduct of the March BWIC auction was neither arbitrary nor irrational.

C. PSP's Experts' Opinions Do Not Create a Fact Issue For Trial

What is left of PSP's lawsuit, then, is an expert's mere disagreement about the fair value of the MNI bonds as of March 31, 2015. This is insufficient to state a cause of action under the parties' contract, and fails to generate a dispute of material fact as a matter of law. PSP's experts' opinions about the fair value of the MNI bonds are irrelevant to the question of Saba's good faith, and do not create a dispute of material fact allowing PSP to survive summary judgment. Saba, in fact, got the fair value of the MNI bonds "right"—but it need not have done so in order to be found to have acted in good faith. Rather, Saba's process for valuing the MNI bonds needed only to be rational and non-arbitrary, and there can be no dispute that it was.

To take just one striking example, PSP's experts' *post hoc* view of fair value does nothing to undermine the good faith evidenced by the participation of Saba's then-COO Ken Weiller in Saba's valuation of the MNI bonds. Mr. Weiller was not only (1) a member of Saba's Valuation Committee who participated in valuing the MNI bonds (Ex. 45 (Weiller Dep 14:9-15, 18:19-19:17, 88:16-90:11); Ex. 7 (SABA00002588).), and (2) a member of the Fund's Board of Directors who signed off on Saba Management's approach to pricing the MNI bonds (Ex. 45 (Weiller Dep. 19:18-20:18, 58:9-63:22, 75:25-76:23, 82:18-83:22)), but also (3) an investor in who redeemed $500,000 of his investment in the Fund alongside PSP in March 2015 (Ex. 45 (Weiller Dep. 50:15-51:7, 106:8-12).) Accordingly, Saba's March valuation could not have been reached in bad faith unless Mr. Weiller allowed his own investment in the Fund to be redeemed at a price that he did not believe represented fair value and that reduced his own redemption proceeds. There is no evidence—let alone evidence that PSP's experts would be competent to provide—to support an inference that Mr. Weiller acted so obviously against his own interests.

If anything, the disagreement among the parties' experts about the fair value of the MNI bonds reinforces why the Fund is entitled to summary judgment. Under the OM, Saba had the

option of using a "manager mark"[16] based on models like those used by Mr. Bouchard (PSP's expert who uses modeling as his primary means of assessing fair value) and Mr. Lee (Saba's expert who uses models only in the alternative to Saba's pricing by BWIC, which he recognizes captured fair value). (*See* Ex. 39 ¶ 61; Ex. 46 ¶ 47.) The parties' experts in this case have used models to derive potential values of the MNI bonds ranging anywhere from 37.35 to 62. (*See* Ex. 39 ¶ 56; Ex. 46 ¶ 66.) The widely disparate array of values for the MNI bonds assembled using modeling techniques, however, reinforces that such modeling is subjective and comes with the potential for abuse. Far from creating a dispute of material fact about Saba's alleged bad faith, these dueling models confirm that Saba acted in good faith by declining to use a "manager mark" and instead relying on firm, objective bids from the financial institutions best suited to value and trade MNI bonds.

III. PSP ASSERTS ITS CONTRACT CLAIM AGAINST THE WRONG PARTY

PSP recognizes that the *Fund*'s contractual obligation relevant to this suit was its obligation to redeem PSP's shares at the "Redemption Price," defined as "such price as the Directors may from time to time determine." (Ex. 47 ¶ 38(a); *see also* Dkt. 18 at 9.) PSP has argued that the Fund may have "delegated the task of calculating the Redemption Price to Saba Management," but that did not "relieve the Fund of its express contractual obligation to redeem shares at a proper Redemption Price." (Dkt. 18 at 10.) Under the parties' contract, however, the Fund is not liable for Saba Management's alleged bad faith.

[16] The OM provides that "[i]f the Investment Manager determines that the valuation of any securities pursuant to [valuation methods specified earlier in the Memorandum, such as consultation of External Pricing Sources] does not fairly represent the fair value, the Investment Manager will value such securities as it reasonably determines and will set forth the basis of such valuation in writing in the Fund's records." (Ex. 31 (SABA00152801).) This type of valuation is known as a "manager mark."

The Fund's Investment Management Agreement with Saba Management expressly provides that the "Investment Manager shall, for all purposes hereof, be an independent contractor and not an agent or an employee of the Fund." (Ex. 48 ¶ 4).) "As a general rule, a principal is not liable for the acts of an independent contractor because principals ordinarily do not control the manner in which independent contractors, as opposed to employees of the principal, perform their work….[T]he mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal." *Goodwin v. Comcast Corp.*, 42 A.D.3d 322, 322 (1st Dep't 2007). The Fund Documents are clear, moreover, that if Saba Management acts in bad faith, it is Saba Management, not the Fund, that will be held to account. (*E.g.*, Ex. 31 (SABA00152759; Ex. 48 ¶ 8.) This makes good sense: if PSP truly were harmed by Saba Management's bad faith, PSP should not recover from other investors (via the Fund) but, rather, from Saba Management itself. PSP's decision to proceed against the Fund and its investors rather than Saba Management—a tactical decision apparently intended to permit PSP to plead a separate, now-dismissed claim for breach of fiduciary duty—is fatal to its claims, and provides this Court with an independent basis on which to grant summary judgment.

CONCLUSION

PSP, the only redeeming investor of March 2015 who felt aggrieved, should not be afforded a trial on the valuation of the two illiquid securities PSP cherry-picked from among 30 that Saba treated in the same manner. PSP's entire lawsuit boils down to an attempt to replace Saba's judgment regarding the fair value of the MNI bonds—made in real time, based on firm bids solicited from a panoply of reputable and knowledgeable dealers in the MNI bonds, in the same manner as the valuation of other illiquid securities over several months, and consistent with the advice of Saba's professional advisors—with that of an expert that PSP hired for the sole

purpose of litigation. The parties' contract, which deems Saba's valuations "final and conclusive," forbids this. The Fund respectfully requests that the Court enter judgment against PSP on its breach of contract claim, and dismiss this action with prejudice.

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Respectfully submitted,

SUSMAN GODFREY L.L.P.

s/ Jacob W. Buchdahl

Jacob W. Buchdahl
Arun Subramanian
Mark Musico
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
Phone: (212) 336-8330
jbuchdahl@susmangodfrey.com
asubrama@susmangodfrey.com
mmusico@susmangodfrey.com

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
Eric Corngold
Anne E. Beaumont
Mona V. Mehta
7 Times Square
New York, New York 10036
Phone: (212) 833-1100
ecorngold@fklaw.com
abeaumont@fklaw.com
mmehta@fklaw.com

Attorneys for Defendant