To Be Argued By:
Francis A. Bottini, Jr.
Time Requested: 30 Minutes

APL-2024-00016

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Appellate Division, First Department Case No. 2022-04657

Court of Appeals

STATE OF NEW YORK

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

Plaintiff-Appellant,

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,

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFF-APPELLANT

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Defendants-Respondents,

and

BARCLAYS PLC,

Nominal Defendant-Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), plaintiff-appellant Ezrasons, Inc. lists the following affiliates:

Embassy Apparel Inc.

Balanced Tech Corp.

Gin and Tonic Corp.

Premier Goal Club L.L.C.

4WBW L.L.C.

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PRELIMINARY STATEMENT

The First Department panel (the "Panel") affirmed the trial court's erroneous dismissal of this action brought on behalf of Barclays PLC ("Barclays")—an English corporation listed on the New York Stock Exchange ("NYSE") and doing business in New York. In doing so, the Panel applied the standing requirement of the English Companies Act 2006 (the "ECA"). This Court should reverse for two reasons.

First, this Court should effectuate the Legislature's intent, reflected in the text and legislative history of §1319 of the Business Corporation Law ("BCL"),[1] to apply New York's gatekeeping rules governing derivative actions to foreign corporations doing business in New York. Second, this Court should ensure compliance with its decision in *Davis v. Scottish Re Group Ltd*., 30 N.Y.3d 247 (2017), to avoid the collision course set by the First Department in this case with the Second Department's *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*").

Unfaithful to §1319's mandate and *Davis*'s directive, the Panel's application of foreign law frustrates the Legislature's intent that foreign corporations doing business in New York, as well as their directors and officers, be subject to New York's centuries-old jurisdiction over shareholder derivative actions.[2]

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[1] Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the N.Y. State and N.Y. City Bar Association*, at 32–35 (Jan. 25, 1961) ("*Joint Report*") (Addendum A).

[2] For two centuries, New York courts have exercised jurisdiction over corporations and "persons who … exercise the corporate powers" to hold them "accountable … for a fraudulent breach of trust[.]" *See Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, 389 (N.Y. Ch. 1817).

The Panel's decision has left Barclays' New York-based shareholders without a remedy against its wayward fiduciaries for grave violations of their duties that cost Barclays $18 billion in fines and caused billions of dollars more in shareholder losses. *See* R898–899 (¶311).[3] Reversal by this Court is necessary to secure New York investors' access to New York courts and to assure corporate accountability as part of preserving New York's "undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980).

* * *

The choice-of-law question presented in this appeal boils down to one of jurisdiction and venue: *Where can a New York resident sue for wrongs done by or to foreign corporations doing business here*?

For over a century, this question has been debated in this Court in varying contexts. Writing for a unanimous Court in 1915, Judge Cardozo applied New York law to a case involving corporate dividends issued by a foreign corporation because "directors of a foreign corporation transacting business in this state and subjecting itself to the conditions established by our laws[] may be charged with liability" if they engage in conduct regulated by New York law. *German-American Coffee Co.*

[3] Citations to "R___" are to pages of the Record. The allegations in Plaintiff's April 16, 2021 First Amended Verified Shareholder Derivative Complaint ("FAC") (R728–905), are cited as "¶¶___" in parentheticals following the Record citations. Unless otherwise noted, all emphases in quoted texts are added.

v. Diehl, 216 N.Y. 57, 65 (1915). The following year, Judge Cardozo, again writing for a unanimous Court, upheld the validity and constitutionality of a foreign corporation's designation of an agent for service of process in New York as constituting consent to New York courts' jurisdiction. *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 439 (1916). More recently, in *Aybar v. Aybar*, a majority of this Court declined to construe a foreign corporation's registration to do business in New York as consent to general jurisdiction in New York courts—over a spirited dissent. *See* 37 N.Y.3d 274, 291 (2021) (Wilson, J., dissenting).

This Court is not alone in confronting this recurring—and important—question of jurisdiction and venue. Just last year, the Supreme Court of the United States decided *Mallory v. Norfolk Southern Railway*, endorsing Judge Cardozo's view, stated in *Bagdon*, on state courts' exercise of jurisdiction over foreign corporations. 143 S. Ct. 2028, 2037 (2023) (citing *Bagdon* as an example of "[o]ther leading judges, including Learned Hand and Benjamin Cardozo, [who] had reached similar conclusions in similar cases"). The Supreme Court in *Mallory* stressed the expansiveness of state jurisdiction over foreign corporations that, like Barclays, both register to do business in a foreign state and, in fact, do business there. *See id.* (citing Pennsylvania statute "permit[ting] state courts to 'exercise general personal jurisdiction' over a registered foreign corporation, just as they can over domestic corporations").

This appeal presents a similar question of state sovereign power—jurisdiction and venue—in the context of a shareholder derivative action brought by a New York resident under BCL §626 and §1319 on behalf of a foreign corporation doing business in New York.

Here, Plaintiff-Appellant Ezrasons, Inc. ("Plaintiff"), owner of 2,500 Barclays common shares, filed a verified FAC asserting shareholder derivative claims on behalf of the NYSE-listed Barclays, which is registered to do business, and conducts billions of dollars of business, in New York through thousands of employees out of its 47-story office tower at 745 Seventh Avenue in Manhattan. *See* R893 (¶297); R974; R1032. New York is where the alleged wrongdoing was centered, where the $18 billion in fines were paid, and where Barclays contractually consented to be sued in numerous instances. R895 (¶303); R1264; R1300; R1337–1338; R1393–1424; R1425–1451; R1466–1480; R1481–1546.

The fact that Barclays does business in New York triggers the application of BCL §1319. Consistent with the "consent regime" articulated by Judge Cardozo in *German-American Coffee* and *Bagdon*, §1319's plain text requires that §626's gatekeeping rules, including its standing requirements, be applied to this shareholder derivative action because Barclays does business in New York.

Despite this statutory mandate, the Panel affirmed the dismissal of this shareholder derivative action, invoking the common-law internal-affairs doctrine.

Ezrasons, Inc. v. Rudd, 217 A.D.3d 406, 406 (1st Dep't 2023). The Panel held that the New York-based Plaintiff—despite its undisputed ownership of Barclays stock—lacked "standing" under English law (*i.e.*, the ECA) to bring derivative claims in a New York court. In so holding, the Panel committed two key legal errors requiring reversal.

First, the Panel refused to follow BCL §1319's text, which mandates the application of §626 to derivative actions brought on behalf of foreign corporations doing business in New York. N.Y. BUS. CORP. LAW §1319(a). As reflected in legislative history (Bill Jacket, L 1961, ch. 855, *Joint Report*, at 32–35), by enacting §1319, the Legislature made a reasoned judgment in balancing the interests of New York investors, the management of foreign corporations, and the overriding public interest of New York as the center of world commerce and finance.[4] To protect New York investors and to preserve New York courts' centuries-old jurisdiction over shareholder derivative actions,[5] the Legislature decided to confer standing to bring derivative actions to all holders of beneficial interest in shares of all corporations, domestic and foreign, regardless of whether such holders have standing under

[4] *See* Robert S. Stevens, *New York Business Corporation Law of 1961*, CORNELL L. REV., Vol. 47, Issue 2, 141, at 172 (Winter 1962) (BCL §1319 reflects the Legislature's judgment in balancing "the interests of shareholders, management, … and the overriding public interest").

[5] In the 1832 case of *Robinson v. Smith*, for example, the New York Court of Chancery exercised "jurisdiction" in aid of "the individual rights of the [in]corporators" to "call the directors to account, and compel them to make satisfaction for any loss arising from a fraudulent breach of trust or the willful neglect of a known duty." 3 Paige Ch. 222, 231–32 (N.Y. Ch. 1832).

foreign law.[6]

To justify its refusal to implement the Legislature's intent based on §1319's text, the Panel construed §1319 not as a "conflict of laws" rule but as "merely confer[ring] jurisdiction upon New York courts over derivative suits on behalf of a foreign corporation." *Ezrasons*, 217 A.D.3d at 406. Such an interpretation betrays the text of §1319 and violates the canon of statutory interpretation by rendering §1319 redundant since §626 already confers jurisdiction over derivative suits over all corporations, foreign or domestic. *See Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018) (Garcia, J.) ("'all parts of a statute are intended to be given effect' and 'a statutory construction which renders one part meaningless should be avoided'").

The Panel's rejection of §1319 as a choice-of-law provision conflicts with the First Department's own precedent as well as the Second Circuit's interpretation of §1319. In *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, a derivative action involving a Bermuda corporation, the First Department complied with §1319's mandate to apply §626 on the issue of derivative standing, rejecting the internal-affairs doctrine:

> [T]he internal affairs doctrine [does not] apply to claims based on … [BCL §1319]. [BCL] §1319(a)(1) expressly provides that §626 (shareholders' derivative action) shall apply to a foreign corporation

[6] Stevens, *New York Business Corporation Law of 1961*, at 174 ("[a]pplicable to all foreign corporations are … the provisions relating to … derivative actions"); Robert A. Kessler, *The New York Business Corporation Law*, ST. JOHN'S L. REV., Vol. 36, No. 1, Art. 1, at 107 n.418 (Dec. 1961) (§§1318–1320 subject "foreign corporations to the same standards as local corporations").

> doing business in New York. Thus, the issue of plaintiffs' standing to bring a shareholder derivative action is governed by New York law, not Bermuda law.

118 A.D.3d 422, 422–23 (1st Dep't 2014). Consistent with *Culligan*, the Second Circuit held in *Norlin Corp. v. Rooney, Pace, Inc*. that §1319 is *all* about choice of law:

> [U]nder [§1319], a foreign corporation operating within New York is subject … to the provisions of the state's own substantive law that control shareholder actions to vindicate the rights of the corporation.

744 F.2d 255, 261 (2d Cir. 1984).

In a clumsy attempt to "harmonize" its untenable position with *Culligan*, the Panel purported to limit *Culligan* to "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.'" *Ezrasons*, 217 A.D.3d at 407. But this purported limitation finds no support in §1319's text, which mandates application of New York law to all "foreign corporation[s]" so long as they are "*doing business in this state*." N.Y. BUS. CORP. LAW §1319(a). By inventing an elevated "in state business presence" jurisdictional test and improperly restricting the jurisdictional reach of BCL §1319 and §626, the Panel violated the basic canon of statutory construction of "constru[ing] [a statutory provision] so as to give effect to the plain meaning of the words used." *See Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 204 (1995). At the same time, the panel disregarded the FAC's

verified allegations of Barclays' New York business registration and ubiquitous New York presence that would satisfy any "doing business" jurisdictional test—elevated or otherwise.

Second, the Panel defied this Court's decision in *Davis* and created a conflict with the Second Department's decision in *HSBC*. In *Davis*, this Court reversed a First Department decision, which relied on the internal-affairs doctrine and refused to apply Cayman Islands procedural rules, similar to ECA §§260–264, to a derivative action involving a Cayman Islands corporation. *See* 30 N.Y.3d at 253–54. This Court also upheld derivative standing to sue under New York's procedural rules. *Id*. Following *Davis*, the Second Department refused to apply ECA §260's requirements to a shareholder derivative action involving an English corporation because they were procedural. *HSBC*, 166 A.D.3d at 757. Instead, the Second Department applied BCL §626 and sustained the pleading sufficiency of the complaint based on New York's own gatekeeping rules governing derivative actions. *Id*. at 758–59.

The Panel completely disregarded Plaintiff's *Davis-HSBC* argument and, instead, cited the First Department's reversed decision in *Davis* (138 A.D.3d 230 (1st Dep't 2016)) to support its erroneous application of the internal-affairs doctrine. *See Ezrasons*, 217 A.D.3d at 406.

In sum, the Panel decision violates basic rules of *stare decisis* and statutory interpretation.

* * *

The Panel decision also has far-reaching public-policy implications. At bottom, this appeal concerns New York courts' jurisdiction and the Legislature's power over foreign corporations doing business in New York, many of which are listed on New York stock exchanges and have thousands of New York-resident shareholders. In an increasingly globalized world, where derivative litigation to call errant fiduciaries of foreign corporations to account is essential, the Panel decision improperly denies a New York resident access to New York courts and improperly insulates Barclays' fiduciaries from the jurisdictional reach of New York.

Beyond the context of shareholder derivative litigation, the Panel decision imperils the established framework for exercising jurisdiction over foreign corporations. The Panel's decision improperly imposes an elevated jurisdictional test beyond the existing "doing business" standard in the BCL and other statutes[7] to sue foreign corporations in New York courts—whether expressed as an *enhanced* "in state" presence requirement or some *super* "doing business" standard.

[7] *See, e.g.*, N.Y. CPLR §302 (providing for personal jurisdiction where a non-domiciliary "transacts any business within the state," "regularly does…business in the state," or "owns or uses or possesses any real property situated within the state").

This erroneous standard concoction is antithetical to the notion of providing New Yorkers with access to justice. A constricted "doing business" standard lessens the accountability of foreign corporations and their directors and officers, and limits access to justice for New Yorkers *of all stripes*—not just shareholders—who want to access their home courts to resolve their claims involving foreign corporations "doing business" in New York.

The U.S. Supreme Court's June 27, 2023 decision in *Mallory* supports Plaintiff's position here. *Mallory* finds that a foreign corporation's registration to do business in Pennsylvania and appointment of an agent for service of process constitutes consent to Pennsylvania's "general jurisdiction" and allows Pennsylvania courts to hear a claim by an out-of-state resident over out-of-state misconduct. *See* 143 S. Ct. at 2037–40. To support part of that analysis, the Court cited Judge Cardozo's famous "consent" decision in *Bagdon*.

The same rationale applies to New York's special outreach statute involved here. BCL §1319 and §626 together create jurisdiction over the directors and officers of all foreign corporations "doing business" in New York. Barclays consented to the application of §1319 and §626 by "doing business" in New York. Nothing more was required to apply New York's gatekeeping rules governing shareholder derivative actions.

This Court should reverse the Panel's decision.

QUESTIONS PRESENTED

Question 1: As a matter of statutory interpretation, supported by the extensive legislative history, must BCL §626 be applied to this action under the plain text of §1319—as a statutory choice-of-law rule that displaces the common-law internal-affairs doctrine?

Question 2: As a matter of *stare decisis*, does this Court's decision in *Davis*, which was followed by the Second Department in *HSBC*, require that BCL §626 be applied to this action involving Barclays PLC (an English corporation doing business in New York) because §260 of England's Companies Act 2006 is procedural and applies only to derivative actions brought in English courts?

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal because the First Department's decision (served with a notice of entry on June 1, 2023) constitutes a final order within the meaning of CPLR §5602(a)(1)(i). Upon Plaintiff's timely motion of June 30, 2023 (*see* N.Y. CPLR §5513(b)), this Court granted leave to appeal on February 22, 2024. R1544.

Plaintiff has raised and preserved both questions presented for review in the Commercial Division in R931 through R939 (Question 1) and in R925, R934, R941, and R942 (Question 2), and in the First Department in R1582 through R1608 (Question 1) and in R1608 through R1612 (Question 2).

STATEMENT OF THE CASE

I. This Shareholder Derivative Action

Barclays is an English corporation doing business in New York. R893 (¶299). Barclays maintains its U.S. "head office" in a Midtown Manhattan skyscraper and boasts naming rights to Brooklyn's main sports arena, the Barclays Center. R893 (¶297); R974; R1032. Barclays and more than 20 of its subsidiaries are registered to do business in New York with an agent appointed for service of process. *See* R893 (¶299). Through its New York Branch, Barclays is licensed as a foreign banking corporation by the New York Department of Financial Services ("NYDFS"). R750 (¶31); R1016. Barclays' stock is listed on the NYSE. R750 (¶31). Thousands of Barclays' shareholders reside in New York. *Id*.

Plaintiff-Appellant Ezrasons, Inc. is a New York-based Barclays shareholder; Plaintiff brought this shareholder derivative action on behalf of Barclays. R750 (¶30). Plaintiff has continuously owned 2,500 shares of "registered" Barclays common stock during Defendants' entire course of misconduct. *Id.*

The verified FAC details how certain current and former directors and officers of Barclays (collectively, "Defendants") permitted or engaged in a decade of wrongdoing emanating from Barclays' Manhattan headquarters. *E.g*., R899–890 (¶¶294–313). The FAC alleges Defendants violated their duties as officers and directors of Barclays under §§174 and 178 of the ECA, which require them to

"exercise reasonable skill and diligence" and make them liable to Barclays for "any act or omission involving negligence, default, breach of duty or breach of trust."[8] R777 (¶91); *see also* R953–964. Defendants' misconduct led to severe punishment by the New York Attorney General ("NYAG"), the NYDFS, and federal regulators, costing Barclays $18 billion in fines and penalties. R899 (¶311). The resulting carnage left Barclays' stock selling for less than the price of a pack of cigarettes. *See* R743 (¶21); *see also* R931 (chart of stock index 2015–21).

The breathtaking multi-billion-dollar destruction of Barclays' shareholder value adversely impacted investors—institutional and individual—in New York and beyond. *See* R743 (¶21). The enormity of the damages to Barclays and the egregiousness of the underlying decade-long corporate misconduct require that Barclays' wayward fiduciaries be called to account. Controlled by Defendants, however, Barclays is powerless to bring suit against them. These circumstances present a classic case for a shareholder derivative action—a form of action that has been endorsed by New York courts since the 1800s. *See*, *e.g.*, *Attorney-General*, 2 Johns. Ch. at 389. Plaintiff brought this action in New York asserting claims for breach of fiduciary duty under the ECA—the substantive law of England. *See* R899–902 (¶¶314–332).

[8] As alleged in the FAC, *substantive* provisions of the ECA apply to Plaintiff's claims. R777 (¶91).

II. Proceedings in the Commercial Division and the First Department

Plaintiff commenced this shareholder derivative action in the Commercial Division of the Supreme Court, New York County, on November 19, 2020. R1. Plaintiff filed the FAC on April 16, 2021. R728–905.

On May 14, 2021, Defendants moved to dismiss the FAC. R50–51. After Defendants' motion to dismiss the FAC was fully briefed, Plaintiff moved for leave to file a sur-reply on February 23, 2022. R1253–1255. On March 11, 2022, the court denied Plaintiff leave to file a sur-reply. R1540–1541.

On April 26, 2022, the court held a hearing on Defendants' motion to dismiss the FAC. R9–49. At the end of the hearing, the court granted Defendants' motion. On May 4, 2022, the court issued its decision and order dismissing the FAC. R6–49.

On June 22, 2022, Plaintiff timely appealed to the First Department. R2–5. The Panel heard argument on May 10, 2023 and issued its decision and order on June 1, 2023, affirming the Commercial Division's dismissal order. *See Ezrasons*, 217 A.D.3d at 406.

III. This Court's Grant of Leave to Appeal

On June 30, 2023, Plaintiff timely moved in this Court for leave to appeal the First Department's decision and order.

On February 22, 2024, this Court granted Plaintiff's motion. R1544.

ARGUMENT

Reversal by this Court is necessary because the Panel violated BCL §1319's mandate and failed to effectuate the Legislative intent to protect New York investors' access to the courts. Reversal is also necessary because in applying foreign law—instead of New York law—on the issue of a shareholder's standing to bring derivative claims, the Panel created a conflict with precedents from this Court and the Second Department.

From a conflict-of-law perspective, this case is simple. *There is no conflict*. To the extent that the ECA requires "stock registration" in an offshore share registry to be a "member" of Barclays *in addition to being a beneficial owner* of shares to have standing to sue in England, that requirement *does not apply outside England*. Because the case is in New York, the only standing rule that applies is BCL §626(a), which expressly governs derivative suits on behalf of "foreign corporations" and only requires "beneficial ownership" for standing to sue. That is—and should be—the end of this matter.

HSBC held that the same ECA procedural provisions at issue in this case are inapplicable in a New York court. Thus, *HSBC* permitted an England-resident shareholder to sue in New York without demanding compliance with English procedures required by the ECA. Likewise, this Court in *Davis* upheld a Mexico-resident shareholder's access to a New York court without demanding compliance

with Cayman Island's procedural rules. Under the *Davis-HSBC* line of precedents, technical requirements imposed by foreign law cannot form a basis to deny shareholders (particularly those based in New York) access to New York courts to bring derivative claims on behalf of foreign corporations.

Yet the Panel denied the same access to a New York court to Plaintiff, a *New York resident* who indisputably owns 2,500 shares of Barclays stock, based on a factual finding *at the pleadings stage* that those shares were not "registered" and thus Plaintiff was not a "member" of Barclays.[9] This technical "membership" requirement, imposed by English law, serves to discriminate against U.S. investors because they are typically beneficial owners who own stock in "street name."[10] Reversal is necessary to correct this discriminatory treatment of U.S.-based investors and protect their access to New York courts as expressly provided in BCL §626.

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[9] To bolster its erroneous conclusion, the Panel said Plaintiff conceded it was not a Barclays "member" in "an informal judicial admission." *Ezrasons*, 217 A.D.3d at 407. Not so. At the April 26, 2022 hearing, counsel reminded the Commercial Division that Plaintiff made no such admission, and that Plaintiff's membership status "would be a matter of discovery." R26–27. But it does not matter. Technical "registration" is a sideshow. To bring a derivative action in a New York court, all Plaintiff has to allege is beneficial ownership. *See* N.Y. BUS. CORP. LAW §626(a). Plaintiff has done so in a *verified* complaint. R750 (¶30). *No one disputes Plaintiff's beneficial ownership of 2,500 shares*.

[10] As demonstrated in a 2011 European Union study (R1053–1093), U.S.-based investors, especially when investing in foreign companies like Barclays, almost universally hold their stock through a "security entitlement model," in which the legal owner is Cede & Co., a subsidiary of the NYSE, while English investors utilize the "trust model." *See* DIRECTORATE-GENERAL FOR THE INTERNAL POLICIES OF THE EUROPEAN PARLIAMENT, *Cross-Border Issues of Securities Law: European Efforts to Support Securities Markets with a Coherent Legal Framework*, at 20 (2011); R1074. The Panel ruling blocks such beneficial owners of stock from access to New York courts assured to them by §626(a).

I. The First Department Erred by Refusing to Follow BCL §1319's Text and by Failing to Effectuate the Legislature's Intent to Protect New York Investors' Access to the Courts and to Preserve New York Courts' Jurisdiction over Derivative Actions Involving Foreign Corporations Doing Business in New York

Reversal by this Court is necessary to correct the Panel's erroneous interpretation of BCL §1319—in contravention of the First Department's own precedent—and set aside the Panel's impermissible elevation of the BCL's existing "doing business" standard.

A. The Panel Misinterpreted BCL §1319 Because Its Text and Article 13's Legislative History Command That New York Law—Specifically, §626—Governs the Issue of a Shareholder's Standing to Bring a Derivative Action

This appeal presents an issue of statutory interpretation. To that end, the court's task is "to effectuate the intent of the Legislature." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). "[T]he clearest indicator of legislative intent is the statutory text." *Id*.

The text of BCL §626(a) establishes subject-matter jurisdiction in New York courts over shareholder derivative actions and confers standing to bring such claims on behalf of "a domestic or foreign corporation" to all "holder[s] of shares … of the corporation or of a beneficial interest in such shares." N.Y. BUS. CORP. LAW §626(a). The text of §1319 mandates that New York's gatekeeping rules regarding shareholder derivative actions—§626 and §627—be applied to "foreign corporation[s] doing business in this state, [their] directors, officers and

shareholders." N.Y. BUS. CORP. LAW §1319(a)(2)–(3). The texts of §1319 and §626 provide a clear directive of the New York Legislature: foreign corporations doing business in New York are subject to §626, which authorizes "holder[s] of shares … of … corporation[s] or of *a beneficial interest in such shares*" to bring shareholder derivative actions in New York courts. *See* N.Y. BUS. CORP. LAW §§626(a), 1319(a)(2).

Where, as here, legislative intent is clear from statutory text, the court's task of statutory interpretation ends and the court must apply the statute according to its plain text. *See Deutsche Bank Nat'l Trust Co. v. Lubonty*, 208 A.D.3d 142, 147 (2d Dep't 2022). A review of legislative history, however, further crystalizes this legislative intent, expressed through §1319's text, to apply §626 to foreign corporations doing business in New York.

Article 13 of the BCL, which includes §1319, was the product of years of study and work by the New York Legislature in the early 1960s to revise and modernize the BCL. *See* Kessler, *The New York Business Corporation Law*, at 1–2.[11] The research and drafting process spanned over four years and was known to be "elaborate" and "well organized." *Id*. at 4. Research reports "were widely distributed for comments" to various constituents, including "the State and New

[11] Professor Robert A. Kessler of Fordham University School of Law served on the Research Advisory Subcommittee to the Joint Legislative Committee to Study Revision of New York Corporation Laws, which was responsible for drafting the revised Business Corporation Law.

York City Bar Associations," which voiced opposition on behalf of business interests to the regulation of foreign corporations. *See id.* at 3–4.

In its deliberation on the provisions regulating foreign corporations, the Legislature balanced the interest of "protection to the shareholders and creditors" against the interest in "avoid[ing] discouraging foreign corporations from doing business in New York." *See id.* at 107 n.418, 108. As Professor Kessler pointed out, the new statute attempted to "[s]ubject[] foreign corporations to the same standards as [New York] corporations … in a number of areas," including §1319's mandate on imposing §§626–627 on foreign corporations doing business in New York. *See id*. at 107 n.418. Known as "[t]he conditions precedent for bringing a shareholder's derivative action" (*id*. at 85), §§626–627 were the product of the Legislature's efforts in striking the "delicate" balance between encouraging "legitimate derivative actions" and discouraging "strike" suits. *Id*. at 36.

To that end, the New York Legislature considered the objection of the corporate establishment, represented by the State and New York City Bar Associations. The corporate establishment 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." Bill Jacket, L

1961, ch. 855, *Joint Report*, at 32–35. As Dean Stevens observed,[12] "[i]t was strongly urged before the [Joint] Committee that the policy of other states should be respected and that foreign corporations should be subject to and regulated by the law of the jurisdiction of incorporation, not by the law of New York." Stevens, *New York Business Corporation Law of 1961*, at 172.

Casting aside these objections, however, the New York Legislature passed the new BCL based on its judgment that it "represent[s] the proper balance of the interests of shareholders, management, employees, and the overriding public interest." *Id*. The modernized BCL, including §1319, became law, codifying the New York courts' long-standing jurisdiction over shareholder derivative actions and subjecting foreign corporations doing business in New York to New York's "conditions precedent for bringing a shareholder's derivative action." Kessler, *The New York Business Corporation Law*, at 85.

The Panel's refusal to construe §1319 as a choice-of-law rule betrays §1319's text and legislative history. Moreover, construing §1319 as "merely confer[ring] jurisdiction upon New York courts over derivative suits" renders §1319 redundant because §626 already confers such jurisdiction. Thus, the Panel's construction of §1319 violates the canon of statutory interpretation "that all parts of a statute must

[12] Dean Robert S. Stevens of Cornell Law School was said to have made such "contribution to corporation law" that "def[ies] adequate enumeration." W. David Curtiss, *The Cornell Law School from 1954 to 1963*, CORNELL L. REV., Vol. 56, Issue 3, 375, at 376 (Feb. 1971).

be given effect and must be harmonized with each other, as well as with the general intent of the whole statute. *See Anonymous*, 32 N.Y.3d at 37; *see also* MCKINNEY'S CONSOL. LAWS OF N.Y. BOOK 1, STATUTES §§97–98 (1971). As the Second Circuit held in *Norlin Corp*., §1319 is *all* about choice of law:

> The New York legislature has expressly decided to apply certain provisions of the state's business law to any corporation doing business in the state …. Thus, under … §1319, a foreign corporation operating within New York is subject … to the provisions of the state's own substantive law that control shareholder actions to vindicate the rights of the corporation. [BCL] §626 made applicable to foreign corporations by §1319, permits a shareholder to bring an action to redress harm to the corporation, including injury wrought by the directors[.]

744 F.2d at 261 (citing *Barr v. Wackman*, 36 N.Y.2d 371 (1975)).

Reversal by this Court is necessary to correct the Panel's erroneous construction of §1319—in contravention of its text and legislative history.

B. The Panel Erred in Invoking the Internal-Affairs Doctrine Because That Common-Law Doctrine Must Give Way to a Statutory Directive

BCL §1319 reflects a legislative policy choice to regulate certain discrete aspects of the affairs of foreign corporations doing business in New York, including derivative standing to sue, which has been traditionally characterized as involving corporate "internal affairs." *See* Bill Jacket, L 1961, ch. 855, *Joint Report*, at 32–35. And that was exactly how the New York Legislature and the corporate establishment understood §1319 to be: §1319 "regulate[s] the internal affairs of

foreign corporations[.]" *Id*. at 34–35. This was the view of both Professor Kessler and Dean Stevens, who participated in the drafting and public comments of the enactment of the 1961 BCL. *See* Stevens, *New York Business Corporation Law of 1961*, at 174 ("[a]pplicable to all foreign corporations are … the other provisions of article 13, and the provisions relating to … derivative actions, and security for expenses therein"); Kessler, *The New York Business Corporation Law*, at 107 n.418 ("[t]he new statute attempts to" subject "foreign corporations to the same standards as local corporations" in §§1318–1320). And legal scholars agreed:

> Most states follow the traditional internal affairs doctrine, either through case law or statutory provisions. … Two states, New York and California, have statutes that are explicitly outreaching. *These statutes expressly mandate the application of local law to specified internal affairs questions in certain foreign corporations*.

Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMPORARY PROBLEMS 161, at 164 (1985).

New York's regulation of foreign corporations is consistent with their growth and importance. As courts recognized at the turn of the 19th century, it became increasingly common for corporations chartered by one state to conduct business in other states. *See generally Merrick v. Van Santvoord*, 34 N.Y. 208 (1866). The need also arose for the non-incorporation states "to regulate and restrain foreign corporations in doing business [within their borders] under charters from other [state] governments." *See id.* at 212. Judicial response to this need was

resolute. The U.S. Supreme Court affirmed the non-incorporation states' "plenary power to exclude a foreign corporation from doing business within [their] borders" and to regulate a foreign corporation "in their discretion"—"as in their judgment will best promote the public interest." *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 343 (1909); *see also Paul v. Virginia*, 75 U.S. 168, 181 (1869). Consistent with this "plenary" and "discretionary" power, the Legislature via §1319 imposed certain BCL provisions, including §626, upon "foreign corporation[s] doing business in this state, [their] directors, officers and shareholders."

Invoking the common law internal-affairs doctrine, however, the Panel refused to apply §1319's language designating several specified provisions of the BCL as applicable to foreign corporations, including §§626 and 627. But a court must "follow a statutory directive of its own state on choice-of-law." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §6(1) (1988). A court defaults to various common-law choice-of-law rules *only* "[w]hen there is no such directive." *Id*. §6(2). "[T]he court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles." *Id*., Cmt. b. on §6(1). BCL §1319 is exactly that kind of choice-of-law statute. The common-law internal-affairs doctrine is inferior to statutory law and must give way. *See id.*

Statutory directives aside, long gone is the era when the internal-affairs

doctrine called for jurisdictional exclusivity for derivative actions only in the place of incorporation. *Koster v. (Am.) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 527 (1947); *see also* Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, STAN. J. OF COMPLEX LITIG., at 51 (2012) ("[t]he modern doctrine does not dictate where a dispute is heard"). New York courts have long rejected any "automatic application" of the internal-affairs doctrine in shareholder derivative litigation. *See Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975). Derivative suits are today embedded as part of American law—with good reason.[13] Today in an increasingly internationalized corporate world, New York's power to regulate foreign corporations doing business in New York is more important than ever. *A key aspect*

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[13] In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), one of 16,000 shareholders sued the officers and directors, alleging 18 years of breaches of duties that resulted in the loss of over $100 million (over $1 billion in today's dollars). *Id*. at 544. Justice Robert H. Jackson emphasized the importance of permitting "*holders of small interests*" to bring derivative actions in the courts—as the only "*practical check on* [*fiduciary*] *abuses*" (*id*. at 547–48):

> As business enterprise increasingly sought the advantages of incorporation, management became vested with almost uncontrolled discretion in handling other people's money. The vast aggregate of funds committed to corporate control came to be drawn to a considerable extent from numerous and scattered holders of small interests. *The director was not subject to an effective accountability*. That created strong temptation for managers to profit personally at expense of their trust. … [*S*]*tockholders, in face of gravest abuses, were singularly impotent in obtaining redress of abuses of trust*.
>
> *Equity came to the relief of the stockholder*, who had no standing to bring civil action at law against faithless directors and managers. *Equity*, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own. … [E]quity would hear and adjudge the corporation's cause through its stockholder with the corporation as a defendant, albeit a rather nominal one. *This remedy, born of stockholder helplessness, was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests*.

of imposing such regulation and maintaining New York's centrality in world commerce is providing a forum for derivative suits involving foreign corporations. *See Deutsche Bank Nat'l Trust Co. v. Flagstar Capital Mkts*., 32 N.Y.3d 139, 162 (2018) (recognizing New York's "unique status as a global center of finance and commercial transactions").

But the lower courts have proven hostile to exercising the jurisdiction conferred by the Legislature and to following decisions like *Davis*, *HSBC,* and *Culligan.* The Panel decision reflects this unjustified hostility towards shareholder derivative lawsuits. The Panel threw this New York shareholder out, in defiance of legislation and precedent. This appeal presents an opportunity for this Court to bring the lower courts back in line with §1319 and the Legislature's intent.

C. In Contravention of the Existing "Doing Business" Standard, the Panel Impermissibly Created an Elevated "in-State Business Presence" Jurisdictional Test to Block Application of §1319

To evade *Culligan*, the Panel created—out of thin air—an elevated jurisdictional requirement for applying BCL §1319 and §626 to the standing issue. Without any legal or factual support, the Panel relegated *Culligan*—and BCL §1319—to be applicable "only … [to] rare situation[s]" where the foreign corporation has "*such presence … in our State as would, irrespective of other considerations, call for the application of New York law*." *Ezrasons*, 217 A.D.3d at 407. The Panel's enhanced jurisdictional standard is akin to what is necessary to

impose *general jurisdiction* over foreign corporations or to apply New York's substantive law to foreign corporations. But §1319 does not contain any elevated "such presence in our state" language. Nor is §1319's reach limited to only "rare situation[s]." By its own terms, §1319 applies to *any* foreign corporation "doing business in this state" and requires the application of §626's gatekeeper provision to *all* derivative actions brought on behalf of such corporations in New York courts.

The Panel's enhanced "in state presence" jurisdictional test is not only wrong, but also dangerous. New York uses a "doing business," "minimum contacts" jurisdictional test for out-of-state actors, including foreign corporations, in many contexts. *See* N.Y. CPLR §302; *see also Williams v. Beemiller, Inc*., 33 N.Y.3d 523, 528 (2019) ("the action is permissible under the long-arm statute [(CPLR §302)]" so long as "the exercise of jurisdiction comports with due process"). In *Aybar*, this Court (over a dissent by then-Judge Wilson and Judge Rivera) limited the jurisdictional consequences of *mere* registration to do business in New York. 37 N.Y.3d at 280; *but see Mallory*, 143 S. Ct. at 2037–38. As *Aybar* made clear, however, New York's long-arm jurisdiction over foreign corporations "doing business" here remains intact.[14] *New York courts*' *jurisdiction reaches as far as the*

[14] In February 2023, this Court again made clear the need for a broad reading of long arm jurisdiction over foreign corporations. In *State of New York v. Vayu, Inc*., this Court upheld personal jurisdiction over a foreign corporation based on *a single* in-state business meeting plus emails and letters. *See* 39 N.Y.3d 330, 333 (2023).

federal "*due process*" *permits especially where, as here, a clear consent to jurisdiction has been made*. *See* 37 N.Y.3d at 310–13 (Wilson, J., dissenting) (stressing the importance of a state's regulation of foreign corporations that consent to jurisdiction by registration and the in-state conduct flowing from that registration).

In any event, any conceivable jurisdictional test would have been satisfied because Barclays is—without question—actually "doing business" in New York.[15] Barclays is not only registered to do business in New York with an agent for service of process (*see* R893 (¶299)), it is also listed on the NYSE and operating a multi-billion-dollar operation out of its 47-story "head office" at 745 Seventh Avenue in Manhattan. R750–751 (¶¶31–32). It has also repeatedly entered contracts in which it "*irrevocably*" *consented to jurisdiction* and *venue in New York*, "*waiving*" *all objections to personal jurisdiction*. R892 (¶297); R893 (¶299); R895 (¶303). According to Barclays, the United States is its "second home market." R892 (¶297). Barclays has over 10,000 employees here. R750 (¶70). Over 20 Barclays subsidiaries are registered to do business in New York. R893 (¶297). Barclays' Board and Board committees have held over 15 meetings in New York between 2010 and 2019. R974. Barclays even boasts naming rights to Brooklyn's main sports arena, the Barclays Center. R893 (¶297); R974, R1032.

[15] In the Commercial Division, Defendants sought a *forum-non-conveniens* dismissal. In light of these facts the Commercial Division expressed skepticism over Defendants' arguments. *See* R47 (the *forum-non-conveniens* arguments are "a little difficult to swallow").

Through its New York Branch, Barclays is licensed as a banking corporation by the NYDFS. R750 (¶31); R1016. Barclays is deeply intertwined with federal and New York banking regulators. *See* R734–735 (¶5), R817–818 (¶162), R821–823 (¶¶170, 174), R836–840 (¶¶197, 202), R844 (¶209), R887–888 (¶289).

Barclays *explicitly consented* to New York jurisdiction and the application of New York law in agreements relating to this action. Barclays' American Shares trade on the NYSE. Over 350 million of its shares are "beneficially" owned by U.S. residents and many New Yorkers. R750 (¶¶30–31). Plaintiff owned Barclays' American Shares for years before converting to ordinary common stock. R750 (¶¶30–31). The American Shares are held for the beneficial owners in New York/United States by JPMorgan in New York, acting as depositary (*see* R895 (¶303)) via a Depositary Agreement (R895 (¶303)), in which Barclays "irrevocably agrees to submit to the jurisdiction of "any state or federal court in New York." R1300. This agreement (R1266–1320) also provides that it "shall be interpreted … and … shall be governed by the laws of New York." R1300.[16]

Importantly, Barclays' vast New York business presence and activities are

[16] Barclays and its subsidiaries also entered into multiple settlement agreements and consent orders, pleaded in the FAC, that *gave rise to this action*. In Barclays' 2016 $100 million settlement with various Attorneys Generals, including the NYAG, for LIBOR misconduct (*see* R1321–1392), Barclays agreed that the state or federal courts in New York shall be the "*exclusive forum*" for any action to enforce the settlement agreement, and "*consent*[*ed*] *to the jurisdiction of the courts of … New York*," *and agreed that* "*New York law shall apply*." R1337–1338.

Barclays has also commenced plaintiff-side litigation in New York and defended cases here without jurisdictional challenges. R970–971.

inextricably intertwined with the alleged wrongdoing, easily satisfying any "specific jurisdiction" requirement that the in-state conduct involved relate to the claims asserted. The decade of alleged wrongdoing emanated from Barclays' Manhattan headquarters (*e.g.*, R890–899 (¶¶294–313)).

By 2008, Barclays had been repeatedly penalized for serious legal violations in New York and subjected to a non-prosecution agreement with the Manhattan District Attorney. R741 (¶¶17–18); R817–819 (¶¶161–163). And Defendants expanded Barclays' New York operations (R834–835 (¶194)) allowing a "deeply flawed" and "out of control" business culture to persist (R734–736 (¶¶5–6)):

- Barclays pleaded guilty "to conspiracy to fix prices and rig bids … collusive conduct … a federal crime that violated [a prior] non-prosecution agreement," "misconduct [that] was serious, widespread and extending over a number of years" made possible because "Barclays failed to ensure it had proper controls in place."

- Barclays failed to "devise and maintain a system of internal accounting controls," and had "deficiencies in its compliance systems," because of [Barclays'] "deeply flawed culture," "shortcomings in governance controls and corporate culture" and the Board's failure "to take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management systems."

- The misconduct "persisted despite similar control failures …[,] which were the subject of previous enforcement actions," and "Barclays failed to apply the lessons from previous enforcement actions."

After 2008, Barclays was consumed by unending scandals (R815–850 (¶¶155–221)), criminal convictions, non-prosecution agreements, and censures

((R741–742 (¶¶18–20); R744–746 (¶¶22–26)), resulting in massive penalties paid to New York regulators, including:

- August 2010: $300 million, NYAG and U.S. Department of Justice ("DOJ")—money laundering (R817–819 (¶¶162–163));
- May 2015: $2.4 billion, NYDFS—conspiring to manipulate Forex trading (R836–837 (¶197));
- May 2015: $710 million, DOJ—guilty plea for Forex manipulation in New York (R837–838 (¶198));
- May 2015: $242 million, U.S./New York Federal Reserve—unsafe and unsound practices, deficient policies and procedures (R838–839 (¶200));
- November 2015: $150 million, NYDFS—forex misconduct in New York (R840 (¶202));
- July 2016: $105 million, SEC and NYAG—dark-pool violations (R840–841 (¶203));
- August 2016: $100 million, NYAG—interest-rate manipulations (R841 (¶204)); and
- December 2018: $15 million, NYDFS—unsafe banking practices (R876 (¶261)).

This litany of New York wrongdoing cost Barclays $18 billion (R742 (¶20); R794–797 (¶¶119–123)), led to punishments by the NYAG and the NYDFS, as well as federal regulators, and destroyed Barclays' shareholder value. *See* R743 (¶21).

In all, this is a specific-jurisdiction case based on BCL §1319. Barclays was certainly "doing business" sufficiently to trigger §1319 and it had also consented to jurisdiction in New York.

But the Panel transmogrified the "doing business" language in BCL §1319(a) to create an elevated "in state presence" test, and then used that test to block application of §1319 and §626 to a foreign corporation that is (1) registered to do business—with an agent for service—in New York; (2) had irrevocably consented to being sued in New York, where it owns property and has a massive physical presence; (3) does billions in business via thousands of employees; (4) lists its stock on the NYSE; and (5) committed the bulk of the alleged wrongdoing in New York.

Reversal by this Court is necessary to prevent any further erosion—caused by the Panel's erroneous construction of §1319—of the reach of New York courts' jurisdiction over foreign corporations like Barclays.

II. The First Department Erred by Defying This Court's Precedent Requiring the Application of New York's Gatekeeping Rules—Not Those of Foreign Jurisdictions—to Actions Brought in New York

As one of the two independent grounds for reversing the dismissal of this action, Plaintiff urged the Panel to follow *Davis* and avoid a conflict with *HSBC*. R1608–1612. Disregarding Plaintiff's arguments, however, the Panel refused to apply BCL §626, as required by *Davis* and endorsed by *HSBC*, and instead relied on English law to find that Plaintiff lacked standing to bring derivative claims in New York. Reversal by this Court is necessary to enforce the rule of *stare decisis* and to prevent conflicting rulings among the lower courts regarding the applicability of the ECA in shareholder derivative actions brought on behalf of English companies.

In *Davis*, this Court unanimously reversed the First Department's decision and rejected the application of the internal-affairs doctrine on the issue of a shareholder's standing to bring derivative claims. *See* 30 N.Y.3d at 249–50 (opinion by Judge Feinman, joined by Chief Judge DiFiore and Judges Rivera, Stein, Fahey, and Wilson), reversing *Davis v. Scottish Re Grp. Ltd*., 138 A.D.3d 230 (1st Dep't 2016)). There, the First Department affirmed a dismissal of derivative claims brought by a Mexico-resident owner of ordinary shares of a Cayman Islands corporation, holding that the internal-affairs doctrine required the application of Cayman Islands statutes governing a shareholder's standing to sue. *See Davis*, 138 A.D.3d at 233–34.

This Court disagreed. The Court instructed that, before deciding whether a foreign statute, which serves a "gatekeeping" function in derivative actions, applies to an action brought in a New York court, the lower courts must first decide whether the foreign statute is substantive or procedural based on statutory text. *Davis*, 30 N.Y.3d at 253 ("[w]e first look at the plain language of [the foreign statute]"). Because the Cayman Islands statute at issue, by its "plain language," applies only to actions brought in the Cayman Islands and "has no provision that would suggest that it applies … in derivative actions brought … outside the Cayman Islands," this Court held that the foreign statute "is a procedural rule that does not apply in New York courts." *Id*. at 254. In *Davis*, this Court upheld the right of a holder of "ordinary

shares" of a foreign corporation to bring a derivative action in New York under "our own 'gatekeeping' statutes." *Id*. at 257.

Here, the Panel *defied* this Court's instruction in *Davis*. Even though Plaintiff raised the substance-*versus*-procedure argument based on *Davis* (R1608–1612), the Panel disregarded that argument. Instead, the Panel cited the First Department's *Davis* decision (138 A.D.3d 230)—reversed by this Court—to support its invocation of the internal-affairs doctrine, without first deciding whether ECA §260 is substantive or procedural. *See Ezrasons*, 217 A.D.3d at 406. To justify its reliance on the reversed decision, the Panel mischaracterized this Court's reversal as being "on other grounds." *See id*. But this Court in *Davis* did *not* reverse the First Department "on other grounds," but on its use of the internal-affairs doctrine to require application of foreign law. *Compare* 30 N.Y.3d at 253, *with Davis*, 138 A.D.3d at 238. This Court rejected the First Department's reliance on the internal-affairs doctrine as a rationale to bar derivative claims brought by a holder of "ordinary shares" and upheld the shareholder's access to New York's courts.

Like the Cayman Islands statute in *Davis*, ECA §§260–264's texts are explicit: *they do not apply in New York*. Those five sections appear in Part 11, Chapter 1 of the ECA, which is entitled "DERIVATIVE CLAIMS *IN ENGLAND AND WALES OR NORTHERN IRELAND*." ECA, Part 11, Chapter 1 (title); R961. As expressly provided in §260 (entitled "Derivative Claims"), "*this Chapter applies to*

proceedings in England and Wales or Northern Ireland by a member of a company," "in respect of a cause of action vested in the company" and "seeking relief on behalf of the company." ECA §260(1). Likewise, §261 (entitled "[*a*]*pplication for permission to continue derivative claim*") expressly provides that the "permission-" or "leave-" application procedure *applies only to actions filed in English courts*: "[a] member of a company who brings a derivative claim under this Chapter must apply to *the court for permission* (*in Northern Ireland, leave*)." ECA §261(1); R962. And §§262, 263, and 264 also refer to the courts in England, Wales, and Northern Ireland—so specific as to employ the term "leave" in place of "permission" to conform to Northern Ireland's practice. ECA §§262(2), 263(1), 264(2); R962–964.

Under *Davis*, ECA §§260–264 are procedural because, just like the Cayman Islands rules in *Davis*, these ECA sections—employing terms specific to the practices of English courts—serve the gatekeeping function solely for actions brought there. Such practice of "apply[ing] to the court for permission" to "continue" a derivative action is non-existent in New York courts. And, just like the lack of extraterritorial reach of the Cayman Islands rules in *Davis*, nothing in the ECA indicates that §§260–264's requirement of a "member" to seek permission to sue in English courts can be applied to derivative actions brought outside England on behalf of English companies. *See Davis*, 30 N.Y.3d at 254.

The Panel's contrary conclusion—in defiance of *Davis*—requires reversal.

In *HSBC*, the Second Department followed this Court's decision in *Davis* and rejected the application of the internal-affairs doctrine. *See* 166 A.D.3d at 755–56. There, the trial court dismissed a derivative action brought by an England-resident owner of shares in HSBC Holdings, PLC, an English corporation, holding that "the internal affairs doctrine required the application of foreign law to questions of standing, and that the plaintiff lacked standing because he failed to seek permission from the English High Court pursuant to [the ECA]." *Id*. at 755. Relying on *Davis*, the Second Department reversed the dismissal because the English requirement for seeking permission to sue under ECA §261 "by its own terms, … applies only to derivative claims brought in England and Wales, or Northern Ireland, and does not suggest that it applies in any other jurisdiction such as New York." *Id*. at 756–57 (citing *Davis*, 30 N.Y.3d at 253). To reach this conclusion, the Second Department—consistent with this Court's instruction in *Davis*—found that the ECA "has no provision suggesting that it applies to derivative actions on behalf of [English companies] commenced … outside of England, Wales, or Northern Island." *Id*. at 757.

By applying the very provisions of the ECA that the Second Department held to be inapplicable, the Panel has created a split with *HSBC*. Defendants' attempt to "harmonize" the application of the ECA and *HSBC* is nothing but a feeble attempt at splitting hairs. They say that *HSBC* is limited to only ECA §261 and thus leaves

open whether ECA §260 can be applied to an action brought in New York. But *HSBC* is not so limited because the Second Department analyzed the "plain language" of ECA §§260–261, specifically citing to §260. *See id*. Moreover, all five sections (§§260–264) in Chapter 1 of the ECA reference the so-called "membership" requirement. *See* R961–964. Thus, Defendants are wrong to argue that only ECA §260 is in play here or in *HSBC*. In any event, under the canons of statutory construction, all provisions in a statute must be "construed as a whole and … its various sections must be considered together and with reference to each other." *People v. Mobil Oil Corp*., 48 N.Y.2d 192, 199 (1979). The title of Chapter 1 says it all: "DERIVATIVE CLAIMS *IN ENGLAND AND WALES OR NORTHERN IRELAND*." ECA 2006, PART 11, Chapter 1 (title); R961. *HSBC*'s holding applies to all five sections of Chapter 1. Defendants' unduly limited interpretation of *HSBC* must be rejected.

All told, the Panel disregarded *Davis* and *HSBC*. By applying English law, instead of New York's gatekeeping rules governing shareholder derivative actions, the Panel's decision is inconsistent with *Davis* and creates a conflict with *HSBC*. This is legal error; the Panel's decision must be reversed.

CONCLUSION

For the reasons set forth above, the Court should reverse and remand.

Dated: New York, New York
May 21, 2024

Respectfully submitted,

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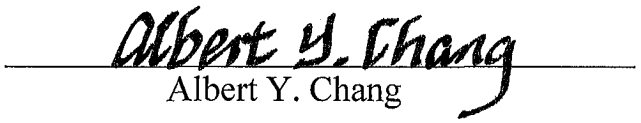

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CERTIFICATE OF COMPLIANCE

In compliance with 22 NYCRR §500.13(c), the foregoing brief was prepared using the Microsoft Word word-processing system. A proportionally spaced typeface was used, as follows:

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