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

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Appellate Division, First Department Case Nos. 2022-02491 and 2022-04806

Court of Appeals

STATE OF NEW YORK

REBECCA R. HAUSSMANN, TRUSTEE OF KONSTANTIN S. HAUSSMANN TRUST, and JACK E. CATTAN, Derivatively on behalf of BAYER AG,

Plaintiffs-Appellants,

against

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZÜHLKE, SIMONE BAGEL-TRAH, NORBERT W. BISCHOFBERGER, ANDRE VAN BROICH, ERTHARIN COUSIN, THOMAS ELSNER, JOHANNA HANNEKE FABER, COLLEEN A. GOGGINS, HEIKE HAUSFELD, REINER HOFFMANN, FRANK LÖLLGEN, WOLFGANG PLISCHKE, PETRA REINBOLD-KNAPE, DETLEF RENNINGS,

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFFS-APPELLANTS

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
(pro hac vice)
Michelle C. Lerach
(pro hac vice)
Albert Y. Chang
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
(858) 914-2001

POWERS & SANTOLA, LLP
Michael J. Hutter
100 Great Oaks Boulevard
Suite 123
Albany, New York 12203
(518) 465-5995

Attorneys for Plaintiffs-Appellants Rebecca R. Haussmann, Trustee of Konstantin S. Haussmann Trust and Jack E. Cattan, Derivatively on behalf of Bayer AG

Date Completed: June 13, 2024

SABINE SCHAAB, MICHAEL SCHMIDT-KIEßLING, OTMAR D. WIESTLER, NORBERT WINKELJOHANN, CLEMENS A.H. BÖRSIG, THOMAS FISCHER, PETRA KRONEN, SUE HODEL RATAJ, THOMAS EBELING, KLAUS STURANY, HEINZ GEORG WEBERS, BAYER CORPORATION, BOFA SECURITIES, INC., BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, HORST BAIER, ROBERT GUNDLACH, and CREDIT SUISSE AG,

Defendants-Respondents,

and

CHRISTIAN STRENGER, SULLIVAN & CROMWELL LLP, and LINKLATERS LLP,

Defendants.

BAYER AG,

Nominal Defendant-Respondent.

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Rebecca R. Haussmann and Jack E. Cattan ("Plaintiffs") seek reversal of the decision of the First Department (the "Panel") affirming the trial court's dismissal of their shareholder derivative action based on lack of personal jurisdiction, *forum non conveniens*, and failure to comply with the procedural requirements under the German Stock Corporation Act ("GSCA"). *See Haussmann v. Baumann*, 217 A.D.3d 569 (1st Dep't 2023). This Court should reverse the Panel's erroneous decision for four reasons.

First, both this Court and the Legislature have mandated that New York courts exercise jurisdiction over foreign corporations (such as Bayer AG) doing business in New York, as well as their directors and officers. The Court should ensure compliance with its consent-to-jurisdiction jurisprudence. *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 64 (1915) (Cardozo, J.) (foreign corporations consent to the application of New York law by doing business here); *Bagdon v. Phila. & Reading Coal & Iron Co*., 217 N.Y. 432, 437 (1916) (Cardozo, J.) (foreign corporations consent to the jurisdiction of New York courts by registering to do business here).[1] And in light of the Legislature's comprehensive statutory scheme,[2] the Court must effectuate the clear legislative intent—reflected in BCL §1319's

[1] Cited with approval in *Mallory v. Norfolk Southern Railway*, 143 S. Ct. 2028, 2037 (2023), and cited in *Aybar v. Aybar*, 37 N.Y.3d 274, 292 (2021) (Wilson, J., dissenting).

[2] N.Y. CPLR §302; N.Y. CPLR 327; N.Y. BUS. CORP. LAW ("BCL") §§626, 1317, 1319.

plain text and legislative history[3]—to apply New York's gatekeeping rules governing shareholder derivative actions to foreign corporations doing business here and to preserve New York courts' centuries-old jurisdiction over those actions.[4] The common-law internal-affairs doctrine—erroneously invoked by the Panel—must give way to §1319's statutory command.

Second, consistent with BCL §1319's broad "doing business" standard, CPLR §302 requires that New York courts exercise jurisdiction over "any non-domiciliary … who in person or through an agent[,] … transacts any business within the state." N.Y. CPLR §302(a)(1). As this Court reaffirmed just last year, §302 "is a single-act statute requiring but one transaction … to confer jurisdiction in New York." *State of N.Y. v. Vayu, Inc.*, 39 N.Y.3d 330, 335 (2023).

Despite §302's minimal "doing business" requirement, the trial court erroneously declined to exercise personal jurisdiction over the Bayer Directors,[5]

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[3] Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the New York State and New York City Bar Association*, at 32–35 (Jan. 25, 1961) ("*Joint Report*"). A copy of the Joint Report is submitted as Addendum A to this Brief for Plaintiffs-Appellants.

[4] *See, e.g.*, *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, 389 (N.Y. Ch. 1817) (recognizing the jurisdiction over corporations and their fiduciaries).

[5] The "Directors" are 31 Bayer AG directors and officers (R713–714), including Defendants Werner Wenning (Chairman of Bayer's Supervisory Board, R182 (¶27)), Werner Baumann (Bayer's Chief Executive Officer ("CEO"), R216 (¶75)), Liam Condon (Bayer Crop Science, Inc.'s President, R217 (¶78)). Citations to "R___" are to pages of the Record. The allegations in Plaintiffs' Second Amended Verified Shareholder Derivative Complaint (the "Complaint") (R158–359) are cited as "¶¶___" in parentheticals following the Record citations. All emphases in quoted texts are added, and all internal punctuations are omitted.

even though Plaintiffs allege in their verified Complaint that these Defendants had substantial, purposeful contacts with New York in connection with Bayer's 2018 acquisition of Monsanto Inc. for $66 billion (the "Acquisition")—the "*worst acquisition in history*"—that gave rise to this shareholder derivative action. *See* R185–189 (¶32); R240–241 (¶141). In fact, the Acquisition was negotiated, signed, financed, and closed in New York after two years of work by Bayer's executive team and its New York law firms and banks, all acting as the agents of Bayer and the Directors. *See*, *e.g.*, R319–322 (¶¶271–274). To pay for the Acquisition, Bayer used its New York bankers to arrange a $50 billion "bridge loan" (R320 (¶273); R277–279 (¶¶202–204)) and to make a $15 billion bond offering (R214–215 (¶73); R277 (¶202); R320–322 (¶¶273–274)). To pay off this loan, Baumann and Condon participated in investor conferences in New York. R288–294 (¶¶223–225). And to complete the Acquisition, Bayer's New York-based "Paying Agent" transferred $57 billion to a bank account in New York. R2515; R2528–2532.

In light of these facts, it is undeniable that New York is the "epicenter" of the Acquisition—orchestrated by the Bayer Directors to entrench their lucrative positions. R168 (¶9); R183 (¶28); *see also* R241 (¶141). The trial court's refusal to exercise personal jurisdiction over the Directors—affirmed by the Panel—is error and must be reversed.

Third, reversal is necessary to ensure compliance with this Court's decision

in *Davis* and to avoid a conflict with the Second Department's decision in *HSBC*. *See Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247 (2017); *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*"). *Davis* and *HSBC* hold that procedural rules of foreign countries, such as GSCA §148 here,[6] are inapplicable to shareholder derivative actions brought in New York courts. In defiance of the *Davis-HSBC* rule, however, the Panel erred in affirming the trial court's decision to apply GSCA §148, instead of New York's BCL §626, to this action. This error, too, requires reversal.

Fourth, the Court should enforce CPLR 327(b)'s limitation on the lower courts' power to dismiss actions under the *forum-non-conveniens* doctrine. CPLR 327(b) precludes a *forum-non-conveniens* dismissal here because Bayer's Depositary Agreement and Offering Memorandum—both pleaded in the Complaint—satisfy General Obligations Law ("GOL") §5-1402's requirements. R312 (¶258); R318 (¶269); R214–215 (¶73); R605; R2440–2441. The trial court's *forum-non-conveniens* dismissal—affirmed by the Panel—exceeds its statutory authority and must be reversed.

In any event, the trial court erred in its *forum-non-conveniens* analysis because, as New York and California residents, Plaintiffs were "*presumptively entitled*" to sue in a New York court by invoking its jurisdiction over their derivative claims. *Broida v. Bancroft*, 103 A.D.2d 88, 89 (2d Dep't 1984) (shareholder

[6] The English text of GSCA §148 is reprinted in R445–446.

plaintiffs are "presumptively entitled to use their judicial system" as "New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation … having a foreign charter has substantial contacts with this state"). Here, the trial court failed to give *any* deference to Plaintiffs' choice of forum and overlooked Defendants' failure to make an evidentiary showing of hardship or oppression in defending this action in New York. These legal errors require reversal.

The questions presented in this appeal boil down to procedure—jurisdiction and venue.[7] *Where can a New York resident sue for wrongs done by or to foreign corporations doing business in New York*?

In answering this question, the lower courts have proven hostile to exercising the jurisdiction conferred by the Legislature and to following decisions like *Davis* and *German-American Coffee*. The Panel decision reflects this unjustified hostility towards shareholder derivative actions. The Panel shut the courthouse door to two Bayer shareholders residing in New York and California in an action involving a New York-centric Acquisition by a company that sells its stock in New York and conducts billions of dollars of business here. This appeal presents an opportunity for this Court to bring the lower courts back in line with its precedent and the statutory scheme that preserve New York courts' jurisdiction and New York's status as the center of world commerce and finance.

[7] Plaintiffs agree that Germany's substantive law applies. R163 (¶2).

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 BCL §1319—as a statutory choice-of-law rule that displaces the common-law internal-affairs doctrine?

Question 2: In this action arising from Bayer's $66 billion Acquisition, does CPLR §302's long-arm jurisdiction—interpreted consistent with BCL §1319 and §626—reach Bayer (a German corporation doing business in New York) and its directors and officers because, as alleged in the Complaint, (a) the directors and officers—by themselves and through their New York-based bankers and lawyers—negotiated, signed, closed, financed, and implemented the Acquisition here; (b) Bayer consented to New York jurisdiction in connection with selling its shares and raising billions of dollars here to help pay for the Acquisition; (c) Bayer's main U.S. subsidiary was registered to do business and had appointed an agent for service of process in New York; and (d) the Acquisition was implemented through Bayer's New York-incorporated subsidiary, which holds the legacy Monsanto business?

Question 3: 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 because §148 of the GSCA is procedural and applies only to derivative actions brought in German courts?

Question 4: First, does CPLR 327(b) limit the lower courts' power to dismiss actions based on *forum non conveniens*, where the underlying claims relate to, or arise from, an agreement or undertaking (involving $1 million or more) in which the parties consent to the jurisdiction of New York courts and the application of New York law? Second, in a *forum-non-conveniens* analysis, are New York-resident plaintiffs "presumptively entitled" to sue in New York courts, and must their choice of a New York forum be accorded "substantial deference"?

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal because the First Department's decision (served with a notice of entry on June 22, 2023) constitutes a final order within the meaning of CPLR §5602(a)(1)(i). Upon Plaintiffs' timely motion of July 21, 2023 (*see* N.Y. CPLR §5513(b)), this Court granted leave to appeal on February 22, 2024. R2566.

Plaintiffs have raised and preserved all four questions presented for review in the Commercial Division in R2335 through R2340 (Question 1), in R1889 through R1898 (Question 2), in R2341 through R2343 (Question 3), and in R1898 through R1906 and in R2393 through R2413 (Question 4); and in the First Department in R2614 through R2627 (Question 1), in R2650 through R2660 (Question 2), in R2628 through R2630 (Question 3), and in R2631 through R2649 (Question 4).

STATEMENT OF THE CASE

I. This Shareholder Derivative Action

Plaintiffs brought this action on Bayer's behalf against the Directors and Bank Defendants[8] for breach of fiduciary duty under German law in connection with Bayer's Acquisition of Monsanto. R162–163 (¶2). As alleged in the verified Complaint, the Acquisition was born of a corrupt motive: an attempt to entrench the Directors and protect them from a possible takeover of Bayer. R168 (¶9). Structured as an all-cash deal (a "poison pill" to make Bayer "unacquirable" (R182 (¶27)), the Acquisition was plagued by conflicted and inadequate due diligence by the Directors and their New York-based bankers and lawyers. R200–211 (¶¶50–64). As a result of the Acquisition—known in the industry as the "worst acquisition in history," Bayer was embroiled in a morass of mass-tort litigation against Monsanto and lost tens of billions of dollars in shareholder value. R168–177 (¶¶9–20).

Bayer Directors and their agents conducted negotiations, signed the merger agreement, and financed the Acquisition in New York, including making a $15 billion bond offering in June 2018 to New York investors. R320–322 (¶¶273–274). The Acquisition was closed in New York, with $57 billion in cash being transferred to a bank account here. R2528–2532; R321–322 (¶274). New York is undeniably the epicenter of the Acquisition. R241 (¶141).

[8] The Bank Defendants include Credit Suisse Group AG, Credit Suisse AG, BofA Securities, Inc., and Bank of America Corporation. R225–237 (¶¶102–132).

II. The Proceedings in the Lower Courts

A. The Commercial Division's Dismissal of the Case

Plaintiffs commenced this action in the Supreme Court Commercial Division in March 2020; on December 9, 2020, Plaintiffs filed a verified Complaint, to which Defendants filed three separate motions to dismiss in February 2021.

The trial court held the initial hearing on Defendants' motions to dismiss on December 13, 2021. R90.1–90.84. At the conclusion of that hearing, after hearing argument on the personal jurisdiction, *forum non conveniens*, and derivative standing issues, the trial court scheduled a second continued hearing for January 10, 2022. R90.82–90.84. That second hearing never occurred.

On December 27, 2021—before the second hearing could take place—the trial court granted Defendants' motions to dismiss. R13–27; R38–52; R63–77. This deprived Plaintiffs the opportunity to make filings and arguments in connection with and at the "continued" hearing, because it was never held.

In February 2022, Plaintiffs moved for leave to renew and reargue the motions to dismiss, raising the arguments under CPLR 327(b). On October 20, 2022, the trial court heard argument. R90.1–90.84. The next day, it issued an order, signed on October 19, 2022—*before the hearing*—denying Plaintiffs' motion. R88–90.

Plaintiffs appealed both the December 27, 2021 order and the October 19, 2022 order.

B. The First Department's Affirmance

On June 22, 2023, the Panel affirmed both orders. In affirming dismissal, the *Bayer* Panel adopted the erroneous panel decision in *Barclays*, which is presently pending review before this Court. *Haussmann*, 217 A.D.3d 570 (citing *Ezrasons, Inc. v. Rudd*, 217 A.D.3d 406, 406 (1st Dep't 2023)). The Panel's decision in this *Bayer* case presents the same "standing" issue addressed in *Barclays*: whether foreign law (here under GSCA §148) or New York law (BCL §1319 and §626) applies in a shareholder derivative action brought in a New York court. *See id.* at 570–71. In refusing to apply BCL §1319, the Panel cited and relied upon *Barclays,* and endorsed an elevated "in state presence" jurisdictional test for §1319, instead of the straightforward—and here easily satisfied—"doing business" test.

But the *Bayer* Panel went even further than *Barclays*. It defied additional precedents and created more conflicts with other departments in affirming the trial court's rulings on the personal jurisdiction and *forum-non-conveniens* issues. Apparently determined to deny Plaintiffs their "presumed" access to New York courts and avoid hearing the case, the trial court dismissed the Bayer Directors for lack of personal jurisdiction. Then for good measure, it dismissed on *forum-non-conveniens* grounds as well. The Panel affirmed all this, finding Plaintiffs' arguments "unavailing." *See Haussmann*, 217 A.D.3d at 571. But the Panel stated no basis for its affirmances on these two issues, presumably finding the reasoning of

the trial court sufficient. *Id*.

Despite the facts pleaded in the verified Complaint,[9] the Panel affirmed the trial court's finding that the Acquisition's "connection to New York" was "too tenuous," and that the Directors did not "do or transact business" in New York, and even though Plaintiffs had requested jurisdictional discovery, the trial court dismissed, without leave to conduct any, and without any explanation as to why. R90.66; R1898 n.9; R26.

Despite the express prohibition of CPLR 327(b), the Panel also affirmed the trial court's grant of Defendants' CPLR 327(a) *forum-non-conveniens* motion. *See Haussmann*, 217 A.D.3d at 571. The Panel erroneously endorsed the trial court's finding that Plaintiffs' breach-of-fiduciary-duty claims did not "arise from or relate to" the two agreements at issue—the Depositary Agreement for Bayer's ADRs and the Offering Memorandum to finance the Acquisition—both of which were pleaded in the Complaint. *See* R89; *see also* R100 ("THE COURT: The *gravamen* of your complaint isn't about those agreements"). The Panel thus made a legal error applying an "enhanced" "gravamen of the complaint" standard to trigger the jurisdictional prohibition of CPLR §327(b) rather than the actual "relates to" text of the statute. Those Agreements, at a minimum, relate *to* the two agreements because "New York courts have given a very broad interpretation to provisions that refer to

[9] A "verified" pleading has the significance of an affidavit. N.Y. CPLR §105(u).

both 'arises out of' and 'relates to'" (*see* R2407–24).

The Panel also affirmed the trial court's ruling that Plaintiffs waived any arguments under CPLR 327(b) because they failed to raise them in opposition to Defendants' original motions to dismiss, *even though the motion-to-dismiss hearing process was still ongoing, and briefing was not closed when the trial court canceled the continued hearing scheduled for January 2022 and threw Plaintiffs out of court*. R89. Plaintiffs asserted—and the Panel rejected—that an issue pertaining to the court's statutory power (*i.e.*, whether the court has the authority to dismiss an action under CPLR 327(a)) is akin to subject-matter jurisdiction and thus cannot be waived. *See* R2405–2406.

Then in going on and improperly deciding the *forum-non-conveniens* motion, the trial court compounded its prior mistake—when it granted *no deference at all* to Plaintiffs' choice of a New York forum despite their "presumed" access to it, and when "substantial" deference was due. R23.

III. This Court's Grant of Leave to Appeal

On July 21, 2023, Plaintiffs timely moved this Court for leave to appeal the First Department's decision and order.

On February 22, 2024, this Court granted Plaintiffs' motion. R2599.

ARGUMENT

I. The First Department Erred by Refusing to Follow BCL §1319's Plain Text and by Failing to Effectuate the Legislature's Intent 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 and set aside the Panel's impermissible elevation of the BCL's existing "doing business" standard.

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

This appeal presents issues 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*.

BCL §626(a) establishes subject-matter jurisdiction in New York courts over shareholder derivative actions and confers standing to bring derivative claims on behalf of "a domestic or foreign corporation." 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). Together, §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 without any pre-suit petition for permission or pre-filing evidentiary showing. *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 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* Robert A. Kessler, *The New York Business Corporation Law*, ST. JOHN'S L. REV., Vol. 36, No. 1, Art. 1, at 1–2 (Dec. 1961).[10] 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 York City Bar Associations," which voiced strong opposition on behalf of business interests to the regulation of

[10] 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.

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 Robert S. Stevens of Cornell Law

School observed,[11] "[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." Robert S. Stevens, *New York Business Corporation Law of 1961*, CORNELL L. REV., Vol. 47, Issue 2, 141, at 172 (Winter 1962).

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. This new law codified 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 endorsement of *Barclays*'s erroneous reasoning and its refusal to construe §1319 as a choice-of-law rule betray statutory text and legislative history. *Haussmann*, 217 A.D.3d at 570 (citing *Ezrasons*, 217 A.D.3d at 406). Moreover, construing §1319 as "merely confer[ring] jurisdiction upon New York courts over derivative suits" renders §1319 redundant because §626 already confers such

[11] Dean Stevens 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).

jurisdiction. *Ezrasons*, 217 A.D.3d at 406. Thus, the Panel's construction of §1319 violates the canon of statutory interpretation "that all parts of a statute must be given effect and must be harmonized with each other, as well as with the general intent of the whole statute. *See Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018); *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)). Consistent with *Norlin*, the First Department in *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, refused to apply the internal-affairs doctrine and, instead, followed §1319 to apply §626 to a derivative action involving a Bermuda corporation doing business in New York. *See* 118 A.D.3d 422, 422–23 (1st Dep't 2014).

Reversal by this Court is necessary to correct the Panel's erroneous construction of §1319—in contravention of its text and legislative history, as well as the First Department's own precedent.

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: §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." N.Y. BUS. CORP. LAW §1319.

Invoking the common law internal-affairs doctrine, however, the Panel refused to apply §1319's language designating several specified provisions of the BCL (*e.g.*, §§626 and 627) as applicable to foreign corporations. 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.*

C. The Panel Erred by Impermissibly Expanding the Reach of the Internal-Affairs Doctrine to Procedural Issues

The internal-affairs doctrine originated from the pre-industrial era when sovereignty considerations required deference to the incorporating state. Early case law articulating the doctrine held that courts of other states lacked jurisdiction to address questions of corporate internal affairs. *See Smith v. Mut. Life Ins. Co.*, 96 Mass. 336, 339 (Mass. 1867) (characterizing the jurisdictional bar as "in the nature of a question of sovereignty"). But "[t]he modern doctrine does not dictate *where* a dispute is heard." Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, STAN. J. OF COMPLEX LITIG., at 51 (2012). Indeed, long gone is the era when the internal-affairs doctrine called for jurisdictional exclusivity for derivative actions only in the place of incorporation. *See Koster v. (Am.) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 527 (1947).

Today derivative actions are embedded as part of American law—with good reason. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547–48 (1949) (recognizing derivative actions as the only "*practical check on* [*fiduciary*] *abuses*").[12] In today's 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 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").

While carrying out New York's statutory scheme to regulate foreign corporations, the courts must guard against reverting the internal-affairs doctrine to its pre-industrial origin—allowing it to serve as a jurisdictional bar. *See* Winship, *Bargaining for Exclusive State Court Jurisdiction*, at 51. The Panel's stubborn application of the internal-affairs doctrine on a procedural issue—involving, at its core, venue—cannot be sustained in this modern world. *See Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975) (rejecting any "automatic application" of the doctrine in shareholder derivative litigation on a substantive (as opposed to procedural) issue).

[12] In *Cohen*, 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). *See* 337 U.S. at 544.

II. The First Department Erred in Affirming the Trial Court's Dismissal for Lack of Personal Jurisdiction Because, Consistent with BCL §§1317 and 1319, CPLR §302 Authorizes New York Courts to Exercise Jurisdiction over Foreign Corporations and Their Directors and Officers Because They Do Business in New York

The Court reviews dismissal of an action for lack of personal jurisdiction *de novo*. *See Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 322 (2016).

A. Consistent with BCL §§1317–1319's "Doing Business" Standard, CPLR §302 Subjects Foreign Corporations and Their Directors and Officers to Personal Jurisdiction Based on a "Single Act"

CPLR §302 is part of the Legislature's statutory scheme, including BCL §1317 and §1319, to regulate foreign corporations doing business in New York and to exercise jurisdiction over them, as well as their directors and officers. CPLR §302 authorizes personal jurisdiction "over any non-domiciliary … who in person or through an agent … transacts any business within [New York]." N.Y. CPLR §302(a)(1). Personal jurisdiction is proper so long as its "exercise … comports with due process." *Williams v. Beemiller, Inc*., 33 N.Y.3d 523, 528 (2019).

CPLR §302 employs the same "doing business" standard under BCL §1317 and §1319. BCL §1317 confers jurisdiction to New York courts "over the directors and officers of a foreign corporation doing business in this state" by subjecting them, "to the same extent as directors and officers of a domestic corporation," to suit under two substantive provisions of the BCL: "(1) Section 719 (Liability of directors in certain cases) …, and (2) Section 720 (Action against directors and officers for

misconduct[])." N.Y. BUS. CORP. LAW §1317(a). Likewise, §1319, in conjunction with §626, confers jurisdiction over shareholder derivative actions involving "foreign corporation[s] doing business in this state." N.Y. BUS. CORP. LAW §1319 (a)(2) (requiring the application of §626).

Under BCL §1317 and §1319, a foreign corporation and its directors and officers are subject to the jurisdiction of New York courts, so long as they "do[] business" in New York. This jurisdictional "outreach" to foreign corporations and their directors and officers is consistent with New York courts' centuries-long exercise of jurisdiction over shareholder derivative actions "to regulate and restrain foreign corporations in doing business [within their borders] under charters from other [state] governments." *Merrick v. Van Santvoord*, 34 N.Y. 208, 212 (1866). It is also consistent with the "consent regime" articulated by Judge Cardozo in *German-American Coffee* and *Bagdon*.

Consistent with the broad "doing business" standards of BCL §§1317–1319, New York's long-arm jurisdiction under CPLR §302 is a "single act statute"—"one transaction is sufficient to invoke jurisdiction." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). Even if a foreign corporation "never enters [New York]," §302 provides a two-prong test for jurisdiction where (1) the corporation engages in sufficient activities in New York to have "transacted business in [New York]," and (2) "the claims … arise from the transactions." *Rushaid*, 28 N.Y.3d at 323.

B. Because Plaintiffs' Verified Allegations Satisfy Both Prongs of CPLR §302(a), Bayers' Directors and Officers Are Subject to Personal Jurisdiction

To satisfy CPLR §302(a)(1)'s first prong, the non-domicile's New York activities must be "purposeful." *Rushaid*, 28 N.Y.3d at 323. "Purposeful activities are those with which [an entity], through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). To satisfy the second prong, "there must be an articulable nexus or substantial relationship between the business transaction and the claim asserted." *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 339 (2012). "This inquiry is relatively permissive and does not require causation." *Rushaid*, 28 N.Y.3d at 329. It requires "merely a relatedness between the transaction and the legal claim such that the latter is *not completely unmoored* from the former"—that is, "[t]he claims *need only be in some way arguably connected to the transaction*." *Id*.

Plaintiffs' verified allegations satisfy both prongs. In affirming the dismissal, the Panel erred by endorsing the trial court's conclusion that the Monsanto Acquisition had only a "*tenuous connection*" with New York, and that a New York Court "does not have personal jurisdiction against any of the [Bayer Directors]." R14–15. As demonstrated in the verified Complaint, however, the Acquisition had everything to do with New York.

1. The Verified Complaint Alleges That the Bayer Directors Purposefully Transacted Business in New York, Satisfying CPLR §302(a)'s First Prong

New York was the "epicenter" of the Acquisition. R241 (¶141). The Acquisition was negotiated, signed, closed and financed in New York after two years of constant work by Bayer's executive team and its New York law firms and banks, all acting as the agents of Bayer and the Directors, who then oversaw, approved and implemented the Acquisition in New York. *See* R319–322 (¶¶271–274).

Beginning in 2016, Bayer's executive team, including Baumann (Bayer's CEO (R216 (¶75))), travelled to New York to negotiate with Monsanto. R611. Both Bayer and Monsanto were represented by New York law firms: S&C for Bayer and Wachtell for Monsanto. R319 (¶ 271). The New York law firms and banks—as Bayer's agents—worked on all aspects of the transaction, including conducting due diligence on Monsanto's Roundup products and related U.S. lawsuits out of their New York offices. R320–322 (¶¶273–274).

Baumann and his assistants conducted the final negotiations with Monsanto's executives in New York in September 2016:

> Final talks took place in New York, culminating in a tete-a-tete dinner Tuesday evening between Baumann and Grant at Aretsky's Patroon … in midtown Manhattan — while advisers dined … at the office as they hammered out the final aspects of the deal.

R611. The September 2016 Merger Agreement, which required closing to take place in S&C's New York office, was signed by Baumann and Liam Condon (BCS's

President (R217 (¶78))) in New York. R2514, 2520, 2523.

Bayer's executive team continued to engage in substantial activities in New York to complete and implement the Acquisition. To secure regulatory approval, the team (including Baumann) met then-President-Elect Trump in January 2017 in New York. R322–323 (¶¶275–278). They also arranged financing for the Acquisition through Bayer's New York bankers. Initially, the Acquisition was funded by a $50 billion "bridge loan" by the New York banks. R320 (¶ 273); R277–279 (¶¶202–204). To pay off this bridge loan and provide financing for the Acquisition, Baumann and Condon participated in "sales job" investor conferences in New York to help sell billions in Bayer securities (R288–294 (¶¶223–225)).

Bayer's June 18, 2018 bond offering raised $15 billion to pay down the bridge loan. R321 (¶274). With Bayer AG as guarantor (R320 (¶ 273)), the bond offering was led by the New York banks (*see* R214–215 (¶73); R277 (¶202)). The offering documents listed the banks' Manhattan offices. R688–689; R691–693. The bond Offering Memorandum also contained a *consent to New York jurisdiction and the application of New York law*, which provided that "[t]he Notes and Fiscal Agency Agreement will be governed by … the laws of the State of New York," and that "[t]he Guarantor [(Bayer AG)] has irrevocably submitted to the non-exclusive jurisdiction of … any federal or state court in … Manhattan" in any action "arising out of or relating to the Notes or the Fiscal Agency Agreement." R2440–2441.

Deutsche Bank's New York operations (at 60 Wall Street in Manhattan) acted as paying agent for the $15 billion in Bayer bonds. R320–322 (¶¶ 273–274). When the Acquisition closed in New York in June 2018 (R2514), New York-based JP Morgan, acting as Bayer's "Paying Agent," transferred $57 billion to a bank account in New York to pay Monsanto's shareholders and complete the Acquisition. R2515; R2528–2532; *see also* R321–322 (¶274).

Immediately after the Acquisition, Bayer suffered multi-billion dollar verdicts in two pending Roundup-cancer suits and was soon buried in thousands more of them (*see* R170 (¶14)), a morass being overseen by the New York office of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). R192 (¶37); R238 (¶136). Through mediations in New York, aided by Skadden-New York, the Bayer Defendants (R308 (¶249)) negotiated an $11 billion "global settlement of all present and future Roundup claims" (R192–200 (¶¶37–49)).[13]

These New York contacts—pleaded in the verified Complaint and taken as true—establish that Bayer and its directors and officers were "transacting business" in New York within the meaning of CPLR §302(a). As demonstrated in Plaintiffs' verified allegations, Bayer and its directors and officers purposefully availed themselves of "'the privilege of conducting activities within [New York], thus

[13] But a federal judge rejected Bayer's "global settlement" gambit as a "dubious" attempt to manipulate the judicial process. R171 (¶16); R195–198 (¶¶43–46).

invoking the benefits and protections of its laws.'" *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297–98 (2017). To that end, the Bayer Directors either were physically present, or directed their agents to conduct business, in New York in connection with the Acquisition. *See*, *e.g.*, R214–215 (¶73); R277 (¶202); R319–323 (¶¶271–278); R611; R2515; R2528–2532. Their New York contacts were "purposeful," "volitional" actions essential to carrying out the wrongdoing complained of. *D&R Global*, 29 N.Y.3d at 297–98; *Rushaid*, 28 N.Y.3d at 327–28 ("[i]t is precisely the fact that defendants chose New York … that makes the New York connection 'volitional' and not 'coincidental'"). Where, as here, "the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)." *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 377 (2014).

Here, Bayer engaged in purposeful activities in New York in relation to the Acquisition for the benefit of and with the "knowledge and consent" of its Directors. The Bayer Directors exercised control over Bayer with respect to the Acquisition. *See Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017) (citing *Kreutter*, 71 N.Y.2d at 467). In fact, as alleged in the verified Complaint, the Directors made key decisions and were involved in all aspects of the Acquisition. R244–250 (¶¶146–157); R329 (¶292). During 2016, the Bayer Directors "were

regularly informed of" and dealt in detail with the planned Acquisition, including financing the strategic aspects of the Acquisition, "the question of Monsanto's valuation," and "the final offer conditions for the acquisition." R245–246 (¶148). During several meetings in 2017–18, the Bayer Directors "focused particularly" on "the Monsanto [Acquisition], including the progress of the merger control proceedings, which were reported on extensively at several meetings[,]" as well as the "performance of the Monsanto business and the related risks of the business"; the Bayer Directors also "look[ed] in detail at the required divestment of parts of Bayer's [BCS] business in connection with the Acquisition and the status of the [Roundup] litigations." R246–248 (¶¶150–152). These allegations are more than sufficient to show "control" under *Coast to Coast Energy*.

That some Bayer Directors were not physically present in New York is of no moment. "It is well settled that 'one need not be physically present'" in New York to be subject to jurisdiction under §302. *Fischbarg*, 9 N.Y.3d at 382. They authorized Bayer's New York activities and Bayer's use of New York agents. *See Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 457 (1965) (even where a contract is not executed in New York (here, the Acquisition was), "the statutory test may be satisfied by a showing of other purposeful acts performed").

2. Plaintiffs' Claims Arise out of the Bayer Directors' Transaction of Business in New York, Satisfying CPLR §302(a)'s Second Prong

Plaintiffs' allegations regarding the Acquisition certainly satisfy CPLR §302(a)'s minimal "articulable nexus" requirement. *Licci*, 20 N.Y.3d at 339. Indeed, Plaintiffs' breach-of-fiduciary-duty claims are inextricably linked with the New York-centered Acquisition. *See Rushaid*, 28 N.Y.3d at 329 ("[t]he claim need only be in some way arguably connected to the transaction").

The Acquisition and the Directors' scheme to stay entrenched were dependent on Bayer's New York transactions. *Rushaid*, 28 N.Y.3d at 329, 330 (sufficient nexus where the scheme "could not proceed" without and "necessarily include[d] the use of" New York contacts). Without the New York negotiations, the New York financing, and New York's legal and banking services, the Acquisition would never have materialized. But for the $15 billion bond offering, the Acquisition would not have been paid for. In all, these transactions were critical to the Acquisition.[14]

[14] This Court should reverse the First Department's affirmance because the trial court disregarded Plaintiffs' request for leave to conduct jurisdictional discovery. *See* R90.66; R1898 n.9. The jurisdictional allegations were more than sufficient to withstand Defendants' CPLR 3211(a)(8) motion, but without a doubt they were non-frivolous. Jurisdictional discovery should be given where a plaintiff makes "a sufficient start, and show[s] that their position [is] not [] frivolous." *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467 (1974). Where "the jurisdictional issue is likely to be complex[,] [d]iscovery is … desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits." *Id*. Because Plaintiffs "have demonstrated that facts 'may exist' in opposition to the motion to dismiss and are therefore entitled to" jurisdictional discovery, the trial court erred in dismissing this action without granting leave to conduct discovery. *Universal Inv. Advisory SA v. Bakrie Telecom Pte., Ltd.*, 154 A.D.3d 171, 178 (1st Dep't 2017).

C. Exercising Jurisdiction over Bayer and Its Directors Does Not Offend Due Process

Due process requires that defendants have sufficient minimum contacts with New York such that they should reasonably expect to be haled into court here, and that requiring non-domiciliaries to defend the action in New York comports with "traditional notions of fair play and substantial justice." *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216 (2000). The inquiry is whether defendant has "purposefully avail[ed] itself of the privilege of conducting activities within [New York]." *Id.*

For the same reasons that personal jurisdiction is proper under New York law, it also comports with due process. "CPLR 302 does not go as far as is constitutionally permissible." *Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 71 (1984).

As demonstrated above, the Acquisition necessarily "arose out of" or "relates to" Bayer and its Directors' New York contacts. Bayer had ample contacts with New York to "reasonably anticipate being haled into court" in New York, where it has sued and been sued many times (R591). *D&R Global*, 29 N.Y.3d at 300. The due-process analysis is no different when jurisdiction is based on an individual's actions in a corporate capacity. *Kreutter*, 71 N.Y.2d at 470–71. Thus, due process is satisfied where §302 extends jurisdiction for corporate acts over a fiduciary who was a "primary actor" in the transaction. *See, e.g.*, *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221, 260–264 (S.D.N.Y. 2019) (extending §302 jurisdiction).

Indeed, Bayer's contacts with New York are overwhelming. Bayer started operating in Albany in the mid-19th century. R213 (¶70). Today, Bayer Corporation—Bayer's main U.S. subsidiary—is registered to do business in New York and has appointed an agent for service of process here. R213 (¶71). Bayer obtains billions from New York, selling a wide range of products. *See* R318 (¶270). Because of Monsanto's terrible reputation, Bayer discarded Monsanto's name after the Acquisition and integrated the Monsanto business into Bayer's New York-incorporated subsidiary—Bayer Crop Science, registered to do business here. R298–299 (¶¶232–234). Moreover, Bayer's American Depositary Receipts ("ADRs"), *i.e*. American common shares, are traded in New York where Bank of New York Mellon ("BNY Mellon") acts as depositary of the shares.[15] In the Depositary Agreement (R602–605), Bayer "*consents* and submits to the non-exclusive jurisdiction of any state or federal court in the County of New York." R605; *see also* R312 (¶ 258).

Bayer's stockholders and businesses are more concentrated here than Germany. *See* R311–312 (¶256); R318 (¶¶269–270). Close to 30% of Bayer shares are held by United States residents, as compared to 20% in Germany. R318 (¶270).

[15] Thousands of Bayer's shareholders reside in New York. For instance, New York State Teachers' Retirement Fund owned 447,216 shares of Bayer stock in 2023, with a market value of $13,731,498 as of March 31, 2024. *See New York State Teachers' Retirement System Global Equity Holdings* (*as of Mar. 31, 2024*), *available at* https://www.nystrs.org/NYSTRS/media/PDF/Investments/equity_global.pdf (last visited June 12, 2024).

Bayer has 15 operations in the United States; 14 in Germany. *Id*. In 2019, Bayer's United States sales exceeded $14.5 billion, compared to German sales of approximately $2.7 billion.[16] *See id*. Bayer's United States assets are 350% greater than those in Germany. *Id*. Bayer AG and Bayer Corporation have commenced at least 60 lawsuits in New York state and federal courts — invoking and consenting to New York courts' jurisdiction. R591–595.

In the face of these extensive case-specific contacts, the Bayer Directors failed to carry their "burden to present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *D&R Global*, 29 N.Y.3d at 300. New York's strong policy interests are implicated here: if not for New York's legal and capital markets, Bayer could not have completed the Acquisition. New York has a strong policy "interest in maintaining and fostering its undisputed status as the preeminent 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). That policy interest, in turn, "embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here." *Id*.

[16] Bayer's public disclosures do not separate its New York revenues from its United States numbers. New York has about 8% of the United States' gross domestic product and 6% of the United States population. *See List of U.S. States and Territories by GDP*, WIKIPEDIA, *available at* https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_GDP (last visited June 12, 2024). Bayer's United States' sales are nearly $14 billion. A fair extrapolation reveals that Bayer generates at least $1 billion in revenues from New York.

D. Exercising Jurisdiction over Bayer and Its Directors Comports with New York's Statutory Outreach Scheme and This Court's Precedents

In affirming the trial court's refusal to exercise personal jurisdiction, the Panel misinterpreted CPLR §302, betrayed the Legislature's statutory scheme, and failed to follow this Court's consent-to-jurisdiction precedents.

As demonstrated above, ample allegations of the New York-centric Acquisition supports the finding of personal jurisdiction over Bayer and its Directors under §302's "single act" standard and is consistent with BCL §§1317–1319's broad "doing business" standard. In affirming the trial court's contrary finding, the Panel cited the First Department's June 1, 2024 decision in *Barclays*. *See Haussmann*, 217 A.D.3d at 570. In a clumsy attempt to distinguish *Culligan*, *Barclays* created—out of thin air—an elevated jurisdictional requirement for applying BCL §1319 and §626 to a shareholder derivative action involving a foreign corporation doing business in New York. *Ezrasons*, 217 A.D.3d at 407 (distinguishing *Culligan*, 118 A.D.3d at 422). In *Culligan*, 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. *See* 118 A.D.3d at 422–23. Without any legal or factual support, the *Barclays* 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 *Barclays* panel's enhanced "in state presence" jurisdictional test—adopted by the *Bayer* Panel—is not only wrong, but also dangerous. Consistent with BCL §1319's broad "doing business" jurisdictional test, CPLR §302 employs a "single act," "minimum contacts" test for personal jurisdiction over out-of-state actors, including foreign corporations. *See* N.Y. CPLR §302; *see also Williams*, 33 N.Y.3d at 528 ("the action is permissible under the long-arm statute [(CPLR §302)]" so long as "the exercise of jurisdiction comports with due process"). As this Court recently made clear in *Aybar*, New York's long-arm jurisdiction over foreign corporations "doing business" here remains intact. New York courts' jurisdiction reaches as far as 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). Reaffirming the need for a broad reading of §302's long-arm jurisdiction over foreign corporations, this Court in *Vayu* upheld personal jurisdiction over a foreign corporation based on *a single* in-state business meeting plus emails and letters. *See* 39 N.Y.3d at 333.

This well settled "single act" standard is consistent with the Court's jurisprudence on foreign corporations. 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. 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).[17]

This issue of sovereign state jurisdiction over foreign corporations and their directors and officers grows ever more important as free market capitalism spreads,

[17] *But see Aybar*, 37 N.Y.3d at 290 ("there was no need to rely on a consent to jurisdiction rationale in *Bagdon*").

using the worldwide corporate form with major impact on New York as the "global center of finance and commercial transactions." *See Deutsche Bank*, 32 N.Y.3d at 162. Beyond the specific context of shareholder litigation, the reasoning of the Panel decision—*Barclays*'s "super doing-business" standard—imperils the established "single act" and broad "doing business" framework under CPLR §302 and BCL §§1317–1319. It threatens to limit 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 v. Norfolk Southern Railway*, 143 S. Ct. 2028, 2037 (2023), supports Plaintiffs' position here. *Mallory* endorsed Judge Cardozo's view, stated in *Bagdon*, on state courts' exercise of jurisdiction over foreign corporations. *Id.* at 2037 (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 stressed the expansiveness of state jurisdiction over foreign corporations that, like Bayer, both register to do business in a foreign state and, in fact, do business there. *See id*.

The same rationale applies to New York's jurisdictional outreach statutes involved here. BCL §626 and §1319 (and §1317) together create jurisdiction over foreign corporations "doing business" in New York and their directors and officers specifically for derivative actions. Consistent with this statutory grant of jurisdiction

over derivative actions, CPLR §302 authorizes New York courts to exercise jurisdiction over the directors and officers of foreign corporations doing business here, based on a "single act." *Wilson v. Dantas*, 128 A.D.3d 176, 181 (1st Dep't 2015). Here, the Acquisition giving rise to this derivative action was negotiated, signed, closed, financed, and implemented in New York, using New York-based bankers and lawyers and through Bayer's U.S.-based and New York-incorporated subsidiaries. As subject-matter jurisdiction exists under BCL §1319 and §626, personal jurisdiction over Bayer and its Directors also exists under CPLR §302. The Panel's affirmance of the trial court's contrary decision is error and must be reversed.

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

Plaintiffs urged the *Bayer* Panel to follow *Davis* and avoid a conflict with *HSBC*. R2628–2630. But the Panel refused to apply BCL §626, as required by *Davis* and endorsed by *HSBC*, and instead relied on German law to find that Plaintiffs lacked standing to bring derivative claims in New York, and that they had to go to Germany to seek permission from a court in Leverkusen to bring a derivative claim. *Haussmann*, 217 A.D.3d at 570–71. 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 foreign procedural rules like the GSCA §148 in shareholder derivative actions brought on behalf of foreign corporations.

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, reversing *Davis v. Scottish Re Group 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 where a foreign statute serves a "gatekeeping" function in derivative actions, the lower courts must first decide whether the foreign statute is substantive or procedural based on its 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 Cayman Islands statute "is a procedural rule that does not apply in New York courts." *Id*. at 254. In so holding, the Court sustained the right of a shareholder of a foreign corporation to bring a derivative action in New York under "our own 'gatekeeping' statutes." *Id*. at 257.

But the Panel *defied* this Court's instruction in *Davis*. Even though Plaintiffs

raised the substance-*versus*-procedure argument based on *Davis* (R2628–2630), the Panel disregarded it. 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 GSCA §148 is substantive or procedural. *See Haussmann*, 217 A.D.3d at 570. To justify its reliance on the reversed *Davis* decision, the Panel mischaracterized this Court's reversal as being "on other grounds." *See id*. But this Court reversed based squarely on the First Department's reliance on the internal-affairs doctrine to apply foreign law. *Compare* 30 N.Y.3d at 253, *with Davis*, 138 A.D.3d at 238.

The Panel erred because, like the Cayman Islands statute in *Davis*, GSCA §148's language is explicit. The title of §148 is "*Court Procedures* for Petitions Seeking Leave to File an Action for Damages." GSCA §148 (R445). Procedure means just that—procedure. Subsection (2) of §148 authorizes only "[t]he regional court of the company's registered seat"—and no other court—to "decide on the petition seeking leave to file [a derivative] action." GSCA §148(2) (R446). And just like the Cayman Islands rules in *Davis*, §148 employs terms specific to the practices of Germany, such as "petition[ing]" to sue and "furnish[ing] evidence" as part of seeking "leave to file" a derivative action. *See* GSCA §148(1)1 (R445). The plain language of §148 dictates the outcome: *it is a procedural rule* applicable only in Germany and *not* in New York. *Davis*'s reasoning applies here and compels the

finding that GSCA §148 is a procedural rule and is thus inapplicable to shareholder derivative actions brought in courts outside Germany.

This interpretation finds support in *HSBC*, where the Second Department interpreted a similar provision in the English Companies Act 2006 ("ECA"). In *HSBC*, a shareholder derivative action brought by an England-resident shareholder on behalf of an English corporation (HSBC Holdings, PLC), the trial court dismissed the action, finding that plaintiff failed to comply with an English statutory requirement to seek permission to sue. *See* 166 A.D.3d at 757. The trial court reasoned 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" under the ECA. *Id*. at 755. Reversing the trial court, the Second Department relied on *Davis* and concluded that the English requirement for seeking permission to sue, provided in 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 reasoned 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.

The same reasoning applies here because, just like the lack of extraterritorial

reach of the English rules in *HSBC* and the Cayman Islands rules in *Davis*, nothing in the GSCA indicates that §148's requirement to seek permission to sue in German courts can be applied to derivative actions brought outside Germany. *See Davis*, 30 N.Y.3d at 254.

In sum, both *Davis* and *HSBC* held that the same type of procedural provisions at issue in this case are inapplicable to derivative actions in a New York court. *HSBC* permitted an England-resident shareholder to sue in New York without demanding compliance with English procedures required by the ECA. *Davis* upheld a Mexico-resident shareholder's access to a New York court without demanding compliance with Cayman Islands' procedural rules. All told, 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. Under the *Bayer* Panel's decision, however, Plaintiffs here—residents of California and New York—are denied access to those same courts.

The Panel's erroneous conclusion and the First Department's repeated defiance of *Davis* require reversal.

IV. The First Department Erred by Permitting the Trial Court to Exceed Its Statutory Authority, Limited by CPLR 327(b), to Grant a *Forum-Non-Conveniens* Dismissal and by Denying a New York Resident's Presumptive Access to New York Courts

In affirming the trial court's *forum-non-conveniens* dismissal, the Panel committed two legal errors. First, the Panel exceeded its statutory power because

CPLR 327(b) prohibits any New York court from dismissing an action that "arises out of or relates to [an] … agreement or undertaking to which [GOL §5-1402] applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part." N.Y. CPLR 327(b). Second, even if the Panel and the trial court had the power to entertain a *forum-non-conveniens* motion (they did not), they disregarded Plaintiffs' "*presumptive entitlement*" to New York courts and failed to give their choice of forum choice any deference—*none at all*—much less the "substantial deference" required by this Court's precedents. These are legal errors subject to *de novo* review. *See Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014) (reviewing *de novo* a *forum-non-conveniens* decision because it "is premised on errors of law").

A. Under CPLR 327(b), the Trial Court Was Precluded from Dismissing This Action Based on *Forum Non Conveniens*

The common-law doctrine of *forum non conveniens* was first codified into the CPLR in the early 1970s when the Legislature enacted CPLR 327(a). *See* N.Y. CPLR 327. Ten years later, subdivision (b) was added "to enhance the status of New York as a leading commercial and financial center." Michael J. Virgadamo, *CPLR 327(b): Forum Non Conveniens Relief May No Longer Be Granted by a Court If, Pursuant to Certain Contracts, the Parties Have Agreed on New York as Their Choice of Forum in Accordance with Section 5-1402 of the GOL*, ST. JOHN'S L. REV., Vol. 59 No. 2, Art. 10, at 415 (Winter 1985). While CPLR 327(a) gives the courts

the power to grant a *forum-non-conveniens* motion, CPLR 327(b) takes away that power under certain circumstances—circumstances that are indisputably present here. *See id*. at 414–15. "Subdivision (b) was enacted to foreclose use of [CPLR] 327 as an 'escape hatch' from enforcement of newly enacted GOL § 5-1402." *Id*. at 415 n.6.

CPLR 327(a) further limits the court's power by requiring that it be exercised "in the interest of substantial justice." Because "*forum non conveniens* is equitable in nature," the exercise of CPLR 327(a)'s power "rests on considerations of public policy." *Strand v. Strand*, 57 A.D.2d 1033, 1034 (3d Dep't 1977).

1. The Panel and the Trial Court Lacked the Power to Grant a CPLR 327(a) Motion Because Plaintiffs' Claims Arise out of and Relate to Bayer's Depositary Agreement and Offering Memorandum, Which Fall Within GOL §5-1402's Purview

The texts of CPLR 327 and GOL §5-1402 manifest New York's public policies, declared by the Legislature, of asserting and exercising jurisdiction over (1) foreign persons and entities that have, by any contract valued at $1 million or more, consented to the jurisdiction of New York courts and to the application of New York law; and (2) cases that either arise from or relate to such contracts. Specifically, CPLR 327(b) provides:

> Notwithstanding the provisions of [CPLR 327(a)], *the court shall not stay or dismiss any action on the ground of inconvenient forum*, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this

state shall govern their rights or duties in whole or in part.

And GOL §5-1402(1) provides in relevant part:

> … [A]ny person may maintain an action … against a foreign corporation, non-resident, or foreign state where the action … arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking … in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

N.Y. GEN. OBLIG. LAW §5-1402(1). Finally, §5-1401(1) provides in relevant part:

> The parties to any contract, agreement or undertaking … may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.

N.Y. GEN. OBLIG. LAW §5-1401(1).

Contrary to the decision of the trial court and the Panel here, the First Department has held that CPLR 327(b) and GOL §5-1402 operate as a "statutory mandate" that "preclude[s] a New York court from declining jurisdiction even where the only nexus is the contractual agreement." *Nat'l Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228, 230 (1st Dep't 1999). Put another way, as a matter of "public policy," New York courts must assert jurisdiction over cases involving foreign persons and entities that have consented to their jurisdiction. *Lumbermens Mut. Cas. Co. v. Commonwealth of Pa.*, 52 A.D.3d 212, 212 (1st Dep't 2008).

This shareholder derivative action falls within CPLR 327(b)'s prohibition

because the Depositary Agreement and the Offering Memorandum satisfy GOL §5-1402's requirements. In those agreements, Bayer AG consented to the jurisdiction of New York courts, their venue and the application of New York law. R605; R312 (¶258); R2440–2441. And the agreements—both pleaded in the Complaint—involved obligations exceeding $1 million. R605; R2440–2441.

Nothing in CPLR 327(b) or GOL §5-1402 requires any Defendant to be party to the underlying agreements, although Bayer AG is a party to both of them (R312 (¶258); R691).[18] So long as Plaintiffs' claims "arise out of" or are "related to" these agreements, CPLR 327(b) bars a dismissal based on "inconvenient forum." *See* N.Y. CPLR 327(b). Functioning as a "statutory mandate," CPLR 327(b)'s bar is as broad as it is absolute. *Nat'l Union*, 257 A.D.2d at 230 (this "statutory mandate" "preclud[s] a New York court from declining jurisdiction"). As recognized in *Lumbermens*, CPLR 327(b) is the Legislature's declaration of New York's "public policy" that New York courts must assert jurisdiction over cases involving foreign persons and entities that have consented to their jurisdiction. 52 A.D.3d at 212. Application of CPLR 327(b) is mandatory, so long as this action "relates to" or "arises out of" agreements that meet GOL §5-1402's requirements—regardless of whether the parties to the agreements overlap with the parties to the action.

A review of dictionaries and thesauruses shows how expansive the meanings

[18] The Bank Defendants are parties to the $15 billion bond offering. R320–321 (¶273).

of "relates to" and "arises from" are. "Relates to" is an exceedingly broad term and covers the meaning of "pertain to," "bears on," "affects," "concerns," "involves," and "touches." BLACK'S LAW DICTIONARY at 1288 (6th ed. 1990). "Arises out of" is synonymous with "originate," "derive," "flow," "emanate," "stem from," and "result from." *Id*. at 108. When used in a legal context, "relates to" and "arises out of" are construed to have "the broadest and most comprehensive" meaning. *In re Potoker*, 286 A.D. 733, 736 (1st Dep't 1955).

Under this broad interpretation, the Depositary Agreement and the Offering Memorandum satisfy both the "arising from" and "relating to" standards under CPLR 327(b). Both the Depositary Agreement and the Offering Memorandum are pleaded in the Complaint. R312 (¶258); R318 (¶269); R214–215 (¶73). They were pleaded as part of the alleged wrongdoing and as facts supporting personal jurisdiction and a New York forum for the case. *See* R312 (¶258); R320–322 (¶¶273–274). The Depositary Agreement *relates to* this case because the derivative claims here are brought on behalf of Bayer and its shareholders, including ADR holders. *See Batchelder v. Kawamoto*, 147 F.3d 915, 917–19 (9th Cir. 1998) (finding that a shareholder derivative action brought by ADR holders relates to the depositary agreement for the issuance of the ADRs). Likewise, the Offering Memorandum *relates to* this case because it is "associated with" the financing of the Acquisition. *Coregis Ins. Co. v. Am. Health Found*., 241 F.3d 123, 128–29 (2d Cir.

2001); *see also Planned Consumer Mktg., Inc. v. Coats & Clark, Inc*., 71 N.Y.2d 442, 448 (1988) ("'relate to[]' is to be interpreted broadly").

The Depositary Agreement and the Offering Memorandum also pass muster under CPLR 327(b)'s "arising-out-of" test. This action arises from the Acquisition. But for the ADRs and bond offering, the Acquisition would not have been undertaken or consummated. But for the Depositary Agreement, there would not have been Bayer shares trading in the United States. But for the $15 billion bond offering, the Acquisition would not have been paid for and the Bayer Defendants' entrenchment scheme would not have succeeded. Thus, Plaintiffs' claims arise out of the agreements for purposes of CPLR 327(b), because "[t]he phrase 'arising out of' has been interpreted … to mean … incident to[] or having connection with …, and requires only that there be some causal relationship between" this case and the two agreements. *Worth Constr. Co. v. Admiral Ins. Co*., 10 N.Y.3d 411, 415 (2008).

In all, where, as here, "arises out of" is combined with "relating to," the combination creates the most "expansive reach." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc*., 96 F.3d 88, 93 (4th Cir. 1996). Because these two agreements are pleaded as necessary parts of the events and transactions that gave rise to Plaintiffs' claims, they fall within CPLR 327(b).

Rejecting all this, the trial court said that "the gravamen of [Plaintiffs' Complaint] isn't about those agreements." R100; *see also* R89. But this was the

wrong legal standard. CPLR 327(b)'s text says nothing about "the gravamen of the complaint." So long as "the action arises out of or relates to [an] … agreement" that falls within GOL §5-1402, the rule takes away the lower court's power to grant a CPLR 327(a) motion. Under New York's broad interpretation of "arising out of" and "relating to," the Depositary Agreement and the Offering Memorandum fit well within the purview of CPLR 327(b) and GOL §5-1402.

By affirming the trial court's erroneous interpretation of CPLR 327(b) and dismissal of the action under CPLR 327(a), the Panel erred and should be reversed.

2. Plaintiffs' CPLR 327(b) Argument—Pertaining to the Courts' Statutory Power—Is Neither Waivable Nor Waived

The trial court found waiver, faulting Plaintiffs for failing to present the CPLR 327(b) argument in their brief in opposition to Defendants' motions. R89. But Plaintiffs' CPLR 327(b) argument is neither waivable as a matter of law, nor waived under the facts of this case. The Panel's affirmance of this finding is error.

CPLR 327(b) addresses the court's power to act—taking away the power granted by subsection (a) where GOL §5-1402 is applicable is a purely legal question. Legal questions are not waivable. *Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.*, 65 A.D.3d 405, 408 (1st Dep't 2009). Indeed, CPLR 327(b)'s prohibition against dismissing an action is analogous to the deprivation of subject-matter jurisdiction. *See Ballard v. HSBC Bank USA*, 6 N.Y.3d 658, 663 (2006) ("'subject[-]matter jurisdiction is a question of judicial power'").

The lack of subject-matter jurisdiction cannot be waived. *Murray v. State Liquor Auth.*, 139 A.D.2d 461, 462 (1st Dep't 1988). So it should be with CPLR 327(b).

In *Title Guarantee & Trust Co. v. Foxvale Realty Corp.*, for example, the trial court issued an order under a statute that imposed a time-period requirement—authorizing the trial court to direct a mortgagor to pay the mortgagee certain income "produced 'during the six months prior to [a certain] application.'" 287 N.Y. 147, 149 (1941). Instead of the six-month period set forth in the statute, the trial court issued an order directing that the mortgagor pay the mortgagee income produced during a different six-month period. *Id*. To justify its departure from the statutorily defined time period, the trial court relied on the mortgagor's decision to waive his right to challenge the order based on the "statutory period." *Id*. Reversing the order, this Court reasoned that by failing to comply with the statutory time-period requirement, the trial court exceeded its authority conferred by statute. *Id*. The Court held that a party may not "waive[] limitations upon the statutory power of the court." *Id*. *Title Guarantee* requires that the lower court comply with CPLR 327(b)'s limitation on its power, regardless of whether or when the CPLR 327(b) argument is raised.[19]

[19] On this point, *Nurlybayev v. SmileDirectClub, Inc.*, 205 A.D.3d 455 (1st Dep't 2022), is distinguishable. There, the First Department found waiver because the CPLR 327(b) argument—presented for the first time on appeal—was never presented to the trial court. But Plaintiffs presented the CPLR 327(b) argument in the trial court. And the First Department did not consider *Title Guarantee*. Thus, *SmileDirectClub* does not require a finding of waiver here.

Here, CPLR 327 was no secret to the trial court, which is presumed to know the limits on its jurisdiction and to act within it. To be sure, the Depositary Agreement and the Offering Memorandum were pleaded in the Complaint (R214–215 (¶73); R312 (¶258); R318 (¶269); R320–322 (¶¶273–274)); and the trial court had previously denied a motion under CPLR 327(b) in another case. *See HH Trinity Apex Invs. LLC v. Hendrickson Props. LLC*, 2019 N.Y. Misc. LEXIS 4866 (Sup. Ct. N.Y. Cnty. Sept. 5, 2019) (Borrok, J.).

At the initial December 13, 2021 motion to dismiss hearing, the trial court scheduled a continued hearing on Defendants' motions to dismiss for January 10, 2022. R90.82–90.84. In reliance on that schedule, Plaintiffs intended to file a pre-hearing brief to specifically raise the CPLR 327(b) issue and argue it at the hearing. R2497. On December 27, 2021, while Plaintiffs were preparing for the hearing, the trial court dismissed the action under CPLR 327(a). The scheduled second hearing was never held. In any event, the trial court ultimately reached the merits of the CPLR 327 issues. R89; R95–110. Under these circumstances, there can be no waiver. *See Lambert v. Williams*, 218 A.D.2d 618, 621 (1st Dep't 1995).

B. Plaintiffs' Presumptive Right to Access to New York's Courts Was Entitled to Substantial Deference in Any *Forum-Non-Conveniens* Analysis

Plaintiffs, as New York and California residents, are presumptively entitled to sue here in New York, and to invoke the subject-matter jurisdiction conferred on

New York courts by the Legislature. *See Cadet v. Short Line Terminal Agency, Inc*., 173 A.D.2d 270, 271 (1st Dep't 1991) (reversing a CPLR 327(a) dismissal because defendants "failed to overcome the presumption that New York residents are entitled to the use of their judicial system"). New York courts have respected this "presumptive[] entitle[ment]" enjoyed by New York-resident shareholders who brought derivative actions on behalf of foreign corporations. In *Broida*, for example, minority shareholders of Dow Jones & Company ("DJ&C"), a Delaware corporation doing business in New York, brought a derivative action on DJ&C's behalf. 103 A.D.2d at 89. On review of an order declining jurisdiction based on the internal-affairs doctrine, the Second Department rejected that common-law doctrine and held that "New York residents[] are presumptively entitled to utilize their judicial system," because "New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation, though having a foreign charter, has substantial contacts with this State." *Id*. at 92.

Broida made clear that the defense bears the burden of proof on *forum-non-conveniens* issues. The Second Department reversed the dismissal order because "[d]efendants ha[d] not carried their burden of establishing that litigation in New York would be inconvenient," and because DJ&C had a substantial nexus to New York, including the fact that its stock was traded on the NYSE and that it was "a frequent litigant in New York courts," just like Bayer here. *Id*. at 92–93.

Bayer and its subsidiaries are frequent litigants in New York state and federal courts—suing here over 60 times, each time invoking the jurisdiction of New York courts over it and its case—consenting to a forum it found convenient. R591–595. "It ill behooves [the Bayer Defendants] to now urge the contrary" in a *forum-non-conveniens* motion. *Broida*, 103 A.D.2d at 92–93.

While the trial court lacked power to grant Defendants' *forum-non-conveniens* motion, when it actually undertook to consider and analyze the issue, it made a legal error. The trial court erred in failure to give any—let alone "substantial"—deference to Plaintiffs' choice of the forum in the *forum-non-conveniens* analysis. And the Panel's affirmance of the trial court is error.

On this point, federal cases are instructive because litigation involving U.S. shareholders in foreign companies often ends up in federal court, where "[t]he deference owed to the forum choice of [such] plaintiffs cannot be reduced solely because they chose to invest in a foreign entity." *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1339–40 (11th Cir. 2020). Also, a New York-resident plaintiff's choice of a New York forum must be accorded *extra weight* where, as here, the proposed alternative forum is in a foreign country. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950). Defendants must overcome the presumption for a New York forum by "establish[ing] *such oppression and vexation* … as to be *out of all proportion* to plaintiff's convenience." *Wiwa v.*

Royal Dutch Petroleum Co., 226 F.3d 88, 102 (2d Cir. 2000). All the same considerations apply to suits in New York given its status as the center of world commerce and finance.

Defendants made no showing—much less any evidentiary showing—of any hardship from defending this action in New York, as was their burden. Nor did Defendants submit evidence to refute the Acquisition's "nexus" to New York. They submitted *not a single affidavit* identifying any "inconvenience." Yet, the Panel endorsed the trial court's conclusion—without citing any evidence in the record—that "[i]t is beyond cavil that defending this action in New York would hoist a substantial and unnecessary burden" on Defendants. *See* R15.

Defendants' evidentiary failures, standing alone, required a denial of their *forum-non-conveniens* motions. *Elmaliach v. Bank of China Ltd*., 110 A.D.3d 192, 208 (1st Dep't 2013) (denying motion because defendants failed to carry the "'*heavy burden*' of establishing that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking").

Because the Acquisition was negotiated, financed, closed and implemented in New York, and because Bayer's lawyers and bankers are based in New York much of the evidence of, and key witnesses to, Defendants' liability are in New York or the United States. Plaintiffs' showing of a substantial nexus, combined with Defendants' failure to show *any* hardship of litigating in New York, require a denial

of the *forum-non-conveniens* motions. *See Cadet*, 173 A.D.2d at 271.

Here, the Plaintiffs are U.S. citizens. In *Elmaliach*, Israeli victims (foreign citizens) of terrorist acts sued a Chinese bank in New York alleging that the bank facilitated the transfer of money for terrorist organizations. 110 A.D.3d at 195. Affirming a denial of the bank's *forum-non-conveniens* motion, the court reasoned that even though the case's nexus to New York was insufficient to justify the application of New York law, it was sufficient to justify plaintiffs' choice of a New York forum. *Id.* at 208–09. And in *HSBC*, the Second Department affirmed the denial of an English bank's CPLR 327 motion because the alleged "wrongdoing occurred in New York," even though plaintiff *resided in England* (R1902). 166 A.D.3d at 759.

The reasoning in *Elmaliach* and *HSBC* applies here—with greater force—because Plaintiffs, unlike the foreign-national plaintiffs in those cases, are based in New York and in California (R211 (¶66)). *See Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc*., 131 A.D.3d 431, 432 (1st Dep't 2015) (plaintiff's residence held generally to be the most significant factor). Applying this rule, New York courts have consistently denied *forum-non-conveniens* motions in shareholder derivative actions that have a nexus to New York. *See*, *e.g.*, *Rocha Toussier y Asociados, S.C. v. Rivero*, 91 A.D.2d 137, 141 (1st Dep't 1983); *Laurenzano v. Goldman*, 96 A.D.2d 852, 853 (2d Dep't 1983) (upholding a New York-resident

plaintiff's choice of forum). Plaintiffs' choice of the New York forum to which they had presumed access was thus entitled to substantial deference in the *forum-non-conveniens* analysis given the allegations of the verified Complaint. Yet, the Panel and the trial court gave it none.

The trial court's error—endorsed by the Panel—is particularly glaring because, given New York's centrality to international finance and commerce, New York courts frequently adjudicate lawsuits involving foreign laws and foreign corporations, including stockholder derivative lawsuits. *See*, *e.g.*, *Duncan-Watt v. Rockefeller*, 2018 N.Y. Misc. LEXIS 1383, at **12–13 (Sup. Ct. N.Y. Cnty. Apr. 13, 2018). CPLR 327(b) was enacted to help assure New York's centrality to world commerce and finance. Virgadamo, ST. JOHN'S L. REV., Vol. 59 No. 2, Art. 10, at 415. Just as held in *Broida*, 103 A.D.2d at 91–92, a New York plaintiff's choice to sue derivatively on behalf of a foreign corporation in New York—exercising Plaintiffs' "presumed access" to our courts—must be given deference.

* * *

CONCLUSION

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

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Respectfully submitted,

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
(*pro hac vice*)
Michelle C. Lerach
(*pro hac vice*)
Albert Y. Chang

Albert Y. Chang

7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
Telephone: (858) 914-2001
Facsimile: (858) 914-2002
fbottini@bottinilaw.com
mlerach@bottinilaw.com
achang@bottinilaw.com

POWERS & SANTOLA, LLP
Michael J. Hutter
100 Great Oaks Boulevard
Suite 123
Albany, New York 12203
Telephone: (518) 465-5995
mhutt@albanylaw.edu

LAW OFFICE OF ALFRED G. YATES, JR. P.C.
Alfred G. Yates, Jr.
(*pro hac vice* forthcoming)
1575 McFarland Road, Suite 305
Pittsburgh, Pennsylvania 15216
Telephone: (412) 391-5164
yateslaw@aol.com

WEISS LAW
Joseph H. Weiss
305 Broadway, 7th Floor
New York, New York 10007
Telephone: (212) 682-3025
Facsimile: (212) 682-3010
jweiss@weisslawllp.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

In compliance with 22 NYCRR Ä500.13(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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