To Be Argued By:
WILLIAM SAVITT
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New York County Clerk's Index Nos. 651500/20

Court of Appeals

STATE OF NEW YORK

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Plaintiffs-Appellants,

(*Caption continued on inside cover*)

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Date Completed: August 6, 2024

—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, 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,

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

Defendants,

—and—

BAYER AG,

Nominal Defendant-Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Defendants state as follows:

- Bayer Aktiengesellschaft ("Bayer") has no parent corporation. A listing of its subsidiaries and affiliated companies is available at https://www.bayer.com/sites/default/files/2024-03/bayer-shareownership-2023.pdf.
- Bayer Corporation is a wholly owned subsidiary of Bayer US Holding LP, which is an indirect wholly owned subsidiary of Bayer. It shares common affiliates with Bayer, and its subsidiaries include Bayer Healthcare Holdings LLC, Bayer International Holding LLC, STWB Inc., and Bayer U.S. LLC.
- BofA Securities, Inc. is a direct, wholly owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a wholly owned subsidiary of Bank of America Corporation. It shares common affiliates with Bank of America Corporation. BofA Securities Prime, Inc. is a subsidiary of BofA Securities, Inc.
- Bank of America Corporation has no parent corporation. Listings of its subsidiaries and affiliates are available at https://www.sec.gov/Archives/edgar/data/70858/000007085824000122/bac-1231202310xkex21.htm and https://www.bankofamerica.com/security-center/affiliate-companies/.

- Until June 12, 2023, Credit Suisse AG was a wholly owned subsidiary of Credit Suisse Group AG. On June 12, 2023, Credit Suisse Group AG merged with and into UBS Group AG, with UBS Group AG being the absorbing company that continues to operate and Credit Suisse Group AG being the absorbed company that ceased to exist. UBS Group AG has no parent company.
- On May 31, 2024, Credit Suisse AG merged with and into UBS AG, with UBS AG being the absorbing company which continues to operate and Credit Suisse AG being the absorbed company which ceased to exist.

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PRELIMINARY STATEMENT

This lawsuit does not belong in the courts of this State. None of the conduct at issue occurred in New York; nearly all occurred in Germany. None of the individual Defendants resides in New York; nearly all reside in Germany. No part of the lawsuit is governed by New York law; every part is governed by German law. None of the corporate conduct the lawsuit seeks to challenge involves New York companies; all involves German companies alone.

Recognizing all this, the Supreme Court dismissed the action on multiple grounds, in a carefully reasoned decision that was fully affirmed by the First Department. The motion court found that the Bayer Defendants, all foreign, were not amenable to personal jurisdiction in New York. Then, vindicating well-settled principles of comity and judicial economy, the court held that New York was an inconvenient forum for the trial of these German-law issues, centered exclusively on German witnesses, evaluating evidence located nearly exclusively in Germany. And finally, vindicating even better-settled choice-of-law principles, the court below ruled that German corporate law supplied the test for whether these plaintiffs could have standing to sue in the name of a German corporation — a test that Plaintiffs admit they cannot pass.

On this appeal, Plaintiffs confirm the exorbitant, unmoored character of their position. As to jurisdiction, they make up new facts never pleaded, never raised

before the motion court, and without any support — asking this Court to rewrite traditional notions of fair play to drag foreign nationals before a New York jury. As to the propriety of this forum, Plaintiffs are unabashed in asking the courts of New York to assume, without precedent, the role of roving corporate law arbiters of the world, dispensing justice as to foreign citizens who exercised duties in foreign countries, owed to foreign corporations, in accordance with foreign law. Moreover, Plaintiffs claim that the motion court was compelled by statute to retain this case in New York, even though they waived that meritless argument below and have been denied leave to appeal on it. And as to standing to sue, Plaintiffs urge this Court to overthrow the internal affairs doctrine — the principle that corporate governance litigation is governed by the law of the incorporating jurisdiction — that controls the choice-of-law analysis in corporate law in every court and jurisdiction in the land, including the Supreme Court of the United States.

The motion court declined to credit any of these extreme positions and dismissed the complaint on three independent grounds. Each supports affirmance:

First, Plaintiffs do not have standing to pursue this derivative action. Under the internal affairs doctrine, Plaintiffs' right to assert the claims of a German corporation is governed by German law, which imposes substantive limitations on derivative litigation that Plaintiffs do not even pretend to have satisfied. This is a

straightforward application of the internal affairs doctrine, a bedrock principle recently reaffirmed by this Court in *Eccles* v. *Shamrock Capital Advisors, LLC*, 2024 WL 2331737 (N.Y. 2024). Plaintiffs contend that Germany's law of derivative standing does not apply to them, because of an obscure provision of New York's Business Corporation Law. If accepted, Plaintiffs' position would upend the internal affairs principle and decades of precedent. *See* Points I and II, *infra*. And even if New York law did govern, Plaintiffs would still lack standing. *See* Point III, *infra*.

Second, New York lacks personal jurisdiction over the Bayer Defendants, all members or former members of Bayer's Board of Management or Supervisory Board. None of the Bayer Defendants resides in New York and none is alleged to have made any of the challenged business decisions here. After weighing those facts and the rest of the voluminous record below, the Supreme Court concluded that the smattering of superficial contacts between the Bayer Defendants and New York alleged by Plaintiffs was neither sustained nor substantial — and therefore did not constitute "transaction of business" by the Bayer Defendants — and that Plaintiffs' claims did not arise from the alleged New York contacts anyway. As the First Department held, that decision was correct and should be sustained. *See* Point IV, *infra*.

Third, the Supreme Court properly exercised its discretion to dismiss the action on the ground of *forum non conveniens*. This case belongs in Germany, if anywhere. A large majority of the Bayer Defendants live there and the business decisions at issue were centered there. The named Bank Defendants were not engaged to provide advisory or financial services in connection with the Monsanto Acquisition, and the entities that did provide such services — BAMLI Frankfurt, ML India, and Credit Suisse Securities (USA) LLC ("CSSU") — did so predominantly from abroad. *Forum non conveniens* dismissal would promote important interests of comity, allowing a German court to apply German law to a core question of German corporate governance, while upsetting no reasonable expectations of either Plaintiff — who invested in a German corporation governed by both a corporate statute and a charter expressly requiring derivative claims just like this to be brought in Germany. *See* Point V, *infra*.

Furthermore, beyond the grounds reached by the Supreme Court, there are also ample alternate bases to affirm dismissal of the Bank Defendants, as to whom Plaintiffs allege virtually no misconduct or wrongdoing — in New York or otherwise. *See* Point VI, *infra*.

Plaintiffs denigrate the decisions of the lower courts here as the product of "unjustified hostility towards shareholder derivative actions," demanding that the Court radically expand the reach of New York's courts so as to preserve New

York's "status as the center of world commerce and finance." They have it backwards. International commerce relies upon New York's respect for the uniform application of the law, which allows multinational corporations to contribute to New York's economic success while preserving the frameworks of corporate governance developed by their states of incorporation. The rule that Plaintiffs sponsor would jeopardize the State's global standing, by flouting foreign sovereignty and upending these reasonable commercial expectations. The Court should reject that result.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Section 1319 of the Business Corporation Law abrogated the internal-affairs doctrine, contrary to the statutory text, legislative history, and a half-century of legal authority.

2. Whether Germany's corporate statute, which requires derivative plaintiffs to obtain permission from the regional German court where a corporation has its registered seat, imposes substantive conditions on derivative standing.

3. In the alternative, whether Plaintiffs have demonstrated derivative standing under New York law, despite failing to plead demand refusal or contemporaneous ownership of Bayer shares.

4. Whether personal jurisdiction over the Bayer Defendants and the Credit Suisse Defendants is authorized by (i) New York statute and (ii) the federal Due Process Clause, notwithstanding the Complaint's failure to plead a substantial connection between New York and Plaintiffs' claims.

5. Whether the Supreme Court abused its discretion when it found that New York is an inconvenient forum to try claims that fiduciaries of a German corporation violated German law in Germany.

6. Whether dismissal of claims against the Bank Defendants should be affirmed on the alternative grounds that none of the named Bank Defendants was

engaged to provide services in connection with Bayer's acquisition of Monsanto or for failure to state a claim.

COUNTERSTATEMENT OF THE FACTS[1]

A. Bayer AG and the Monsanto Transaction

Bayer AG is a German corporation, organized under the German Stock Corporation Act and headquartered in Leverkusen, Germany. R211-12 (¶ 67); R746 (Semrau Aff. ¶¶ 2-3). Like all German stock corporations, Bayer has two governing boards: a Board of Management, which manages the company's business affairs; and a Supervisory Board, which monitors the company's management. R789 (Koch Aff. ¶ 4). Both boards meet in Germany. R748 (Semrau Aff. ¶ 8). Bayer's corporate charter provides (and provided at all relevant times) that any legal dispute between shareholders and the corporation must be litigated in Germany. R315 (¶ 262).

In September 2016, Bayer's Board of Management and Supervisory Board approved an agreement to acquire The Monsanto Company, an agricultural-products company incorporated in Delaware and headquartered in Missouri. R162-63, R200, R304 (¶¶ 2, 51, 242); R781 (Branca Aff. ¶¶ 2-3). The merger agreement is governed by Delaware law. R317 (¶ 268). Plaintiffs do not allege

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[1] Citations in the form of "¶ __" refer to paragraphs of the second amended complaint (the "Complaint," R158-356). "Order" refers to the Supreme Court's Decision and Order on Plaintiffs' Motion to Dismiss (R13-27). "First Dep't Opinion" refers to the First Department's decision affirming dismissal (R2567-70).

that either board ever met outside Germany or that any of the individual Bayer Defendants made any relevant business decision in New York.

After the merger closed, a California jury found that Roundup, a Monsanto herbicide product, was carcinogenic and awarded a plaintiff $289 million in compensatory and punitive damages. R168-69, R307 (¶¶ 10, 248). Other adverse verdicts followed. R305-06 (¶ 245). In the wake of these post-transaction litigation results, some investors criticized the merger, and Bayer's stock price fell. R177, R184-85 (¶¶ 20, 30-32).

B. Plaintiffs allege breaches of German law relating to Bayer's acquisition of Monsanto.

Plaintiff Ms. Haussmann, a citizen of California, filed this lawsuit on March 6, 2020, NYSCEF No. 1, ¶ 41. Shortly thereafter, the same counsel representing Ms. Haussmann filed six other European-law derivative actions in the Supreme Court on behalf of foreign companies, including two others incorporated in Germany, three in Switzerland, and one in England. On December 9, 2020, Ms. Haussmann, newly joined by co-plaintiff and professed New York resident Jack Cattan, filed the operative and second amended complaint. R158-356.

The Complaint alleged that the individual Bayer Defendants — including two current or former members of Bayer's Board of Management and 29 current or former members of its Supervisory Board — breached duties to Bayer under German law in pursuing and approving the Monsanto transaction. *See* R270-72

(¶¶ 190-92); *see also* R263-74, R284-86 (¶¶ 176-96, 216-19). Among the individual defendants were eight Supervisory Board members who joined the Board after Bayer agreed to buy Monsanto. R746-47 (Semrau Aff. ¶ 6). Twenty-six of the individual Bayer Defendants live overseas, one has passed away, and only four reside in the United States, all outside New York. R746-48 (Semrau Aff. ¶¶ 6-7); R778 (Arnold Aff. ¶ 5).

The individual Bayer Defendants, the Complaint alleged, failed to ensure that Bayer performed sufficient diligence concerning the risks of personal-injury litigation against Monsanto. *See* R209-10, R257-58, R270-71, R273, R298 (¶¶ 63, 169, 190, 195, 231). Plaintiffs also named as defendants the investment banks that advised Bayer in connection with the transaction (or certain affiliates, collectively the "Bank Defendants"), on the theory that they aided and abetted those fiduciary breaches and separately breached German-law duties to Bayer stockholders. Boiled all the way down, the 360-paragraph, 195-page Complaint alleged that Bayer should have conducted more pre-merger diligence on Monsanto and sought to hold Defendants liable in damages for Monsanto's adverse post-merger litigation outcomes.

C. The Supreme Court dismisses Plaintiffs' claims on three independent grounds, then denies renewal and reargument as to one of those grounds.

On February 9, 2021, Bayer and the Bayer Defendants moved to dismiss the Complaint for failure to establish derivative standing, lack of personal jurisdiction, and because New York is an unsuitable and inconvenient forum for litigating Plaintiffs' claims. *See* R713-15 (Bayer Defs.' Mot. to Dismiss); R716-44 (Bayer Defs.' Mem. ISO Mot. to Dismiss); R1932-50 (Bayer Defs.' Reply ISO Mot. to Dismiss); R2288-89 (Bayer's Mot. to Dismiss); R2290-2314 (Bayer's Mem. ISO Mot. to Dismiss); R2364-83 (Bayer's Reply ISO Mot. to Dismiss). The Bank Defendants separately moved to dismiss on the grounds of *forum non conveniens*, because Plaintiffs sued the wrong entities, and for failure to state a claim. R126-52 (Bank Defs.' Mem. ISO Mot. to Dismiss); R695-712 (Bank Defs.' Reply Mem. ISO Mot. to Dismiss). Credit Suisse Group AG and Credit Suisse AG (together, the "Credit Suisse Defendants") also moved to dismiss for lack of personal jurisdiction. R140 (Bank Defs.' Mem. ISO Mot. to Dismiss); R708 (Bank Defs.' Reply Mem. ISO Mot. to Dismiss).

After hearing oral argument on December 13, 2021, the Supreme Court issued a Decision and Order on December 27, dismissing all claims on three grounds:

First, the court held that Plaintiffs lack standing to pursue derivative claims on Bayer's behalf. R26-27 (Order at 14-15). Opposing that result, Plaintiffs had argued that a provision of the Business Corporation Law, BCL § 1319, mandated the application of New York's substantive standing requirements in derivative litigation brought in this State. The Supreme Court followed long-standing precedent rejecting that interpretation and concluded that, under the internal affairs doctrine, substantive German law governs shareholders' standing to sue on behalf of German companies like Bayer. R26 (Order at 14). This compelled dismissal, because Plaintiffs had made "no attempt whatsoever to satisfy" several substantive German-law conditions to derivative litigation. R16 (Order at 4).

Second, the Supreme Court concluded that it could not exercise personal jurisdiction over the Bayer Defendants, because the lawsuit's connection to New York is "simply too tenuous" and the Bayer Defendants "cannot be said to have purposefully availed themselves of the benefit of the New York forum." R26, R15 (Order at 14, 3). As the court explained, none of the Bayer Defendants "live[s] here, conduct[s] business here regularly, or ha[s] contacts with New York that give rise to this dispute." R15 (Order at 3). Moreover, the court reasoned, "[t]hat Bayer engaged New York-based attorneys and arranged funding through New York institutions simply does not constitute purposeful availment as it relates to" Plaintiffs' claims, which involve "due diligence activities as to a Missouri-based

company and the decisions made in Germany to proceed with the acquisition forming the basis of this lawsuit." R25 (Order at 13).

Third, the court held that the Complaint must be dismissed under the doctrine of *forum non conveniens* as codified in CPLR 327(a), because New York is not a suitable forum for litigation about decisions made in Germany by foreign fiduciaries of a German corporation. R21 (Order at 9). In support of this conclusion, the court reasoned that nearly all of the Bayer Defendants reside in Europe, none resides in New York, and that they received the advice of the banks in Germany. R21-22 (Order at 9-10). The court further considered that all of Bayer's board meetings during the relevant period took place in Germany, and all of Bayer's board records are maintained in Germany. *Id.* The Supreme Court also emphasized the significant burden of applying German law, particularly when Germany presents an adequate alternative forum and has "a significant interest in adjudicating a dispute involving an old and major German company, and the activities and judgments of individual directors all located in Germany and operating under German law." *Id.*

On February 2, 2022, Plaintiffs moved for leave to reargue and renew Defendants' motions to dismiss, directed only to the court's decision on *forum non conveniens*. R2388-92 (Mot. for Leave to Reargue and Renew); R2393-2413 (Mem. ISO Mot. for Leave to Reargue and Renew). On that motion, Plaintiffs

argued that dismissal under CPLR 327(a) was barred by CPLR 327(b), which precludes defendants from seeking dismissal on the ground of *forum non conveniens* where claims "arise[] out of or relate[] to" a contract with a plaintiff that exceeds a monetary threshold and contains a New York choice-of-law provision. R2407. In seeking to invoke that provision, Plaintiffs referenced a debt agreement that post-dated the Monsanto merger and a deposit agreement that governs Bayer's American Depositary Receipts (ADRs). Plaintiffs had never cited CPLR 327(b) in opposition to dismissal and do not claim to own Bayer ADRs.

At an October 20, 2022 hearing on Plaintiffs' motion, they conceded that they "were at fault for neglecting to squarely raise the 327(b) argument. . . ." R97; *see also* R102 ("[W]e bear the blame for not raising the argument earlier. . . ."). Later that day, the Supreme Court issued an order denying leave for reargument and renewal. R88-90 (Decision and Order on Pls.' Mot. for Leave to Reargue and Renew). The motion court found that Plaintiffs had waived any argument under CPLR 327(b) by failing to raise it in opposition to dismissal. R89. In the alternative, the court denied the motion as moot, because it challenged just one of several independent grounds for dismissal and thus could not disturb the result. *Id.*

D. The First Department affirms the Supreme Court's orders.

The First Department unanimously affirmed both orders. R2567-70 (First Dep't Opinion). The court's opinion focused on whether BCL § 1319 compels the

application of New York law to the issue of derivative standing. Rejecting Plaintiffs' interpretation of the statute, the First Department instead relied upon long-standing precedent "consistently invok[ing] the internal affairs doctrine in derivative actions to apply foreign law on substantive issues, including those affecting a party's right to sue." *Id.* at 570. The First Department also affirmed the Supreme Court's findings on personal jurisdiction and *forum non conveniens*. *Id.* at 569.

ARGUMENT

POINT I

THE FIRST DEPARTMENT CORRECTLY APPLIED THE INTERNAL AFFAIRS DOCTRINE TO DETERMINE PLAINTIFFS' DERIVATIVE STANDING

The internal affairs doctrine is a foundational principle of corporate jurisprudence, flowing from imperatives of interstate comity and uniform application of the law. As this Court recently reiterated in *Eccles* v. *Shamrock*, the doctrine "serves the vital need for a single, constant, and equal law to avoid the fragmentation of continuing, interdependent internal relationships." 2024 WL 2331737, at *5 (internal quotation omitted). It thus vindicates the policy that "only one State should have the authority to regulate a corporation's internal affairs — matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders — because otherwise a corporation could be faced with conflicting demands." *Edgar* v. *MITE Corp.*, 457 U.S. 624, 645 (1982). As such, "[i]n addition to providing consistency to legal obligations, the internal affairs doctrine also protects the interests and expectations of shareholders by giving effect to their choice as to what jurisdiction's laws will govern the corporation's affairs." *Eccles*, 2024 WL 2331737, at *5.

Under the doctrine, "the substantive law of a company's place of incorporation presumptively applies to causes of action arising from its internal

affairs." *Id.* at *7. In *Eccles*, the Court clarified that this presumption is subject to only a narrow exception, where a party has established both that (1) "the interest of the place of incorporation is minimal — i.e., that the company has virtually no contact with the place of incorporation other than the fact of incorporation" and that (2) "New York has a dominant interest in applying its own substantive laws." *Id.* Plaintiffs do not even cite *Eccles* — recent, controlling authority from this Court — let alone attempt to satisfy either of these factors. They cannot. The Complaint itself makes clear that Bayer AG has a deep association with Germany, *see, e.g.*, R211 (¶ 67) (noting Bayer's "overwhelming presence" in Germany), the jurisdiction with the "overriding interest" in policing the conduct of German fiduciaries who manage a German corporation from within its borders. *Eccles*, 2024 WL 2331737 at *7. German substantive law thus "presumptively applies to causes of action governing [Bayer's] internal affairs." *Id.*

Decades of precedent from this Court and the lower courts have applied the internal affairs doctrine to the question of derivative standing, holding that "issues of corporate governance, including the threshold [derivative] demand issue, are governed by the law of the state in which the corporation is chartered." *Lerner* v. *Prince*, 119 A.D.3d 122, 128 (1st Dep't 2014). *See, e.g.*, *Davis* v. *Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 253 (2017) (applying internal affairs doctrine to determine plaintiff's derivative standing to assert claims on behalf of Cayman Islands

company); *Graczykowski* v. *Ramppen*, 101 A.D.2d 978, 979 (3d Dep't 1984) ("The central issue . . . concerns [defendant's] contention that [plaintiff] lacks standing to sue herein. In this regard, the generally accepted choice-of-law rule with respect to such 'internal affairs' as the relationship between shareholders and directors is to apply the law of the place of incorporation." (internal quotation omitted)).[2]

Faithfully applying this precedent, the Supreme Court held and the First Department affirmed that the internal affairs doctrine governs Plaintiffs' standing to sue on behalf of Bayer. R26 (Order at 14). Plaintiffs say this was error — and every decision cited above was wrongly decided — based on an idiosyncratic construction of BCL § 1319, a provision that confirms the subject-matter jurisdiction of New York courts to resolve derivative actions involving foreign companies. Plaintiffs' position lacks statutory grounding; is unsupported in the legislative history; is contrary to well-settled controlling case law; and, if accepted, would place New York's corporate governance choice-of-law principles far outside

[2] *See also Wilson* v. *Tully*, 243 A.D.2d 229, 232 (1st Dep't 1998) (applying law of the state of incorporation to determine derivative standing); *David Shaev Profit Sharing Account* v. *Cayne*, 24 A.D.3d 154, 154 (1st Dep't 2005) (same); *In re NASD Disp. Resol.*, 46 A.D.3d 294, 295 (1st Dep't 2007) (same); *Levin* v. *Kozlowski*, 45 A.D.3d 387, 388 (1st Dep't 2007) (same); *Siegel* v. *J.P. Morgan Chase & Co.*, 103 A.D.3d 598, 598 (1st Dep't 2013) (same); *Int'l Painters* v. *Cantor Fitzgerald, L.P.*, 132 A.D.3d 470, 470-71 (1st Dep't 2015) (same); *Mason-Mahon* v. *Flint*, 166 A.D.3d 754, 756 (2d Dep't 2018) (same); *Deckter ex rel. Bristol-Myers Squibb Co.*v. *Andreotti*, 170 A.D.3d 486, 486 (1st Dep't 2019) (same); *Matter of Renren, Inc.*, 192 A.D.3d 539, 539 (1st Dep't 2021) (same).

the mainstream. But even if Plaintiffs' interpretation were correct, that would not disturb the result below — because Plaintiffs have also failed to establish that Bayer was "doing business" in New York, a prerequisite to the application of BCL § 1319.

A. BCL § 1319 did not displace the internal affairs doctrine.

Beginning with statutory text: Section 1319 provides that BCL § 626 (among other provisions of the Business Corporation Law), "to the extent provided therein, shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders." Section 626, in turn, governs "shareholders' derivative action[s] brought in the right of the corporation." BCL § 626. Neither provision remotely states or even suggests that New York law governs issues of derivative standing. Section 1319 itself provides only that § 626 applies to foreign corporations doing business in New York "to the extent provided therein." BCL § 1319. By its terms, § 1319 does not alter or expand the reach of § 626; it merely refers the question to the text of § 626. Section 626, for its part, requires that a derivative plaintiff must continuously own shares of stock in the subject company (§ 626(b)) and that plaintiff must detail any efforts it made to cause the company to bring the proposed action (§ 626(c)). The provision says nothing about what substantive law governs questions of derivative standing. Nor does it suggest an

intent to undermine prevailing conflict-of-law rules — let alone displace the internal affairs doctrine.

As to legislative history: Lacking support for their position in the statutory text, Plaintiffs undertake a long and misleading exegesis on the origins of § 1319. The relevant legislative history supports the modest interpretation of the statute suggested by its text. At an early session of the Joint Legislative Committee to Study Revision of Corporation Laws — the expert body charged with crafting what would become the Business Corporation Law — the reporter suggested that "it would be desirable to have a single section or series of sections spell out expressly the extent to which the other articles might be applicable to foreign corporations." Minutes of the Proceedings of a Public Hearing of the Joint Legislative Committee to Study Revision of Corporation Laws (May 13, 1960) at 124 (Addendum at 67).

When drafts of the Business Corporation Law emerged in 1961, they featured just such a provision — "§ 13.19 Applicability of other provisions." Joint Legislative Committee to Study Revision of Corporation Laws, *Fifth Interim Report to 1961 Session of New York Legislature* at 79 (Addendum at 50). This initial draft of § 1319 was intended only to "list[] the articles and the sections in other articles, the provisions of which apply to foreign corporations." *Id*. Equivalent commentary accompanied every iteration of the statute, from passage

through amendment.[3] As this Court found in a related context, likewise reviewing the legislative history of the BCL, "there is no suggestion, as elsewhere in the revisors' notes, that any change in law is propounded." *Indus. Psych., Inc.* v. *Simon*, 16 A.D.2d 114, 119 (1st Dep't 1962). The same result follows here. Section 1319 was never intended to displace the choice-of-law regime governing derivative standing. Instead, it was created as a jurisdictional index of BCL provisions with potential application to foreign corporations.

To portray a radically different picture of § 1319's drafting, Plaintiffs rely on commentary published by two academics who claimed no role in drafting § 1319 that, Plaintiffs say, characterized § 1319 as "regulat[ing] the internal affairs of foreign corporations." Brief for Plaintiffs-Appellants ("Br.") at 18. But, fact-checking the sources, one sees that neither of Plaintiffs' academics said anything like that.[4] More fundamentally, academic articles can't override legislative

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[3] *See, e.g.*, Joint Legislative Committee to Study Revision of Corporation Laws, *Seventh Interim Report to 1963 Session of New York State Legislature* at 175 (Addendum at 52) ("The section lists the articles and sections of other articles which, to the extent provided therein, apply to foreign corporations doing business in this state . . . .").

[4] Br. 18 (quoting Robert S. Stevens, *New York Business Corporation Law of 1961*, 47 Cornell L.Q. 141, 174 (Winter 1962) (Addendum at 72) ("Applicable to all foreign corporations are to the extent stated therein . . . the provisions relating to . . . derivative actions . . . .")); Br. 18 (quoting Robert A. Kessler, *The New York Business Corporation Law*, 36 St. John's L. Rev. 1, 107 n.418 (Dec. 1961) (Addendum at 59) ("Subjecting foreign corporations to the same standards as local corporations to some extent accomplishes the same results. The new statute

history, still less legislative text — and still less than that, inaccurate citations of academic articles that are said to contradict the formal record of proceedings.[5]

As to caselaw: New York precedent overwhelmingly confirms that Plaintiffs are wrong about § 1319. Under a long line of decisions, the statute has been understood not "as a conflict of laws rule," but rather a procedural vehicle for New York courts to "assume jurisdiction of derivative actions involving foreign corporations." *David Shaev Profit Sharing Plan* v. *Bank of Am.*, 2014 WL 7503654, at *2 (N.Y. Cty. Sup. Ct. Dec. 29, 2014); *see Levin* v. *Kozlowski*, 45 A.D.3d 387, 388 (1st Dep't 2007) (rejecting argument that § 1319 mandates New York law of derivative standing); *Rudd*, 217 A.D.3d at 406 (same), *leave to appeal granted*, 41 N.Y.3d 903 (2024); *Lewis* v. *Dicker*, 459 N.Y.S.2d 215, 216 (Kings

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attempts to do this in a number of areas. See [BCL] §§ 1318-20.")). Notably, Prof. Kessler's commentary made clear that he was referencing a soon-to-be-stricken subsection (b) of § 1319 (then § 1320), covering "domiciled foreign corporations." Kessler at 107-08 n.418 (Addendum at 60) (acknowledging that "not all foreign corporations doing business in New York will be held to the New York standard of conduct").

[5] Plaintiffs also point to an "objection of the corporate establishment," which characterized the draft § 1319 as a "detailed list of Articles and sections of the [proposed legislation] which are made applicable to foreign corporations," and thus criticized it as an "attempt to regulate the internal affairs of foreign corporations." Br. 15; Bill Jacket, L. 1961, ch. 855 at 245-46 (Addendum at 47, 48). This critique reflected a misunderstanding of the legislative text — ignoring that § 1319 did not purport to expand the application of § 626 or any of the other provisions it references — and thus was never addressed by the Legislature and was subsequently withdrawn. Bill Jacket, L. 1961, ch. 855 at 211 (Addendum at 14).

Cty. Sup. Ct. 1982) (Section 1319 is "not a conflict of laws rule" and does not require New York law to determine liability of directors of non-New York corporation); *Potter* v. *Arrington*, 810 N.Y.S.2d 312, 316 (Monroe Cty. Sup. Ct. 2006) (same); *Stephen Blau MD Money Purchase Pension Plan Tr.* v. *Dimon*, 2015 WL 2127119, at *4 n.1 (N.Y. Cty. Sup. Ct. May 6, 2015) (same); *City of Aventura Police Officers' Ret. Fund* v. *Arison*, 134 N.Y.S.3d 662, 673 n.3 (N.Y. Cty. Sup. Ct. 2020) (same).

A contrary result would mark New York as the only jurisdiction in the country to disregard foreign law on the issue of derivative standing. Foreign companies, domestic and international, would be subject to competing claims under competing laws, multiplying litigation and creating the continuing risk of inconsistent results — replacing a "single, constant, and equal law" with the "fragmentation of continuing, interdependent internal relationships." *Eccles*, 2024 WL 2331737, at *5 (internal quotation omitted). This is precisely the outcome that the internal affairs doctrine was designed to avoid. The Court should not invite that chaos.

B. BCL § 1319 does not apply to Bayer AG, because it is not "doing business" in New York.

Even if, contrary to its text and long precedent, § 1319 could be read as a choice-of-law provision, that would not provide grounds for reversal here. Section

1319 applies only to corporations that are "doing business" in New York. BCL § 1319(a). Bayer does not.

Plaintiffs claim that when the Legislature enacted BCL § 1319 in 1961, it adopted the "same 'doing business' standard" that governs long-arm jurisdiction under CPLR 302. Br. 22. But CPLR 302 does not implicate any "doing business" standard. To the contrary, as this Court held shortly after the passage of both statutes, "Section 302 . . . *discard[ed]* the concept of 'doing business' as a test of jurisdiction and substitute[d] therefor the broader standard of 'transacting any business.'" *Simonson* v. *Int'l Bank*, 14 N.Y.2d 281, 288 (1964) (emphasis added). For that reason, New York courts interpreting the "doing business" standard under Article 13 of the BCL instead "appl[y] the traditional jurisdictional standard for doing business" that prevailed before Section 302's adoption, rather than importing Section 302's standard. *Airtran N.Y., LLC* v. *Midwest Air Grp., Inc.*, 46 A.D.3d 208, 217 (1st Dep't 2007) (collecting cases). For example, in *Fremay, Inc.* v. *Modern Plastic Corp.*, 15 A.D.2d 235 (1st Dep't 1961), issued just months after the BCL's enactment, the First Department *rejected* a plaintiff's effort to interpret Article 13 using the jurisdictional principles that now underlay CPLR 302. Instead, the court concluded, "the applicable test as to whether defendant corporation does business within the State of New York is the classic 'presence' test." *Id.* at 240.

Under this stringent standard, a corporate defendant must operate with "such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction." *Frummer* v. *Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 536 (1967); *see also Airtran*, 46 A.D.3d at 216. Plaintiffs did not attempt to satisfy this standard below and have not attempted to satisfy it here. Nor could they, given the Complaint's threadbare allegations of Bayer's relationship with New York. Because Plaintiffs have not established that Bayer transacted business in New York for jurisdictional purposes, *see infra* Point IV.A, they cannot satisfy the higher standard of "doing business" required under BCL § 1319.

POINT II

THE FIRST DEPARTMENT CORRECTLY HELD THAT PLAINTIFFS HAVE NOT SATISFIED SUBSTANTIVE REQUIREMENTS FOR DERIVATIVE STANDING UNDER GERMAN LAW

The claims that Plaintiffs seek to assert on Bayer's behalf are governed by the German Stock Corporation Act (abbreviated in Germany as "AktG"), which orders the internal affairs of German corporations. The Act gives minority shareholders rights to pursue derivative litigation, subject to conditions that the German parliament devised to strike a balance between protecting shareholders and preserving the prerogatives of the board of management and supervisory

board. R799-800 (Koch Aff. ¶¶ 42-43); R843-45 (AktG § 148). These statutory conditions require Plaintiffs to demonstrate that they:

- own at least one percent or €100,000 of the company's issued share capital, R801-02 (Koch Aff. ¶¶ 49-51 (discussing AktG § 148(1)));
- obtained permission to sue from the regional court where the company has its corporate seat, R806-07 (Koch Aff. ¶¶ 68-72 (discussing AktG § 148(2)));
- made pre-suit demand upon the corporation "to take its own legal action within a reasonable period of time set by them," without exception for purported futility, R803-04 (Koch Aff. ¶¶ 56-58 (discussing AktG § 148(1)(2)));
- entered their stock ownership in the corporate share registry before they might have discovered the alleged misconduct at issue, R800-01, R803 (Koch Aff. ¶¶ 44-48, 54 (discussing AktG §§ 67(2), 148(1))); and
- possess facts justifying a suspicion that the corporation may have suffered damage as a result of severe misconduct, such that there would be reason to suspect that a board acted improperly in rejecting the shareholder's demand to sue, R804-05 (Koch Aff. ¶¶ 59-63 (discussing AktG § 148(1)(3))).

On appeal, Plaintiffs have not argued that they satisfy these requirements — waiving any argument as to those specific requirements that the Supreme Court found were not met. *See* R26-27 (Order at 14-15) (dismissing for failure to demonstrate sufficient share ownership, demand upon the company, or permission from the German courts). Instead, Plaintiffs claim the requirements are inapplicable because they are procedural, rather than substantive. Br. 38-42.

Plaintiffs call this a matter of "plain language," with their conclusion "dictate[d]" by the appearance of the word "[p]rocedure" in the title of AktG § 148. *Id.* at 40. Even if Plaintiffs were correct that the title of that provision could determine the substantive or procedural nature of the standing rules it contains, it would not bear upon the requirement of registered ownership, which derives from a different section of the Act. *See* R826 (AktG § 67(2)). But Plaintiffs are not correct. They offer no support for the claim that everything beyond a statutory title is meaningless in considering substance versus procedure. Both New York and German law are contrary. *See Tanges* v. *Heidelberg N. Am.*, 93 N.Y.2d 48, 54 (1999); R1953-56 (Koch Reply Aff. ¶¶ 2-10) (affirming that Germany's derivative standing requirements are substantive).

New York law governs whether a foreign legal provision is substantive for choice-of-law purposes. *See, e.g.*, *Tanges*, 93 N.Y.2d at 54. Substantive rules in New York are those that create or negate the existence of a right. *See Davis* v. *Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 255 (2017) (citing *Tanges*, 93 N.Y.2d at 54-55). Consistent with these principles, New York courts have held for decades that foreign rules of derivative standing are substantive. *See supra* Point I.A. This is true for derivative standing generally, *e.g.*, *In re NASD Disp. Resol.*, 46 A.D.3d at 295, and foreign-law analogues to specific requirements codified in the German corporation statute, including registered membership, *Aventura*, 134 N.Y.S.3d at

678; pre-suit demand, *Hart* v. *General Motors Corp.*, 129 A.D.2d 179, 182 (1st Dep't 1987); and the requisite nature of the alleged misconduct, *In re Renren, Inc. Derivative Litig.*, 127 N.Y.S.3d 702, at *24 (N.Y. Cty. Sup. Ct. 2020).

Notably, Plaintiffs cite nothing to support their contention that any of those particular standing requirements can be ignored as procedural. They cite only precedents that addressed leave-of-court requirements — leaving Plaintiffs with no authority on any of Germany's other substantive requirements for derivative standing. In any event, Plaintiffs' cases do not support their position.

Plaintiffs' lead precedent is *Davis* v. *Scottish Re Group*, where this Court reviewed a provision of the Cayman Islands Grand Court Rules that required a plaintiff filing a derivative suit in the Cayman Islands to petition the Cayman Grand Court for leave to continue the action. 30 N.Y.3d at 253-55. The Court determined that this rule was procedural, not substantive, because it applied to "any derivative action commenced in the Cayman Islands, brought by writ on behalf of *any* corporation, no matter where incorporated" — as opposed to "derivative actions, wherever brought, concerning Cayman companies specifically." *Id.* at 254. Hammering home this distinction, the Court highlighted the different outcome in cases involving Canadian and British Virgin Islands statutes — statutes that courts had deemed "substantive" because they required local court permission to pursue derivative claims only on behalf of companies

incorporated in those jurisdictions. *See Scottish Re*, 30 N.Y.3d at 254-55 (discussing *Microsoft Corp.* v. *Vadem, Ltd.*, 2012 WL 1564155 (Del. Ch. Apr. 27, 2012); *Vaughn* v. *LJ Int'l, Inc.*, 174 Cal. App. 4th 213 (2d Dist. 2009); *Dragon Invs. Co. II* v. *Shanahan*, 2007 WL 4144251 (N.Y. Cty. Sup. Ct. Nov. 2, 2007); *Locs. 302 & 612 of Int'l Union of Operating Engineers* v. *Blanchard*, 2005 WL 2063852 (S.D.N.Y. Aug. 25, 2005)).

The Court was clear: where the rule applies to all derivative litigants, without regard to place of incorporation, the rule is procedural. But when the rule applies to derivative litigants because it reflects the law of the place of incorporation, the rule is substantive. *Scottish Re*, 30 N.Y.3d at 254. And that is how the rule has been understood and applied by the lower courts since. *See, e.g.*, *Mason-Mahon* v. *Flint*, 166 A.D.3d 754, 756-57 (2d Dep't 2018) (UK rules of court were procedural, because they applied to any would-be derivative litigant appearing in the local courts without regard to choice-of-law); *Aventura*, 134 N.Y.S.3d at 678 (UK rule requiring derivative plaintiffs to establish registered ownership of equity in the corporation was substantive).

Section 148(2) of the German Stock Corporation Act is unequivocally substantive under the rule in *Scottish Re*. Its requirement that the "regional court in whose judicial district the company has its registered seat shall decide" whether a shareholder has permission to sue derivatively applies to German corporations

only, R807 (Koch Aff. ¶ 68); R844 (AktG § 148(2)), because only German companies have a "registered seat" within Germany. Accordingly, under *Scottish Re* and consistent with the many precedents applying that decision, § 148(2) is another substantive requirement that Plaintiffs have not met.

POINT III

IN THE ALTERNATIVE, DISMISSAL SHOULD BE AFFIRMED BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH DERIVATIVE STANDING UNDER NEW YORK LAW

Even were this Court to accept Plaintiffs' invitation to ignore the requirements of the German Stock Corporation Act and apply New York law to the core question of derivative standing — contrary to the internal affairs doctrine — Plaintiffs would still lack derivative standing. Plaintiffs have not alleged demand futility with the particularity required by New York law, and they have not satisfied the contemporaneous ownership requirement of BCL § 626(b). While the lower courts did not reach either ground, each is sufficient for affirmance.[6]

A. Plaintiffs do not adequately allege demand futility under New York law.

Section 626(c) states that the complaint in a derivative action "shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action

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[6] *See* R732-34; *Friedman* v. *Rice*, 30 N.Y.3d 461, 485 n.1 (2017) (arguments preserved below are "properly before [the Court] as an alternative ground for an affirmance").

by the board or the reasons for not making such effort." Plaintiffs have neither made a demand nor adequately alleged why it should be excused.

As an initial matter, Plaintiffs' assertions of demand futility regarding their claims against Bayer's Supervisory Board members and the company's financial advisors are misdirected. Their futility allegations focused on alleged conflicts of Supervisory Board members only, R327-39 (¶¶ 286-308), but in a German stock corporation, the board of management — *not* the supervisory board — is responsible for bringing claims against supervisory board members and third parties. R789, R794, R803 (Koch Aff. ¶¶ 4, 23, 57). Bayer's Board of Management had five members when the Complaint was filed, R778 (Arnold Aff. ¶ 5), and Plaintiffs alleged no self-interest or conflict as to three of the five. There is thus no basis under New York law to excuse demand for claims against the Supervisory Board or the company's financial advisors.

As for the claims against the two Board of Management defendants (Messrs. Baumann and Condon), Plaintiffs' allegations do not excuse their failure to make demand upon the Supervisory Board. Under New York law, demand may be excused as futile only when a derivative plaintiff pleads one of the following circumstances with particularity:

1. “a majority of the board of directors is interested in the challenged transaction,” either by virtue of “self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is ‘controlled’ by a self-interested director”;

2. “the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances”; or

3. “the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment.”

— *Marx* v. *Akers*, 88 N.Y.2d 189, 189-201 (1996)

Plaintiffs have not adequately alleged demand futility on any of these grounds.

Prong one — no particularized pleading of self-interest. Plaintiffs’ principal theory of futility was that there is a “substantial likelihood that a majority of the current Supervisors could be found liable in this action.” R329 (¶¶ 291-92). New York does not recognize this substantial-likelihood-of-liability theory. *See, e.g.*, *Wandel ex rel. Bed Bath & Beyond, Inc.* v. *Eisenberg*, 60 A.D.3d 77, 80 (1st Dep’t 2009).

Plaintiffs further alleged that all members of the Supervisory Board had a personal interest in the Monsanto acquisition as a means to “entrench” themselves in “positions of power.” R335-36 (¶¶ 301-03). But this generic theory of motive is not sufficiently particularized to meet the heightened pleading standard of § 626(c). *See, e.g.*, *Alpert* v. *Nat’l Ass’n of Sec. Dealers, LLC*, 2004 WL 3270188, at *10 (N.Y. Cty. Sup. Ct. July 28, 2004) (“[T]he receipt of directors’ fees is not sufficient to show self-interest by a board member.”).

As for potential claims against Bayer's former CEO Werner Baumann, Plaintiffs claimed that Bayer's Supervisory Board members cannot consider litigation against him because he is favored by former Supervisory Board member Werner Wenning, to whom all Board members are supposedly beholden. R330-35 (¶¶ 295-98). Plaintiffs offer no particularized facts to substantiate this claim of control. *See Health-Loom Corp.* v. *Soho Plaza Corp.*, 209 A.D.2d 197, 198 (1st Dep't 1994) (requiring "specific and detailed allegations that the defendant directors have coercive powers over the other directors").

Prong two — no particularized pleading of inadequate information. Plaintiffs likewise failed to plead with particularity that Supervisory Board members did not adequately inform themselves about the Monsanto acquisition. Indeed, Plaintiffs pleaded to the contrary that the Supervisory Board members "were each intimately involved in the Monsanto Acquisition at critical points from May 2016 to the date the Acquisition closed in June 2018," R244-45 (¶ 146); *see also* R245-48 (¶¶ 147-52). These allegations preclude a finding of demand futility based on adequacy of information. *See, e.g.*, *Brewster* v. *Lacy*, 24 A.D.3d 136, 136 (1st Dep't 2005).

Prong three — no particularized pleading of egregiousness. Finally, the Complaint leveled an extensive critique of the Monsanto acquisition, almost entirely from the perspective of later litigation outcomes. R162-78, R185-200,

R305-09 (¶¶ 2-20, 32-50, 245-49). These hindsight criticisms do not satisfy Plaintiffs' burden of pleading that the Monsanto transaction was "egregious on its face" when it was entered. *In re Omnicom Grp. Inc. S'holder Derivative Litig.*, 43 A.D.3d 766, 768-69 (1st Dep't 2007) (egregiousness prong requires particularized allegations that "rule out all possibility" that the challenged transaction "was the product of sound business judgment" when entered).

B. Plaintiffs do not satisfy New York's "contemporaneous ownership" rule.

In addition, BCL § 626 requires Plaintiffs to show they held Bayer shares "at the time of bringing the action" and "at the time of the transaction of which [they] complain[]." BCL § 626(b). This "contemporaneous ownership" rule is "rigorously enforced." *Indep. Inv. Protective League* v. *Time, Inc.*, 50 N.Y.2d 259, 263 (1980).

Plaintiffs did not allege when they first acquired Bayer shares, the Complaint is inconsistent as to the temporal relationship between their ownership and the breaches they allege, R211, R310 (¶¶ 66, 252), and their verifications were either silent or vague as to timing. R358 (Haussmann Verification ¶ 1), R359 (Cattan Verification ¶ 1). Without anything more, this threshold failure to satisfy § 626(b) would require affirmance.

POINT IV

THE FIRST DEPARTMENT CORRECTLY AFFIRMED DISMISSAL OF PLAINTIFFS' CLAIMS FOR LACK OF PERSONAL JURISDICTION

To survive a motion to dismiss under CPLR 3211(a)(8), a plaintiff must show that the exercise of jurisdiction would satisfy both the CPLR and the federal Due Process Clause. *Williams* v. *Beemiller, Inc.*, 33 N.Y.3d 523, 528 (2019). The Supreme Court concluded that Plaintiffs failed to make the requisite statutory showing for the Bayer Defendants, R23-26 (Order at 11-14), and the First Department affirmed, R2569 (First Dep't Opinion at 3). Neither court reached the constitutional infirmities of the Complaint. Both grounds support affirmance.

A. Plaintiffs have not shown that the Bayer Defendants transacted business in New York under CPLR 302(a)(1).

Plaintiffs seek to establish specific jurisdiction under New York's long-arm statute, which extends jurisdiction to non-resident defendants where the alleged causes of action "aris[e] from" categories of contacts identified in the statute. CPLR 302(a). According to Plaintiffs, New York has jurisdiction because the Bayer Defendants "transact[ed] business" here. *See* CPLR 302(a)(1); Br. 25-29. "In order to determine whether personal jurisdiction exists under CPLR 302(a)(1), a court must decide (1) whether the defendant transacts any business in New York and, if so, (2) whether the cause of action arises from such a business transaction." *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 334 (2012) (cleaned up). The

first *Licci* prong requires an objective inquiry into whether the non-domiciliary defendant, on its own initiative, projected itself into the State to engage in a "sustained and substantial transaction of business." *D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297-98 (2017). The second prong requires that these same contacts have "an articulable nexus or substantial relationship" with the plaintiff's cause of action. *Id.* at 299.

The Supreme Court correctly held that Plaintiffs' scattershot pleading fell far short on both prongs:

> That Bayer engaged New York-based attorneys and arranged funding through New York institutions simply does not constitute purposeful availment as it relates to the cause of action, which relates to due diligence activities as to a Missouri-based company and the decisions made in Germany to proceed with the acquisition forming the basis of this lawsuit. It is simply too tenuous of a connection to New York.

R25-26 (Order at 13-14). In so holding, the Supreme Court followed a consistent line of authority establishing that incidental contacts like those alleged by Plaintiffs are insufficient for long-arm jurisdiction. The First Department correctly upheld that result.[7]

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[7] Plaintiffs also suggest that in affirming dismissal for lack of personal jurisdiction, the First Department relied upon recent precedent that adopted a "wrong" and "dangerous" "in state presence" jurisdictional test. Br. 35 (citing *Rudd*, 217 A.D.3d at 407). Plaintiffs are confused. The court cited precedent acknowledging that the internal-affairs doctrine does not apply where "a foreign entity nevertheless ha[s] 'such presence' in our State as would, irrespective of other considerations, call for the application of New York law." *Rudd*, 217 A.D.3d at 407 (quoting *Greenspun* v. *Lindley*, 36 N.Y.2d 473, 477 (1975)). There is nothing

1. Plaintiffs did not plead that the Bayer Defendants "establish[ed] a continuing relationship" for "sustained and substantial" business in New York.

Plaintiffs have failed to allege that any of the activity underlying their claims took place in New York. There is no allegation that any member of Bayer's Board of Management or Supervisory Board committed any misconduct here, performed any due diligence here, held any board meetings here, or made any business decisions here. *See generally* R158-357; *see also* R18 (Order at 6) ("None of the defendants were present at the closing and no board meetings took place in New York in connection with the due diligence or otherwise in authorizing the deal.").

On appeal to the First Department, Plaintiffs attempted to overcome their deficient pleading by pulling new, unpleaded New York contacts out of thin air — a tactic that they now repeat in their briefing before this Court. For example, Plaintiffs assert that the merger agreement was "signed by Baumann and Liam Condon . . . in New York." Br. 25-26; *see also* Br. 3, 8, 38. Nothing in the record supports that (inaccurate) contention. *See id.* (citing only R2514 (a lawyer's affidavit asserting that the agreement was signed, without saying where) and the merger agreement itself). And even if the merger agreement had been signed in New York, that fact would not establish long-arm jurisdiction. *See Presidential*

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novel about that holding, which this Court reiterated just months ago in *Eccles*. 2024 WL 2331737, at *7.

Realty Corp. v. *Michael Square W., Ltd.*, 44 N.Y.2d 672, 673 (1978) (allegation of contract signing in New York insufficient under CPLR 302(a)(1)).

Another example: Plaintiffs suggest that Monsanto has merged into or integrated with the New York corporation Bayer CropScience, Inc., such that Monsanto's operations are now conducted out of New York. Br. 6. Again, that allegation is unpleaded, unsupported, inaccurate, and entitled to no weight.

Yet another example: Plaintiffs repeatedly assert that the transaction physically "closed" in New York. Br. 3, 8, 25, 27, 38, 54. This is unpleaded speculation, all the more dubious because closings are often conducted virtually in the modern era. *See* TriBar Opinion Committee, *Comment Concerning Use of Electronic Signatures and Third-Party Opinion Letters*, 75 Bus. Law. 2253 (2020) ("[V]irtual closings have been and are the norm.").

With these record distortions, Plaintiffs try to obscure the dearth of New York contacts alleged in their complaint. In fact, the record below includes only a handful of allegations placing any Bayer Defendant in New York: R322-23 (¶¶ 275-78) (alleging that Mr. Baumann met with then-president-elect Trump in January 2017 to discuss antitrust approval for the merger); R320 (¶ 273) (alleging that unidentified Bayer personnel made investor presentations "in New York City and elsewhere"); R320-22 (¶¶ 274-75) (alleging that after Bayer agreed to acquire Monsanto, one of its U.S. subsidiaries refinanced merger debt through a bond

offering led by New York-based banks); *see also* R1891 (Pls.' Mem. Opp. Bayer Defs.' Mot. to Dismiss) (asserting that Mr. Baumann had dinner with Monsanto's CEO in New York days before the merger agreement, without offering any detail on what the top executives discussed).

This Court's precedents show that these attenuated, peripheral contacts do not constitute the transaction of business in the State. *See Presidential Realty*, 44 N.Y.2d at 673 (meeting to negotiate "conciliatory modifications" to deal and sign related agreement not transaction of business); *Paterno*, 24 N.Y.3d at 378 (frequent calls, emails, and texts with New York resident plaintiff did not constitute transaction of business because contacts were "responsive in nature"); *see also Ghose* v. *CNA Reinsurance Co.*, 43 A.D.3d 656, 660-61 (1st Dep't 2007) (reversing denial of *forum non conveniens* dismissal, even though defendants conducted business here and the transaction at the "heart of the litigation" had "some nexus to New York"); *Aquiline Cap, Partners LLC* v. *FinArch LLC*, 861 F. Supp. 2d 378, 388-90 (S.D.N.Y. 2012) (CPLR 302(a)(1) not satisfied where alleged meetings in New York "did not involve the drafting or negotiation" of the agreements underlying the plaintiff's cause of action and "repeated phone calls and emails" to New York did not demonstrate that the defendant had "s[ought] out a New York forum").

Indeed, Plaintiffs' own cases demonstrate their failure to allege the kind of "continuing relationship" for "sustained and substantial" business that CPLR 302(a)(1) demands. For example, Plaintiffs lean heavily on the Court's recent decision in *State of N.Y.* v. *Vayu, Inc.*, 39 N.Y.3d 330 (2023), which they characterize as affirming personal jurisdiction "based on a single in-state business meeting plus emails and letters." Br. 36. In fact, *Vayu* involved allegations that a foreign corporation conducted a two-year campaign to sell merchandise to a New York state institution, through phone calls and emails, culminating in two in-person meetings in New York. 39 N.Y.3d at 335. Plaintiffs allege nothing like that here. And their other authorities are likewise far afield of the allegations pleaded in the Complaint.[8]

Nor can Plaintiffs paper over this absence of New York contacts by pointing to Bayer's engagement of advisors with New York offices. *See* R225, R231, R237-38, R319-22 (¶¶ 102, 114, 133-36, 271-74). On this point, the Supreme

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[8] *See Al Rushaid* v. *Pictet & Cie*, 28 N.Y.3d 316, 326-27 (2016) ("[r]epeated, deliberate use" of a correspondent bank in New York for money-laundering purposes); *Wilson* v. *Dantas*, 128 A.D.3d 176, 183 (1st Dep't 2015) (multiple contracts negotiated and executed in New York creating decade-long relationship with New York bank); *Fischbarg* v. *Doucet*, 9 N.Y.3d 375, 381, 385 (2007) ("continuing relationship" involving "frequent" and "regular[] communicat[ions]" with New York lawyer); *D&R Glob.*, 29 N.Y.3d at 297-98 (multiple New York meetings between plaintiff and defendant to further their agreement and promote defendant's product).

Court correctly concluded that Bayer's retention of these advisors "simply does not constitute purposeful availment." R25 (Order at 13). Courts routinely reject the hiring of New York-based advisors as a basis for long-arm jurisdiction. *See Davis* v. *Scottish Re Grp. Ltd.*, 2016 WL 3688466, at *5 (N.Y. Cty. Sup. Ct. July 11, 2016) (defendant's retention of New York lawyers and financial advisors insufficient under CPLR 302(a)(1) because plaintiff had not shown it was "essential to retain New York advisors" and not merely "incidental"); *PaineWebber, Inc.* v. *Westgate Grp., Inc.*, 748 F. Supp. 115, 120 (S.D.N.Y. 1990) (defendant's "desire to get a big 'New York' [i]nvestment house" not purposeful availment, "just as 'Get me a New York lawyer,' without more, is not an invocation of *in personam* jurisdiction").

Plaintiffs also fail to leverage Bayer's New York contacts into jurisdiction over all 31 individual Bayer Defendants. To do so, Plaintiffs needed to establish that each Defendant controlled Bayer's activities in New York. This requires a detailed showing that each "was a 'primary actor' in the specific matter in question," not simply that they held high "title[s] or position[s]." *Coast to Coast Energy, Inc.* v. *Gasarch*, 149 A.D.3d 485 487 (1st Dep't 2017) (internal quotation omitted); *see Kreutter* v. *McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988).

In an effort to meet this demanding standard, Plaintiffs point to the sort of conclusory allegations New York courts consistently reject. *See* Br. 28-29 (citing

¶¶ 146-57, 150-52, 292). Plaintiffs' complaint generically alleged that the individual Bayer Defendants "review[ed]" and "approv[ed]" the Monsanto acquisition. *See* R244-50, R329 (¶¶ 146-57, 292). This is a far cry from the detailed showing required. *See Coast to Coast Energy*, 149 A.D.3d at 487. Notably absent is any mention of New York, let alone a detailed description of how each individual Defendant controlled Bayer's activities here.

The cases on which Plaintiffs rely all involved much greater New York engagement, thus highlighting the poverty of their pleading. *See Kreutter*, 71 N.Y.2d at 464-65 (allegations that defendant instructed company to divert plaintiff's investment to entity wholly owned by his family); *Coast to Coast Energy*, 149 A.D.3d at 487-88 (rejecting exercise of agency-based jurisdiction where plaintiffs offered "conclusory" allegations of "daily communication[s]" with New York actors and "failed to proffer any specific facts to demonstrate how or when [defendant] participated" in the relevant activities); *Aviles* v. *S&P Glob., Inc.*, 380 F. Supp. 3d 221, 260-62 (S.D.N.Y. 2019) (allegations that founder, CEO, and sole voting shareholder intimately involved in company's day-to-day operations directed outflows of capital into his own pockets).[9]

[9] Plaintiffs argue that they should have been permitted to conduct jurisdictional discovery, claiming that they made a "sufficient start" to demonstrate that essential facts establishing jurisdiction are unavailable. Br. 30 n.14. Before the Supreme

2. Plaintiffs' claims do not arise from any New York contacts.

Plaintiffs also had to show that their claims "aris[e] from" the Bayer Defendants' New York contacts, CPLR 302(a), which requires a "substantial relationship" between the alleged activity in New York and the cause of action. *Johnson* v. *Ward*, 4 N.Y.3d 516, 519 (2005).

They failed on that prong, too. Plaintiffs' claims attack Bayer's decision to acquire Monsanto based on allegedly deficient due diligence. Plaintiffs do not even pretend to be suing about the terms of the merger agreement or the regulatory approval process. And Plaintiffs have conceded that their suit did not arise from the merger debt:

> THE COURT: [T]he way I understood the gravamen of your complaint, it was that this company should never have been bought. (. . .) [I]t wasn't the debt itself that caused the problem. In other words, if they had picked another company that didn't have these problems and taken on this debt, we might not be here today.
>
> [Plaintiffs' Counsel]: I think that's fair to say, your Honor.

R90.38 (Tr. Hr'g on Mot. to Dismiss at 38:3-14).

Nor did this lawsuit arise from any of the grab bag of other tangential New York contacts alleged by Plaintiffs. The Complaint asserts in conclusory fashion that Monsanto-related litigation was "centered" in New York, *see* R171-73, R192,

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Court, Plaintiffs advanced a perfunctory discovery request in a footnote of their brief opposing dismissal. R1898. This is waiver, not a "sufficient start."

R240-41, R308-09, R319 (¶¶ 17, 37, 141, 249, 271-72), yet Plaintiffs' claims are not about Monsanto's litigation, but instead the risk it presented to Bayer at the time of the Monsanto deal. Plaintiffs further alleged that Bayer ADRs are issued by a New York bank, R310-12, R318 (¶¶ 255-58, 269); that Monsanto's shares traded on the New York Stock Exchange, R319 (¶ 271); and that Wachtell Lipton represents Bayer in a securities case in California, R319 (¶ 272). But these allegations likewise have no relation to the breaches of duty that Plaintiffs allege, and their peripheral mention in the Complaint makes dismissal no less appropriate.

Caselaw confirms that the link between Plaintiffs' claims and Bayer's activities in New York is too attenuated to support jurisdiction. Applying this Court's precedents, the lower courts have repeatedly found no nexus between deal-related New York contacts and claimed misconduct that did not stem from the terms of the deal. *See, e.g.*, *Poms* v. *Dominion Diamond Corp.*, 2019 WL 2106090, at *3-4 (N.Y. Cty. Sup. Ct. May 15, 2019) (New York forum-selection and choice-of law provisions in merger financing documents and engagement of New York-based deal advisors insufficiently connected to claims based on misleading merger disclosures); *Access Advantage Master, Ltd.* v. *Alpha Prime Fund Ltd.*, 2020 WL 1852641, at *4 (N.Y. Cty. Sup. Ct. Apr. 9, 2020) (New York contacts in the course of investing with Bernie Madoff insufficient for jurisdiction

where claims arose from fund's decision to suspend redemptions after Ponzi scheme was revealed).[10]

B. Jurisdiction over the Bayer Defendants would violate due process.

Even if jurisdiction were permissible under the CPLR, it would be incompatible with constitutional due process. While the lower court did not reach this issue, it provides an alternate ground for affirmance. *Friedman*, 30 N.Y.3d at 485 n.1.

Under the federal constitution, a state court cannot exercise personal jurisdiction over a foreign citizen unless the lawsuit both "arise[s] out of or relate[s] to the defendant's contacts with the forum," *Daimler AG* v. *Bauman*, 571 U.S. 117, 118 (2014) (internal quotation and citation omitted), and comports with "traditional notions of fair play and substantial justice." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 923 (2011) (internal quotation and citation omitted). Five "reasonableness" factors are relevant to this analysis:

1. the burden on defendants;

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[10] Plaintiffs also suggest that Defendant Bayer Corp. consented to personal jurisdiction in New York by registering to do business here. Br. 36. This argument was never raised below and so cannot support reversal. Nor is it an accurate statement of New York law. *See Aybar* v. *Aybar*, 37 N.Y.3d 274, 290 (2021) (rejecting the same argument). And, in all events, the argument is irrelevant because it is directed solely to a Bayer subsidiary from which no damages are sought and to which no misconduct is attributed. R214 (¶ 73).

2. the forum state's interest in adjudicating the dispute;

3. plaintiffs' interest in obtaining convenient and effective relief;

4. the judicial system's interest in the efficient resolution of controversies; and

5. the shared interest of the states in furthering fundamental substantive social policies.

Asahi Metal Indus. Co., Ltd. v. *Superior Ct. of California, Solano Cnty.*, 480 U.S. 102, 113 (1987). Each factor favors dismissal here.

First, Bayer, a German company, headquartered in Germany and governed by German law, would be significantly burdened if forced to litigate its internal affairs in New York. The U.S. Supreme Court has instructed courts to accord "significant weight" to the "unique burdens placed upon one who must defend oneself in a foreign legal system." *Id.* at 114. Similarly, as for the 31 Bayer officers and directors named as defendants, 23 live overseas and none in New York. Forcing these individuals to litigate in American courts would impose significant hardship. *See, e.g.*, *AlbaniaBEG Ambient Sh.p.k* v. *Enel S.p.A.*, 160 A.D.3d 93, 110 (1st Dep't 2018).

Second, New York has no cognizable interest in adjudicating Plaintiffs' claims, which concern the internal governance of a German corporation and the application of German law to decisions made in Germany. Plaintiff Ms. Haussmann is a California resident. R211 (¶ 66). Mr. Cattan claims to live in New

York, but a "plaintiff's residence alone is not sufficient basis under due process for jurisdiction." *Scheuer* v. *Schwartz*, 2008 WL 5191395, at *2 (N.Y. Cty. Sup. Ct. Oct. 15, 2008).

Third, any claimed interest in convenient relief carries little weight here. Plaintiffs chose to invest in a German company whose charter and governing law require shareholder disputes to be brought in Germany. A German court would be best-equipped to assess Plaintiffs' German-law claims of fiduciary misconduct. Plaintiffs' right to pursue relief in Germany is sufficiently convenient under the third *Asahi* factor. *See, e.g.*, *Metro. Life Ins. Co.* v. *Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996) (plaintiff's interest in convenient relief not better served by litigating in Vermont, where defendant was a nonresident and no witnesses or evidence were likely to be in the state). And the same holds under the fourth *Asahi* factor, because a German court would also be better positioned to enforce any judgment resulting from this dispute, allowing for more efficient resolution of the litigation.

Finally, the laws and policies implicated here — the application of German fiduciary law to the internal affairs of a German company — further reveal the impropriety of litigating Plaintiffs' claims in New York. When considering whether to summon a foreign defendant to an American court, deference must be given to "the procedural and substantive policies of other nations whose interests

are affected by the assertion of jurisdiction." *Asahi*, 480 U.S. at 115. Plaintiffs should not be allowed to evade German law and Bayer's governance policies, both of which apply to Bayer's shareholders worldwide. To hold otherwise would undermine the "[g]reat care and reserve" American courts must apply when extending their jurisdiction to overseas defendants. *Id*.

C. Plaintiffs have also not established personal jurisdiction over the Credit Suisse Defendants.

The Credit Suisse Defendants are also not subject to personal jurisdiction under New York statute or the federal constitution (*see supra* Point IV.B), as demonstrated in their briefing before the Supreme Court. Plaintiffs had no response, and do not allege that any Credit Suisse Defendant engaged in any wrongdoing in New York. The motion court's reasoning in dismissing the Bayer Defendants thus applies equally to the Credit Suisse Defendants. *See supra* Point IV.A. Indeed, the record shows that the Credit Suisse Defendants "had no involvement" in the decisions made or due diligence performed concerning the Acquisition — the only activities that the motion court determined had given rise to Plaintiffs' cause of action. *See* R404 ¶ 8 (Kläy Aff.); R406 (¶ 7) (Kläy Aff.); R140-141 & n.9; R25-26 (Order at 13-14). It is uncontested, moreover, that (i) the Credit Suisse Defendants are located in Switzerland (R403 ¶ 2; R406 ¶ 2) and (ii) the Bayer Defendants received all "advice from the banks in Germany, where the Bayer Defendants were located and where all meetings of the Supervisory and

Management Board occurred" (R22 (Order at 10)). While the lower courts did not reach this argument, it provides an alternate ground for affirmance. *Friedman*, 30 N.Y.3d at 485 n.1.

POINT V

THE FIRST DEPARTMENT CORRECTLY AFFIRMED DISMISSAL OF PLAINTIFFS' CLAIMS ON THE GROUND OF *FORUM NON CONVENIENS*

Under CPLR 327(a), "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court . . . may stay or dismiss the action in whole or in part on any conditions that may be just." The question under the statute is whether the action "would be better adjudicated elsewhere." *Islamic Republic of Iran* v. *Pahlavi*, 62 N.Y.2d 474, 478-79 (1984). As the Supreme Court found and the First Department confirmed, the answer is a resounding "yes," and the "elsewhere" is Germany. *See* R21-22 (Order at 9-10). Plaintiffs argue that this was an abuse of discretion. This Court should affirm.

A. The Supreme Court correctly applied the CPLR 327(a) factors in dismissing for *forum non conveniens.*

Consistent with the guidance of this Court, the Supreme Court applied a discretionary, multifactor analysis under CPLR 327(a), examining "the burden on New York courts, potential hardship to [Defendants], the unavailability of an alternative forum in which [Plaintiffs] may bring suit, the residence of the parties, and whether the transaction at issue arose primarily in a foreign jurisdiction."

R20-21 (Order at 8-9) (citing and applying *Pahlavi*, 62 N.Y.2d at 479). The Supreme Court's faithful application of these factors — standing alone — supplies sufficient basis to affirm. As this Court has held, "if the courts below considered the various relevant factors in making" a determination to dismiss under CPLR 327(a), "there has been no abuse of discretion reviewable by this Court, even if we would have weighed those factors differently." *Est. of Kainer* v. *UBS AG*, 37 N.Y.3d 460, 467 (2021) (internal alteration and quotation omitted).

But even if the Supreme Court's analysis of the discretionary CPLR 327(a) factors were reviewable, the outcome would be the same. The decision below correctly concluded that each factor favors dismissal. R21-22 (Order at 9-10).

1. The action would impose an unnecessary burden on New York courts.

Plaintiffs plead claims under German corporation law. R239-40, R242-44 (¶¶ 139, 143). As the Supreme Court held, the application of German law to those claims would impose a "significant" and entirely avoidable burden on New York's courts. R22 (Order at 10) (citing *Est. of Kainer* v. *UBS AG*, 175 A.D.3d 403, 405 (1st Dep't 2019)). Moreover, discovery would impose further burdens in the handling of witnesses and evidence abroad, implicating European data privacy laws and the Hague Evidence Convention. *See Serov ex rel. Serova* v. *Kerzner Int'l Resorts*, 43 N.Y.S.3d 769, at *8 (N.Y. Cty. Sup. Ct. 2016) (noting burdens

attendant to jurisdiction over witnesses, evidence, and possible additional defendants in the Bahamas).

Although the Supreme Court is certainly capable of navigating this international complexity, CPLR 327 does not compel the New York courts to "add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." *Shin-Etsu Chem. Co. Ltd.* v. *3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 176 (1st Dep't 2004). As the Supreme Court found, the nexus here is almost nonexistent. While one of the Plaintiffs claims to reside in New York, he asserts a claim on behalf of a German corporation that is the true party in interest, and CPLR 327(a) expressly states that a party's residence in New York "shall not preclude" dismissal. *See Koster* v. *(Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947) (reasoning that derivative plaintiffs' forum selection is entitled to less deference because "[t]he cause of action which such a plaintiff brings before the court is not his own but the corporation's").

2. Litigation in New York would impose an undue burden on defendants.

The "potential hardships to the [foreign] defendants of litigating in New York are clear." *Est. of Kainer*, 175 A.D.3d at 405. They would go beyond the inconvenience and cost of possible travel to New York for testimony — for the Bayer Defendants and other witnesses who may be willing to testify — and would also include for the Bayer Defendants what the U.S. Supreme Court has recognized

as the "unique burden" of defending themselves in a foreign legal system. *Asahi*, 480 U.S. at 114.

Confronting these facts, the Supreme Court found it "beyond cavil that defending this action in New York would hoist a substantial and unnecessary burden on the defendants." R15 (Order at 3). Plaintiffs' blithe response is that Defendants made no "evidentiary showing . . . of any hardship from defending this action in New York." Br. 54. This is false. Defendants submitted detailed affirmations and documentary evidence confirming that none of the Bayer Defendants reside in New York and virtually all reside in Europe, and that bank entities that were engaged to provide services to Bayer – which were not the named Bank Defendants, *see supra* Point VI – did so predominantly from abroad. This evidence, which the Supreme Court considered in its analysis, *see* R21-22 (Order at 9-10) (citing affirmations from Defendants), is the evidence relevant to establish the burden of litigating an overseas dispute in Manhattan.

3. Plaintiffs' claims arise from facts outside New York.

As discussed above, Plaintiffs' causes of action bear only the most attenuated connection to New York, further favoring *forum non conveniens* dismissal. *Pahlavi*, 62 N.Y.2d at 479. The claims against Defendants stem from allegedly faulty oversight of the Monsanto acquisition and alleged aiding and abetting of that oversight. *See* R270-72, R280-81 (¶¶ 190-92, 208-09); *see also*

R263-74, R298-305 (¶¶ 176-96, 228-44). But this conduct, if it occurred at all, occurred outside New York. *See supra* Point IV.

Plaintiffs' authority only demonstrates how far afield their pleadings are from CPLR 327's "substantial nexus" standard. They rely heavily on *Broida* v. *Bancroft*, 103 A.D.2d 88 (2d Dep't 1984), for example, where they say the requisite nexus was established because the defendant Dow had shares trading on a New York exchange and "frequent[ly] litig[ated] in New York courts." Br. 52. This ignores that Dow was headquartered in Manhattan and a majority of directors and officers who lived or worked here. *Broida*, 103 A.D.2d at 93. No part of that reasoning supports Plaintiffs here. Similarly, Plaintiffs cite *Mason-Mahon* as an authority for rejecting dismissal, Br. 55 — overlooking the fact that *Mason-Mahon*, unlike this case, involved alleged wrongdoing here in New York, 54 individual defendants who lived or worked here, and three nominal defendants incorporated or headquartered here. 166 A.D.3d at 759.

4. Relevant documents and witnesses are in Germany.

The documents and witnesses relating to the dispute are almost entirely confined to Germany. None of the individual Bayer Defendants live in New York. R746-48 (Semrau Aff. ¶¶ 6-7); R778 (Arnold Aff. ¶ 5). Likewise, their financial advisors are located outside of the United States and/or traveled extensively to Germany, where many of the agreements were negotiated. *See* R154 (Buchwald

Aff. ¶ 6); R157-368 (Buchwald Aff. Exs. 1, 2); R393 (CSSU Aff. ¶ 4). And the key documents are Bayer corporate books and records, including board minutes and materials — all maintained in Germany. *See* R244-48 (¶¶ 146-53); R748 (Semrau Aff. ¶ 9); R779 (Arnold Aff. ¶ 8); *Bader & Bader* v. *Ford*, 66 A.D.2d 642, 647 (1st Dep't 1979) (granting *forum non conveniens* dismissal where alleged misconduct was board approval of corporate actions and "most if not all" relevant documents and witnesses were in Michigan); *Zelouf* v. *Republic Nat'l Bank of N.Y.*, 225 A.D.2d 419, 419 (1st Dep't 1996) (affirming dismissal where majority of relevant witnesses and documents were in London). Plaintiffs have identified no basis to infer that Bayer stored any relevant communications or other records in this country, let alone this State.

5. Germany is an available alternative forum.

Plaintiffs suggested in their pleadings that German courts are inadequate because German corporation law imposes conditions for derivative standing that do not exist under New York law. R313-15 (¶¶ 260-61). But shareholders have already filed suits in Germany to recover damages stemming from the Monsanto acquisition. Plaintiffs in these actions, including a New York-based investment company, claim that Bayer and its leadership misrepresented the risks of acquiring Monsanto, either because they knew of the risks or were "negligent" about them.

See R748 (Semrau Aff. ¶ 11). That amply demonstrates the adequacy of the German courts.

6. Germany has an interest in the internal affairs of German corporations.

Finally, but importantly, dismissal of this derivative action in favor of a German court would promote the public interest of comity by recognizing Germany's interest in the substance of the dispute. The lower courts have repeatedly invoked CPLR 327(a) to vindicate this interest. Thus, in *Fernie* v. *Wincrest Cap. Ltd.*, the court granted *forum non conveniens* dismissal as a matter of comity "defer[ring] to the Bahamian interest in resolving that country's own corporate governance issues." 2019 WL 978483, at *4 (N.Y. Cty. Sup. Ct. Feb. 28, 2019), *aff'd*, 177 A.D.3d 531 (1st Dep't 2019). And in *Holzman* v. *Xin*, the court likewise recognized that the "Cayman Islands have a significant interest in the application of Cayman Islands law to the actions of a Cayman Islands corporation." 2015 WL 5544357, at *10 (S.D.N.Y. Sept. 18, 2015).

As in these cases, Germany has a significant interest in disputes about the internal affairs of companies incorporated there, as reflected in the statutory requirement that derivative actions be brought there. R806-07 (Koch Aff. ¶¶ 68-72); R844 (AktG § 148(2)). There is no reason to depart from the rule of comity here.

Moreover, Bayer's articles of association also require that this derivative case proceed in Germany, supplying another basis for affirmance. Article 3(3) states that the "location of the Company's registered office" shall be "[a] place of jurisdiction for all disputes between the Company and stockholders," and that "[f]oreign courts shall have no jurisdiction with respect to such disputes." R752 (Semrau Aff. Ex. 1, Article 3(3)). The European Court of Justice has held that such provisions operate as a matter of contractual agreement to assign exclusive jurisdiction to the court identified. Case C-214/89, *Powell Duffryn plc* v. *Petereit*, 1992 E.C.R. I-1745 (Addendum at 1-12); R808-09 (Koch Aff. ¶¶ 76-84).

B. Plaintiffs do not have leave to appeal the Supreme Court's denial of leave to reargue and renew their waived and meritless argument under CPLR 327(b).

Plaintiffs separately argue that even if New York is an inconvenient and unsuitable forum for the litigation of their claims, CPLR 327(b) barred the Supreme Court from dismissing under the doctrine of *forum non conveniens*. Br. 43. But this Court has already denied Plaintiffs leave to appeal the "portion of the Appellate Division order resolving [the] appeal from the October 2022 Supreme Court order" that rejected this argument. *Haussmann* v. *Baumann*, 41 N.Y.3d 934, 934-35 (2024). Accordingly, Plaintiffs' reliance on CPLR 327(b) is not before the Court.

Even if the issue were live, Plaintiffs' reliance on CPLR 327(b) would fail. They concede that they presented no such argument in opposition to Defendants' motions to dismiss. Instead, Plaintiffs waited for months after dismissal to advance their statutory argument, through a filing styled as a motion for leave to reargue and renew under CPLR 2221. The Supreme Court properly denied leave without reaching the merits. R89.

1. Denial of leave to reargue and renew was proper.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221(d)(2). Under this standard, new arguments that were not previously advanced may not be raised on reargument. *William P. Pahl Equip. Corp.* v. *Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992).

Leave to renew, meanwhile, must be "based upon new facts not offered on the prior motion that would change the prior determination . . . ." CPLR 2221(e)(2); *William P. Pahl Equip.*, 182 A.D.2d at 27 (renewal is proper where "new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal"). A renewal motion "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(3).

Plaintiffs could not invoke either procedure. With respect to reargument, Plaintiffs expressly conceded that they "were at fault for neglecting to squarely raise the 327(b) argument . . . ." R97 (Tr. Hr'g on Pls.' Mot. for Leave to Reargue and Renew at 7:22-23); *see also* R102 (Tr. at 12:12-13) ("[W]e bear the blame for not raising the argument earlier . . . ."). And with respect to renewal, Plaintiffs have conceded that the Complaint "set[] forth the choice-of-law and submission-to-jurisdiction provisions" they belatedly invoked. R2410. But even supposing that Plaintiffs had submitted that contractual language as evidence for the first time in their post-dismissal motion, renewal would still have been improper, because Plaintiffs presented no "justification for the[ir] failure" to timely present them. CPLR 2221(e)(3).

Unable to identify any procedural basis for their motion, Plaintiffs advance the bizarre claim that the Supreme Court and now this Court *must* entertain their late-breaking argument because CPLR 327(b) "cannot be waived." Br. 50. This, Plaintiffs say, is because the provision is equivalent to a "deprivation of subject-matter jurisdiction." Br. 49. Plaintiffs cite no relevant authority for this far-fetched proposition, which has been rejected by the lower courts for that reason. *See, e.g.*, *Nurlybayev* v. *SmileDirectClub, Inc.*, 205 A.D.3d 455, 457 (1st Dep't 2022) (holding that plaintiff "failed to preserve" argument under CPLR 327(b)).

In the alternative, Plaintiffs suggest that "there can be no waiver" because they secretly "intended to file a pre-hearing brief to raise the CPLR 327(b) issue" after oral argument on Defendants' motions to dismiss concluded. Br. 51. Even were that representation credited, it would make no difference. An unauthorized, post-argument sur-reply would not have cured Plaintiffs' waiver.

2. CPLR 327(b) did not preclude dismissal of Plaintiffs' claims.

In addition to being procedurally improper, Plaintiffs' argument under CPLR 327(b) is meritless. Under that provision:

> [T]he 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.

CPLR 327(b). According to Plaintiffs, the statute governs this dispute because their derivative claims "'relate to' and 'arise out of'" a Bayer ADR deposit agreement and several loan agreements through which Bayer refinanced its debt from the Monsanto acquisition. Br. 44-49. To prevail on that theory, Plaintiffs must establish that their claims "depend[] on rights and duties that must be analyzed with reference to" each agreement. *Imaging Holdings I, LP* v. *Israel Aerospace Indus. Ltd.*, 907 N.Y.S.2d 437, at *3 (N.Y. Cty. Sup. Ct. 2009). Plaintiffs cannot carry that burden.

ADR deposit agreement. Bayer's ADR agreements have nothing to do with this case. Plaintiffs have conceded that they do not even hold ADRs. R2508. No part of their claim relies or possibly could rely upon the terms and conditions of ADR deposit ownership. And even if Plaintiffs did hold ADRs, fiduciary breach claims by ADR holders are independent of any underlying ADR agreement. *See, e.g.*, *Batchelder* v. *Kawamoto*, 147 F.3d 915, 918 (9th Cir. 1998) (rejecting claim that the right of an ADR holder to bring derivative suit arose from a deposit agreement).

Post-signing lending agreements. The lending agreements cited by Plaintiffs are likewise untethered to the claims advanced in the Complaint. As the Supreme Court held in its decision granting dismissal, Plaintiffs' claims are not even related to the loans that funded the acquisition. R25-26 (Order at 13-14). They clearly bear no relationship to the post-close restructuring agreements cited by Plaintiffs in support of their CPLR 327(b) argument.

Plaintiffs sputter that CPLR 327(b) applies because "[b]ut for" the lending agreements, the acquisition would "not have been undertaken or consummated" and "not have been paid for." Br. 48. The claim is absurd. The agreements Plaintiffs cite came over two years after the merger was approved and after it closed. R2435. Plaintiffs thus cannot establish even a rough causal relationship

between the agreements and the Monsanto acquisition — let alone the necessary connection to the specific claims advanced in the Complaint.

Nor can CPLR 327(b) apply to the Bank Defendants, since they were not even signatories of the agreements cited by Plaintiffs. *See* R2429-2433 (Chang Aff., Ex. 11 (Bayer Deposit Agreement)); R2434-2457 (Chang Aff., Ex. 12 (Offering Memorandum)). The statutory language is clear that the provision applies only to "the parties to the contract," and only when those parties "have agreed" to apply New York law to their dispute. CPLR 327(b).

POINT VI

IN THE ALTERNATIVE, DISMISSAL OF CLAIMS AGAINST THE BANK DEFENDANTS SHOULD BE AFFIRMED BECAUSE NONE OF THE NAMED BANK DEFENDANTS WAS ENGAGED TO PROVIDE SERVICES TO BAYER IN CONNECTION WITH THE MONSANTO ACQUISITION OR FOR FAILURE TO STATE A CLAIM

Dismissal of Plaintiffs' claims against the Bank Defendants can also be affirmed on the independent, alternative grounds that (i) none of the named Bank Defendants was engaged to provide advisory or financial services to Bayer in connection its acquisition of Monsanto, and (ii) Plaintiffs failed to state a claim against the Bank Defendants. *See Friedman*, 30 N.Y.3d at 485 n.1.

First, dismissal is warranted where, as here, "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 8-9 (1st Dep't

2004) (citation omitted); *see also* CPLR 3211(a)(1). The Bank Defendants submitted documentary evidence conclusively demonstrating that they were not engaged to provide services to Bayer in connection with the Monsanto Acquisition. *See* R360-68 (Buchwald Aff. Ex. 2 (BAMLI Frankfurt Engagement Letter)); R369-79 (Buchwald Aff. Ex. 3 (ML India Engagement Letter)); R394-402 (CSSU Aff. Ex. A (CSSU Engagement Letter)). Only their non-party affiliates were engaged by Bayer. *See* R360-68; R369-79; R394-402.

Plaintiffs did not allege facts sufficient to pierce the corporate veil such that any of the named Bank Defendants could be held liable for its subsidiaries or affiliates, and as such, dismissal of Plaintiffs' claims against the Bank Defendants should be affirmed on this alternative ground. *See, e.g.*, *Menche* v. *Meltzer, Lippe, Goldstein & Breitstone, LLP*, 129 A.D.3d 682, 682 (2d Dep't 2015) (granting motion to dismiss pursuant to CPLR 3211(a) where "provision of [an] engagement letter was clear, explicit, and unequivocal" and contradicted plaintiff's allegations).

Second, dismissal is appropriate where, as here, Plaintiffs failed to plead any specific factual allegations as to what the Bank Defendants allegedly failed to do or how alleged financial incentives prevented them from adequately advising Bayer, *see* CPLR 3211(a)(7) — let alone with the particularity required under CPLR 3016(b) for claims that sound in breach of fiduciary duty. Indeed, the Complaint lacks *any* factual allegations of wrongdoing against the Bank Defendants under

German law or otherwise — a fact the Supreme Court aptly recognized was a "problem" for Plaintiffs. R90.74 (Tr. at 74:9-14) ("[Plaintiffs' counsel] cites the statute and says that liability arises under the statute without specifically telling me which bank did what.").

CONCLUSION

The Court should affirm the First Department's decision and reject Plaintiffs' effort to transform New York into a forum for derivative litigation untethered to this State.

Dated: New York, New York
August 6, 2024

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ADDENDUM

JUDGMENT OF THE COURT
10 March 1992 *

In Case C-214/89,

REFERENCE to the Court pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberlandesgericht Koblenz for a preliminary ruling in the proceedings pending before that court between

Powell Duffryn plc

and

Wolfgang Petereit

on the interpretation of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978 Accession Convention,

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, F. Grévisse, and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— Powell Duffryn plc, by Eckart Wilcke, Rechtsanwalt of Frankfurt am Main;

— Wolfgang Petereit, by Karl Otto Armbrüster, Rechtsanwalt of Mainz;

— the German Government, by Professor Christof Böhmer, acting as Agent;

— the Commission of the European Communities, by Friedrich-Wilhelm Albrecht, Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt of Düsseldorf;

having regard to the Report for the Hearing,

after hearing the oral observations of Powell Duffryn plc, Wolfgang Petereit and the Commission, represented by Henri Étienne, Principal Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, at the hearing on 15 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 20 November 1991,

gives the following

Judgment

1 By order of 1 June 1989, which was received at the Court on 10 July 1989, the Oberlandesgericht (Higher Regional Court) Koblenz referred to the Court for a preliminary ruling pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters a number of questions on the interpretation of Article 17 of that convention, as amended by the 1978 Accession Convention (Official Journal 1978 L 304, p. 1, hereinafter referred to as the 'Brussels Convention').

2 The questions arose in proceedings between W. Petereit, acting as liquidator of the company IBH-Holding AG, in liquidation, and Powell Duffryn plc (hereinafter referred to as 'Powell Duffryn'). It appears from the papers in the case that Powell Duffryn, a company under English law, had subscribed for registered shares in IBH-Holding AG (hereinafter referred to as 'IBH-Holding'), a company limited by shares under German law, when the latter's capital was increased in September 1979. On 28 July 1980 Powell Duffryn participated in the proceedings of a general meeting of IBH-Holding during which, by a show of hands, the shareholders adopted resolutions amending the statutes of IBH, in particular by inserting into them the following clause:

'By subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company.'

3 In 1981 and 1982 Powell Duffryn subscribed for further shares on successive increases in the capital of IBH-Holding and also received dividends. In 1983 IBH-Holding was put into liquidation and Mr Petereit, acting as liquidator, brought an action before the Landgericht Mainz claiming that Powell Duffryn had not fulfilled its obligations to IBH-Holding to make the cash payments due in respect of the increases in capital. He also sought to recover dividends which he maintained had been wrongly paid to Powell Duffryn.

4 The Landgericht dismissed the plea of lack of jurisdiction raised by Powell Duffryn whereupon the latter appealed to the Oberlandesgericht Koblenz. That court considered that the dispute raised a question of interpretation of Article 17 of the Brussels Convention, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does the rule contained in the statutes of a company limited by shares on the basis of which the shareholder by subscribing for or acquiring shares submits, with regard to all disputes with the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company constitute an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention which is concluded between the shareholder and the company?

(Must this question be answered differently depending on whether the shareholder himself subscribes for shares on the occasion of an increase in the company's capital or acquires existing shares?)

2. If Question (1) is answered in the affirmative:

   (a) Does subscription for and acceptance of shares, by means of a written declaration of subscription, on the occasion of an increase in the capital of a company limited by shares comply with the requirement for writing laid down in the first paragraph of Article 17 of the Brussels Convention as regards a jurisdiction clause contained in the statutes of the company?

   (b) Does the jurisdiction clause satisfy the requirement that the dispute must arise in connection with a particular legal relationship within the meaning of Article 17 of the Brussels Convention?

   (c) Does the jurisdiction clause in the statutes also cover claims for payment arising out of a contract relating to the subscription of shares and claims for repayment of wrongly paid dividends?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

6 Article 17 of the Brussels Convention provides that if the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court of a Contracting State is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court is to have exclusive jurisdiction.

7 It is necessary to examine whether a clause conferring jurisdiction inserted in the statutes of a company limited by shares constitutes an agreement within the meaning of Article 17 between the company and its shareholders.

8 Powell Duffryn maintains that a clause conferring jurisdiction contained in the statutes of a company limited by shares cannot constitute an agreement because the statutes are normative by nature and thus the contents are not open to discussion by shareholders; shareholders even face the risk of clauses being introduced against their express wishes if such a possibility is provided for in the statutes or the applicable national law.

9 In contrast, Mr Petereit and the Commission argue, on the basis of German law and in particular the provisions of the German Aktiengesetz (Law on share companies), that the statutes are contractual by nature and therefore a clause conferring jurisdiction contained therein constitutes an agreement within the meaning of Article 17 of the Brussels Convention.

10 In that regard, it appears from a comparative examination of the different legal systems of the Contracting States that the characterization of the nature of the relationship between a company limited by shares and its shareholders is not always the same. In some legal systems the relationship is characterized as contractual and in others it is regarded as institutional, normative or *sui generis*.

11 The question therefore arises whether the concept of 'agreement conferring jurisdiction' in Article 17 of the Brussels Convention must be given an independent interpretation or be construed as referring to the national law of one or other of the States concerned.

12 It must be emphasized that, as the Court held in its judgment in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, neither of those two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the

Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty.

13 The concept of 'agreement conferring jurisdiction' is decisive for the assignment, in derogation from the general rules on jurisdiction, of exclusive jurisdiction to the court of the Contracting State designated by the parties. Having regard to the objectives and general scheme of the Brussels Convention, and in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and persons concerned, therefore, it is important that the concept of 'agreement conferring jurisdiction' should not be interpreted simply as referring to the national law of one or other of the States concerned.

14 Accordingly, as the Court has held for similar reasons as regards, in particular, the concept of 'matters relating to a contract' and other concepts, referred to in Article 5 of the Convention, which serve as criteria for determining special jurisdiction (see the judgment in Case 34/82 *Peters* v *ZNAV* [1983] ECR 987, paragraphs 9 and 10), the concept of 'agreement conferring jurisdiction' in Article 17 must be regarded as an independent concept.

15 In that connection, it must be recalled that, when it was requested to interpret the concept of 'matters relating to a contract', referred to in Article 5 of the Convention, the Court held that the obligations imposed on a person in his capacity as member of an association were to be considered to be contractual obligations, on the ground that membership of an association created between the members close links of the same kind as those which are created between the parties to a contract (see the judgment in Case 34/82 *Peters* v *ZNAV*, referred to above, paragraph 13).

16 Similarly, the links between the shareholders of a company are comparable to those between the parties to a contract. The setting up of a company is the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective. In order to achieve that objective each shareholder is assigned, as regards other shareholders and the organs of the

company, rights and obligations set out in the company's statutes. It follows that, for the purposes of the application of the Brussels Convention, the company's statutes must be regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up.

17 It follows that a clause conferring jurisdiction in the statutes of a company limited by shares is an agreement, within the meaning of Article 17 of the Brussels Convention, which is binding on all the shareholders.

18 It is immaterial that the shareholder against whom the clause conferring jurisdiction is invoked opposed the adoption of the clause or that he became a shareholder after the clause was adopted.

19 By becoming and by remaining a shareholder in a company, the shareholder agrees to be subject to all the provisions appearing in the statutes of the company and to the decisions adopted by the organs of the company, in accordance with the provisions of the applicable national law and the statutes, even if he does not agree with some of those provisions or decisions.

20 Any other interpretation of Article 17 of the Brussels Convention would lead to a multiplication of the heads of jurisdiction for disputes arising from the same legal and factual relationship between the company and its shareholders and would run counter to the principle of legal certainty.

21 Consequently, the reply to the national court's first question must be that a clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

The first part of the second question

22 In the first part of the second question the national court seeks essentially to ascertain the circumstances in which a clause conferring jurisdiction contained in a company's statutes satisfies the formal requirements laid down in Article 17 of the Brussels Convention.

23 Pursuant to Article 17 of the Brussels Convention an agreement conferring jurisdiction must be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with usage in that area and of which the parties are or ought to be aware.

24 As the Court held in Case 24/76 *Estasis Salotti* v *Rüwa* [1976] ECR 1831, paragraph 7, the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.

25 It must nevertheless be emphasized that the situation of shareholders as regards the statutes of a company — which are the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective — is different from that, referred to in the abovementioned judgment, of a party to a contract of sale as regards general conditions of sale.

26 First of all, in the legal systems of all the Contracting States the statutes of a company are in writing. Moreover, in the company law of all the Contracting States it is acknowledged that the statutes of companies play a particular role in so far as they constitute the basic instrument governing the relations between a shareholder and the company.

27 Furthermore, irrespective of how shares are acquired, every person who becomes a shareholder of a company knows, or ought to know, that he is bound by the

company's statutes and by the amendments made to them by the company's organs in accordance with the provisions of the applicable national law and the statutes.

28 Consequently, when the company's statutes contain a clause conferring jurisdiction, every shareholder is deemed to be aware of that clause and actually to consent to the assignment of jurisdiction for which it provides if the statutes are lodged in a place to which the shareholder may have access, such as the seat of the company, or are contained in a public register.

29 Having regard to the foregoing, the reply to the first part of the national court's second question must be that, irrespective of how shares are acquired, the formal requirements laid down in Article 17 must be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

The second part of the second question

30 Pursuant to Article 17 of the Brussels Convention, jurisdiction is conferred for the purpose of settling disputes which have arisen or which may arise 'in connection with a particular legal relationship'.

31 That requirement is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given *forum* as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.

32 In that regard, a clause conferring jurisdiction contained in a company's statutes satisfies that requirement if it relates to disputes which have arisen or which may arise in connection with the relationship between the company and its shareholders as such.

33 The question whether in the present case the clause conferring jurisdiction is to be regarded as having such an effect is a question of interpretation which is a matter for the national court to resolve.

34 Consequently, the reply to the second part of the national court's second question must be that the requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such.

The third part of the second question

35 In the third part of the second question the national court is essentially seeking to ascertain whether the clause conferring jurisdiction raised before it applies to the disputes brought before it.

36 In that regard, it should be observed that it is for the national court to interpret the clause conferring jurisdiction invoked before it.

37 Consequently, the reply to the third part of the national court's second question must be that it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.

Costs

38 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberlandesgericht Koblenz, by order of 1 June 1989, hereby rules:

1. A clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention;

2. Irrespective of how shares are acquired, the formal requirements laid down in Article 17 must be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register;

3. The requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring

jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such;

4 **It is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.**

Due Slynn Joliet Schockweiler Grévisse

Kapteyn Mancini Kakouris Moitinho de Almeida

Rodríguez Iglesias Diez de Velasco Zuleeg Murray

Delivered in open court in Luxembourg on 10 March 1992.

J.-G. Giraud
Registrar

O. Due
President

GOVERNOR'S BILL JACKET

1961
CHAPTER 855

108 PAGES

NYLS added 3 pages

BUSINESS CORPORATION LAW

Revision

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We accept the following:

Chapter 855

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET

COMMITTEE ON STATE LEGISLATION

SHELDON OLIENSIS, CHAIRMAN
425 PARK AVENUE
NEW YORK 22, N. Y.
PLAZA 9-8400

S-522

April 19, 1961

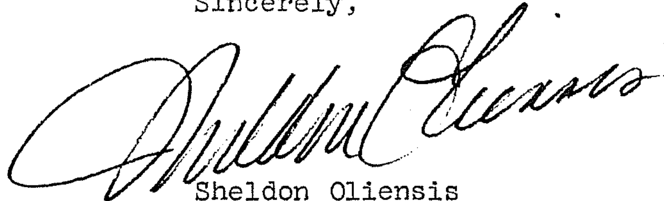
Re: S. Int. 522, Pr. 522

Dear Mr. MacCrate:

This bill would effect a comprehensive revision of the New York Corporation laws. The Committee on Corporate Law of this Association, in conjunction with the Committee on Corporation Law of the New York State Bar Association has issued a joint report with respect to this bill, and we enclose a copy herewith.

Jan 25, 1961 – opposition later withdrawn RJW

Sincerely,



Sheldon Oliensis
Chairman

Enclosure

Honorable Robert MacCrate
Executive Chamber
State Capitol
Albany 1, New York

1961 C.855

JOINT REPORT

OF

NEW YORK STATE BAR ASSOCIATION
Committee on Corporation Law

AND

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
Committee on Corporate Law

ON

PROPOSED NEW YORK BUSINESS CORPORATION LAW
1961 SENATE INT. 522, ASSEMBLY INT. 885

INTRODUCTION

On March 22, 1956, the Legislature of the State of New York adopted a Resolution creating the Joint Legislative Committee to Study Revision of Corporation Laws. This action was taken as a result of recommendations to the executive and legislative branches of the state government by the Committee on Corporation Law of the New York State Bar Association and others.

After almost five years, there has been introduced in the current session of the Legislature a Bill representing the product of the Joint Legislative Committee's endeavors. The purpose of this Report, which is presented jointly by the Committee on Corporation Law of the New York State Bar Association and the Committee on Corporate Law of The Association of The Bar of the City of New York, is to comment on the Bill. The Bill was referred to in Governor Rockefeller's annual message to the Legislature on January 4, 1961 as "of major importance to our business climate".

The aim of this project was the modernization and simplification of the present outmoded and overcomplicated statutes, which have not been subject to a general revision for many years, and the elimination of unnecessarily onerous and cumbersome provisions which have burdened New York corporations and harmed the New York business climate. While the Bill embodies certain improvements over the existing corporate laws of New York, it falls short of the hopes of the members of the Bar who have been working on these matters. A great many of the suggestions made by the State and City Bar Committees have been disregarded, perhaps because the procedures adopted did not provide an adequate opportunity for exchanges of views between members of the practicing bar and the revisers' staff. In most cases, our Committees do not know why these recommendations were not adopted.

ARTICLE 1

SHORT TITLE; DEFINITIONS; APPLICATION; CERTIFICATES; MISCELLANEOUS

General.

This Article contains a combination of provisions derived from the introductory and concluding sections of the Model Act, together with various additional miscellaneous provisions, largely from the existing corporation laws, which are not paralleled in the Model Act.

§ 1.02 *Definitions.*

To a large extent the definitions are based on definitions in Section 2 of the Model Act and and are not contained in the existing corporation laws. In several instances the Model Act definitions have been altered, without improvement and actually with resulting defects. Several useful definitions in the Model Act have been omitted, namely definitions of "Shares", "Subscriber", "Shareholder" and "Authorized shares".

A definition of "Bonds" is included, of no recognizable origin, which defines the term to include bonds, debentures and notes "having a maturity date of more than a year after the date of their issue". This gives an artificial meaning to a well recognized term and, while doing so, eliminates short-term obligations for no apparent sound reason in the light of later provisions of the Bill, e.g., § 5.21 and § 5.22.

The Bill in general adopts accounting definitions from the Model Act, including the equity definition of insolvency. As hereinafter noted in respect of Article 5, this will import major undesirable changes into the New York law.

A change in the Model Act definition of "net assets" should be pointed out, since it is likely to invite litigation because of its effect on the right to pay dividends and other matters. The new definition is, in short, assets less "debts and similar liabilities". There is no indication as to what "similar" means.

The definition of "earned surplus" is taken in part from the Model Act, but omits express provision for elimination of a deficit, which makes the definition inconsistent with § 5.20 of the Bill, also taken from the Model Act. The definition also substitutes "net *realized* earnings, gains or profits, after deduction of all losses" for "net profits, income, gains and losses", which might have the effect of raising questions under the accrual basis of accounting. (Italics here and elsewhere supplied for emphasis.)

"Certificate of incorporation" is not adequately defined to encompass corresponding instruments of corporations formed under the varying laws of other jurisdictions.

The definition of "stated value" is inadequate in the case of different series of shares of the same class, by providing that all shares of the same class shall have the same stated value.

§ 1.03 *Application.*

Since the existing corporation laws must continue in effect, at least for the time being, for the purpose of insurance, banking, railroad and other special corporations in New York, it is essential that the scope and applicability of the new Business Corporation Law be precisely defined. This is attempted, but not adequately accomplished, in this section.

§ 1.04 *Certificates; requirements, signing, filing, effectiveness.*

This section is useful in combining in one place various requirements which apply throughout the Bill. Paragraph (d) however, as to who shall sign a certificate, is not clear. It also perpetuates the requirement of notarization which has been eliminated in some forward-looking states and has been eliminated in our own state as to tax returns and for various other purposes. At least, a provision should be added to this section to eliminate the present requirement by the Department of State for authentication of all foreign notarizations of corporate instruments to be filed in the Department. We understand that New York stands almost alone in requiring this.

Under paragraph (f) of this section, an instrument becomes effective upon filing by the Department of State "Except as otherwise provided in this chapter". The Bill presently makes an exception to permit a delayed effective date of an instrument only in the case of mergers and consolidations. Our Committees have urged that delayed effective dates of amendatory certificates, and also of certificates of incorporation and certificates of dissolution, should be authorized. We can see no practical objection.

Paragraph (g) of this section retains the requirement that the Department of State certify and transmit a copy of every instrument to the clerk of the county in which the office of a domestic or foreign corporation is located in this state and that the county clerk file and index such copy. Our Committees consider this county filing of instruments obsolete in this day of rapid communication. There is no such requirement in the Model Act and many forward-looking states no longer require it. Its elimination would produce a tremendous saving to the state, both in current expense and in the long-term cost of preservation of duplicate records.

§ 1.08 *Notices dispensed with when delivery is prohibited.*

This section is taken from G. C. L. § 32. A new requirement has been added for no apparent reason, requiring that in lieu of proof of notice when dispensed with there must be set forth the name of every person not notified. This could be an unreasonable burden, especially in the case of publicly-held corporations.

ARTICLE 2

Corporate Purposes and Powers

§ 2.01 *Purposes.*

This basic substantive section of the Bill provides:

> "A corporation may be formed under this chapter for any lawful business purpose or purposes except to do in this state any business for which formation is *permitted* under any other statute of this state unless such statute permits formation under this chapter."

The word "permitted" in the foregoing provision should read "required" and the "unless" clause should be omitted. Various statutes of the state permit formation of certain types of corporations under such statutes, while the same types of corporations may also be formed under the present Stock Corporation Law, although such formation is not specifically permitted under the other statutes. The suggested changes would, we believe, be more consistent with the present law and not require consideration and possible amendment of other statutes.

Two separate bills have been introduced on behalf of the Joint Legislative Committee for amendment of this section. One bill (Senate Int. 939; Assembly Int. 1359) would amend the section to insert authority to form a corporation "for all lawful business purposes" and then to add the following to the section:

> "Where the certificate of incorporation states that the purposes of the corporation shall be all lawful business purposes, either alone or along with a specified purpose, or purposes, the purposes of the corporation shall be all lawful business purposes permitted corporations formed under this chapter except any business purpose requiring the consent of any public body or officer under this chapter or any other statute unless such business purpose is expressly set forth in the certificate of incorporation and the required consent is attached thereto."

Our Committees recommend adoption of this amendment. Several states now permit this. We believe that it is a sensible recognition of the actual effect of innumerable certificates of incorporation as presently drawn to encompass every conceivable purpose that the draftsman can dream up.

The second Bill (Senate Int. 962; Assembly Int. 1360) would further amend this section to provide that a corporation may be formed for any lawful business purpose or purposes "whether or not for profit". Some members of our Committees have urged such a provision and we would approve this amendment.

§ 2.02 *General Powers.*

This section is based on Section 4 of the Model Act, but the language has in a number of instances been altered without apparent improvement and with resulting

defects. For example, in the introduction there has been inserted the limitation that each power thereafter granted to a corporation shall be "in furtherance of its corporate purposes". Thereafter in the section, however, it is provided that a corporation may make donations "irrespective of corporate benefit" or in time of war or national emergency may do any lawful business in aid thereof "notwithstanding its corporate purposes".

The section omits certain desirable general powers specified in the Model Act, such as a general power of indemnification of officers, directors and others. Since extensive limitations upon indemnification, at least of officers and directors, are specifically dealt with in Article 7, the omission of the general authority from Article 2 is improper. It also raises a question as to whether or not there is any authority to indemnify employees who are not officers or directors.

At this point it may be noted that § 9.08, in an irrelevant context, authorizes a corporation to give a guaranty "although not in furtherance of its corporate purposes", when authorized by a two-thirds stock vote. This provision should be transferred from Article 9 to Article 2.

§ 2.03 *Defense of ultra vires.*

This section, based on Section 6 of the Model Act, would, in effect, abolish the defense of ultra vires on behalf of a New York corporation. We approve the change, but the section requires some clarification in language.

ARTICLE 3

Corporate Name and Service of Process

§ 3.01 *Corporate name; general.*

This section retains the narrow restriction of the existing corporation laws which require a corporate name to contain the word "corporation", "incorporated" or "limited", or an abbreviation thereof. The Model Act and the vast majority of states allow a corporation to be designated also by the word "company". Furthermore, New York until 1911 recognized "company" as sufficient for both domestic and qualified foreign corporations, with the result that many older corporations now do business in this state with only such appellation.

We recommend that the more liberal Model Act provision be reinstated in the New York law. Further, the State of Connecticut, in recently adopting the Model Act, recognized that it should be sufficient for companies incorporated in other countries to qualify without the addition of an appellation other than that indicating corporate status in their home jurisdiction, such as "A.G." or "S.A.". Such a provision would seem particularly appropriate for a state concerned with encouraging international commercial transactions, such as New York.

This Article contains a general and salutary provision in § 3.03 for reservation of corporate names, but in § 3.01(a)(6) provides that where consent of the State Board of Standards and Appeals to the use of certain appellations is required (such as "labor union"), such consent must be obtained before the name may be reserved. This seems unnecessary and should only be required at the time of the filing of the certificate of incorporation or certificate of qualification, rather than at the time of reservation.

The provision of the Model Act that the name of a new corporation shall not be the same as the name of an existing corporation has been altered in this section to limit the prohibition to similarity with the name of an existing corporation "as such name appears on the index of names of existing domestic and authorized foreign corporations of any type or kind in the department of state, division of corporations". We are informed that this index is not complete. The fact that this change might simplify checking by the Division of Corporations, or limit its responsibility in this regard, would not seem a valid reason for a test which affords inadequate protection against formation of new corporations in contravention of the substantive rights of other existing corporations.

§ 3.02 *Corporate name; exceptions.*

This section contains certain exceptions to the restrictions on corporate names, but fails to include an exception to permit use of a similar name with the consent of the prior user. On the other hand, the same section permits a foreign corporation in certain cases and with approval of the Department of State to qualify under a name similar to that of a prior user without giving the latter an opportunity to be heard.

This section omits any provision corresponding to G. C. L. § 9-c, which permits an investment company to include "finance" or "bond" in its name with the approval of the Superintendent of Banks.

§ 3.03 *Reservation of name.*

This section is based upon Section 8 of the Model Act and in large part is an addition to the existing corporation laws. The Model Act provision, however, has been considerably revised and most of the changes are undesirable. For example, a provision has been added for issuance of a formal "certificate of reservation" which must later be filed with the certificate of incorporation or application for authority of a foreign corporation. This appears wholly unnecessary. No provision is made for a lost certificate. Also, extension of a reservation under the Bill is authorized only "for good cause shown by affidavit", which seems unwarranted and may create difficulties in the absence of any expressed standards.

Sections 9 and 10 of the Model Act contain provisions, not reflected in the Bill, whereby foreign corporations which are not doing business in the state, and there-

fore are not required to qualify, may register their names on an annual basis. This affords a simple procedure for the protection of corporate names by companies of national reputation and obviates the need for forming name-holding subsidiaries. A majority of our Committees favor the addition of such provisions in the Bill.

§§ 3.04 - 3.08 [*Service of Process*].

These sections are an example of numerous provisions in the Bill, some in great detail, on matters of civil procedure which obviously belong in the Civil Practice Act. A reason which has been given for not removing them from the existing corporation laws is that there has been a moratorium on amendments to the Civil Practice Act. However, the revision of that Act is pending in the Legislature so that the time is now appropriate to put these procedural provisions where they belong. This is especially so since the present Bill is not to take effect for two years.

Section 3.05 provides that, in addition to the mandatory designation of the Secretary of State for service of process, a corporation may designate an additional registered agent who may be "a natural person who is a resident of or has a business address in this state or a domestic corporation or authorized foreign corporation". This would permit a non-resident individual to act as such agent, although service of process upon him might be impracticable because of his non-residence. Further, since § 1.02(a)(4) defines "domestic corporation" as one organized or which could be organized under the new Business Corporation Law, the permission here granted would not extend to a New York corporation organized under another law, such as the Banking Law, even though it may have acted as statutory agent in New York for many years.

ARTICLE 4

Formation of Corporations

§ 4.01 *Incorporators.*

We see no reason why a corporation should not act as an incorporator and point out that in § 2.02(a)(16) the Bill would include the power to act as an incorporator as one of the general powers of New York business corporations. It would thus appear that business corporations organized in our state are to be granted a general power which they may exercise under the laws of some other state, if those laws so permit, while they cannot exercise the same power within New York. This attitude furnishes a striking contrast with that exhibited in Article 13 which imposes various and onerous restrictions on foreign corporations.

§ 4.02 *Certificate of incorporation; contents, filing.*

Reference is made to the discussion under § 2.01 concerning incorporation for "all lawful business purposes". We further note that while the lists of subscribers to shares and of initial directors have been dispensed with, which we approve, there has been added a requirement that the specific address of the office of the corporation be stated in the certificate. This is unnecessary. There is also required the specific address of any designated resident agent other than the Secretary of State and the specific address where the Secretary of State shall mail a copy of any process served upon him.

ARTICLE 5

Corporate Finance

General.

Essentially this Article represents a combination of provisions based on Sections 5, 14 through 22, 40 and 41 and 60 through 64 of the Model Act. The Article embodies the most far-reaching changes of the entire Bill in existing corporation laws. In substance, many of these provisions of the Model Act have been the most seriously questioned, and least accepted, provisions when that Act has been adopted by other states. The draftsmen of the Bill have recognized this and have not attempted to adopt to the fullest extent the provisions of the Model Act, but they still have gone far beyond the present law of this state.

While, as noted, most of the sections are based on sections of the Model Act, extensive language changes have been made apart from deliberate substantive changes, and the drafting changes, in the opinion of our Committees, have not been for the better. As a consequence, the Article raises serious problems, not only of the substance of the provisions, but of ambiguities and inconsistencies which we believe would for many years plague the practitioner and present questions which could only be resolved in the courts or by legislative clarification.

§ 5.01 *Authorized shares.*

Paragraph (a) of this section is based on the first paragraph of Section 14 of the Model Act, with extensive changes of language which are confusing, although not apparently intended to accomplish substantively different results. Essentially in the case of this paragraph we would recommend adherence more closely to the Model Act provision.

Authorization of special classes of stock should also be recognized, as is done in the Model Act provision and in certain other provisions of this Bill.

§ 5.02 *Issue of any class of preferred shares in series.*

This section is essentially based on Section 15 of the Model Act, but again with confusing variances in language. For example, the purpose of the section is to authorize the issuance of preferred shares in series, but the opening sentence of the Model Act provision has been so twisted that there is not in this section of the Bill any express statement that, if the certificate of incorporation so provides, a corporation may issue any class of preferred shares in series. It should also be noted that the Model Act authorizes issuance in series of both preferred shares and special classes of shares, which is desirable.

Contrary to the provisions of the Model Act which are reflected in this section, we believe that there should be no narrow delineation of the variations permissible between different series of the same class. Indeed, we see no reason to limit the power of a corporation, in accordance with its charter, to make whatever variations its business requirements dictate in different series of the same class of stock, except that the shares of all series of the same class should share ratably when stated dividends or amounts payable on liquidation are not paid in full, as presently required by S. C. L. § 11. The existing provision of S. C. L. § 11 also contains a limitation that the shares of all series of the same class having voting power shall not have more than one vote each, but we do not see any reason why this limitation is necessary. We believe that many large and small corporations will be greatly handicapped in their customary methods of financing through serial preferred stock issues, if the permissible variations between series are restricted as in this section.

§ 5.03 *Subscriptions for shares; time of payment, forfeiture for default.*

Paragraph (d) of the section provides that in case of default in paying any installment due on a subscription for shares, the shares and all previous payments made shall be forfeited to the corporation. This forfeiture provision, which is presently contained in S. C. L. § 68, is harsh. Section 16 of the Model Act appropriately provides that amounts realized on resale of any forfeited shares, in excess of the amount due on the subscription, must be returned to the defaulting subscriber. We believe the Model Act provision should be adopted.

§ 5.04 *Consideration and payment for shares.*

Paragraphs (g) and (h) of this section provide for withholding of the issue of certificates for shares until full payment has been received and further provide that the subscriber is entitled to all the rights and privileges of a shareholder "When the consideration for shares has been paid in full". This is not in accord with current New York law, which permits the issue of certificates for partly paid shares and the payment of dividends thereon. The existing law, particularly in connection with employees' stock purchase plans, is often desirable and should be retained. If eliminated, confusion could result, for example, under plans heretofore adopted under S. C. L. § 14.

§ 5.05 *Rights and options to purchase shares.*

Paragraph (d) of this section requires shareholder authorization for a "plan" for the issue of rights or options to officers, directors or employees, leaving ambiguous, as under the present S. C. L. § 14, the granting of rights or options on an individual basis without a formal plan. We believe that shareholder approval should be required in the case of the granting of rights or options to officers, directors or employees, whether or not there is a formal plan, and recommend that the matter be dealt with as in Section 18A of the Model Act, which is similar to § 5.05 except in this respect.

§ 5.06 *Determination of stated capital.*

This section is a modification of Section 19 of the Model Act. Among the problems dealt with is the question of what part of consideration for shares without par value shall constitute stated capital. The Model Act, recognizing the practicalities of the problem, permits the board of directors to make an allocation between stated capital and capital surplus within sixty days after issuance of shares. The Bill requires such allocation to be made "at the time of issue" which would present serious practical difficulties in many instances.

§ 5.07 *Compensation for formation, reorganization and financing.*

This section of the Bill adopts Section 20 of the Model Act but, without apparent reason, restricts payment, out of the consideration for an issuance of shares, to expenses for the sale or underwriting "by underwriters or dealers or others performing similar services". We see no reason to prevent payment, out of such consideration, of ordinary expenses, such as issue taxes, printing and legal fees, which may be incurred in a private issuance of securities without intervention of underwriters or dealers.

§ 5.08 *Certificates representing shares.*

This section contains in paragraph (c) a requirement for giving notice of existence of certain charter provisions on the face or back of every certificate for shares issued by a corporation. In general, we believe such requirements to be unnecessary and undesirable; shareholders do not generally look at certificates they receive after they have acquired shares for the purpose of ascertaining their rights.

§ 5.10 *Prohibited transfers to officers, directors, shareholders or creditors; laborers' wages preferred.*

It is strongly urged that this section be eliminated. It is derived in part from S. C. L. § 15, which came from an 1890 statute. The 1890 statute was never brought up-to-date to be integrated with the Uniform Fraudulent Conveyance Act which

was enacted in 1925 (Article 10—Debtor and Creditor Law). The protection of creditors is adequately covered in the Debtor and Creditor Law and in the Bankruptcy Act.

Apparently because the Uniform Fraudulent Conveyance Act and the Bankruptcy Act contain detailed provisions dealing with preferential transfers no provision similar to this section was thought necessary in the Model Act.

Paragraph (a) of this section is based on the definition of "insolvent" set forth in § 1.02. Paragraph (b) sets up another test for invalidity of transfer, and that statutory test varies from the test set forth in the Debtor and Creditor Law §§ 271-273.

Paragraph (e) of this section gives priority to laborers' wages. This paragraph is unnecessary because other laws ensure the same result. See comment to § 6.29, *infra*.

The Debtor and Creditor Law refers to every conveyance (defined to mean every payment of money, assignment, release, transfer, lease, mortgage, etc.). The Debtor and Creditor Law is broad enough to include a prohibited transfer to any person, including officers, directors and shareholders of a corporation. Therefore, there is no need for § 5.10.

§ 5.11 *Dividends in cash or property; partial liquidation.*

Paragraph (a) of this section makes several important changes in the New York law relating to corporate dividends, presently embodied in S. C. L. § 58 and Penal Law § 664:

(1) While the capital impairment test for legality of dividends is retained, the section adds a further restriction against payment of dividends which would leave the corporation "insolvent" in the equity sense. This is in accord with the Model Act. However, in view of the difficulty of applying the insolvency test, and the severe personal liability imposed by Article 7 of the Bill on directors for improper dividend payments (as well as for improper purchases of the corporation's own stock and in other respects), we note here particularly that there should be included in Article 7 the provision of Section 43 of the Model Act, not unlike the Delaware law, that exempts a director from liability if he relies and acts in good faith upon financial statements by independent public accountants or represented to be correct by certain corporate officers or if in good faith he considers assets to be of their book value.

(2) Special treatment of "wasting assets" corporations has been added in § 5.11(a)(1). Dividends may be paid in excess of surplus to the extent that the cost of the wasting assets has been recovered by depletion reserves, amortization or sale, if the net assets remaining are sufficient to cover the liquidation preferences of shares having preference on involuntary liquidation. However, unlike com-

parable provisions in, for example, the Model Act and the Delaware Corporation Law, the treatment is limited to corporations engaged "principally" in the exploitation of wasting assets. We see no reason for this limitation; furthermore, the term "principally" is imprecise and is likely to breed doubt and litigation.

(3) Dividends may be paid generally from any surplus, whether capital surplus or earned surplus, as under New York law today, but when a dividend is from sources other than earned surplus notice must be given to the shareholders disclosing the portion of the dividend charged to earned surplus and the portion charged to capital surplus. This is a provision new to the law of New York. The Bill requires like disclosures in other sections with respect to the surplus category from which funds come for purchases under certain circumstances of a corporation's own stock and with respect to the surplus accounts charged when a stock dividend is made, and with respect to transfers of surplus on *split-ups* and *reclassifications.* All this would of course require all New York corporations to maintain separate earned surplus and capital surplus accounts, even though the Bill permits dividends and stock purchases to be made freely out of either class of surplus. The problem is greatly aggravated by § 13.18, which in effect imposes the same requirement on all foreign corporations doing business in New York and having shareholders in New York. Many corporations maintain such separate accounts today; many more do not, and in the case of a large company with a long history we are advised by accountants that separating the accounts for past years will be a major task. Small corporations may find it even more difficult. Section 5.20(a)(1)(A) provides that a domestic corporation formed before the effective date of the Bill which has not previously determined the amount of its earned surplus may do so before the declaration of the first dividend after such effective date, and "such determination shall be conclusive in the absence of fraud", although there is no such provision in favor of a foreign corporation. Despite this provision and the fact that the Bill omits from § 5.20 much of the complex accounting principles of the 1960 Study Bill which were to apply to the computation of earned and capital surpluses, we believe that the disclosure requirement is not of sufficient importance to justify this change from the existing corporation laws. Publicly held corporations are already adequately regulated by stock exchange and S. E. C. rules, and the supposed advantages of the disclosure requirement are largely inapplicable to small and closely held corporations. The directors and officers of small corporations will probably in many cases fail to comply with the requirement simply by reason of unfamiliarity with it and will thereby be trapped into unintended violations and subjected to the severe and broad personal liability imposed by § 5.23.

Even if the underlying principle as to the distinction between earned surplus and capital surplus were acceptable, compliance with the disclosure requirement will often be impossible. Notice is to accompany the dividend or other distribution, setting forth the amount which comes other than from earned surplus. Not infre-

quently a corporation would be uncertain of the source of a distribution until after the close of the fiscal year and then only after its accountants had completed their audit.

Paragraph (b) of this section creates confusion by introducing the concept of "partial liquidation", which is not defined or explained elsewhere in the Bill.

§ 5.12 *Share distributions to shareholders.*

This section is completely new to the statutory law of New York. It provides that "A corporation may, from time to time, make a pro rata distribution of its authorized but unissued shares, or its reclassified or split-up shares, or its treasury shares, to holders of any class or classes of its outstanding shares" subject to five "conditions".

Before turning to the conditions we call attention to the fact that the section is premised on a basic misconception of the way in which the New York corporation law has always operated and will continue to operate under the revision. Stock dividends are, of course, actually "distributed" to the shareholders, just as cash dividends are distributed. On the other hand, a *reclassification* or *split-up* (or *combination* of shares into a lesser number, which is not mentioned) is legally accomplished by the filing of an amendment to the certificate of incorporation, after such amendment has been properly authorized by the stockholders. As soon as the filing takes place the stockholders automatically become the owners of the new shares, and their old certificates at once become evidence of such new ownership. Of course steps should be, and usually are, promptly taken to give the stockholders new *certificates,* appropriately describing the new shares, either in exchange for or in addition to, their old certificates, but such exchange of certificates or delivery of additional certificates is not necessary to make the stockholders the owners of the new shares. There is no "distribution" of the new shares in the ordinary sense.

The first condition is that shares of one class may not be distributed to holders of shares of any other class unless the certificate of incorporation so provides. Section 40 of the Model Act (which properly deals only with the distribution of dividends, and not split-ups, combinations or reclassifications) adds an alternative condition that the payment be authorized by a majority of the shares of the class in which the payment is made. We see no real need for either condition; a court of equity has adequate power to prevent misuse of the corporate power to make share distributions. In any event the application of the condition to reclassification is meaningless; a reclassification by its very nature changes shares of an existing class into shares of another class by amendment of the certificate of incorporation.

The second condition requires a transfer from surplus to stated capital in the event of the distribution of authorized but unissued shares "of an amount at least equal to that required by section 5.04." The reference to § 5.04 is inept. That section, which governs the consideration and payment for newly-issued shares, does not contain any fixed requirement as to amount other than that in the

case of par value shares the consideration shall not be less than the par value; in the case of par value shares the board may from time to time fix a higher consideration, and in the case of no par shares the board may (absent restrictions in the certificate of incorporation) fix the consideration "from time to time". Section 5.12 includes a proviso that "no transfers from surplus need be made upon a share *distribution following a reclassification* of shares by amendment of the certificate of incorporation, except to the extent that the aggregate par or stated value of the reclassified shares *so distributed* exceeds the stated capital for such shares prior to reclassification." For the reason given above this proviso is inappropriate. If any allocation of surplus should be required it would necessarily be made as a part of the reclassification and would not take place when certificates for the reclassified shares are later delivered.

The third "condition" is not a condition at all, but is expressed as an authorization to the corporation to split up treasury shares (while again nothing is said about combinations) or to reclassify treasury shares at the same time that outstanding shares are split or reclassified. This can be, and is, done by New York corporations today, and no specific authorization is necessary. If it were not done the treasury shares which were not so changed might constitute a separate class of shares—a most confusing and undesirable result. The third "condition" also contains an authorization to pay stock dividends on treasury shares, which is desirable. It is believed that this could be done without specific authorization, if it were not for the provisions of § 5.12, which only authorizes distributions on "outstanding" shares, thus excluding treasury shares as defined in § 1.02.

The fourth "condition" is also not a condition, but merely a statement that no transfer from surplus to stated capital need be made by a corporation making a distribution of its treasury shares to holders of any class of outstanding shares. It is an unnecessary accounting provision, and in any event is repeated and covered in § 5.18(c).

The fifth condition requires that "Every share *distribution* to shareholders, whether of authorized but unissued shares, or of split-up or reclassified shares, or of treasury shares, shall be accompanied by a written notice appropriately disclosing the effect of such distribution upon the stated capital and the earned surplus or capital surplus of the corporation." As pointed out above, in the case of a split-up or reclassification the change in the shares is effected by an amendment of the certificate of incorporation authorized by the stockholders, and any effect of the change on capital or surplus would normally be disclosed when that authorization is sought. In any event, however, as stated before, our Committees are opposed to such statutory disclosure requirements which make distinctions between earned and capital surplus compulsory.

We believe that all of § 5.12 is unnecessary and can be eliminated in its entirety. In any event the section should go no further than paragraphs (c), (d) and (e) of Section 40 of the Model Act.

§ 5.13 *Purchase by a corporation of its own shares out of surplus.*

This section adds to the restrictions now existing on the purchase of its own shares by a corporation (1) an "equitable insolvency" test and (2) a provision that no such purchase shall reduce net assets "below the aggregate amounts payable to the holders of shares having prior or equal preferential rights upon involuntary liquidation." This second restriction is inconsistent with provisions in the Bill which permit—properly, we think—the payment of dividends which reduce net assets below amounts necessary to satisfy preferential rights on involuntary liquidation, and which permit preference shares to be originally issued for less than such amounts. We do not think it is necessary or desirable to protect such preferences.

We note that the Bill adds the words "for any purpose" to the opening words of § 5.13 reading: "A corporation may purchase its own shares at any time and *for any purpose* when it is not insolvent * * *." These words did not appear in the 1960 Study Bill. We think that the phrase should be omitted because it could support the argument that there could be no purposes that would be improper—which is not the fact.

§ 5.14 *Purchase by a corporation of its own shares out of stated capital.*

This section permits a corporation to purchase its own shares out of capital in order to eliminate fractions, collect or compromise indebtedness to the corporation, pay shareholders entitled to receive payment for their shares under the chapter, and to effect "subject to the other provisions of this chapter" the retirement of redeemable shares by redemption or purchase. Generally speaking, these exceptions are all desirable. The last-quoted words presumably refer to § 5.17(a) where there is provision that: "No redemption or purchase of redeemable shares shall be made by a corporation out of its surplus or stated capital when such redemption or purchase would reduce the net assets below the aggregate amount payable to holders of shares having prior or equal preferential rights upon involuntary liquidation or below its stated capital after giving effect to the reduction required by paragraph (d) of section 5.18." Confusion and complexities result from the overlapping treatment of this subject in §§ 5.13, 5.14 and 5.17.

We further note that the Bill makes no attempt to extend to these sections dealing with the purchase by a corporation of its own shares the principle that there must be some kind of "disclosure" to the stockholders if the purchases or redemptions of stock are made from capital surplus rather than earned surplus. Disclosure is only required if the purchased shares are cancelled, and cancellation is only required if the purchase is out of stated capital. In that case § 5.18(d) requires disclosure of the effect on stated capital to be made "in the next financial statement furnished by the corporation to its shareholders [where it should be made regardless of the statutory requirement] and in the first notice of dividend

or share distribution that is furnished to shareholders between the date of the reduction of capital and the next financial statement". (Of course, neither the Bill nor the existing corporation laws require the periodic furnishing of any financial statements to shareholders.) We do not point out the inconsistencies in order to urge broader "disclosure" requirements such as those contained in § 5.11(a)(2) and § 5.12(a)(5). We expand on the subject only to show the inconsistencies and complications which the Bill fails to resolve in the process of introducing statutory "disclosure" requirements in an area not touched by the existing corporation laws.

§ 5.15 *Agreements for purchase of its own shares by a corporation.*

Paragraph (a) of this section provides: "A contractual promise by a corporation to purchase the shares of a shareholder shall be enforceable by the shareholder to the extent permitted by section 5.13 (Purchase by a corporation of its own shares out of surplus); except that, if the promise was made contemporaneously with the issue of the shares, it shall be so enforceable only if it was part of an agreement made in furtherance of the business of the corporation." The first part of this sentence removes doubt as to the enforceability of such contracts and is desirable. We do not, however, understand the "except" clause. If the promise is *not* contemporaneous with the issue of the shares is it to be enforceable although *not* made in furtherance of the business of the corporation? What does "in furtherance of the business of the corporation" mean as to a contract to purchase outstanding shares?

§ 5.16 *Redeemable shares.*

Paragraph (b) of this section provides that: "No redeemable or other shares shall be issued which purport by their terms to grant to any holder thereof the right to compel the corporation to redeem such shares" except in the case of open-end investment companies as defined in the Investment Company Act of 1940. At least, this exception is appropriate. A further exception in the 1960 Study Bill applicable to sinking funds has been omitted. This may have been done in response to a memorandum submitted by this Committee which criticized the detailed provisions which the 1960 Study Bill made applicable to sinking funds as being matters that should be regulated by the preferred stock provisions. We still believe that these previous detailed provisions should be eliminated, but it is important that the present language of paragraph (b) be expanded to include a simple exception which would permit a corporation to create sinking funds for the redemption or purchase of its preferred shares to the extent that surplus is available. This would be in accordance with frequent financial practice and would eliminate any doubt as to the continued validity of such provisions in existing issues.

§ 5.18 *Reacquired shares.*

We have mentioned in the discussion of § 5.14 the provision in § 5.18(d) requiring "disclosure" when stated capital has been reduced by the cancellation of reacquired shares. We object to this statutory provision as unnecessary. Regardless of any statutory mandate the necessary information should appear in all subsequent balance sheets of the corporation.

Paragraph (e) provides that shares cancelled under § 5.18 shall be restored to the status of authorized but unissued shares "except that if the certificate of incorporation prohibits the reissue of any shares required or permitted to be cancelled under this section, such shares shall be eliminated from the number of authorized shares by the filing of a certificate of amendment under section 8.05". This ignores the fact that certificates of this kind under § 8.05 must be authorized by the shareholders under § 8.03. Since it is mandatory that these shares be eliminated, we believe that such certificate need only be authorized by the board.

§ 5.19 *Reduction of stated capital in certain cases.*

This section permits a simplified procedure for reduction of capital in two cases: (1) elimination from stated capital of amounts previously transferred thereto from surplus, and (2) reduction of stated capital represented by no-par shares. It is based in general on Section 63 of the Model Act. However, it eliminates the requirement of shareholder authorization which was contained in the 1960 Study Bill and is also contained in the existing corporation laws of New York, the Model Act and, for example, the Delaware Corporation Law. A majority of our Committees think this requirement should be restored. If it is, the "disclosure" provision in paragraph (c) of course becomes unnecessary.

§ 5.20 *Special provisions relative to surplus and reserves.*

This section, together with certain of the definitions in § 1.02, is contained in the Bill chiefly because of the requirements in §§ 5.11(a)(2) and 5.12(a)(5), discussed above, that shareholders be furnished with information as to the effect of dividends on earned surplus and capital surplus. We are glad to note that much of the complex and confusing accounting provisions of the 1960 Study Bill have been eliminated. However, as stated above, we still believe that statutory distinctions between earned surplus and capital surplus are unnecessary and ill-advised innovations in the law, and that the so-called "disclosure" provisions are not required to protect shareholders of New York corporations. We therefore urge the elimination of a large part of this section.

In addition, we would eliminate paragraph (a)(3), which requires the consent of shareholders for the application of capital surplus to eliminate any deficit in the earned surplus. We do not believe that such consent should be necessary

in view of the fact that this is a mere accounting change which should be within the province of the board of directors.

§ 5.21 *Corporate bonds.*

Paragraph (a) of this section dealing with consideration for the issuance of bonds reflects existing provisions in S. C. L. § 69 and is appropriate, except that the definition of "bonds" in § 1.02 excludes notes with a maturity of not more than one year.

Paragraph (b) permits a corporation in its certificate of incorporation to confer upon holders of bonds "rights to inspect the corporate books and records and limited or contingent rights to vote in the election of directors, provided that, so long as the bonds are not in default, the holders thereof shall not have the power to elect more than one-third of the entire board". We do not see why the phrase "limited or contingent" is made applicable only to rights to vote and not to rights to inspect. As a matter of fact, however, the phrase appears inappropriate in either place. The grant of "rights to inspect" and of "rights to vote" would include, without more, lesser rights of the same kind which are subject to conditions or contingencies. We are more concerned by the language of the proviso. The bondholders would have the "power to elect" an entire board if the votes to which they were entitled constituted a majority of those present at an annual meeting, even though the total votes held by all bondholders might have been less than a majority of all votes that might have been cast. The "*power* to elect" cannot be effectively limited to a power to elect one-third or less of the entire board, except by specifically providing that the bondholders, voting alone, shall have the sole right to elect a stated number (not more than one-third) of the board. If stockholders and bondholders all vote together for the same candidates it will not be possible in most situations to know who was elected by the stockholders and who was elected by the bondholders. We believe that it is undesirable to provide for a specific class of directors who would be elected only by the bondholders, and urge that if bondholders are to be given voting rights it be done in the same manner as in the Delaware and Maryland Corporation Laws where they are given rights to vote in the same manner as stockholders. This leaves in the air, of course (as does § 5.21 (b)) the question of the size of the principal amount of bonds which a bondholder must hold for each vote cast by him, but this is not a serious defect.

§ 5.22 *Convertible shares and bonds.*

This section provides that securities convertible at the option of the corporation may not be issued, and prohibits "upstream" conversion in line with Section 14(e) of the Model Act. It contains a specific provision that a corporation may issue bonds convertible into other bonds, which seems superfluous.

Paragraph (d)(1) is badly drafted. It authorizes the corporation to issue bonds convertible into its shares upon terms fixed by the board of directors: "If the number of shares of each class outstanding plus the number of shares that the corporation may be obligated to issue to satisfy conversion privileges does not at any time while such conversion privileges are outstanding exceed the number of authorized shares of that class." In other words, the condition upon which the validity of the convertible bonds (or at least their conversion feature) depends may be broken after the issue of the convertible bonds has taken place. To avoid this any careful lawyer would always elect the alternative condition set forth in paragraph (d)(2), which requires inclusion of a provision in the certificate of incorporation (either originally or by amendment) conferring express authority on the board of directors. Thus the apparent intention of the Bill to make convertible bonds issuable by vote of the board of directors alone is indirectly defeated.

We object again to "disclosure" requirements in paragraph (f) in connection with conversions of convertible stock. Furthermore, we do not see why such "disclosure" should be required when stock is converted and not when bonds are converted.

§ 5.23 *Liability for failure to disclose required information.*

This section provides that the failure of a corporation to comply in good faith with the notice or disclosure requirements contained in various sections of the Bill referred to above "shall make the corporation liable for any direct or indirect damage sustained by any person in consequence thereof". If the disclosure requirements are eliminated, as we urge, this section would of course become unnecessary. If they are not eliminated we believe that the imposition of liability on the corporation is much too vague and indefinite. Very possibly the chance of such liability may not be great, but the damage (including "indirect damage", which is a unique term without any defined meaning as far as we know) could be tremendous. Certainly directors would not regard the risk as inconsequential, particularly since, if the corporation were held liable, stockholders might, in derivative actions, force the directors to make restitution. We know of no similar provision in any corporation law of any state.

The problem is greatly aggravated by § 13.18, which makes § 5.23 applicable to all foreign corporations doing business and having shareholders in New York.

ARTICLE 6

Shareholders

§ 6.01 *By-laws.*

This section provides for amending by-laws by the vote of shareholders entitled to vote for directors and ignores the fact that there may be different classes of shareholders voting for some but not all of the directors. The section is not clear as to whether power to amend by-laws may be vested solely in the board of directors.

§ 6.03 *Special meeting for election of directors.*

The time periods set forth in this section may in some circumstances be insufficient, particularly in the case of corporations subject to S. E. C. proxy requirements. They should be extended.

§ 6.09 *Proxies.*

This section incorporates the provisions of the existing corporation laws as to circumstances under which proxies may be irrevocable. Section 6.20 of the Bill contains a new provision authorizing a binding agreement between two or more shareholders as to the exercise of voting rights, subject to specified limitations. To be consistent with this new provision and to make possible the implementation of such agreements, an additional category of authorized irrevocable proxies should be included in § 6.09.

Paragraph (g) of this section follows S. C. L. § 47-a in providing that a revocable proxy given by the seller of shares to the purchaser may be revoked after the contract of sale has been performed. In most contract of sale cases, that is just the time when continued effectiveness of the proxy is most important, particularly if a record date is involved. The provision should be changed.

§ 6.10 *Oath of shareholder.*

This continues existing corporation law provisions against giving anything of value for a proxy or vote. As noted in connection with § 6.09, this section also should be correlated with § 6.20. The two sections as presently drafted are inconsistent and incomplete. The simplest thing would be to do away entirely with the provision for shareholder oath-taking, which we believe is archaic and not required in most states.

§ 6.11 *Selection and duties of inspectors at shareholders' meetings.*

This section imports a new requirement that the number of inspectors must be "one or three", which seems unnecessary and contrary to the very common practice of using two inspectors.

§ 6.12 *Qualification of voters.*

Paragraph (c) of this section contains a peculiar requirement that shares held by a trustee may be voted by him only "after the shares have been transferred into his name as trustee". It hardly seems possible that it was intended to prevent trustees from ever obtaining proxies and voting shares held by their nominees.

§ 6.20 *Agreements as to voting; provision in certificate of incorporation as to control of directors.*

This section contains two major new provisions for New York law, one dealing with agreements between shareholders concerning their voting rights as such and the other dealing with limitations on the powers of directors in their management of the corporate affairs.

As to paragraph (b), it should be made clear that its purpose is limited to validating charter provisions which otherwise might be questioned as improperly limiting directors' power to manage the business. The wording of the Bill is such that the paragraph might be given a restrictive rather than a broadening effect and thus call into question many limitations on directors' powers which have long been accepted under case law or customary practice, such as restrictions on incurring debt and paying dividends, commonly found in preferred stock charter provisions.

Further, it appears that there is some inconsistency between paragraph (b) and § 6.01(b) which in general terms permits by-law restrictions on directors' powers, as also does § 2.02(a)(11). A further objection to paragraph (b) is that the limitations on directors therein permitted cannot, under the present language, be inserted in an original certificate of incorporation, since a shareholder vote is required to insert such limitations.

Paragraph (c) requires a two-thirds shareholder vote to eliminate director limitations provided in the charter pursuant to the foregoing paragraph. We see no need for the high vote requirement and suggest its elimination.

Paragraph (d) provides for shifting liability for managerial acts or omissions from directors to "the shareholders consenting thereto", where the directors' freedom has been limited under this section. We think that the imposition of shareholder liability might not be appropriate in all circumstances and that the description of the persons to be liable is too vague.

§ 6.24 *Books and records; right of inspection, prima facie evidence.*

Paragraph (e) provides for the mailing to a shareholder, upon written request, of the corporation's most recent balance sheet and profit and loss statement. We believe that the statements required to be furnished should be specifically described and appropriately limited. Thus, subject to a proviso requiring the furnishing of statements for the most recent fiscal year, if more recently publicized statements are not available, the corporation should be required to furnish only the balance sheet and profit and loss statement which were last furnished to shareholders generally or otherwise made available to the general public (e. g., by filing with the S. E. C. or other regulatory agencies). Otherwise, the corporation could be required to furnish to particular stockholders interim balance sheets and profit and loss statements prepared solely for the internal operating purposes of management. Since these are usually unaudited and always subject to year-end adjustment, they

could be misleading. There is also the possibility that particularly enterprising stockholders could use information so obtained to the detriment of other stockholders. Most important is the fact that such statements are prepared for operating purposes and disclosure would often prove contrary to the interests of the stockholders generally.

There should also be some limitation on the frequency with which a shareholder may demand such statements as are to be subjected to the requirement.

§ 6.27 *Security for expenses in shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor.*

Toward the end of this section, there is a new provision conditioning recourse to the security for costs in a derivative action upon a finding by the court "that the action was brought without reasonable cause." This is not in the existing corporation laws, and the Model Act expressly provides for the recourse whether or not there is such a finding. The court's discretion in this important area should not be limited by the necessity of such a finding, and therefore the provision in the Bill should be deleted.

[§ 6.29 *Liability of shareholders for wages due to laborers, servants or employees.*]

While this section is not contained in the Bill itself, the Joint Legislative Committee has introduced a separate bill (Senate Int. 523, Print 523; Assembly Int. 837, Print 837) which would add this § 6.29, and also make a related change in § 6.24. The proposed § 6.29 is a compromise suggestion to retain in the New York law a slightly watered-down version of § 71 of the Stock Corporation Law. Our Committees have repeatedly pointed out that S. C. L. § 71, imposing personal liability on shareholders of New York corporations, is an anachronism. Corresponding provisions are today to be found in the laws of only a few other states. The provision makes it impossible for the careful practitioner to give an unqualified opinion that stock of a New York corporation is "fully paid and non-assessable."

The New York Debtor and Creditor Law, as well as the Federal Bankruptcy Act, properly give priority to wage earners' claims, and the New York Penal Law also contains provisions to protect wage earners against non-payment of their wages. As has been repeatedly documented, S. C. L. § 71 has in the past produced probably as great injustice upon smaller shareholders as could equal any misfortune of the persons it was designed to protect. Its existence in the New York corporation laws has been a prime reason for corporate counsel's selecting other jurisdictions for incorporation in order that they might assure their clients that stock of a corporation would be non-assessable. Our Committees strongly recommend that neither the proposed § 6.29, nor any provision based on the existing S. C. L. § 71, should be added to the new Business Corporation Law.

ARTICLE 7

Directors and Officers

General.

We feel that various changes are necessary from a standpoint of policy on important points covered by this Article. The faults that exist are largely those of concept rather than of drafting, although a number of technical improvements are required. The main topics for concern are the liability of officers and directors, conflicting interests of directors in transactions of the corporation and the indemnity provisions.

§ 7.02 *Number of Directors.*

References in this and other sections to by-laws "adopted by the shareholders" should be expanded to include by-laws adopted by the incorporators.

§ 7.06 *Removal of directors.*

We believe that the right to remove a director *for cause* should not be qualified, as in the Bill, simply because he may have been elected by cumulative voting or may represent one class of shares.

§ 7.07 *Quorum of directors.*

We believe it undesirable to permit one director to constitute a quorum (as one-third of a minimum three-man board) and would require a quorum of not less than two.

§ 7.08 *Action by the board.*

The City Committee recommends that directors should be permitted to act without a meeting by unanimous consent in writing, believing that the twelve states that permit such action are in the forefront and that the trend is toward such legislation. The omission of such a provision coupled with a statement of the Joint Legislative Committee in its Fourth Interim Report to the effect that the provision had been considered and rejected makes it less likely than ever that a New York court would sustain board action by unanimous written consent in any case where the question might be presented. The reason generally adduced for requiring a directors' meeting applies only where there is lack of unanimity among the board members. The arguments of a dissenting director should be heard by the other directors, of course, but where no director dissents there is no need for directors to confront each other in a meeting before taking any action.

A majority of the State Committee does not concur in the foregoing, believing that interchange of ideas is important in reaching decisions.

§ 7.11 *Notice of meetings of the board.*

Paragraph (d) of this section provides that, if a board meeting is adjourned, notice shall be given to directors not present at the time of adjournment "Unless otherwise provided in the by-laws". This is contrary to accepted practice and will simply be a trap for the average practicing lawyer. We believe that the requirement should be omitted and that no notice should be necessary in such a case unless required by the by-laws.

§ 7.12 *Executive committee and other committees.*

Paragraph (c) provides that the designation of any committee and delegation thereto of authority shall not relieve any director of any responsibility imposed upon him by law. The apparent intention of paragraph (c) is to impose liability upon a director who is not a member of a committee for action taken by the committee even if taken without the knowledge of the director or an opportunity for him to be heard thereon. We think the imposition of such liability is unwarranted and therefore recommend the elimination of this provision.

§ 7.13 *Interested directors.*

This section in paragraph (a) (2), and the succeeding section dealing with loans to directors, contain novel provisions which provide that approval of a contract or transaction with an interested director or authorization of a loan to a director shall be "by a vote sufficient for such purpose, without counting the vote or votes cast as a shareholder by such interested director or directors". We believe that the holders of a majority of the disinterested shares should be able to approve interested directors' contracts and loans to directors.

Paragraph (c) provides that the preceding paragraphs shall not relieve directors from responsibility. This is correct as to directors who are not interested and vote in favor of a contract or transaction, but it should not be true of the interested director who discloses his interest and does not vote on the contract or transaction. Paragraph (c) is not necessary and may be interpreted as placing greater responsibility on directors than is intended.

§ 7.19 *Liability of directors and officers in certain cases.*

A provision should be added to spell out what is presumed as to the assent of absent or silent directors, rather than imposing liability simply for "concurring" in corporate action. It should be expressly provided that a director who records his dissent is relieved of liability, and such provision should be general rather than limited to the special cases referred to in this section. Such a provision should probably be set forth as a part of § 7.17.

It should be made clear that no liability should be placed upon an officer for ministerial actions taken pursuant to a vote of the board.

In this section or in some other appropriate place in the Bill there should be inserted a provision as to both directors and officers similar to that found in Section 43 of the Model Act allowing directors to rely in good faith upon financial statements.

We believe that no personal liability should be imposed upon directors for transfers which constitute a preference in the face of insolvency. Small corporations, especially when in difficulty, often can obtain financing only by loans from directors or shareholders and this should not be discouraged. We know of only two other states which impose such a liability, and believe that the provisions of the Debtor and Creditor Law and of the Bankruptcy Act are sufficient.

§ 7.20 *Action against directors and officers for misconduct.*

We think that the actions set forth in this section are available without this provision and that it is unnecessary. No such provision appears in the Model Act. If allowed to stand, this section should be amended to state that this is not exclusive of other rights at law.

§§ 7.21 through 7.25 [*Indemnification*].

A number of issues of policy are raised in these sections. Although progress has been made in finding a solution to one of the troublesome and important problems under our corporate laws, the present Bill has not overcome the drafting problems presented by the complexity of the subject.

We have particular reference to a failure to distinguish in some situations (a) between derivative actions and actions in which the corporation is likely to be a real defendant, (b) between the proper indemnification of officers, as opposed to directors who are not officers, and (c) between civil and criminal liabilities. Each of these raises different considerations.

We are least satisfied with the provisions relating to the settlement of pending actions and to the attempt to regulate indemnification of officers and directors of foreign corporations. In some instances the mechanics of shareholder approval and the restrictions upon court discretion are also troublesome. Section 7.21 provides that nothing contained in Article 7 "shall affect the indemnification of corporate personnel other than directors and officers". This is inadequate in the absence of any general power of indemnification in Article 2. See our comment under § 2.02.

Sections 7.21 through 7.25 should be thoroughly reworked. The following basic results to be achieved are set forth to indicate the general nature of the changes we think necessary:

The provisions should cover all employees, which term should be defined to include directors as well as officers. Also, a provision should be added to the effect that nothing contained therein shall affect the right of a corporation to purchase insurance protecting its employees against claims of any kind.

Section 7.21 now provides that no indemnification shall be valid unless authorized by Article 7. This exclusivity provision may be acceptable in principle, if the succeeding provisions are couched in broad language, subject only to limitations therein stated. If the succeeding provisions are stated in terms of limited grants of authority, then the exclusivity provision of § 7.21 should be eliminated because no one can now have the foresight to write a limited grant of power which would be applicable in all situations where indemnification should be permitted.

Accordingly, it is suggested that §§ 7.22 and 7.23 permit indemnification in civil, criminal and administrative proceedings, subject, however, to the following limitations:

1. In the case of an action by or in the right of the corporation to procure a judgment in its favor (shareholders' derivative action), there shall be no indemnification of any sums which shall be adjudged in such action to be payable by the employee to the corporation because of negligence or misconduct in the performance of his duty to the corporation.

2. In the case of a criminal action or proceeding, there shall be no indemnification unless the employee acted for what in good faith he considered to be the best interests of the corporation and unless he acted in the scope of his employment or authority or in his capacity as a director.

3. Except pursuant to a court order under § 7.24, no indemnity shall be granted unless authorized, generally or in a specific case, by the certificate of incorporation, the by-laws, an agreement, or a resolution of directors or shareholders. Directors, in taking any action in respect of any indemnification, shall discharge their duty to the corporation as set forth in § 7.17 and shall act through a quorum of disinterested directors.

4. In the case of any settlement, no indemnification shall be had which would be inconsistent with any condition with respect to indemnification set forth in the settlement.

In addition, provision should be made which clearly permits a corporation to advance, as incurred, without any requirement of reimbursement, the current expenses of litigation.

If the various references to venue in other Articles of the Bill are retained, additions should be made to Article 7 providing for the venue of the various actions it creates.

ARTICLE 8

Amendments and Changes

§ 8.01 *Right to amend certificate of incorporation.*

This section provides that the certificate of incorporation, *as amended,* may contain only provisions which might, at the time of the amendment, be lawfully contained in an original certificate of incorporation. This means that whenever

an existing corporation requires an amendment of its certificate, the entire certificate will have to be reviewed and brought into line with existing law. Only the amendment should be required to contain currently authorized provisions.

§ 8.06 *Provisions as to certain proceedings.*

Paragraph (b)(3) of this section provides that no reduction of stated capital may be made unless, after the reduction, the stated capital exceeds the aggregate preferential amount payable upon all shares having preferential rights in assets upon involuntary liquidation, plus the par value of all other shares with par value. This is consistent with § 5.19 and also with the limitation of § 5.13 on purchase by a corporation of its shares out of surplus, but we previously pointed out the inconsistency between these provisions and the absence of similar restrictions on the original issuance of shares and on payment of dividends.

Paragraph (b)(6) of this section retains the appraisal rights now provided under S. C. L. § 38 (11). Our Committees recommend that such appraisal rights be eliminated. As a possible alternative, such appraisal rights might be retained as to existing corporations, but, at least as to corporations organized under the new law, provision should be made whereby these rights may be denied if the certificate of incorporation so provides.

§ 8.07 *Restated certificate of incorporation.*

This section should provide that the restated certificate need not include any statement not required in a certificate of incorporation filed at the time the restated certificate is filed. Otherwise, a restated certificate would have to perpetuate obsolete data concerning original subscribers and similar information.

ARTICLE 9

Merger or Consolidation; Guarantee; Disposition of Assets

General.

We note that the Bill omits the material formerly contained in § 9.08 of the 1960 Study Bill which specifically authorized mortgage and pledge of property by the board of directors without shareholder approval. While § 2.02(a)(5) of the Bill contains a general power to mortgage or pledge all or any part of the corporate property, we believe that it should be made clear that this can be done without stockholder approval, since this is a change from the existing corporation laws.

§ 9.04 *Certificate of merger or consolidation.*

Paragraph (b) of this section (and also paragraph (c) of the following section) requires a surviving or consolidated corporation to file a certified copy

of the certificate of merger or consolidation in the office of the clerk of each county in which the office of a constituent corporation, other than the surviving corporation, is located, and also in the office of the recording officer of each county in this state in which real property of a constituent corporation is situated. This is carried over from the existing corporation laws and is obviously intended to provide a record for title purposes. Nevertheless, it is unduly burdensome and does not effectively serve such purpose, since there is no requirement in the law that original certificates of incorporation or amendments thereof, particularly amendments which change the name of a corporation holding record title, need be filed with a recording officer in any county.

§ 9.08 *Guarantee authorized by shareholders.*

This section, which authorizes corporations to give guarantees, should be moved to Article 2. See our comments under § 2.02.

Further, the permission to give guarantees not in furtherance of corporate purposes seems to us too broad, despite the requirement of a two-thirds vote of shareholders. We believe that the power to give guarantees should be limited to those that are in furtherance of corporate purposes unless there is unanimous consent of shareholders thereto.

§ 9.09 *Sale, exchange or other disposition of assets.*

Paragraph (b) of this section provides for an automatic dissolution of a corporation in certain instances. Apart from the fact that dissolution should be covered in the dissolution articles, we do not see why dissolution should be required because of a sale of assets.

§ 9.10 *Right of shareholder to receive payment for shares upon merger, consolidation or sale, exchange or other disposition of assets.*

This section purports to grant appraisal rights in a variety of circumstances. Our Committees believe that appraisal rights should not be available in the case of a sale of all assets for cash where the cash is, pursuant to stockholder approval, to be distributed within one year from the sale, without regard to whether the sale is made to a corporation of the same name.

ARTICLE 10

NON-JUDICIAL DISSOLUTION

§ 10.03 *Certificate of dissolution; filing, effect, publication.*

This section perpetuates the provisions of the existing corporation laws as to the procedure upon filing a certificate of dissolution, inconsistent with the procedure upon filing other corporate certificates. Thus this section requires that one certifi-

cate of dissolution be filed on behalf of the corporation and thereupon the Department of State shall make and issue a second certificate "that such certificate of dissolution has been filed", and thereupon one of such second certificates shall be transmitted to the appropriate county clerk for filing and the other copy delivered to the corporation. We see no reason for this exceptional procedure. As in the case of all other corporate certificates which are filed, it should be sufficient to file one certificate and to have evidence thereof obtained by issuance by the Secretary of State of certified copies thereof.

The section further perpetuates the existing requirement for publication of the certificate of dissolution in the county in which the office of the corporation is located at the date of dissolution. This is generally a useless formality, since the place of publication is likely to bear little relation to the location of corporate creditors and shareholders. In fact, for practical business purposes, credit organizations and others that may be interested in the filing of a certificate of dissolution obtain their information regularly and currently from the filings in the Department of State in Albany. We recommend that the publication requirement be dispensed with.

§ 10.04 *Procedure after dissolution.*

This section requires a corporation, after dissolution, to use the words "in liquidation" after its name. A majority of our Committees believe that this would impose a needless burden on the corporation in settling its affairs. In the vast majority of instances of corporate dissolution, the matter of liquidation proceeds simply and expeditiously and should not be burdened with unnecessary paper work to change the corporate title on all papers during the short interval necessary for completing liquidation.

This section authorizes a dissolved corporation to sell its assets "for cash" or, after paying or adequately providing for its liabilities, the corporation, if authorized by a majority of the shareholders, may sell assets to other corporations for their securities, or partly for cash and partly for their securities. This could in many instances be too restrictive.

This section apparently also requires the consent of shareholders for the sale of even a small part of a corporation's assets, if sold to another corporation for securities. This is inconsistent with § 9.09 which requires shareholder approval only for the sale of all or substantially all the assets of a corporation and then only if the sale is not in the usual or regular course of business. Likewise, the right of appraisal should be provided only if a sale is of all or substantially all of the assets which the corporation has at the time of its dissolution. Here the section is inconsistent with § 9.10.

Paragraph (c) of this section inadequately provides for payment to the State Comptroller of assets distributable to creditors or shareholders who are unknown or cannot be found. No time is fixed when such sums shall be paid to the Comptroller.

§ 10.05 *Corporate action and survival of remedies after dissolution.*

Paragraph (a) (3) provides that shares may be transferred and determination of shareholders for any purpose may be made without fixing a record date until such time as it is fixed by the board of directors or the shareholders. This is unclear. It may mean that any fixing of a record, which might be for purposes of voting or a partial liquidating distribution, could result in an automatic closing of the stock records and a prohibition of subsequent transfers. The 1960 Study Bill gave the option of keeping the stock record open for transfer of shares or of closing the record books, which we believe desirable.

§ 10.07 *Jurisdiction of supreme court to supervise liquidation.*

Paragraph (a) (7) of this section refers to the appointment of a receiver under Article 12, which we hereafter recommend should be omitted from the Bill. If this is done, subparagraph (7) should be amplified to give the court general authority to appoint a receiver and to specify his powers.

ARTICLE 11

Judicial Dissolution

General.

This Article contains many procedural provisions which belong in the Civil Practice Act.

§ 11.01 *Attorney-general's action for judicial dissolution.*

This section provides for trial by jury as a matter of right. We question the wisdom of this provision in view of the wide discretion vested in the court. The Model Act does not provide for trial by jury in judicial dissolution.

§ 11.03 *Shareholders' petition for judicial dissolution.*

Paragraph (b) of this section authorizes the holders of 10% of outstanding shares entitled to vote, or a lesser proportion specified in the certificate of incorporation, to call a meeting of shareholders to vote on dissolution, with a proviso that such meeting may not be called more often than once in any period of 12 consecutive months. This paragraph, we believe, may invite harassment of a corporation by the calling of successive meetings to consider dissolution, notwithstanding that a large majority of shareholders may have previously voted against dissolution.

§ 11.14 *Preservation of assets; appointment of receiver.*

Reference is made to our recommendations under § 10.07 as to receivers.

§ 11.15 *Certain sales, transfers and judgments void.*

This section, in broadest terms, states that any transfer of property of a corporation, without prior court approval, after service upon the corporation of a summons or an order to show cause under this Article, shall be void to such extent as the court shall determine. This is unnecessarily broad and would appear to apply to even the payment of current wages and payment for current supplies.

ARTICLE 12

Receivership

General.

Our Committees have repeatedly urged that the provisions of Article 12, taken from the existing corporation laws, should not be included in the new Business Corporation Law. To the extent that revisions in these provisions are necessary, the Joint Legislative Committee should call them to the attention of those working on the revision of the Civil Practice Act. Detailed provisions regarding appointment and compensation of receivers, the oath of receivers, bonds of receivers and other matters embraced in Article 12 are contained in Sections 974-977-c of the Civil Practice Act and Civil Practice Rules 175-181. These provisions belong more appropriately in the Civil Practice Act and Rules than in a corporation statute.

The Article contains an anomaly from the existing corporation laws in apparently permitting, upon a mortgage foreclosure, appointment of a receiver of all the property of a corporation. This indicates a confusion with the appointment of a receiver of rents of mortgaged property, which is provided by § 254(10) of the Real Property Law. On the other hand, the Bill might permit the rents of the mortgaged property to be used for purposes other than pursuant to the mortgage.

Article 12 includes provisions which are overlapping and inconsistent with other provisions of the Bill as well as provisions of the Civil Practice Act. For example, Article 10 contains adequate and comprehensive provision for the filing, allowance and barring of claims. Article 12 sets forth an entirely different scheme for handling claims. The Bill as drafted makes Article 12 applicable to receivers appointed under Articles 10 and 11 and it would not be clear whether, when a receiver was appointed, the procedure as to claims set forth in § 12.07 should be followed or that in § 10.06.

ARTICLE 13

Foreign Corporations

General.

This Article we believe is particularly deficient in that it not only would continue the basic philosophy of existing New York law but would impose addi-

tional obligations and liabilities upon foreign corporations, their directors and stockholders, which go well beyond what other states see fit to do.

Instead of encouraging foreign corporations to come into this state and do business and qualify and pay taxes, the provisions of this Article we believe would actively discourage them, particularly the small ones, from coming in, or if they did, from qualifying. We believe that the approach of the Model Act, which has had so much consideration on the part of so many able and public-spirited people, and which has been adopted by so many states, is the correct one. That approach is basically to provide for qualification to do any business which similar domestic corporations are permitted to do; to eliminate as much as reasonably practicable the confusion over what is doing business requiring qualification, by setting forth certain activities which are not deemed to be doing business; to prohibit bringing an action in the courts of the state to enforce a contract made here unless qualified, but to permit such action after qualification; and to eschew any attempt to regulate the internal affairs of foreign corporations. Provisions like those in Article 13 of the Bill encourage retaliation in other states which can only hurt New Yorkers.

§ 13.01 *Authorization of foreign corporations.*

This section would be greatly improved if it followed the substance of Section 99 of the Model Act, including the specific list of activities therein contained which do not constitute transacting business in the state, eliminating, however, subdivision (e) of that section which makes "Effecting sales through independent contractors" an activity not constituting doing business.

This and succeeding sections should not, however, be cast in terms of applying for authority to transact business in the state. The generally accepted modern concept is that a foreign corporation "qualifies" to do business in a state. Thus, the law should provide for filing, and from time to time amending, a "certificate of qualification", corresponding to the filing (and amending) of a "certificate of incorporation" of a domestic corporation.

§ 13.07 *Tenure of real property.*

This section contains an archaic requirement that a foreign corporation may acquire and hold real property in the state (whether or not the corporation is required to qualify to transact business) "if the laws of the jurisdiction of its incorporation confer similar privileges on domestic corporations." This reciprocity requirement ill-advisedly makes the validity of title to New York real estate depend upon foreign law.

§ 13.12 *Contracts of unauthorized foreign corporations not enforceable.*

As previously noted in the general comments on this Article, we can see no reason from the standpoint of public interest for penalizing foreign corporations in the fashion of the existing corporation laws and as proposed in this section. It should be sufficient simply to provide that a foreign corporation transacting business in the state without qualification shall not maintain an action or proceeding in any court of the state until it shall have filed a certificate of qualification. Any further penalties should be a matter for the tax laws, if the foreign corporation, in fact, transacted business without having duly qualified and paid the appropriate New York franchise taxes.

§ 13.15 *Record of shareholders.*

Few, if any, other states require a foreign corporation qualifying to do business to maintain a record of shareholders within the state. The Model Act contains no such requirement. It is a burdensome requirement and its continuance may invite retaliation against New York corporations. It is one of those provisions that discourage qualification.

§ 13.16 *Voting trusts.*

For the same reasons stated under the preceding section, this provision for maintaining voting trust records in the state by foreign corporations should be eliminated.

§ 13.17 *Liabilities of directors and officers.*

Again, as in the case of the preceding sections, this is an extremely onerous and unnecessary section. The liabilities of directors and officers is a matter for the state of incorporation and it is neither appropriate nor good sense for New York to attempt to regulate the internal affairs of foreign corporations.

§ 13.18 *Liability of foreign corporations for failure to disclose required information.*

The same reasons previously stated apply to this section, which should be eliminated.

§ 13.19 *Applicability of other provisions.*

This section contains a detailed list of Articles and sections of the Bill which are made applicable to foreign corporations, the directors, officers and shareholders thereof. There is no such provision in the Model Act. The section is an attempt

to regulate the internal affairs of foreign corporations and we strongly recommend that it should be deleted in its entirety.

In many respects the proposed Business Corporation Law embodies improvements over the existing corporation laws of New York. With revisions along the lines indicated in this Report, we believe the Bill can be amended to merit the support of the Bar of this state.

January 25, 1961

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methods capable of being converted to readable form within a reasonable time.

Cash penalties have been eliminated. When inspection has been refused by the corporation an application to the court for an order directing such inspection has been provided. Failure to comply with the order for inspection would be punishable by contempt.

§ 13.16 Voting trusts.

Revisers' Notes:
1. Source: Stk. Corp. L. § 115.
2. Changes: Revised.

Comment:

This section provides for the maintaining of a record of voting trust certificate holders by voting trustees and the right of inspection of such records and of the voting trust agreement by holders of such certificates and shareholders of the corporation. The right of inspection is similar to that granted in §§ 6.21 and 6.24 to shareholders and certificate holders of domestic corporations and in § 13.15 to shareholders and certificate holders of foreign corporations.

§ 13.17 Liabilities of directors and officers.

Revisers' Notes:
1. Source: Stk. Corp. L. § 114.
2. Changes: Revised and reworded.

Comment:

Liabilities imposed on directors and officers of domestic corporations by §§ 7.19 and 7.20 are similarly imposed by this section on directors and officers of foreign corporations doing business in this state.

§ 13.18 Liability of foreign corporations for failure to disclose required information.

Revisers' Notes:
1. Source: None.
2. Changes: Completely new.

Comment:

The disclosure requirements set forth in the enumerated sections are applied to foreign corporations doing business and which have shareholders in this state. The liability of the foreign corporation for failure to give the required notice is as set forth in § 5.23.

§ 13.19 Applicability of other provisions.

Revisers' Notes:
1. Source: Gen. Corp. L. § 222.
2. Changes: Revised; new provisions.

Comment:

The section lists the articles and the sections in other articles, the provisions of which apply to foreign corporations.

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such certificates and shareholders who meet qualifications similar to those provided in § 624 and § 1315. If such inspection is refused, application may be made to the court to compel the voting trustee or his agent to comply with this section.

Paragraph (e) is Stk. Corp. L. § 115(3) without change of substance.

§ 1317. Liabilities of directors and officers of foreign corporations.

Revisers' Notes:

1. Source: Stk. Corp. L. § 114.
2. Changes: Revised and reworded.

Comment:

Liabilities imposed upon directors and officers of domestic corporations by §§ 719 except subparagraph (a) (3) thereof and 720 are similarly imposed upon directors and officers of foreign corporations doing business in the state except to the extent they may be exempted under § 1320.

§ 1318. Liability of foreign corporations for failure to disclose required information.

Revisers' Notes:

1. Source: None.
2. Changes: Completely new.

Comment:

The disclosure requirements set forth in the enumerated sections are applied to foreign corporations doing business in the state to the extent of requiring disclosure to shareholders of record who are residents of this state, unless the corporation is exempt from such provisions under § 1320. The corporation is liable as provided in § 520 for failure to disclose the required information.

A foreign corporation may, by board action, determine its earned surplus prior to the declaration of its first dividend after being authorized or after the effective date of this chapter, whichever is later. Cf. § 517(a) (1) (A).

§ 1319. Applicability of other provisions.

Revisers' Notes:

1. Source: Gen Corp. L. § 222.
2. Changes: Revised; new provisions.

Comment:

The section lists the articles and sections of other articles which, to the extent provided therein, apply to foreign corporations doing business in this state and to the directors, officers and shareholders of such corporations, except as set forth in § 1320.

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THE NEW YORK BUSINESS CORPORATION LAW*

ROBERT A. KESSLER †

ON April 24, 1961, L. 1961, ch. 855 was approved by the Governor of New York. The statute is entitled "An Act in relation to business corporations, constituting chapter four of the consolidated laws." [1] It represents the culmination of over four years of study by a joint legislative committee and its advisory groups [2] "directed toward one end—the ultimate preparation of corporate laws for legislative action that will give our State the best possible statutes under which all who carry on activity in the corporate form may conduct that activity . . . to their maximum

* This article is the first of two articles on the newly enacted New York Business Corporation Law. The second article, which will follow in the May issue, will present a critique of the procedural aspects of the new law from the viewpoint of the Honorable Abraham N. Davis, Executive Deputy Secretary of State.

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[1] The bill which thus became law was S. Int. 522, Pr. 4061, and A. Int. 885, Pr. 5310 (1961). The original versions of these bills were S. Int. 522, Pr. 522, A. Int. 885, Pr. 885 (1961).

[2] The Committee was set up by Joint Resolution No. 27 of the New York Senate and Assembly on March 22, 1956. 1957 N.Y. LEG. DOC. No. 17, at 9, JOINT LEGISLATIVE COMMITTEE TO STUDY REVISION OF CORPORATE LAWS —INTERIM REPORT TO 1957 SESSION OF NEW YORK STATE LEGISLATURE [hereinafter cited as 1957 N.Y. LEG. DOC. No. 17].

proved only slightly to prevent waste of the shareholders' money in the defense of disloyal directors. The general limitations on voluntary indemnification in non-derivative actions may not be sufficient to prevent such a waste in those cases, too. The provisions for judicial, or involuntary, indemnification are either designed to carry-over the excessively generous present law, or are merely poorly drafted, a significant fault in either event.

CONCLUSION

What shall we say now of the statute as a whole? Such a question is as obvious as it is impossible to answer. It is rather like asking what one thinks of life, and can only be answered in the same way. Some of it is bad, some not so bad and, even for a perfectionist, some of it at least is good enough to give us complete satisfaction.

Of course, apart from mere consideration of appropriateness of form to accomplish the ends chosen, *i. e.*, whether or not its provisions are ambiguous, one's assessment of any statute is based on his philosophy, that is, whether or not its aims are acceptable to him, or accord with his ideas of what is right. Clearly, therefore, anyone who judges the new statute will have to judge it in terms of his own philosophy of what a corporation law should be like.

I have outlined my philosophy on a number of previous occasions.[407] Although names have little meaning, I should like to characterize it as the "liberal" position, although I am afraid that in corporation law jargon the terms are often the reverse of their political counterparts, and hence the characterization will be disputed.[408] A corporation,

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[407] Kessler, *Promoters' Contracts: A Statutory Solution,* 15 RUTGERS L. REV. 566 (1961); Kessler, *Share Repurchases Under Modern Corporation Laws,* 28 FORDHAM L. REV. 637 (1960); Kessler, *The Statutory Requirement of a Board of Directors: A Corporate Anachronism,* 27 U. CHI. L. REV. 696 (1960).

[408] The term "liberal" as applied to corporation statutes today usually means "permissive," *i. e.*, that the corporation and its directors may do what they want without worry about shareholder and creditor rights. See BAKER & CARY, CASES ON CORPORATIONS 9-11 (3d ed. 1958).

I think, is basically no more than a legally sanctioned vehicle for the betterment of the economy. It is a recognition that the welfare of the people as a whole may best be served by encouraging people to take the risk of developing new products (or making old ones better) without having to risk everything they have on the success or failure of the venture. The interest of the state is, as is always true in a democracy, merely the interest of the people, that is, the common welfare. Obviously, once it has decided that the general welfare is best served by conferring limited liability on some individuals, the state must concern itself with the welfare of those most intimately concerned with each individual corporation: its employees, shareholders, creditors and customers. The primary interest of all, but especially of the first three, is the survival of the enterprise as a going concern. The interest of the customers is adequately provided for by tort and contract law, both case and statutory, to assure them that their dealings with the corporation are fair. The interests of the employees and shareholders conflict only on the question of their relative shares in the profits of the enterprise. This is, today, by and large, a subject for negotiation between the representatives of the two groups, regulated by labor laws. The basic concern of corporation laws today is, therefore, the shareholders and the creditors.

The welfare of these two groups, consonant with the public welfare and the welfare of the corporate employees and customers, seems therefore, to be the only interest of the state in enacting corporation laws. The state has no interest, in the sense of legitimate concern, in the form or operation of the limited liability vehicle as long as the individuals in these two groups are protected, without injury to anyone else.

Complete flexibility, where no harm is done by the corporate structure or operations desired, is therefore a desideratum. The idea of "statutory norms" of corporate organization from which no deviation, or "only a slight infringement" [409] upon, will be permitted is therefore anathema

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[409] See Long Park, Inc. v. Trenton-New Brunswick Theatres Co., 297 N.Y.

unless it can be shown that someone will be harmed by such experiments. Testing the close corporation provisions of the proposed law by this standard it is clear that they are an improvement over present statutory law, which except for the addition of section 9 of the Stock Corporation Law, as a reaction against narrow judicial construction, has not made clear enough its permissive scope. It is equally obvious that the proposed law does not go far enough since it still places limits on the extent to which the shareholders may mold, by their own agreement, the operational structure of their business.

Shareholders and creditors of large corporations are peculiarly unprotected in this country. Creditors have, ordinarily, no say in the operation of the corporation.[410] Their only protection usually comes from a requirement of sound financial management of the corporation. Since they have no voice in this, the law should step in to protect their interest through prohibition of improvident corporate distributions. Under present New York law, and under the laws of most American states, it has done little to prevent such harmful distributions, until actual insolvency has taken place. This is why the financial provisions of a corporation law are so important. The financial provisions are also a potential means for protection of the shareholders who, unless they are themselves the recipients, have a like interest in preventing such improvident distributions. The new law has done little to help either group. The most significant change is the requirement that notice be given to the shareholders, when they receive such an improvident distribution, that it is from capital or capital surplus. Even granting that they understand the significance of this notice, it is not much protection to the shareholders, and certainly none to the creditors.

However, after the great permissiveness of present law

174, 77 N.E.2d 633 (1948); Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936).

[410] In contrast to the laws of American states, England requires creditor approval for corporate recapitalizations. See GOWER, MODERN COMPANY LAW 551 (2d ed. 1957).

in this regard, it is probably too much to hope for adoption of a strict rule restricting distributions, with but a minimum of exceptions, to earned surplus, and requiring creditors' consent to "quasi-reorganizations," as they are called, but which are really diversions of corporate capital into a spurious surplus category.

Partly for the same reasons one cannot have too many sanguine hopes for "corporate democracy." Even if minority representation on the boards of large corporations is desirable (and I have some misgivings about that) cumulative voting alone will not guarantee it. Even for minimal guarantees of effectiveness of that device the provisions requiring it would probably have to enter New York law as a constitutional amendment, rather than through the corporation law.[411] Even there, there would be little assurance of its success in attaining its end,[412] and the long-standing contrary rule in this state gives little hope that such a constitutional amendment would be enacted.

Even apart from the overrated panacea of cumulative voting, pleas for greater shareholder participation generally in corporate affairs seem rather impractical. The "town meeting" analogy of corporate government is as inappropriate to the running of a large corporation as it is to a national election. Perhaps, it would be nice to have direct national presidential primaries, perhaps also it would be a good thing to have more shareholder control of public issue corporations. I am not convinced that the results in either sphere would represent any considerable improvement. Even granted that they would, apathy and the practical difficulties involved in taking such a poll, if it is not to degenerate into the same type of thing we now have, would seem to foredoom the

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[411] In Illinois, the constitutional provision guaranteeing cumulative voting was held to invalidate a statute allowing classification of directors, an obvious device for circumventing the effectiveness of cumulative voting. Wolfson v. Avery, 6 Ill. 2d 78, 126 N.E.2d 701 (1955). Despite its constitutional provision, however, Pennsylvania upheld the validity of the "loophole" of director classification. Janney v. Philadelphia Transp. Co., 387 Pa. 282, 128 A.2d 76 (1956). If even a constitutional provision is not a sure guarantee of the efficacy of cumulative voting, the ineffectiveness of a mere statutory provision is obvious.

[412] See Janney v. Philadelphia Transp. Co., *supra* note 411.

effort to failure. At any rate, the new statute does carry over the permission to have cumulative voting, should enough of the shareholders feel it desirable to force it upon the corporation,[413] and the number of shares required to do so has been reduced to a bare majority[414] rather than the almost unattainable two-thirds of present law.[415] Furthermore, on the same terms, the shareholders may retain to themselves the power of electing officers.[416] This is some concession to the movement for greater shareholder participation in corporate management.

While the shareholders of large corporations probably do not have a vital need for more shareholder democracy, they do have a legitimate right to demand proper corporate management, and means at their disposal for enforcing this demand. The state should act in this area since to abstain here in favor of permissivism means definite harm to the corporate shareholders. The standard of corporate morality set by the new statute is much lower than that of the old law. The means provided for enforcement of the standard, the shareholder's derivative suit, was already under that old law, a seriously limited policeman of that norm.

As is usual in statutory draftsmanship the matter requires a balancing of conflicting interests. The real interest of the shareholders is as much opposed to "strike" suits as it is to requirements so onerous as to prevent legitimate shareholder suits. Both mean a loss of money to them: the cost to the corporation, and, therefore, to them, in defending unfounded suits, and the loss to the corporation, and also to them, in being unable to recover on justifiable claims. Admittedly, the balance that must be struck is a delicate one: "strike" suits must be prevented, legitimate derivative actions must be encouraged. Under present law too much weight has been given to preventing "strike" suits. The legitimate interest of the shareholders in the legitimate shareholder's suit has not, in my opinion, been properly recognized. Fortunately, however, under the new law the

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[413] N.Y. BUS. CORP. LAW § 618.
[414] N.Y. BUS. CORP. LAW § 803(a).
[415] N.Y. STOCK CORP. LAW § 37(1)(c)(2).
[416] N.Y. BUS. CORP. LAW § 715(b).

situation is made no worse, and the settlement provisions are somewhat of an improvement. Unfortunately, however, the indemnification provisions leave something to be desired, since they appear overly-generous to corporate wrongdoers.

It must be remembered, however, in criticizing any statute like this, which represents a recension of basic law in the country's most populous, and second greatest corporation state,[417] that the act is bound in many respects to involve compromises in an attempt to satisfy the competing demands of those who must live under the statute. And this is entirely proper, since any corporation act, as I have suggested above, should be designed as much as possible to satisfy the needs of those who will utilize it, consistent with the proper protection of the public.

Since corporations are more and more ambulatory, large corporations, at least, have a tendency to incorporate in those states which they feel are most sympathetic to corporate problems. Even if they do not intend to take advantage of their shareholders or the public they may still prefer incorporation in states which are not too concerned with shareholder and creditor rights, since the laws of "strict" states, such as New York is at present, are bound to be more technical and hence more burdensome to comply with, in order to accomplish their end of adequate shareholder and creditor protection, than are the laws of the states which take a more old-fashioned laissez-faire attitude to those interests.

Clearly, New York could exclude all foreign corporations if it chose, or require their reincorporation under local law as a condition to doing business.[418] The loss in business

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[417] 1957 N.Y. LEG. DOC. No. 17, at 18.

[418] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). Subjecting foreign corporations to the same standards as local corporations to some extent accomplishes the same results. The new statute attempts to do this in a number of areas. See N.Y. BUS. CORP. LAW §§ 1318-20.

However, in an attempt to avoid discouraging foreign corporations from doing business in New York, the bill as enacted has made a significant change in its coverage of foreign corporations with regard to directorial liability, and failure of a corporation to give the notices, discussed under the Financial Provisions portion of this article. Under the statute as enacted only "domiciled foreign corporations" are subject to these requirements. N.Y. BUS. CORP. LAW §§ 1318, 1319; *cf.* S. Int. 522, Pr. 522, §§ 13.17, 13.18 (1961). The object of this distinction is basically the same as that of the new

to the state which might follow such a course, however, would be a clear injury to the public interest which it is the duty of the legislature to protect. The only practical alternative is a certain amount of competition for the incorporation business. Again the balancing of interests is a difficult one: the statute must be "liberal" enough not to drive away big corporate business, while at the same time "strict" enough to give protection to the shareholders and creditors.

One thing I can say without hesitation is that the Joint Legislative Committee has earnestly attempted to balance all of these conflicting interests, reflected in divergent proposals, in a way which will adequately protect the public interest in aiding business, and at the same time afford sufficient protection for the special needs of shareholders, creditors, and organizers of close corporations.

But compromise rarely satisfies everybody, and, no matter how sincere the effort to do the best, opinions will always differ as to whether or not it has been accomplished.

Is the new law better than the old? Yes, if for no other reason than that it is simpler in many respects not affecting substantial rights, as indicated in my bird's eye view. Is it as good as it should be? That I leave to *your* philosophy of what a good corporation law should be like.

---

federal diversity statute's provision which makes foreign corporations citizens of the state in which they have their "principal place of business": to accord spurious foreign corporations the same treatment as domestic ones. N.Y. Bus. Corp. Law § 1317 provides:

> "(a) As used in this chapter an authorized foreign corporation or a foreign corporation doing business in this state is a 'domiciled foreign corporation' if:
>
> (1) At least two-thirds of all its outstanding shares, with or without voting rights, are owned, either beneficially or of record, by residents of this state, or
>
> (2) At least two-thirds of all its outstanding shares with voting rights are owned, either beneficially or of record, by residents of this state, or
>
> (3) At least two-thirds of its business income or its investment income is allocable to this state for franchise tax purposes under the tax law."

The New York provision is less likely to give the interpretive difficulties present under the new federal statute. See *Federal Diversity Jurisdiction—"Principal Place of Business,"* 23 Corp. J. 83 (1961). This is fortunate, at least, although the provision means that not all foreign corporations doing business in New York will be held to the New York standard of conduct. See, as to the federal statute, Kessler, *Corporations and the New Federal Diversity Statute: A Denial of Justice,* 1960 Wash. U.L.Q. 239, 243, 272.

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New York (State) Legislature, Joint Committee to Study Revision of Corporation Laws.

MINUTES OF THE PROCEEDINGS OF A PUBLIC HEARING OF THE JOINT LEGISLATIVE COMMITTEE TO STUDY REVISION OF CORPORATION LAWS, HELD AT THE STATE OFFICE BUILDING, 80 CENTRE STREET, NEW YORK, N. Y. ON MAY 13, 1960.

Present:

Senator Warren M. Anderson, Chairman;

Assemblyman George L. Ingalls, Acting Chairman;

Assemblyman John Robert Brook,

Members of the Committee.

Robert S. Lesher, Esq.,
Associate Counsel to the Committee;

Howard L. Yood, Esq.,
Research Associate to the Committee;

Robert J. Ast, Esq.,
Representing Senator Walter J. Mahoney,
Majority Leader of the Senate;

Bernard Nadel, Esq.,
Representing Senator Joseph Zaretzki,
Minority Leader of the Senate;

Robert Bentley, Esq.,
Representing Senator Austin W. Erwin,
Chairman of the Senate Finance Committee;

C. Dean Vlassis, Esq.,
Representing Assemblyman Charles A. Schoeneck, Jr.,
Majority Leader of the Assembly.

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various States as to the possible problems you may encounter through the provisions of the bill, either administratively or in various practical operations. We hope to have this study completed by the end of May and to put it in such shape that it could be presented to the Committee at the Albany meeting, realizing that you gentlemen are under quite a bit of pressure to get this thing shaped up by the Fall. Thank you.

THE CHAIRMAN: Thank you, Mr. Hobbs.

→ MR. LESHER: Is Mr. Lenore still in the room? There was a question handed up by Mr. Lenore and if you don't mind I will read it. The question that was submitted is, what is being done to clarify the manner in which general provisions apply to foreign corporations? Mr. Kantrowitz, as a consultant in this area, would you care to make a brief comment on that? I believe Mr. Lenore's question addresses itself to the general problem that I think the Bar -- I am not sure whether Mr. Rorhlich or Mr. Hatch made reference to about which sections apply to foreign corporations.

MR. ISADORE KANTROWITZ: I think that the question of what provisions of the Act will apply to foreign corporations refers principally to what type of actions can be brought by foreign corporations or what provisions of the statute will apply to a foreign corporation as dis-

tinguished by what will apply to all corporations. Now, I think that as far as the powers of a foreign corporation, the Article 13 contains a provision which says that a foreign corporation which has been authorized to transact business in the State shall enjoy such powers as (1) are permitted by the laws of the state or country of its incorporation but no greater powers than a domestic corporation formed for the business set forth in the application for authority of a foreign corporation. In other words, most of the powers with reference to foreign corporations are given to it not by our statute but by its own home statute and it retains those powers unless they are contrary to the statutes of the State of New York.

MR. LESHER: Is there anything else, Mr. Lenore?

MR. LENORE: Would you comment briefly on the indemnification provisions; the manner in which they may apply? You will notice those relating to application for indemnification are lumped pretty closely together with those governing charter provisions in domestic corporations, so you get into a situation of possibly if you have a foreign corporation with an indemnification provision which varies from that permitted with respect to domestic corporations, you possibly get into a situation that you are litigating in New York -- that if you complied with your own charter, granting indemnification would not be

permitted in New York law.

MR. KANTROWITZ: I am not prepared to pass on those provisions at all.

PROFESSOR HOFFMAN: If you look at Sections 718 and 719 of the draft you will find that those sections are not intended to apply to foreign corporations, they are intended to regulate indemnification in domestic corporations only. If you look at Section 720 of the draft you will find that for the first time in the draft 720, which involves indemnification sought by judicial action, that in that case and that case alone would a foreign corporation become involved. That would now involve a cause of action for indemnification by a director of a foreign corporation as well as a domestic corporation.

721 of the Act provides that there shall be jurisdiction in the courts of this State for the purpose of such action in the courts where the foreign corporation is doing business, is authorized to do business in the State, and where the action is brought against the foreign corporation in the court in the very action itself. Now, to the extent that there is an action brought in New York court involving a foreign corporation and there is conflict between the voluntary indemnification provisions under the foreign law and the provisions we have incorporated in 720, to that extent, of course, our provisions

would govern.

MR. LESHER: This poses the very basic question of the drafting of the statutes that have been considered and continue to be considered and that is to what extent that particular series of points of application of laws of foreign corporations should be spelled out in a single section. I wonder if either Mr. Rohrlich or Mr. Hatch would want to expand on whether they think it would be desirable to have a single section or series of sections spell out expressly the extent to which the other articles might be applicable to foreign corporations. It involves a whole field of law that is more or less in the state of transition in many other States and frankly we were a little afraid to get into it and freeze it into the statute.

MR. HATCH: I don't believe it is hardly possible to just put it in an index of the section. The important thing is to be sure that you deliberately use your fine terms, either corporation or domestic corporation, where you mean only domestic corporation, and that you are sure you use the word foreign corporation at the various places in the statute when you mean to include both.

MR. LESHER: I wasn't clear as to the comment that was made. I understood that at least some members of the Bar thought that there should be one place in the

statute, perhaps in Article 13, where you could look to see the application of any other substantive provisions.

MR. ROHRLICH: Perhaps you missed the point. I believe that is an entirely independent question. I made a suggestion in my original remarks that some of our Committee feel that there should be a specific enumeration of those acts which a foreign corporation may do in New York without being held to "do business" in New York.

MR. LESHER: That wasn't what I was referring to.

MR. ROHRLICH: No, but there is no other suggestion along that line.

MR. LESHER: Then is it clear that in this area the sections in the Articles 2 through 12 would indicate that fact; you wouldn't try to make Article 13 as a self-sufficient article to which you term find these points?

MR. ROHRLICH: It strikes me it would be an almost impossible task.

MR. LESHER: Mr. Chairman, that completes the list of cards that we received.

MR. ADLER: May I make just one more point about directors? I don't remember just where I read it in this act but if my memory serves me correctly there is a provision for directors to meet without meeting. In other words, to have a meeting through a waiver and that would

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NEW YORK BUSINESS CORPORATION LAW OF 1961

Robert S. Stevens†

The Business Corporation Law passed by the Legislature at the 1961 session and approved by the Governor is the first major revision of New York law relating to business corporations in over thirty years. It consolidates into one law, simplifies, and modernizes most of the provisions in the General Corporation Law and the Stock Corporation Law affecting business corporations, omits some of these, and adds some new ones. In the first report of the Joint Legislative Committee to Study Revision of Corporation Laws, in 1957, it was stated that the Committee's objective was to prepare a Business Corporation Law which will represent the proper balance of the interests of shareholders, management, employees, and the overriding public interest. During the four years of study this has been the constant objective of the Committee.

The new law will apply not only to business corporations to be formed in New York, but also to existing domestic business corporations and to foreign corporations doing business in the state. Upon the effective date of the new law, which is postponed to April 1, 1963, the General and the Stock Corporation Laws become inapplicable to all business corporations except those governed by the Banking, Insurance, Railroad, Transportation, and Cooperative Corporations Laws. Because those laws are in part dependent upon the Stock Corporation Law, the latter cannot be entirely repealed until those laws are made self-sufficient or amended so as to be interrelated with the Business Corporation Law rather than the Stock and General Corporation Laws. To attempt to secure such an adjustment of these special laws is an immediate objective of the Joint Legislative Committee.

As a preface to a consideration of the new law, it will be illuminating to indicate the procedure adopted by the Committee and to emphasize the invaluable collaboration of groups and of individuals representing varying interests in the project.

† See Contributors' Section, Masthead, p. 248, for biographical data.

a state of deadlock or dissension. In view of the reluctance of courts to order dissolution in cases of deadlock and dissension,[106] a useful supplement to the procedure by petition is supplied by this provision.

Another new provision is that which gives a single shareholder the privilege of petitioning for dissolution when the hopelessness of the deadlock is indicated by the fact that two annual meetings have passed without being able to elect directors.[107]

(d) Applicability of other Provisions

The provisions of article 10 relating to procedure after dissolution, notice to creditors, and the filing and barring of claims, and the powers of a court to supervise liquidation, are, by reference, made applicable to judicial dissolution.[108]

RECEIVERSHIP

Article 11 includes GCL section 70—Action for sequestration—and a consolidation and simplification of the many sections relating to receivers in articles 10, 11, and 12 of the GCL. This process involved some rewording and some revision but with very few substantial changes.

FOREIGN CORPORATIONS

As stated at the outset, the constant objective of the Joint Legislative Committee was to have the new Business Corporation Law represent the proper balance of the interests of shareholders, management, employees, and the overriding public interest. Having adhered to that as the policy that should be embodied in the corporation law of New York, the Committee was confronted with the problem of what should be the law of New York with regard to foreign corporations engaged in business in New York. It was strongly urged before the 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.[109] Many corporations engaged in a nation-wide business are incorporated in other states. Their activity in this state should not, it was argued, be discouraged by subjecting them,

106 Matter of Radom & Neidorf, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954). For further discussion and additional citations, see Henn, Corporations, § 280 (1961), and 2 Hornstein, Corporation Law and Practice, § 789 (1959).

107 § 1104(c).

108 §§ 1004-07.

109 Model Business Corporation Act § 99 reads in part:

A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this State, and nothing in this Act contained shall be construed to authorize this State to regulate the organization or internal affairs of such corporation.

because of those activities, to the regulatory provisions and to the individual liability of their directors, officers, and shareholders peculiar to New York and not imposed by the law of the state of incorporation. On the other hand, it seemed obvious that it would be futile to enact into law what is considered a sound policy towards New York corporations if that law could be evaded by going to some other state to incorporate with the purpose of returning to New York to do business here. The new law has been drafted with the acceptance of these distinctions as a premise, and a significant ehange in the present law is to have the provisions of the new act apply to domestic corporations and, with a few exceptions, only to a foreigu corporation defined as a "domiciled foreign corporation," that is, one of which "(1) at least two-thirds of all its outstanding shares, with or without voting rights, are owned, either beneficially or of record, by residents of this state, or (2) at least two-thirds of all its outstanding shares with voting rights are owned, either beneficially or of record, by residents of this state, or (3) at least two-thirds of its business income or its investment income is allocable to this state for franchise tax purposes under the tax law."[110] This cuts down the effects of section 114 of the SCL which subjects the directors, officers, and shareholders of a domestic corporation for making (1) unauthorized dividends, (2) unlawful loans to shareholders, (3) false certificates, reports, or public notices, (4) illegal transfers of the stock and property of the corporation when it is insolvent or its insolvency is threatened.[111] Under the new law, there is imposed upon the directors and officers of a domiciled foreigu corporation the same liability that is imposed upon the directors and officers of a domestic corporation for declaring dividends or making other distributions to shareholders, purchasing its own shares or making loans to directors that would be contrary to the provisions of the act, and they are made accountable for any other official misconduct.[112] A domiciled foreign corporation is required, in the same manner as a domestic corportation, to give those shareholders who are residents of New York notice of the effect that any transaction would have upon capital surplus or stated capital,[113] and the provisions as to indemnification of directors and officers are made appli-

110 § 1317. This definition is subject to change. Note, 47 Cornell L.Q. 273 (1962).
111 Three other states have similar provisions in varying language: Mass. Ann. Laws ch. 181, § 14 (1955); Mich. Stat. Ann. § 21.95 (1956); and Tex. Rev. Civ. Stat. Ann. art. 8.01 and 8.02 (1956). As to SCL § 114, loans to directors are prohibited unless approved by the shareholders, and so much of SCL § 15 which prohibited transfers of corporate property when insolvent or when insolvency is threatened has been omitted. But cf. N.Y. Penal Law §§ 664 and 667.
112 § 1318.
113 § 1319.

cable to it.[114] Applicable to all foreign corporations are to the extent stated therein, articles 1 and 3, the other provisions of article 13, and the provisions relating to dissenters' rights in mergers or consolidations of domestic and foreign corporations, derivative actions, and security for expenses therein and reorganization under act of Congress.[115]

There are other changes in the law relating to foreign corporations. A foreign corporation intending to apply for authority to do business in the state may reserve its name, and a person intending to form a foreign corporation and then apply for such authority may reserve its proposed name.[116] The application for authority must designate the Secretary of State as agent for service of process against the corporation, but may also designate a registered agent for that purpose.[117] The application must include a statement that the corporation has not theretofore engaged in activity in the state, or, in lieu thereof, the consent of the state tax commission to the filing of the certificate must be attached to it.[118] This is to supplement section 1312 which is a change in section 218 of the GCL. The latter denied a foreign corporation the right to sue in the courts of New York upon any contract made before it had obtained authority to do business here. The new provision denies it the right to maintain any cause of action or special proceeding unless and until it has received authority to do business and has paid all fees, penalties, and taxes for the period in which it did business without authority. A foreign corporation will no longer be required to keep a record of its shareholders in this state, but will be required to produce it upon the request of a qualified shareholder, and, in the event of a wrongful refusal of the request, the shareholder may apply for an order compelling production and for such other relief as to the court may seem just.[119]

New grounds for an action by the attorney general to annul the authority or to enjoin a foreign corporation from doing business in the state have been added. Such an action may be brought where the corporation's authority was obtained through a fraudulent misrepresentation or concealment of a material fact, or where it has done or omitted any act for which a domestic corporation could be dissolved.[120]

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114 § 1320(b).
115 § 1320.
116 § 303.
117 §§ 1304 and 305.
118 § 1304(a)(7).
119 § 1315.
120 § 1303.