To be Argued by:
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Court of Appeals

of the

State of New York

EZRASONS, INC., as a shareholder of BARCLAYS PLC derivatively on behalf of BARCLAYS PLC,

Plaintiff-Appellant,

(For Continuation of Caption See Inside Cover)

BRIEF FOR DEFENDANTS-RESPONDENTS

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– against –

SIR NIGEL RUDD, SIR DAVID WALKER, SIR JOHN SUNDERLAND, SIR MICHAEL RAKE, LORD GERRY EDGAR GRIMSTONE, REUBEN JEFFERY III, DAMBISA MOYO, STEPHEN THIEKE, ANTONY JENKINS, FRITS D. VAN PAASSCHEN, MARCUS AGIUS, ROBERT DIAMOND, JR., DAVID BOOTH, CHRISTOPHER LUCAS, FULVIO CONTI, SIMON FRASER, STEPHEN RUSSELL, JOHN MCFARLANE, NIGEL HIGGINS, JAMES "JES" STALEY, CRAWFORD S. GILLIES, MATTHEW LESTER, MICHAEL ASHLEY, TIMOTHY J. BREEDON, SIR IAN M. CHESHIRE, MARY ANNE CITRINO, MARY ELIZABETH FRANCIS, TUSHAR MORZARIA, DIANE L. SCHUENEMAN, MICHAEL ROEMER, TIMOTHY "TIM" THROSBY, C.S. VENKATAKRISHNAN, ROBERT LE BLANC, THOMAS KING, JOHN CARROLL, JERRY DEL MISSIER, JUDITH SHEPHERD, JOHN S. VARLEY, ROGER JENKINS, THOMAS L. KALARIS, JONATHAN HUGHES, MARK HARDING, RICHARD RICCI, MITCHELL COX, ANDREW TINNEY, LAURA PADOVANI and BARCLAYS CAPITAL INC.,

Defendants-Respondents,

– and –

BARCLAYS PLC,

Nominal Defendant-Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rule of Practice for the Court of Appeals of the State of New York, Defendant-Respondent Barclays Capital Inc. states as follows with respect to its corporate parents, subsidiaries and affiliates: Barclays Capital Inc.'s corporate parents or publicly held corporations that own 10% or more of any class of its equity interests include Barclays Group US Inc., Barclays US LLC, Barclays US Holdings Limited, Barclays Bank PLC and Barclays PLC.

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Defendants-Respondents Barclays Capital Inc., Dambisa Moyo, Robert Diamond Jr., Mary Anne Citrino, C.S. Venkatakrishnan, Stephen Thieke, and John Carroll respectfully submit this brief in response to the appeal filed by Plaintiff-Appellant Ezrasons, Inc., in which plaintiff seeks reversal of the unanimous June 1, 2023, Decision and Order of the Appellate Division, First Department (Kapnick, J.P., Oing, Gesmer, Singh, Shulman, JJ.) ("Decision and Order") affirming the decision and order of the Supreme Court, Commercial Division (New York County) that dismissed plaintiff's amended complaint for lack of standing.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Question 1: Whether, consistent with more than six decades of New York precedent as well as the statutory language and legislative history, Business Corporation Law Sections 1319 and 626 confer subject-matter jurisdiction on New York courts to hear foreign derivative actions but do not displace New York's longstanding common law internal affairs doctrine?

Question 2: Whether Section 260 of the United Kingdom's Companies Act of 2006, which permits only registered members to bring a shareholder derivative action, is a substantive requirement of English law?

Defendants-Respondents respectfully submit that both questions should be answered in the affirmative and the Decision and Order should be affirmed.

PRELIMINARY STATEMENT

Through this appeal, plaintiff asks this Court to overturn more than 60 years of its precedent holding that the internal affairs doctrine applies to shareholder derivative actions brought on behalf of foreign corporations. Plaintiff's motivation is not hard to discern: If the internal affairs doctrine applies, substantive English law indisputably controls here, and plaintiff does not have standing to bring shareholder derivative claims. To evade its predicament, plaintiff urges this Court to upend the fundamental principle that, absent unique circumstances inapplicable here, the place of a company's incorporation supplies the substantive law to the governance of that company—a principle just affirmed by this Court in *Eccles v. Shamrock Capital Advisors, LLC*, –N.E.3d –, 2024 WL 2331737 (2024). Each of plaintiff's arguments fails and the First Department's proper application of well-settled law in the Decision and Order should be affirmed.

Plaintiff seeks to bring derivative claims on behalf of Barclays PLC, a U.K.-organized company, against certain current and former directors, officers, or employees of Barclays PLC or its subsidiaries for allegedly breaching their fiduciary duties under substantive English law based on purported mismanagement of the company in England.[1] Consistent with longstanding precedent, the First Department

[1] Plaintiff also brings claims against Barclays PLC's indirect subsidiary Barclays Capital Inc., but alleges no wrongdoing by (and seeks no damages from) Barclays Capital Inc., and therefore cannot state a claim against it.

correctly applied New York's internal affairs doctrine and held that the requirement of the United Kingdom's Companies Act of 2006 (the "Companies Act") that only registered members have standing to pursue derivative claims is substantive. Applying that substantive requirement to the facts of this case, the First Department (like the trial court before it) correctly determined that plaintiff lacked standing to pursue these derivative claims because it was not a registered member.

Tellingly, at the trial court and in the First Department, plaintiff did not dispute that English substantive law governs the merits of its action. Nor did plaintiff dispute that both the Companies Act and English common law dictate that only registered members may bring shareholder derivative claims. There is also no dispute that plaintiff does not appear in the Barclays PLC's share registry. Instead, plaintiff argued before the trial court (as it does for the third time now) that the BCL provisions designed to confer subject-matter jurisdiction on New York courts to hear foreign derivative actions—§1319 and §626—are actually choice-of-law provisions that displace the internal affairs doctrine with respect to standing. Every court that has considered this argument has rejected it.

New York courts' unanimous rejection of plaintiff's argument is hardly surprising, as that argument hinges almost exclusively on the misinterpretation of a single First Department case, *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014). Plaintiff's misreading of *Culligan* conflicts

with decades of precedent on the applicability of the internal affairs doctrine to foreign derivative suits—and even with subsequent First Department decisions. Nor is plaintiff's argument tethered to the BCL's plain text and legislative history, both of which make clear that §1319 and §626 are not choice-of-law provisions. Out of options, plaintiff repeatedly tries to confuse the issues before this Court by framing them as questions of jurisdiction, consent regimes, and venue. But this misdirection cannot obscure the question plaintiff poses here: Did §1319 and §626 silently overrule the internal affairs doctrine 60 years ago, even as New York courts continued to apply it? Plainly, they did not—as the First Department correctly determined consistent with both its and this Court's precedent.

Plaintiff's second argument—that the Companies Act's membership requirement is procedural rather than substantive—was raised only at the First Department and thus is not properly before this Court. But even if it were not waived, this argument fails because plaintiff mischaracterizes both this Court's opinion in *Davis v. Scottish Re Group Ltd*. and the Second Department's opinion in *Mason-Mahon v. Flint* in an unavailing attempt to create a conflict between those cases and the Decision and Order. There is no such conflict. This case involves the straightforward application of the principles and test set forth in *Davis*, which both the trial court and the First Department faithfully followed in determining that the membership requirement of English law is substantive.

The Decision and Order should be affirmed.

STATEMENT OF JURISDICTION

Defendants do not dispute plaintiff's jurisdictional statement as it pertains to the question of whether New York's internal affairs doctrine was displaced by the BCL's statutory jurisdictional predicates.

Plaintiff, however, did not properly preserve its argument that the Companies Act's membership requirement is procedural. Plaintiff failed to make this argument before the trial court and raised it for the first time at the First Department. (*See* NYSCEF No. 11, Defs' Br. 23-24) (Compendium for Defendants-Respondents ("C") 244-45). The Court of Appeals "has no power to review . . . unpreserved error" and does not consider issues and arguments unless they were first raised before the trial court. *Elezaj v. P.J. Carlin Constr. Co.*, 89 N.Y.2d 992, 994-95 (1997) (citation omitted).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. Relevant Factual Background

Nominal defendant Barclays PLC is a foreign bank holding company under Section 8(a) of the International Banking Act of 1978, 12 U.S.C. §3106(a), and registered solely as a financial holding company with the Federal Reserve under the Bank Holding Company Act of 1956, 12 U.S.C. §1841. (Record on Appeal ("R") 718, ¶¶4, 6.) Barclays PLC, which is incorporated under the laws of England and Wales, maintains its headquarters, its principal place of business, and its sole office

in England. (*Id.* ¶¶4, 5, 9.) Between 2008 and 2020, the majority of Barclays PLC board meetings were held in the United Kingdom. (R719, ¶10.) It owns no real estate, holds no leases, and has no employees in the United States. (*Id.* ¶¶7-8.) Some of Barclays PLC's separately incorporated and distinct subsidiaries conduct business in the United States, including nonparty Barclays Bank PLC, which has a foreign branch registered with New York's Department of Financial Services. (R723, ¶2; R726.)

Plaintiff Ezrasons, Inc. is a corporation incorporated in New York with its principal place of business in Manhattan. Plaintiff alleges it has standing to bring this shareholder derivative action because it owns "Barclays common ordinary shares" as a result of a conversion of its American Depositary Receipts ("ADRs") at some point in 2020. (R750, ¶30.) Although plaintiff states in conclusory fashion that its shares are "registered with Barclays," it does not allege that it appears on Barclays PLC's official register of members (*id.*), as required by the Companies Act and English common law to bring a derivative claim. (R91, ¶32.) In fact, undisputed documentary evidence submitted to the trial court confirmed that plaintiff is not on the Barclays PLC share register. (R719, ¶11.)

Plaintiff's allegations arise from a number of unrelated government investigations and civil litigations beginning in 2008 and spanning over 12 years,

involving, in some manner, Barclays PLC or its subsidiaries. (R798-862.)[2] Plaintiff purports to bring derivative claims on behalf of Barclays PLC against Barclays PLC's indirect subsidiary, Barclays Capital Inc., as well as 46 current and former directors, officers, or employees of Barclays PLC or its subsidiaries for allegedly breaching fiduciary duties imposed by English law and owed to Barclays PLC. (*Id.*; R899-902; Br. 13 ("Plaintiff brought this action in New York asserting claims for breach of fiduciary duty under the [Companies Act]—the substantive law of England."))[3] According to plaintiff, the individual defendants—many of whom were never affiliated with Barclays PLC at the same time—somehow created a supposed culture of non-compliance, prompting various unrelated investigations and litigations over more than a decade.

B. Procedural History

1. Defendants' motion to dismiss the Amended Complaint

Barclays Capital Inc. and certain individual defendants moved to dismiss the

[2] This action is one of many recent derivative complaints brought by the same counsel (and often a related plaintiff) against officers and directors of foreign corporations. New York courts have repeatedly recognized that these actions do not belong in this forum and have dismissed them for myriad reasons. *See Haussmann v. Baumann*, 73 Misc. 3d 1234(A), 2021 N.Y. Slip. Op. 51232(U), at *4 (Sup. Ct. N.Y. Cnty. 2021); *Cattan v. Ermotti*, No. 652270/2020, 2021 WL 6200975, at *2 (Sup. Ct. N.Y. Cnty. Dec. 30, 2021); *Cattan v. Vasella*, No. 650463/2021, 2022 N.Y. Slip Op. 32814(U), at *7 (Sup. Ct. N.Y. Cnty. Aug. 18, 2022).

[3] As of April 2021, twenty-four individual defendants resided in the United Kingdom, and all but five resided outside New York. (R719, ¶13.)

Amended Complaint. (R50-51.)[4] Defendants identified five bases for dismissal, including that plaintiff lacked standing to bring derivative claims on behalf of Barclays PLC because it was not a registered member of the company—a substantive requirement imposed by English law. (R60-61; R67-71.) In support, defendants submitted an affirmation from Martin Moore KC, an English law expert. (R83-715.) Mr. Moore testified to the requirements of English law governing shareholder derivative actions and explained that English statutory and common law both impose the substantive requirement that a derivative plaintiff must be a registered member of the corporation to have standing. (R91-92, ¶¶31-32.) Defendants also submitted documentary evidence pursuant to CPLR 3211 in the form of an affirmation from Barclays PLC Assistant Company Secretary Hannah Ellwood, confirming that plaintiff did not appear as a registered member of Barclays PLC as of April 30, 2021. (R719, ¶11.)

Plaintiff opposed defendants' motion to dismiss (R919), but did not submit any evidence rebutting the English law principles set forth in Mr. Moore's affirmation. Nor did plaintiff address, let alone challenge, Ms. Ellwood's

[4] The trial court approved the parties' stipulation creating two motion to dismiss phases. (*See* NYSCEF No. 9, Stipulation and Order) (C388-396). In phase one, the defendants not challenging personal jurisdiction (Barclays Capital Inc., Dambisa Moyo, Robert Diamond, Jr., Mary Anne Citrino, C.S. Venkatakrishnan, Stephen Thieke, and John Carroll) would move to dismiss and raise all "global" arguments, including *forum non conveniens*. (*Id.* at 2-3.) If the court denied the motion, then in phase two, the remaining defendants could move on any individual arguments, including personal jurisdiction. (*Id.*)

affirmation. To the contrary, plaintiff's counsel conceded that plaintiff was not a member of Barclays PLC by admitting it "'could become a member,' but it would be time-consuming to achieve and cumbersome once achieved." (R940 n.9.) Moreover, plaintiff did not contest that the Companies Act's membership requirement set forth in Section 260 was a substantive provision. Instead, as relevant to this appeal, plaintiff claimed that BCL §1319 displaced the internal affairs doctrine and thus substantive English law did not apply. (R913-35.)

On reply, defendants submitted a second affirmation from Mr. Moore responding to the unsupported commentary on English law in plaintiff's opposition. Mr. Moore testified that membership in an English company, unlike beneficial ownership, is fundamental to English company law.[5] (R1138-1218.)

2. The trial court correctly dismissed the Amended Complaint

Following oral argument and after stating his reasoning on the record, Justice Robert Reed of the Supreme Court, Commercial Division granted the motion to dismiss with prejudice. (R44-48.) The court relied on the reasoning of two decisions dismissing derivative actions brought on behalf of English companies and held that

[5] Nearly six months after motion to dismiss briefing was complete, plaintiff sought leave to file a sur-reply, attempting to argue for the first time, that CPLR 327(b) and GOL §5-1402 precluded dismissal on *forum non conveniens* grounds. (R1253-59.) As exhibits, plaintiff attached certain settlement agreements entered into by Barclays PLC or its subsidiaries. (R1266-1516.) The trial court denied leave to file the sur-reply and its exhibits (R1540-41)—a decision plaintiff has repeatedly flaunted by citing these exhibits before both the First Department and this Court.

BCL §1319 and §626 "do[] not override the internal affairs doctrine on the issue of standing to bring a derivative claim because it is a mere statutory predicate to jurisdiction." (R45 (discussing *City of Aventura Police Officers' Retirement Fund v. Arison*, 70 Misc. 3d 234 (Sup. Ct. N.Y. Cnty. 2020), and *City of Philadelphia Board of Pensions & Retirement v. Winters*, No. 601438/2020, 2022 N.Y. Slip Op. 34589(U) (N.Y. Sup. Ct. Nassau Cnty. Feb. 3, 2022), NYSCEF No. 200 (R1240-52).) Rather, the BCL "simply conferred jurisdiction upon New York Courts over derivative suits on behalf of out of state corporation[s], but did not require application of New York Law in such suits." (*Id.*) Justice Reed also determined that the First Department's decision in *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014), does not "dictate[] a different outcome," because "*Culligan* concerned regulation of conduct within New York and did not purport to alter settled New York law on the application of the internal affairs doctrine." (R46.) In so ruling, the trial court relied on precedent from both this Court and the First Department applying the internal affairs doctrine to foreign derivative actions. (R46-47 (citing *Hart v. Gen. Motors Corp.*, 129 A.D.2d 179, 182-83 (1st Dep't 1987); *Lerner v. Prince*, 119 A.D.3d 122, 127-28 (1st Dep't 2014); and *Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 252-53 (2017)).)

Having determined that the internal affairs doctrine—and therefore English substantive law—applies, the trial court held that "the membership requirement of

the United Kingdom's Companies Act is a substantive provision that . . . had to be met here." (R45.) The trial court expressly adopted the rationale articulated in *Arison*, which applied the three-factor test set forth by this Court in *Davis*, to determine that the Companies Act's membership requirement in Section 260 was substantive. (R45 (citing *Arison*, 70 Misc. 3d 234).) Thus, the trial court concluded that the membership requirement was a "substantive limit on a shareholder standing to assert a derivative claim and not merely a procedural hurdle." (*Id.*) Further, plaintiff did not meet this requirement, as made clear by an "admission by attorneys in the course of their opposition that they could become a member which speaks plainly that they are not members" and "an affidavit . . . searching the record of documents that would show who are or are not members." (R44-45.) Accordingly, "[p]laintiff lack[ed] standing to sue" because it "is not a registered member of Barclays." (R44.)

The trial court also dismissed the action on additional grounds, concluding that, even if English common law applied instead of the Companies Act, plaintiff still did not have standing. (R46.) In this aspect, the trial court adopted the reasoning of *Winters*, which held that even if a derivative suit against an English company proceeded outside the confines of the Companies Act, "standing to assert derivative claims on behalf of an English corporation in [New York] becomes a substantive inquiry governed by English common law." *Winters*, 2022 N.Y. Slip

Op. 34589(U), at *11. And plaintiff did not satisfy the specific bases English common law permits for standing to pursue a derivative suit. (R46.) As a result, regardless of whether the Companies Act or common law governed plaintiff's action, plaintiff still would not have standing to assert its derivative claims under substantive English law. (R42.) The trial court thus dismissed the action with prejudice, without need to reach the merits of defendants' other arguments.[6]

3. The First Department unanimously affirmed dismissal

After full briefing and oral argument, the First Department issued the unanimous Decision and Order affirming dismissal. (R1545-48.)

The First Department explained that the internal affairs doctrine "has been consistently invoked by this Court in derivative actions to apply foreign law on substantive issues, including those affecting a party's right to sue." (R1545-46.) The First Department expressly rejected plaintiff's argument that BCL §1319 displaced the internal affairs doctrine. (R1546.) Instead, like the trial court, it "adopt[ed] the rationale" set forth in *Arison*, "which ruled that Business Corporation Law §1319 merely confers jurisdiction upon New York courts over derivative suits

[6] Should this Court be inclined to reverse the Decision and Order, it should remand this case for reconsideration of the alternative grounds for dismissal the Supreme Court did not need to reach, including that: (1) the Supreme Court lacked subject-matter jurisdiction under BCL §1319 (R64-66); (2) plaintiff failed to plead facts to show that it satisfies New York's continuous ownership requirement as well as facts to excuse pre-suit demand on the board (R71-74); and (3) *forum non conveniens* weighs in favor of dismissal for a more convenient forum. (R74-78.)

on behalf of a foreign corporation" and held that the Companies Act's "requirement that suit be brought by a 'member of the company' is an applicable substantive rule in a New York derivative suit." (R1546.)

The First Department also rejected plaintiff's argument that its decision in *Culligan* "silently overruled the longstanding principle regarding the applicability of the internal affairs doctrine in derivative actions." (R1546-47.) To the contrary, the First Department noted that "in many decisions since" *Culligan*, "the internal affairs doctrine continues to apply to derivative actions." (R1547 (citing *In re Renren, Inc.*, 192 A.D.3d 539, 539 (1st Dep't 2021); *Davis v. Scottish Re Grp. Ltd.*, 138 A.D.3d 230, 233-34 (1st Dep't 2016); *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018)).) Finally, citing Ms. Ellwood's affirmation and "plaintiff's counsel's clear acknowledgment in its opposition to defendants' motion to dismiss that plaintiff was not a member" of Barclays PLC, the First Department held that the trial court "correctly ruled that defendants made the showing necessary for dismissal for lack of standing" under the Companies Act. (R1546.)

ARGUMENT

I. THE FIRST DEPARTMENT CORRECTLY HELD THAT THE INTERNAL AFFAIRS DOCTRINE APPLIES

A. Decades of New York Case Law Makes Clear That the Internal Affairs Doctrine Applies to Foreign Derivative Suits

Consistent with decades of precedent, the First Department properly held that the internal affairs doctrine applies and English law dictates the substantive

requirements that apply to whether a derivative plaintiff has standing to sue. The internal affairs doctrine "is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *see also Eccles*, 2024 WL 2331737, at *5. As this Court has explained, the internal affairs doctrine "provides that relationships between a company and its directors and shareholders are generally governed by the substantive law of the jurisdiction of incorporation." *Davis*, 30 N.Y.3d at 253; *see also Eccles*, 2024 WL 2331737, at *5; (*see also* R1545).

Since the enactment of the BCL more than 60 years ago, this Court and courts in New York following its precedent have routinely applied the internal affairs doctrine. *See, e.g.*, *Diamond v. Oreamuno*, 24 N.Y.2d 494, 503–04 (1969) ("The primary source of the law in this area [involving obligations of directors and officers and their relation to the corporation and its shareholders] ever remains that of the State which created the corporation."); *Zion v. Kurtz*, 50 N.Y.2d 92, 100 (1980) (the law of the state of incorporation is "the generally accepted choice-of-law rule with respect to such 'internal affairs' as the relationship between shareholders and directors"). Courts have specifically applied the doctrine to foreign shareholder

derivative actions. *See, e.g.*, *Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975); *Davis*, 30 N.Y.3d at 252; *Hau Yin To v. HSBC Holdings, PLC*, 700 F. App'x 66, 69 (2d Cir. 2017) (summary order) (applying the internal affairs doctrine to the issue of plaintiff's standing to sue); *CPF Acquisition Co. ex rel. Kagan. v. CPF Acquisition Co. (In re CPF Acquisition Co.)*, 255 A.D.2d 200, 200 (1st Dep't 1998) (same); *David Shaev Profit Sharing Acct. v. Cayne*, 24 A.D.3d 154, 154 (1st Dep't 2005); *Sec. Police & Fire Pros. of Am. Ret. Fund v. Mack*, 93 A.D.3d 562, 562-63 (1st Dep't 2012); *Cent. Laborers' Pension Fund v. Blankfein*, 111 A.D.3d 40, 45 n.8 (1st Dep't 2013); *Lerner v. Prince*, 119 A.D.3d 122, 128 (1st Dep't 2014); *Renren, Inc. v. XXX (In re Renren Inc. Derivative Litig.)*, 67 Misc. 3d 1219(A), 2020 N.Y. Slip Op. 50588(U), at*21 (Sup. Ct. N.Y. Cnty. 2020) ("Pursuant to the internal affairs doctrine, New York courts look to the substantive law of the place of incorporation to determine whether a plaintiff has standing to bring a derivative suit on behalf of a corporation."), *aff'd sub nom. In re Renren, Inc.*, 192 A.D.3d 539 (1st Dep't 2021).

Just this year, and in the days following plaintiff's filing of its opening brief, this Court reaffirmed its commitment to the internal affairs doctrine, including with respect to issues of corporate governance, calling it a "presumption" that applies "with rare exception." *Eccles*, 2024 WL 2331737, at *1. In *Eccles*, this Court held that "[c]onsistent with [its] precedent" and "New York's established interest analysis approach to choice-of-law issues," "the substantive law of the place of incorporation

applies to disputes involving the internal affairs of a corporation." *Id.* Declining to create any broad exceptions to this presumption, the Court instead crystalized the existing law by setting forth two factors that a party must establish to overcome it: (1) "the interest of the place of incorporation is minimal—*i.e.*, that the company has virtually no contact with the place of incorporation other than the fact of its incorporation" and (2) "New York has a dominant interest in applying its own substantive law." *Id.* Neither factor, much less both, are met here. (*Infra* § I.C.1.)

Accordingly, pursuant to the well-established and vital internal affairs doctrine, on issues of substantive law, English law applies.

B. Section 1319 Is Not A Choice-of-Law Provision

The First Department (and trial court) correctly rejected plaintiff's argument that BCL §1319 is a choice-of-law provision overriding the internal affairs doctrine with respect to the issue of standing. Neither the text nor legislative history of the statute supports plaintiff's argument.

1. Nothing in the text of §1319 establishes that it is a choice-of-law provision.

On its face, BCL §1319 is not a choice-of-law provision. As plaintiff acknowledges, statutory interpretation begins with the text, the "clearest indicator of legislative intent." (Br. 17.) And when the New York legislature wants to create a choice-of-law statute, it does so expressly. An express "choice-of-law directive" is one providing "the law of the jurisdiction." *Ministers & Missionaries Benefit Bd. v.*

Snow, 26 N.Y.3d 466, 470-71 (2015) (quoting N.Y. Est. Powers & Trusts Law §3-5.1(b)(2) in which the legislature provided that the governing law is "the jurisdiction in which the decedent was domiciled at death"). This approach is also consistent with the Restatement (Second) of Conflict of Laws, which lists statutes that expressly provide for the law of a certain jurisdiction to apply as exemplar choice-of-law statutes. *See* Restatement (Second) of Conflict of Laws §6 cmt. a (1971) (C482) (citing UCC §1-105(1), which states that the parties may choose which law applies; *id.* §2-402, which states that the law of the place where goods are situated applies; *id.* §4-102, which states that the law of the place where the bank is incorporated applies; the Model Execution of Wills Act, which provides for the validity of wills so long as they comply with certain "enumerated state['s]" laws).

Here, no express choice of law language appears in the relevant statutes: BCL §1319 neither dictates nor limits what law applies to foreign shareholder derivative actions, nor is it expressly identified as a choice-of-law provision. Instead, it provides only that certain BCL sections, including §626, "shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders." BCL §1319(a). Section 626, in turn, sets forth the basis for subject-matter jurisdiction by New York courts over shareholder derivative actions and the minimum standing requirements for a shareholder to maintain that action in New York. It states that "[a]n action may be brought in the right of a domestic or foreign

corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates." BCL §626(a) (emphasis added). While these provisions together serve as statutory predicates for subject-matter jurisdiction by New York courts over foreign shareholder derivative suits, absent is any mention of choice of law. This is not surprising. As the Restatement (Second) of Conflicts makes clear, "[s]tatutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number." §6 cmt. a (1971) (C482). Accordingly, "a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue." *Id.* §6 cmt. b (C482).

Consistent with these principles, courts have agreed that BCL §1319 is not a choice-of-law provision. *See Arison*, 70 Misc. 3d at 244 (§1319 is a jurisdictional provision that "does not require application of New York law" and "does not . . . override the internal affairs doctrine" (citation omitted)); *Stephen Blau MD Money Purchase Pension Plan Tr. v. Dimon*, No. 650654/2014, 2015 N.Y. Slip Op. 32909(U), at *11 (Sup. Ct. N.Y. Cnty. May 6, 2015) ("Section 1319 is a mere statutory predicate to jurisdiction - *i.e.*, it simply confers jurisdiction upon New York courts over derivative suits on behalf of out-of-state corporations; it does not require application of New York law in such suits."); *David Shaev Profit Sharing Plan v.*

Bank of Am. Corp., No. 652580/11, 2014 N.Y. Slip Op. 33986(U), at *5 (Sup. Ct. N.Y. Cnty. Dec. 29, 2014); *Potter v. Arrington*, 11 Misc. 3d 962, 966 (Sup. Ct. Monroe Cnty. 2006). Commentators too have noted that "BCL §1319 . . . is not a conflict of laws rule and does not compel the application of New York domestic law. Rather, it is the statutory predicate allowing New York to follow its conflict of laws rules in determining the applicable law." 3 Christopher M. Potash et al., *White, New York Business Entities* ¶B1319.01 (14th ed. 2022) (C437); *see also* 14 N.Y. Jur. 2d Bus. Relationships §3 n.5 (2024) (C436) ("BCL §1319, which lists the provisions of the Business Corporation Law that apply to foreign corporations, is not a conflict-of-laws rule and does not compel the application of New York domestic law; rather, it must be read as the statutory predicate allowing New York to follow its conflicts rules in determining the applicable law."); 20 Carmody-Wait 2d §121:166 (2024) (C440) ("[T]he right of a stockholder of a foreign corporation to bring a lawsuit in New York on behalf of the corporation is not a mere question of procedure to be determined by the law of the forum but is a substantive issue relating to the administration of the internal affairs of a foreign corporation and the stockholder's right to participate in its management, requiring reference to the law of the place of incorporation.").

Plaintiff is also wrong to contend that the First Department's construction of the statute as a predicate to subject-matter jurisdiction renders §1319 redundant of

§626, which already confers jurisdiction on New York courts. Section 1319 does more than confer jurisdiction; it narrows §626, limiting its application to corporations "doing business" in New York. Moreover, §1319 serves to consolidate in one place all provisions of the BCL that apply to foreign corporations. *See* Warren M. Anderson & Robert S. Lesher, *The New Business Corporation Law–Part II*, 33 N.Y. St. B.J. 428, 432 (1961) (C647) ("A novel approach has been taken in [Article 13] in that all provisions of the new law controlling foreign corporations are assembled in this Article either in full or by express cross reference.").

Nothing in the text of §1319 suggests that it is a choice-of-law provision, and the Court need not go further to reject plaintiff's argument. *See Lloyd v. Grella (In re Lloyd)*, 83 N.Y.2d 537, 545-46 (1994) (where "the language of a statute is clear," the court "should look no further than unambiguous words and need not delve into legislative history").

2. The legislative history of §1319 does not support plaintiff's argument that is it a choice-of-law provision.

The BCL's legislative history also does not support plaintiff's contention that §1319 and §626 displace the internal affairs doctrine with respect to standing. Nowhere does the legislative history refer to §1319 as a choice-of-law provision, nor does it evince the New York legislature's intent to have §1319 and §626 override the longstanding principle that the substantive law of the place of incorporation governs a corporation's internal affairs. *See Amorosi v. S. Colonie Indep. Cent. Sch.*

Dist. (In re Amorosi), 9 N.Y.3d 367, 373 (2007) ("[T]he Legislature is presumed to be aware of the law in existence at the time of an enactment." (citation omitted)). Instead, it makes clear that the purpose of §1319 was to "enumerate[] the sections of the other provisions of this chapter which apply to foreign corporations generally and to domiciled foreign corporations." Joint Legislative Committee to Study Revision of Corporation Laws, Explanatory Memorandum on Business Corporation Law (Mar. 13, 1961) (*See* NYSCEF No. 11, Defs' Br., Addendum A, at 281) (C371).

Plaintiff's reliance on a report submitted on behalf of the so-called "corporate establishment" as purported legislative history (Br. 19), does not advance its cause. Plaintiff cites a Joint Report of the New York State Bar Association Committee on Corporation Law and the Association of the Bar of the City of New York Committee on Corporate Law (the "Bar Association Report"), claiming that this report "specifically criticized §1319 as an attempt 'to regulate the internal affairs of foreign corporations' and to 'impose additional obligations and liabilities upon foreign corporations, their directors and stockholders, which go well beyond what other states see fit to do.'" (*Id.*) As a threshold matter, and contrary to plaintiff's characterization, the Bar Association Report is not legislative history. Regardless, and as plaintiff conspicuously fails to inform this Court, the Bar Association Report commented on the draft BCL, not the final statute. (*See* NYSCEF No. 11, Defs' Br., Addendum A, at 212-13) (C302-03). In fact, the New York State Legislative

Annual explained that the draft BCL was amended based on the "criticisms and suggestions set forth in the Bar [Association] Report." (*Id.* at 297) (C387). What is more, the cover letter submitting the Bar Association Report to the governor's office—which plaintiff did not include at the First Department or note for this Court—made clear that this "opposition" was later withdrawn. (*Id.* at 211) (C301).

In any event, the substance of the Bar Association Report does not help plaintiff. Although it recommends against "regulat[ing] the internal affairs of foreign corporations" (*Id.* at 245-46) (C335-36), it says nothing about which part of §1319 it believed constituted such an attempt. Notably, at the time the BCL was drafted, New York courts often declined subject-matter jurisdiction over foreign derivative actions to avoid interfering with the internal affairs of the corporation. *Broida v. Bancroft*, 103 A.D.2d 88, 90 (2d Dep't 1984) ("Older cases tended to view the [internal affairs] doctrine as jurisdictional."). By expressly providing for jurisdiction over certain of such actions, §1319(a)(2) eliminated the jurisdictional conception of the internal affairs doctrine still applied by some courts at the time, *see Adolph Meyer, Inc. v. Florists' Tel. Delivery Ass'n*, 36 Misc. 2d 566, 567 (Sup. Ct. Queens Cnty. 1962), but did not eliminate the doctrine altogether. *See Jensen v. Gen. Elec. Co.*, 82 N.Y.2d 77, 86 (1993) ("The Legislature is . . . presumed to be aware of the decisional and statute law in existence at the time of an enactment." (citation omitted)).

Plaintiff's remaining "legislative history" is also not legislative history at all, but rather three law review articles. (Br. 18-19.) These articles, too, do not help plaintiff as they say nothing about choice of law issues and are not expressly directed to §1319. Plaintiff highlights, for example, Professor DeMott's assertion that New York law may apply to "specified internal affairs questions in certain foreign corporations." Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 Law & Contemp. Probs. 161, 164 (1985) (C446). But Professor DeMott was referring only to those sections of the BCL that expressly provide for the application of New York law to specific (and irrelevant) corporate governance issues. *Id.* at n.17-24 (C446) (citing §1315(a), (b) (right to inspect records); *id.* §1317(a) (liability of directors or officers in certain cases or for specified misconduct); *id.* §1319(a)(3) (security for expenses in derivative actions); *id.* §1319(a)(4) (liability of shareholders for employee wages); *id.* §1319(a)(6) (reorganization under act of congress).) Professor DeMott did not discuss §1319(a)(2) or §626, and never suggested that the issue of standing was among the "specific internal affairs questions" to which New York law may apply. *Id.* at 164 (C446); (*see also* R45 (the BCL "simply conferred jurisdiction upon New York Courts over derivative suits on behalf of out of state corporations, but did not require application of New York law in such suits" (citing *Arison*, 70 Misc. 3d at 244)).)

Plaintiff's reliance on an article from Professor Kessler is unavailing for similar reasons. Professor Kessler wrote that the BCL attempted to "[s]ubject[] foreign corporations to the same standards as local corporations" "to some extent" "in a number of areas," without specifying what these "standards" or "areas" are. Robert A. Kessler, *The New York Business Corporation Law*, 36 St. John's L. Rev. 1, 107 n.418 (1961) (C607). Professor Kessler was likely referring to the provisions in the BCL that expressly provided for the application of New York law to specific corporate governance issues—the same provisions cited by Professor DeMott, discussed above. *See, e.g.*, BCL §1315(a), (b); *id.* §1317(a); *id.* §1319(a)(3)-(4), (6).

Plaintiff's reliance on Professor Stevens fares no better. Plaintiff cites his article to contend that the legislature "cast[] aside" (Br. 20), arguments that "foreign corporations should be subject to and regulated by the law of the jurisdiction of incorporation, not by the law of New York" (*id.* (quoting Robert S. Stevens, *New York Business Corporation Law of 1961*, 47 Cornell L.Q. 141, 172 (1962) (C640))). But Professor Stevens did not say that the legislature "cast aside" anything, much less in the context of §1319. In fact, he explained that BCL §1317 was "drafted with the acceptance of the[] distinctions" between the reasons for and against applying New York law to foreign corporations. Stevens, 47 Cornell L.Q. at 172-73 (C640-41). Nothing in his article suggests that the BCL mandated the application of New

York law or that the New York legislature "cast aside" precedent for applying the law of the place of incorporation.[7]

C. Plaintiff's Remaining Arguments Are Unavailing

1. The First Department's clarification of *Culligan* is consistent with this Court's precedent, including *Eccles*.

Plaintiff's argument that §1319 must be interpreted as a choice-of-law provision largely rests upon the faulty premise that the First Department improperly ignored its own precedent, *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014). (Br. 25-27.) According to plaintiff, in *Culligan*, the "First Department complied with §1319's mandate to apply §626 on the issue of derivative standing." (Br. 6.) Plaintiff claims that, in distinguishing *Culligan*, the First Department created an "elevated jurisdictional requirement for applying §1319 and §626 to the standing issue." (Br. 25.) The First Department's interpretation of *Culligan*, however, is entirely consistent with this Court's prior precedent in *Greenspun* and its recent decision in *Eccles*.

To start, plaintiff overstates *Culligan*, which did not hold that §1319 and §626 displaced the internal affairs doctrine with respect to standing to bring shareholder derivative claims. Rather, as the Decision and Order correctly recognized, *Culligan*

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[7] Professor Stevens also appears to have commented on a version of BCL §1317 not ultimately enacted because he notes that it applies only to "domiciled foreign corporation[s]," as opposed to corporations "doing business" in New York as reflected in the final statute. *Id.* (C640-41); *see also* BCL §1317.

concerned a limited exception to the internal affairs doctrine discussed by this Court in *Greenspun*. In that case, this Court "le[ft] open what law [New York courts] might apply were there proof from which it could properly found" that a foreign nominal-defendant was "so 'present' in [New York] as perhaps to call for the application of New York law." *Greenspun*, 36 N.Y.2d at 477-78. That proof existed in *Culligan*. There, the Bermuda-incorporated nominal defendant was managed and directed in New York and primarily conducted its business from New York, with an office in Manhattan. (NYSCEF No. 16, Culligan First Am. Compl. ¶65) (C407-08). But for the fact that Bermuda was the state of incorporation, the company had no contacts with Bermuda. (*Id.*) Accordingly, the First Department held that, under those circumstances, New York law, rather than Bermuda law, applied. *Culligan*, 118 A.D.3d at 423. Here, by contrast, Barclays PLC has extensive connections to the United Kingdom—a fact plaintiff does not and cannot dispute.

Next, the Decision and Order's treatment of *Culligan* is consistent with this Court's recent approach to the internal affairs doctrine in *Eccles*. The First Department explained that *Culligan* was the "rare situation in which a foreign entity nevertheless had 'such presence' . . . in our State as would, irrespective of other considerations, call for the application of New York law." (R1547-48 (quoting *Greenspun*, 36 N.Y.2d at 477-78).) So too in *Eccles*, this Court held that the internal affairs doctrine presumptively applies in a case arising from a company's internal

management, but that this presumption could be overcome in the rare instance that a party demonstrates "both that (1) the interest of the place of incorporation is minimal—*i.e.*, that the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law." *Eccles*, 2024 WL 2331737, at *7. Thus, contrary to plaintiff's position, the Decision and Order correctly interpreted the limited exception left open in *Greenspun*. *See also* Restatement (Second) of Conflict of Laws § 302 (1971) (C489) ("[T]he local law of the state of incorporation should be applied except in the extremely rare situation where a contrary result is required by the overriding interest of another state in having its rule applied.").

Under the *Eccles* factors, English law plainly applies here. Just as in *Eccles*, this is a case relating to corporate governance and the management of a foreign company, including whether individual defendants breached their fiduciary duties under foreign law. And just as in *Eccles*, Barclays PLC has substantial contacts with its place of incorporation. Barclays PLC is headquartered and registered in the United Kingdom, maintains its principal place of business (and only office) there, the majority of its board meetings from 2008 through 2020 were held there, and over half of the individual defendants reside there. (R718-19 ¶¶5, 9-10, 13); *see also Eccles*, 2024 WL 2331737, at *7 (company's contacts with Scotland were

"considerable" where, among other things, it was founded there, maintains offices there, and was registered under the Companies Act); *Hau Yin To*, 700 F. App'x at 69 (applying British Virgin Island law where plaintiffs sued "entities largely located abroad pertaining to a fund incorporated in [the British Virgin Islands]"). Plaintiff cannot point to any facts alleged in the Amended Complaint to support the conclusion that Barclays PLC has virtually no contact with England or that England has only a minimal interest in how one of its historic, flagship corporations is governed.[8] And because plaintiff would have to prove both *Eccles* factors to overcome the presumption that English law applies, the inquiry ends here.

Even if this Court were to reach the second *Eccles* factor, New York does not have an overriding interest in applying its substantive law. Indeed, plaintiff's claims of alleged breaches of fiduciary duty imposed by English law—which "belong to" Barclays PLC, *Auerbach v. Bennett*, 47 N.Y.2d 619, 631 (1979)—are based on purported breaches of oversight and management by individual defendants in the United Kingdom. The claims therefore arose, and any alleged economic loss

[8] This is not a situation like *Culligan*, for example, where no connection exists between the company and its place of incorporation other than the fact of its incorporation. (NYSCEF No. 16, Culligan First Am. Compl. ¶65) (C407-08). Nor is this case like *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255 (2d Cir 1984), which concerned a Panamanian corporation that had "no significant operations" in Panama. *Id.* at 259. In any event, plaintiff's reliance on *Norlin* misses the mark because, as this Court explained in *Eccles*, the *Norlin* court ultimately avoided the issue because it determined that Panama would not apply its own law to the dispute and that New York and Panama law mandated the same result. *Eccles*, 2024 WL 2331737, at *6.

occurred there, where nominal defendant Barclays PLC is incorporated. *Glob. Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 527-29 (1999); *see also Hart v. Gen. Motors Corp.*, 129 A.D.2d 179, 185 n.3 (1st Dep't 1987) ("[T]hat GM has a significant number of individual and institutional shareholders in New York. . . . is not controlling . . . since the corporation is the real party in interest."). England, not New York, "has an interest superior to that of all other states in deciding issues concerning directors' conduct of the internal affairs of corporations." *David Shaev Profit Sharing Plan*, 2014 N.Y. Slip Op. 33986(U), at *7 (applying the law of the state of incorporation even though "Bank of America maintains a substantial presence and significant contacts in New York" (citing *Hart*, 129 A.D.2d at 185)). As in *Eccles*, this "is simply not a situation where New York has an overriding interest in applying its own law to plaintiff's breach of fiduciary duty claims." *Eccles*, 2024 WL 2331737, at *7 (holding that New York did not have a "dominant interest in applying its own law" even though it was the location of board meetings, the company's principal office, and the merger negotiation that formed the basis of the complaint).

2. Plaintiff's "doing business" arguments are irrelevant, and in any event, fail.

The First Department correctly interpreted this Court's precedent in *Greenspun* when distinguishing *Culligan*. Yet plaintiff accuses the First Department of attempting to "evade *Culligan*" by creating "out of thin air" an "elevated

jurisdictional requirement for applying BCL §1319 and §626 to the standing issue" (R25), and then spills pages of ink arguing that Barclays PLC does business in New York and therefore meets this supposedly new "enhanced jurisdictional standard." (R25-31.) This argument is both irrelevant and incorrect.

Despite plaintiff's repeated invocation of the phrase, the issue of whether Barclays PLC is "doing business" in New York is not part of this appeal. First, the question of whether Barclays was "doing business" in New York for purposes of §1319 was not before the First Department on appeal and is not before this Court.[9] Second, whether Barclays PLC satisfies what plaintiff describes as the new, elevated "doing business" standard supposedly created in the Decision and Order was not a question certified for appeal, and so too is not properly before this Court. *Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 10 n.10 (2019) ("We limit ourselves, as we must, to resolving those questions presented by the parties and the underlying matters necessarily implicated by the facts and posture of this appeal.").

Plaintiff's misplaced "doing business" argument also fails on the merits. Plaintiff points to various activities of Barclays PLC's subsidiaries (Br. 27-30), but the fact that corporate subsidiaries conduct business in New York is not sufficient,

[9] In their motion to dismiss, defendants argued that Barclays PLC was not "doing business" in New York for purposes of BCL §1319 and, as a result, the trial court lacked subject matter jurisdiction. (R65-66.) But the trial court did not reach this argument.

as a matter of law, to establish that Barclays PLC itself does business in New York. *See FIMBank P.L.C. v. Woori Fin. Holdings Co.*, 104 A.D.3d 602, 602-03 (1st Dep't 2013) (plaintiff failed to show that parent's control over subsidiary was "so complete" that subsidiary was "merely a department" of parent; instead, plaintiff merely showed "common ownership, demonstrating that [parent] is simply a holding company" (citation omitted)). Plaintiff's assertions that "Barclays has commenced plaintiff-side litigation in New York and defended cases here," and that "Barclays's Board and its Board committees have held over 15 meetings in NY" similarly fail. (Br. 27-28 & n.16.) Section 1301, governing the authorization of foreign corporations, makes clear that "a foreign corporation shall not be considered to be doing business in this state" by "(1) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting settlement thereof or the settlement of claims or disputes" or "(2) Holding meetings of its directors." BCL §1301(b)(1)-(2) (emphasis added).

Plaintiff's contention that Barclays PLC consented to New York jurisdiction through agreements and consent orders ostensibly related to the underlying merits of the action (Br. 28 & n.16) does not pass muster. As a threshold matter, these materials are not part of the record; they were attached to a sur-reply that the trial

court denied leave to file. (R1540-41.)[10] But even if these agreements were properly before the Court, the agreements and consent orders do not establish that Barclays PLC is doing business in New York. First, Barclays PLC is not even a party to five of the seven settlement agreements plaintiff cites. (Br. 28 n.16.) Second, a consent-to-jurisdiction clause in a particular contract does not establish general jurisdiction over a foreign corporation, *cf. Aybar v. Aybar*, 37 N.Y.3d 274, 290 (2021) (a foreign corporation's consent to service of process did not include consent to general jurisdiction), let alone that the corporation's activities in New York were "so systematic and regular as to manifest continuity of activity in the jurisdiction," *Interline Furniture, Inc. v. Hodor Indus. Corp.*, 140 A.D.2d 307, 308 (2d Dep't 1988). Third, the derivative claims asserted here do not arise from or relate to the rights and obligations set forth in those agreements.

3. Plaintiff's jurisdiction and venue arguments are red herrings.

As with its "doing business" arguments, plaintiff makes irrelevant claims about personal jurisdiction and venue. Despite plaintiff's repeated assertions to the contrary, none of the questions certified for appeal "boils down to one of jurisdiction and venue." (Br. 2; *see also, e.g.*, Br. 1, 3-10, 23-24, 26-27, 30 (characterizing this action as a "specific jurisdiction case").) Accordingly, plaintiff's numerous

[10] Moreover, plaintiff never sought to use these documents for this purpose (even when unsuccessfully seeking leave to file a proposed sur-reply) and thus waived the argument. *See Aybar*, 37 N.Y.3d at 282.

references to *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023) do nothing to further its claim. (Br. 3, 10, 26.) *Mallory* concerned the limits of general personal jurisdiction over a registered foreign corporation imposed by the Due Process Clause. *Mallory*, 600 U.S. at 125. The issues in this appeal deal with choice of law and standing, not personal jurisdiction, and *Mallory* has nothing to say about either.

D. Plaintiff's Interpretation of §1319 Would Upset the Expectations of Corporations and Their Shareholders and Render New York an Outlier

Contrary to plaintiff's protestations (Br. 2, 9), applying the internal affairs doctrine here protects the settled expectations of corporations and their shareholders. The internal affairs doctrine "serves the vital need for a single, constant[,] and equal law to avoid the fragmentation of continuing, interdependent internal relationships." *Eccles*, 2024 WL 2331737, at *5 (alteration in original) (citation omitted). It is key to management's ability to plan for the future. *See Hart*, 129 A.D.2d at 184 (the "[u]niform treatment of directors, officers and shareholders . . . is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law" (citation omitted)).

Plaintiff's interpretation would dramatically complicate corporate planning by replacing the internal affairs doctrine with a "doing business" test. (Br. 26.) Instead of the assurance that the law of a company's place of incorporation

presumptively applies, any foreign corporation with New York contacts would have to attempt to assess whether their activities constituted "doing business" in New York sufficient to invoke New York law on standing. This would "undermine the important interests of consistency and predictability that are critical to the internal affairs of a corporation." *Eccles*, 2024 WL 2331737, at *7. Indeed, the internal affairs doctrine "protects the interests and expectations of shareholders by giving effect to their choice as to what jurisdiction's laws will govern the corporation's affairs." *Id.*, at *5. Any other conclusion would mean directors and officers face the prospect of inconsistent and "conflicting demands." *Id.* Absent the internal affairs doctrine, the same transaction could be held valid in one state but invalid in another due to conflicting state laws governing, for example, shareholder voting and director liability. *See id.* at *7 ("Only one [s]tate should have the authority to regulate a corporation's internal affairs . . . because otherwise a corporation could be faced with conflicting demands." (alteration in original) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982))).

Plaintiff's interpretation is equally problematic for shareholders, who make a voluntary decision to invest in a foreign corporation before any claim for breach of fiduciary duty accrues. If a shareholder believes a particular jurisdiction's remedies for breaches of fiduciary duty are inadequate, a shareholder may simply choose not to invest in businesses incorporated under that jurisdiction's law. Moreover,

shareholders "have a right to know by what standards of accountability they may hold those managing the corporation's business and affairs." *McDermott Inc. v. Lewis*, 531 A.2d 206, 216-17 (Del. 1987). Affirming the First Department's decision would not leave "New York-based shareholders without a remedy," as plaintiff claims (Br. 2), but instead would confirm what New York-based shareholders who voluntarily invest in foreign corporations already expect: they are entitled to seek redress through the proscribed mechanisms and processes of the foreign corporation's jurisdiction of incorporation.

For these and numerous other reasons, courts consider the internal affairs doctrine to be a bedrock principle of law. The United States Supreme Court has relied on it since at least 1933. *See Rogers v. Guar. Tr. Co. of N.Y.*, 288 U.S. 123, 130, 148 (1933) (noting that, under "long settled" doctrine, corporate internal affairs are "to be determined upon the ascertainment and proper application of" the "laws of the State in which it was organized"); *Atherton v. FDIC*, 519 U.S. 213, 224 (1997) ("States normally look to the State of a business' incorporation."). State courts, too, have regarded it "as axiomatic," *McDermott*, 531 A.2d at 216 n.10, and the "majority" approach of those "jurisdictions that have addressed this issue." *Harrison v. NetCentric Corp.*, 433 Mass. 465, 471 (2001). New York would become a clear outlier were this Court to jettison longstanding internal affairs principles.

II. THE FIRST DEPARTMENT CORRECTLY HELD THAT THE COMPANIES ACT'S MEMBERSHIP REQUIREMENT IS SUBSTANTIVE

The First Department also correctly held that the Companies Act's membership requirement, permitting only registered members of a corporation to bring derivative claims, is a "substantive limit on shareholder standing to assert a derivative claim—and not merely a procedural hurdle." (R1546.) *See also Arison*, 70 Misc. 3d at 236. This conclusion is firmly rooted in this Court's *Davis* decision.

A. Plaintiff Waived Any Argument That the Companies Act's Membership Requirement Is Procedural

As a threshold matter, plaintiff waived its argument that the Companies Act's membership requirement is procedural rather than substantive. (Br. 34, 36.) This Court "has no power to review . . . unpreserved error," *Elezaj v. P.J. Carlin Constr.*, 89 N.Y.2d 992, 994-95 (1997) (citation omitted), and does not consider arguments unless they were first raised before the trial court. *See Henry v. N.J. Transit Corp.*, 39 N.Y.3d 361, 367 (2023) ("To demonstrate that a question of law is preserved for this Court's review, a party must show that it 'raise[d] the specific argument in [the] Supreme Court and ask[ed] the court to conduct that analysis in the first instance.'" (first and third alterations in original) (quoting *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, 33 N.Y.3d 84, 89 (2019))). Defendants' motion to dismiss expressly argued that the membership requirement was substantive under both the Companies Act and English common law. (R67-69.) Plaintiff did not dispute this and instead

argued only that BCL §1319 displaced the internal affairs doctrine. (R941.) In fact, the only "procedural requirement" plaintiff referenced was the Companies Act's requirement "to seek judicial permission from a court in England"—a condition defendants did not challenge in their motion to dismiss. (*Id.*)

Plaintiff's Statement of Jurisdiction further solidifies its waiver.[11] Appellants must "identify the particular portions of the record where the questions sought to be reviewed are raised and preserved." 22 N.Y.C.R.R. §500.22(b)(4). Here, plaintiff points only to instances in which it cited *Davis* and *Mason-Mahon* for propositions that have nothing to do with whether the Companies Act's membership requirement is procedural. (*See, e.g.*, R934 ("NY courts have in recent years been notably receptive to shareholder derivative actions involving non-U.S. corporations."); R942 ("Moore's all-or-nothing theory not only lacks support in English law, it is plainly an improper attempt to circumvent the [*Davis*] and [*Mason-Mahon*] decisions *via* back-door reinforcement of the judicial-permission procedure.") Plaintiff does not—and cannot—point to instances where it argued the membership requirement was procedural rather than substantive.

[11] Plaintiff's Statement of Preservation of the Issues Presented in their Motion for Leave to Appeal to the New York State Court of Appeals similarly fails to point to instances where it argued the membership requirement was procedural rather than substantive. (Pl's Br. ISO Leave to Appeal at 38, Jun. 30, 2023) (C49).

B. There Is No Conflict Between This Court's Decision in *Davis* and the First Department's Decision and Order

1. The First Department correctly applied this Court's decision in *Davis*.

In any event, contrary to plaintiff's assertions, the Decision and Order did not "defy" *Davis* or violate the rule of *stare decisis* (Br. 31, 33), but faithfully applied *Davis* to the specific membership requirement of the Companies Act.

To begin, plaintiff is objectively wrong in its description of *Davis* and the First Department's treatment of this precedent. *Davis* had not "rejected the application of the internal affairs doctrine on the issue of a shareholder's standing to bring derivative claims." (Br. 32.) That case concerned a derivative action brought by a shareholder of Scottish Re Group Limited, a Cayman Islands company, alleging that Scottish Re's directors implemented a series of transactions that enriched themselves while causing harm to minority shareholders, including plaintiff and Scottish Re. *Davis*, 30 N.Y.3d at 249. The First Department applied the internal affairs doctrine and held that the substantive law of the Cayman Islands, the laws under which Scottish Re Group Limited was incorporated, governed the merits of the dispute. *Davis*, 138 A.D.3d at 233-34 ("Under the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation . . . in this case the Cayman Islands."). Contrary to plaintiff's assertion, this Court did not take

issue with the First Department's invocation of the internal affairs doctrine, nor its decision that Cayman Islands substantive law would apply to the merits of the claim. *Davis*, 30 N.Y.3d at 252 ("[W]ere we to address the merits of plaintiff's claims, we would employ the Cayman Islands Companies Law . . . .").

Moreover, *Davis* did not relate to standing. This Court assessed whether Rule 12A of the Cayman Islands Grand Court Rules—which requires a plaintiff to apply for leave to the Cayman Islands Grand Court to continue a contested derivative action—functioned as a "substantive 'gatekeeper'" rule and applied under the internal affairs doctrine, or was a procedural rule, and thus, did "not apply to derivative actions on behalf of Cayman companies litigated in New York courts." *Id.* at 253. The First Department held that Rule 12A was "applicable in [New York] courts . . . as a substantive, rather than procedural, condition precedent to the continuation of a derivative action." *Davis*, 138 A.D.3d at 238. This Court disagreed and held, instead, that it was procedural. *Davis*, 30 N.Y.3d at 257. Nowhere did this Court proclaim that issues of standing fall outside the purview of the internal affairs doctrine.

But even setting aside plaintiff's incorrect description of the facts and holding in *Davis*, plaintiff cannot analogize the membership requirement of Section 260 of the Companies Act to Cayman Island Rule 12A. In *Davis*, this Court articulated a three-factor test to determine whether a rule was substantive or procedural: (1) "the

plain language of [the] rule," (2) whether the statute itself "creates a right," and (3) "general policy considerations." *Id.* at 253, 255-56. Plaintiff never once analyzes those factors. By contrast, the First Department expressly followed *Arison*, which applied each of these factors to the Company Act's membership requirement and correctly determined that the Companies Act's membership requirement was substantive, not procedural. (R1546.)

Instead, plaintiff argues that, because the preamble to Chapter 1 of the Companies Act provides that it "applies to proceedings in England and Wales and Northern Ireland," Chapter 1's rules are forum-specific procedural rules inapplicable under the internal affairs doctrine. (Br. 33-34.) But the preamble is intended only to distinguish Chapter 1 of the Companies Act, which applies to proceedings in England and Wales or Northern Ireland, from Chapter 2, which applies to proceedings in Scotland. *See Arison*, 70 Misc. 3d at 248 n.6. Classifying the entirety of Chapter 1 as forum-specific procedural rules based on its preamble ignores the substantive provisions found in Chapter 1, which include the very substantive causes of action that plaintiff purports to pursue here. (R777-778.)

Plaintiff also cannot analogize the Companies Act's membership requirement to the judicial permission requirements of Cayman Rule 12A. The judicial permission requirement was procedural, in part, because it invoked "procedures . . . specific to Cayman Islands litigation." *Davis*, 30 N.Y.3d at 253. For example,

Rule 12A expressly pertained to derivative actions "begun by writ" and was triggered when the defendant had "given notice of intent to defend." *Id.* By contrast, the Companies Act's membership requirement contains no language invoking unique English procedures. Moreover, this Court emphasized that Rule 12A did not "specifically apply to actions involving Cayman-incorporated companies" and therefore the plain language suggested that the rule served as "a gatekeeping function, but only as to derivative actions brought in the Cayman Islands." *Id.* at 254. By contrast, the Companies Act's membership requirement expressly requires a shareholder bringing a derivative action to be a "member" of "a company formed and registered in the United Kingdom under this Act." (Companies Act 2006 §112(2).) This requirement can apply in equal measure irrespective of the forum where the derivative action is pending.

2. All three *Davis* factors support the First Department's conclusion that the Companies Act's membership requirement is substantive.

Each of the three *Davis* factors demonstrates that the Companies Act's membership requirement is substantive.

Under the first *Davis* factor, which considers the plain language of the rule, "the statutory text of the Companies Act does not support the conclusion that the membership requirement is merely a procedural rule limited to proceedings in U.K. courts." *Arison*, 70 Misc. 3d at 250; *see also CBF Indústria de Gusa S/A v. AMCI*

Holdings, Inc., 650 F. Supp. 3d 228, 257 (S.D.N.Y. 2023) (noting the "well-reasoned" *Arison* analysis distinguishing the substantive Companies Act membership requirement from Cayman Island procedural requirements). Chapter 1, Section 260 of the Companies Act sets forth the core substantive underpinnings for shareholder derivative actions brought on behalf of English-organized companies, including that they can only be brought by a "member of the company." (Companies Act 2006 §260(1)(a)-(b).) Mr. Moore's unrebutted affirmation confirms that English law views the membership requirement as "substantive."[12] (R85, ¶8(b).) Moreover, plaintiff cannot credibly dispute that these provisions are substantive because plaintiff conceded in its Amended Complaint that this section of the Companies Act, which "applies to proceedings in England and Wales or Northern Ireland by a member of the company," is one of the "substantive provisions of [the Company] Act" that "apply to this litigation." (R776-78, ¶91 (citing Companies Act 2006 §260(1)-(4)) (emphasis added).)

The second *Davis* factor, which analyzes whether the statute creates a right, similarly supports the substantive nature of the membership requirement because only a member has the fundamental right to bring a derivative action. (R91, ¶32.) The "inquiry must be directed to the question whether [the plaintiff's] right to bring

[12] This Court has recognized that how the at-issue jurisdiction views the relevant provision is "instructive" to this analysis. *Davis*, 30 N.Y.3d at 252.

this action involves no more than compliance with procedural requirements extraneous to the substance of their claim, or whether it concerns the very nature and quality of their substantive right, powers and privileges as stockholders." *Arison*, 70 Misc. 3d at 251 (alteration in original) (citation omitted). Under English law, only a member has the right to bring a derivative action. (R91, ¶32.) The concept of membership, as distinct from beneficial ownership, is fundamental to English law, even beyond the Companies Act. (*see* R1139, ¶5(a); R1140, ¶¶9-10.) Registration as a member of a company brings about a fundamental change in the legal relationship between a company and the investors. (R1140, ¶¶9-10.) The membership requirement "prevent[s] what might otherwise have been a cause of action from ever arising" and thus, is substantive. *Tanges v. Heidelberg N.Am., Inc.*, 93 N.Y.2d 48, 55-56 (1999); *Arison*, 70 Misc. 3d at 252 ("The membership requirement in the Companies Act shapes the substantive rights of stakeholders to sue derivatively on behalf of English corporations.").

Finally, the third *Davis* factor, which examines general policy considerations, also supports the substantive nature of the membership requirement because it "discourages forum shopping by acknowledging the Companies Act's uniform standard for derivative actions brought on behalf of English companies, wherever they are brought." *Arison*, 70 Misc. 3d at 253. A substantive membership requirement "provides stable guidance to shareholders and ADS holders in English

companies as to the scope of their rights to bring derivative actions . . . [and] corporate officers and directors, who have more than a passing interest in knowing whether and under what circumstances they will be subject to derivative lawsuits outside the United Kingdom." *Id.*[13]

C. There Is No Conflict Between the Second Department's Decision in *Mason-Mahon* and the First Department's Decision and Order

The Decision and Order is also consistent with the Second Department's decision in *Mason-Mahon*. As with *Davis*, plaintiff mischaracterizes *Mason-Mahon* to attempt to generate a conflict, claiming the Second Department "followed this Court's decision in *Davis* and rejected the application of the internal affairs doctrine," finding "that the [Companies Act] 'has no provision suggesting that it applies to derivative actions on behalf of [English companies] commenced . . . outside of England, Wales, or Northern [Ireland].'" (Br. 35.) Not so.

As an initial matter, contrary to plaintiff's assertion, *Mason-Mahon* did not "reject the application of the internal affairs doctrine." (Br. 35.) *Mason-Mahon* involved a derivative action brought by a shareholder of HSBC Holdings, PLC against current and former officers and directors, alleging breach of fiduciary duty

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[13] Even if the membership requirement were procedural, and the Companies Act did not apply to plaintiff's action, plaintiff still does not have standing to bring its claims under English common law because it is not a member of Barclays PLC. (R46.) Membership is a substantive requirement not only for derivative claims under the Companies Act, but also under the narrow circumstances where derivative actions are permitted under English common law. (R91, ¶32 ("[T]he exceptions to the rule in *Foss v. Harbottle* confer limited rights on members of the company, not on any other person."); R1140-42, ¶¶6-14.) Plaintiff has never challenged this fundamental principle.

and waste of corporate assets, among other things. *See Mason-Mahon*, 166 A.D.3d at 754-55. The *Mason-Mahon* court, consistent with *Davis*, and the First Department here (R1545; R1547), applied the internal affairs doctrine, holding that the substantive law of the United Kingdom (under which HSBC Holdings, PLC was incorporated) governed the merits of the action. *Mason-Mahon*, 166 A.D.3d at 756 ("Based upon the internal affairs doctrine, the substantive law of the United Kingdom governs the merits of this action." (emphasis added)).

Then, consistent with *Davis* (and the trial court's and First Department's approach here), the *Mason-Mahon* court properly assessed the specific provision in question—the judicial permission requirement in the Companies Act set forth in Section 261(1)—to determine whether it was procedural or substantive. *See id.* at 756 ("In determining whether the subject judicial-permission rule is procedural or substantive, we must first look at its plain language." (emphasis added)). Ultimately, the Second Department determined the judicial permission requirement was procedural. But *Mason-Mahon*'s holding was limited only to Section 261(1), a wholly separate provision from the membership requirement in Section 260 at issue in this case. The Second Department's conclusion that the Companies Act "has no provision suggesting that it applies to derivative actions on behalf of [English companies] commenced . . . outside of England, Wales, or Northern Ireland," was expressly limited to this context. *Id.* at 757. The Companies Act's judicial

permission requirement is not at issue here, and, as a result, there is simply no conflict between the Decision and Order and *Mason-Mahon*.

Plaintiff's over-reading of *Mason-Mahon* is also at odds with its own allegations. According to plaintiff, the Second Department's holding applies to all five sections of Chapter 1 of the Companies Act—Sections 260 through 264—meaning that every provision within these sections is a forum-specific procedural rule. (Br. 36.) But this interpretation would render Section 260(3), the very provision that plaintiff relies on as a substantive basis for its claims, a forum-specific procedural rule.[14] The core provisions of Section 260 "can hardly be called procedural rules. . . . [y]et that would be the incongruous conclusion if the *entirety* of chapter 1 (*i.e.*, sections 260-264) is deemed limited to 'proceedings in England and Wales or Northern Ireland.'" *Arison*, 70 Misc. 3d at 248. As a matter of logic, the provision on which plaintiff relies upon to bring its substantive claims in New York cannot be a procedural rule that applies only in English courts.[15]

III. PLAINTIFF LACKS STANDING UNDER ENGLISH LAW TO BRING ITS DERIVATIVE CLAIMS

Having correctly determined the internal affairs doctrine applies, and that

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[14] Plaintiff specifically purports to rely on Section 260(3) as the "substantive provisions of that Act . . . [that] provide the basis of the Individual Defendants' liability to Barclays." (R776-78, ¶¶ 90-91.)

[15] Plaintiff concedes that the "*substantive* provisions of the [Companies Act] apply to [its] claims." (Br. 13 n.8 (emphasis in original).)

English substantive law—including the Companies Act's membership requirement—governed the merits of this action, the First Department correctly held that plaintiff lacked standing because it was not a member of Barclays PLC. (R1545-46.) There is no basis to overrule that well-reasoned conclusion.

To qualify as a "member," plaintiff must be the legal owner of shares of the company and have its name "entered in its register of members." (R91, ¶31; *accord* R1140-42, ¶¶8-14.) But plaintiff alleges only that its common shares (purportedly converted from ADRs in 2020) are "registered with Barclays and [plaintiff] is hence a 'member of the company.'" (R750, ¶30.) This conclusory statement conspicuously fails to allege that plaintiff's name appears on the share register, as required, and is insufficient to plead membership. *See Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 658 (1st Dep't 2016) ("bare legal conclusions" are not presumed to be true); *Heritage Partners, LLC v. Stroock & Stroock & Lavan LLP*, 133 A.D.3d 428, 428 (1st Dep't 2015) ("unsupported factual allegations, speculation and conclusory statements" are insufficient). Moreover, as the First Department correctly recognized, the trial court properly relied on unrebutted documentary evidence demonstrating that plaintiff was not "a registered, legal owner of Barclays PLC shares." (R719, ¶11.) Plaintiff's counsel even conceded in its opposition to defendants' motion to dismiss that plaintiff was not a member of Barclays PLC by admitting it "'could become a member,' but it would be time-consuming to achieve

and cumbersome once achieved." (R940 n.9.) The First Department correctly recognized that this was a clear judicial admission that the trial court was permitted to accord evidentiary weight. (R1546.) Plaintiff fails to satisfy the membership requirement, and its claims are barred due to its lack of standing.

CONCLUSION

For the foregoing reasons, the First Department's unanimous Decision and Order should be affirmed.

Dated: August 7, 2024
New York, New York

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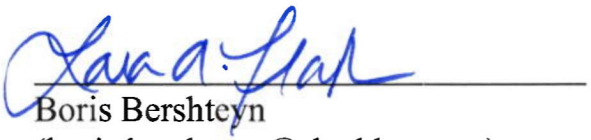

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2021.

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