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Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Appellants,

—against—

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZÜHLKE, SIMONE BAGEL-TRAH, NORBERT W. BISCHOFBERGER,

(*Caption continued on inside cover*).

JOINT BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Date Completed: August 18, 2023

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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/Bayer-Shareownership-2022.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 CM 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 direct, wholly owned subsidiary of Bank of America Corporation. It shares common affiliates with Bank of America Corporation. BofA Securities, Inc.'s subsidiaries include Merrill Lynch Professional Clearing Corp. (as of December 31, 2022) and BofA Securities Prime, 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/70858/000007085823000092/bac-1231202210xkex21.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.

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PRELIMINARY STATEMENT

Plaintiffs seek leave to relitigate dismissal of a lawsuit that had no place 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 are German. No part of the lawsuit is governed by New York law; every part is governed by German law. None of the corporate governance policies the lawsuit seeks to challenge involve New York companies; all implicate German corporate law alone.

Recognizing all this, the Supreme Court dismissed the action on three independent grounds in a carefully reasoned decision. 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 German-law issues, centered 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 Plaintiffs could have standing to sue in the name of a German corporation — a test that they admit they cannot pass.

The First Department unanimously affirmed dismissal on all grounds. Relying on broad mischaracterizations of the record below, Plaintiffs now ask this Court to give over its docket to the review of four fact-bound questions — ranging from derivative standing to personal jurisdiction to *forum non conveniens*. None are fit for appeal under this Court's strict standards. Leave should be denied.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. Bayer and the Monsanto Transaction.

Nominal Defendant Bayer is a German corporation, organized under the German Stock Corporation Act and headquartered in Leverkusen, Germany. R211 (¶ 67);[1] R746 (Semrau Aff. ¶¶ 2-3). 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). Two months after the acquisition closed in June 2018, a jury found that Monsanto's popular herbicide Roundup was carcinogenic and issued an award for $289 million in damages. R168-69, R307 (¶¶ 10, 248). Other adverse verdicts followed. R305-06 (¶ 245).

In the wake of these Roundup verdicts, some investors criticized the merger, and Bayer's stock price fell. R177, R184-85 (¶¶ 20, 30-32). Several investors sued Bayer in Germany. Plaintiff Ms. Haussmann, a citizen of California, filed a derivative action in New York, claiming that the individual Bayer Defendants — including 31 current and former officers and directors — breached their fiduciary duties under German law by failing to ensure that Bayer performed sufficient diligence on Roundup litigation risk. *See* R209-10, R270-71, R273, R298 (¶¶ 63, 190, 195, 231). Ms. Haussmann was later joined by co-plaintiff and professed New York resident Jack Cattan. Plaintiffs also named as

[1] Citations in the form of "¶ __" refer to paragraphs of the second amended complaint (R158-356). Citations in the form of "Br. __" are to the Corrected Memorandum of Law in Support of Plaintiffs-Appellants' Motion for Leave to Appeal.

defendants the investment banks that advised Bayer in connection with the transaction (or their U.S. affiliates), on the theory that they aided and abetted those fiduciary breaches and separately breached their own duties to Bayer stockholders. Boiled all the way down, the 360-paragraph, 195-page complaint alleged that Bayer should not have entered the Monsanto merger and sought to hold its leadership and advisors liable in damages for Monsanto's adverse post-merger litigation outcomes.

B. The Supreme Court dismisses Plaintiffs' claims on three independent grounds, then denies renewal and reargument on 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 on *forum non conveniens* grounds under CPLR 327(a). *See* R713-15 (Bayer Defs.' Mot. to Dismiss); R716-44 (Bayer Defs.' Mem. ISO Mot. to Dismiss); R1932-50 (Bayer Defs.' Reply Mem. ISO Mot. to Dismiss); R2288-89 (Bayer's Mot. to Dismiss); R2290-2314 (Bayer's Mem. ISO Mot. to Dismiss); R2364-2383 (Bayer's Reply Mem. ISO Mot. to Dismiss). That same day, the Bank Defendants also moved to dismiss the complaint under CPLR 327(a). R123-25 (Bank Defs.' Mot. to Dismiss). The Bank Defendants additionally moved to dismiss on the grounds that Plaintiffs sued the wrong bank entities and failed to state a claim because none of the named Bank Defendants had been engaged to provide services to Bayer in connection with the acquisition and because Plaintiffs failed to identify any basis for liability under German law. R126-52 (Bank Defs.'

Mem. ISO Mot. to Dismiss); R695-712 (Bank Defs.' Reply Mem. ISO Mot. to Dismiss).

On December 27, 2021, the Supreme Court granted dismissal for three independent reasons:

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, 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 . . . New York forum." R26, R15 (Order at 14, 3). As the court explained, none of the Bayer Defendants "live here, conduct business here regularly, or had contacts with New York that give rise to this dispute," R15 (Order at 3), which concerns "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).

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. 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 own Bayer ADRs.

On October 20, 2022, the Supreme Court heard argument on Plaintiffs' motion. *See* R91-122 (Tr. Hr'g on Pls.' Mot. for Leave to Reargue and Renew). At the hearing, Plaintiffs 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.*

C. The First Department affirms.

On appeal from both orders, the First Department unanimously affirmed. *Haussmann as Tr. of Konstantin S. Haussmann, Tr.* v. *Baumann*, 217 A.D.3d 569 (1st Dep't 2023). 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 longstanding 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 (citing *Ezrasons, Inc.* v. *Rudd*, 217 A.D.3d 406, 406 (1st Dep't 2023); *Lerner* v. *Prince*, 119 A.D.3d 122, 127-28 (1st Dep't 2014); *Hart* v. *Gen. Motors Corp.*, 129 A.D.2d 179, 183 (1st Dep't 1987)). This blackletter law compelled dismissal, because Germany's corporate statute imposes substantive conditions on derivative standing that Plaintiffs had concededly failed to satisfy. *Haussmann*, 217 A.D.3d at 571. The First Department also affirmed the Supreme Court's findings on personal jurisdiction and *forum non conveniens*. *Id.*

ARGUMENT

A movant seeking leave to appeal before this Court must demonstrate issues that "are novel or of public importance, present a conflict with prior decisions of th[e] Court [of Appeals], or involve a conflict among the departments of the Appellate Division." 22 NYCRR 500.22(b)(4); *see also* N.Y. Ct. Appeals Civ. Jurisdiction & Prac. Outline § III(A).

Plaintiffs offer nothing like that. Instead, their 71-page motion serves up a dog's breakfast of claimed defects in the decisions below — none of public importance, none departing from the well-established precedents of this Court or any department of the Appellate Division. Indeed, the only common thread running through Plaintiffs' omnibus motion — which proposes four disparate questions for review — is the contention that the courts below should not have dismissed their complaint. Leave will not be granted to appeal to this Court where, as here, a movant seeks only the correction of purported "errors committed by the courts below." Arthur Karger, *Powers of the N.Y. Court of Appeals* § 10:3. And discretionary review is still less justified where reversal would require the Court to overrule the lower courts on three independent grounds. Leave should be denied.

I. THE COURT SHOULD NOT GRANT LEAVE FOR PLAINTIFFS TO RELITIGATE PERSONAL JURISDICTION.

Plaintiffs first ask this Court to examine whether New York has specific personal jurisdiction over the foreign fiduciaries named as defendants. In seeking to relitigate this point, Plaintiffs do not attempt to identify anything of novelty or importance that would satisfy this Court's standard for granting such

leave. Instead, Plaintiffs argue that leave is justified because "the trial court's findings [we]re erroneous." Br. 31. Even if Plaintiffs could identify any error, that would not support leave. *See* N.Y. Ct. Appeals Civ. Jurisdiction & Prac. Outline § II(E)(5) ("[a]rguing error below is not enough").

And Plaintiffs do not identify any error. The Supreme Court correctly applied New York's demanding standard for establishing specific personal jurisdiction. Under CPLR 302(a) and this Court's precedents, Plaintiffs had the burden to plead facts showing that the Bayer Defendants purposefully "avail[ed] [themselves] of the privilege of conducting activities" in New York, that they "establish[ed] a continuing relationship" for "sustained and substantial" business, and that the claims asserted "aris[e] from" their New York contacts. CPLR 302(a); *Paterno* v. *Laser Spine Inst.*, 24 N.Y.3d 370, 376-77 (2014); *Johnson* v. *Ward*, 4 N.Y.3d 516, 519 (2005) (New York requires a "substantial relationship" between the alleged activity in New York and the cause of action).

The complaint fell well short of this standard. As the Supreme Court held:

> 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). The court thus found that Plaintiffs had failed to satisfy either of the CPLR's prerequisites: The complaint established neither "purposeful

availment" nor that Plaintiffs' claims of fiduciary breach arise out of the Bayer Defendants' alleged New York contacts. *See* R14-15 (Order at 2-3).

On appeal before the First Department, Plaintiffs sought to paper over their deficient complaint with unpleaded and inaccurate allegations concerning the negotiation, financing, and regulatory approval of the Bayer-Monsanto merger. *See* Ex. A at 40-42 (Bayer Defs.' Response Br.). With these record distortions, Plaintiffs attempted unsuccessfully to obscure the dearth of New York contacts alleged in their complaint. In fact, the record before the Supreme Court included only a handful of allegations placing any Bayer Defendant in New York: R1891 (Pls.' Mem. in Opp'n to Bayer Defs.' Mots. to Dismiss) (asserting that an individual Bayer Defendant had dinner with Monsanto's CEO in New York days before the merger agreement, without offering any detail on what the top executives discussed); R322-23 (¶¶ 275-78) (alleging that the same Defendant 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" in seeking to finance the Monsanto transaction).

As the Supreme Court recognized, following a consistent line of authority from this Court, incidental contacts like those alleged by Plaintiffs are insufficient for long-arm jurisdiction. *See Paterno*, 24 N.Y.3d at 375-77 (defendant's "responsive" contacts did not constitute purposeful availment); *Presidential Realty Corp.* v. *Michael Square West, Ltd.*, 44 N.Y.2d 672, 673 (1978) (allegations of a meeting in New York during which "conciliatory

modifications" to a deal were negotiated and signed insufficient under CPLR 302(a)(1)). Moreover, the makeweight contacts alleged by Plaintiffs bear no connection to the claims underlying their lawsuit — which concern Bayer's decision to acquire Monsanto on the basis of 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 acknowledged that their suit is not based on any harm suffered by investors from the merger's financing:

> THE COURT: [T]he way that 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).

None of this supports the extension of specific personal jurisdiction to the Bayer Defendants. Plaintiffs' desire to reargue the deficiency of their pleadings yet again before yet another tribunal cannot justify burdening this Court's docket.[2]

[2] Plaintiffs also suggest that Bayer Corp. consented to personal jurisdiction in New York by registering to do business here. Br. 1 (citing *Bagdon* v. *Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 437 (1916)). This argument was never raised below and so cannot supply grounds for further appeal. 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 observing that "under existing New York law, a foreign corporation does not consent to general jurisdiction in this state merely by complying with the Business Corporation Law's registration provisions"). And even if the record and the law were otherwise, the argument would be 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) (acknowledging that Bayer Corp. was named solely as an "instrument").

II. THE COURT SHOULD NOT GRANT LEAVE FOR PLAINTIFFS TO RELITIGATE THE TRIAL COURT'S DISCRETIONARY APPLICATION OF CPLR 327(a).

Plaintiffs cannot and do not dispute that the Supreme Court cited and addressed the factors this Court has identified as guideposts for application of CPLR 327(a). That forecloses further review. As this Court's precedents instruct, "if the courts below considered the various relevant factors in making" a determination to dismiss under the statute, "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 marks omitted). Ignoring that guidance, Plaintiffs now ask the Court to brush aside the trial court's discretionary analysis, on the argument that it "fail[ed] to give any" deference to their choice of forum. Br. 49.

Again, this reduces to an unvarnished charge of "legal error," *id.*, unsuitable for review. And again it misstates the decision below, which held that any presumed deference to Plaintiffs' forum-shopping was overcome by the burden of dragging the German law claims of a German corporation into a Manhattan courthouse, an ocean away from where the relevant events occurred. R15 (Order at 3). None of the individual Bayer Defendants is located in New York or undertook any relevant conduct in New York. And the same holds for Bayer's bank advisers, affiliates of the named Bank Defendants, which provided advice to Bayer "in Germany, where the Bayer Defendants were located and where all meetings of [Bayer's] Supervisory and Management Board occurred." R22 (Order at 10). On those facts, the trial court appropriately exercised its discretion to

dismiss under CPLR 327(a). Plaintiffs have identified no cause for reconsideration.

In the alternative, Plaintiffs argue that leave should be granted to consider whether dismissal for *forum non conveniens* was barred by CPLR 327(b). To begin, this issue is waived. In opposition to dismissal, Plaintiffs nowhere cited the provision — and have conceded that they "bear the blame for not raising the argument earlier." R102 (Tr. Hr'g on Pls.' Mot. for Leave to Reargue and Renew at 12:12-13). This is dispositive, both because the Court of Appeals "has no power to review . . . unpreserved error," *Elezaj* v. *P.J. Carlin Constr. Co.*, 89 N.Y.2d 992, 994 (1997), and because it is not error for the Supreme Court to deny renewal and reargument for a waived legal argument.

In an effort to sidestep this waiver, Plaintiffs have advanced the bizarre claim that the Supreme Court, the First Department, and now this Court must ignore their procedural default because CPLR 327(b) "cannot be waived." Br. 46. This, Plaintiffs say, is because the provision is equivalent to a "deprivation of subject-matter jurisdiction." *Id*. That contention has no basis in the precedents of this (or any) Court — and it has been specifically and properly rejected in the Appellate Division. *See Nurlybayev* v. *SmileDirectClub, Inc.*, 205 A.D.3d 455, 457 (1st Dep't 2022) (argument under CPLR 327(b) waived).[3]

[3] Plaintiffs also suggest that "there can be no waiver" because Plaintiffs secretly "intended to file a pre-hearing brief to specifically raise the CPLR 327(b) issue" after oral argument on Defendants' motions to dismiss concluded in December 2021. Br. 47. Even were that representation credited, it would make no difference. An unauthorized, post-argument sur-reply would not have cured Plaintiffs' waiver either. *Williams* v. *City of New York*, 114 A.D.3d 852, 854 (2d Dep't 2014).

Moreover, even if the application of CPLR 327(b) were properly before this Court, it would not support disturbing the decisions of the lower courts. Plaintiffs argue that dismissal for *forum non conveniens* was precluded because their claims arise from an ADR deposit agreement and a debt agreement. As to the former, Plaintiffs have conceded that they do not even hold ADRs, R2508, and fiduciary breach claims brought by ADR holders are independent of any underlying ADR agreement anyhow, *see, e.g.*, *Batchelder* v. *Kawamoto*, 147 F.3d 915, 918 (9th Cir. 1998). As for the proffered debt agreement, it concerned the restructuring of Bayer's merger debt after the transaction closed. Plaintiffs present no basis for their claim that the acquisition would "not have been undertaken or consummated" absent this post-close lending arrangement. Br. 44. CPLR 327(b) is waived, otherwise unsuitable for review by this Court, and irrelevant besides. It does not merit further review.

III. THE COURT SHOULD NOT GRANT LEAVE FOR PLAINTIFFS TO RELITIGATE DECADES OF PRECEDENT APPLYING THE INTERNAL AFFAIRS DOCTRINE TO THE ISSUE OF DERIVATIVE STANDING.

Plaintiffs next claim that the lower courts erred by applying German law to the question whether stockholders may derivatively assert the claims of a German company.

That result was far from novel. To the contrary, it stands four-square with decades of precedent from this Court and every department of the Appellate Division confirming that the internal affairs doctrine governs the question of derivative standing. *See Greenspun* v. *Lindley*, 36 N.Y.2d 473, 478 (1975); *Davis*

v. *Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 253 (2017); *see also Graczykowski* v. *Ramppen*, 101 A.D.2d 978, 979 (3d Dep't 1984); *Wilson* v. *Tully*, 243 A.D.2d 229, 232 (1st Dep't 1998); *O'Donnell* v. *Ferro*, 303 A.D.2d 567, 568 (2d Dep't 2003); *David Shaev Profit Sharing Acct.* v. *Cayne*, 24 A.D.3d 154, 154 (1st Dep't 2005); *In re NASD Disp. Resol.*, 46 A.D.3d 294, 295 (1st Dep't 2007); *Levin* v. *Kozlowski*, 45 A.D.3d 387, 388 (1st Dep't 2007); *Ahlers* v. *Ecovation, Inc.*, 74 A.D.3d 1889, 1890 (4th Dep't 2010); *Siegel* v. *J.P. Morgan Chase & Co.*, 103 A.D.3d 598, 598 (1st Dep't 2013); *Cent. Laborers' Pension Fund* v. *Blankfein*, 111 A.D.3d 40, 45 n.8 (1st Dep't 2013); *Int'l Painters* v. *Cantor Fitzgerald, L.P.*, 132 A.D.3d 470, 470-71 (1st Dep't 2015); *Mason-Mahon* v. *Flint*, 166 A.D.3d 754, 756 (2d Dep't 2018); *Deckter ex rel. Bristol-Meyers Squibb Co.* v. *Andreotti*, 170 A.D.3d 486, 486 (1st Dep't 2019).

At every level of review, Plaintiffs have attempted to upend this bedrock law by arguing that — unbeknownst to the New York courts — the Legislature displaced the internal affairs doctrine six decades ago when it enacted BCL § 1319. That argument is not novel, either. It has been rejected over and again for decades by the lower courts, which have found that the statute is not "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 America*, 2014 WL 7503654, at *2 (N.Y. Cty. Sup. Ct. Dec. 29, 2014); *see Lewis* v. *Dicker*, 459 N.Y.S.2d 215, 216 (Kings 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) (Section 1319 is "not a conflict of laws rule and does not compel the application of New York law"); *Levin*, 45 A.D.3d at 388 (same); *Stephen Blau MD Money Purchase Pension Plan Tr.* v. *Dimon*, 2015 WL 2127119, at *6 (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); *Ezrasons*, 217 A.D.3d at 406 (rejecting identical argument, likewise asserted by counsel to Plaintiffs). No court has adopted Plaintiffs' reading of BCL § 1319.

Nor does Plaintiffs' effort to weaponize the BCL against foreign corporate law present an issue of public importance. German statute sets out clear conditions for stockholders who seek to assert derivative claims. Plaintiffs' individual failure to satisfy those conditions lacks any statewide significance. If they wish to assert claims against defendants under German law, their recourse is to the German courts — not the crowded dockets of this State.[4]

[4] Plaintiffs also argue that the First Department's interpretation of BCL § 1319 "conflicts with [its] own precedent" in *Culligan Soft Water Co.* v. *Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014). Br. 61. But as the First Department recently explained, "*Culligan* addressed only the rare situation in which a foreign entity nevertheless had 'such "presence" . . . in our State as would, irrespective of other considerations, call for the application of New York law.'" *Ezrasons*, 217 A.D.3d at 407 (quoting *Greenspun*, 36 N.Y.2d at 477). Plaintiffs characterize this distinction as "creat[ing]—*out of thin air*—an elevated jurisdictional requirement for applying BCL § 1319." Br. 62. The First Department was not inventing anything "*out of thin air*"; it was quoting, citing, and relying upon authority from this Court holding that the significant "presence" of a foreign company in New York could "call for application of New York law." *Greenspun*, 36 N.Y.2d at 477. Plaintiffs' apparent belief that this Court's longstanding precedent is "not only wrong, but dangerous" does not support leave to appeal. Br. 63.

IV. THE COURT SHOULD NOT GRANT LEAVE FOR PLAINTIFFS TO RELITIGATE WHETHER GERMANY'S CORPORATE STATUTE IMPOSES SUBSTANTIVE CONDITIONS ON DERIVATIVE STANDING.

In applying the internal affairs doctrine, the Supreme Court held — and the First Department affirmed — that Plaintiffs failed to comply with substantive conditions that German law imposes on derivative litigation. Plaintiffs argue that this result merits yet more review because it "[d]efied" this Court's decision in *Davis* v. *Scottish Re Group Ltd.*, 30 N.Y.3d 247 (2017) and "[c]onflicted" with the Second Department's decision in *Mason-Mahon* v. *Flint*, 166 A.D.3d 754 (2d Dep't 2018). Br. 65. There is no conflict. Once again, Plaintiffs misstate the law and mischaracterize the decisions below.

In *Davis*, the Court applied the internal affairs doctrine to a derivative action brought on behalf of a Caymans Islands entity. Following a careful review of Cayman Islands law, the Court held that a statutory restriction cited by the defendant corporation was procedural, and thus that it did not apply to derivative litigation brought in this State. In reaching that result, this Court distinguished cases applying 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 Davis*, 30 N.Y.3d at 254-55 (discussing *Microsoft Corp.* v. *Vadem, Ltd.*, 2012 WL 1564155 (Del. Ch. Apr. 27, 2012), *aff'd*, 62 A.3d 1224 (Del. 2013); *Vaughn* v. *LJ Int'l, Inc.*, 174 Cal. App. 4th 213 (2d Dist. 2009); *Dragon Invs. Co. II LLC* v. *Shanahan*, 2007 WL 4144251 (N.Y. Cty. Sup. Ct. Nov. 2, 2007); *Locs. 302 & 612*

of Int'l Union of Operating Eng'rs v. *Blanchard*, 2005 WL 2063852 (S.D.N.Y. Aug. 25, 2005)). This Court's guidance was clear: where a foreign statute applies to all derivative litigants, without regard to place of incorporation, it is procedural. But when the statute applies to derivative litigants because it reflects the law of the place of incorporation, the rule is substantive. *Davis*, 30 N.Y.3d at 254.

Both the decision below and *Mason-Mahon* applied the rule in *Davis*. In *Mason-Mahon*, the Second Department determined that a UK statute was procedural. That result turned on a finding that the specific provisions at issue applied to derivative litigation in England, Wales, or Northern Ireland on behalf of any company, "irrespective of where such company is incorporated." *Mason-Mahon*, 166 A.D.3d at 757.

In the decision below, the Supreme Court and the First Department determined that the German statute is substantive. That result turned on a finding that nothing in the statutory text purports to limit its application to the German courts. Among other substantive conditions, German law includes a requirement identical to the provisions of Canadian and BVI law that the *Davis* Court distinguished as substantive — a statutory mandate that the "regional court in whose judicial district the company has its registered seat shall decide" whether a shareholder has permission to sue derivatively. R844 (German Stock Corporation Act § 148(2)). Only German corporations have registered seats in Germany, so this judicial-permission requirement does not apply irrespective of where the nominal defendant is incorporated. R807 (Koch Aff. ¶ 69). Plaintiffs' failure to

comply with this — and other — substantive requirements imposed by German statute is fatal to derivative standing under the rule in *Davis*.

The First Department thus did not, as Plaintiffs claim, "def[y] this Court's instruction in *Davis*" or "disregard[]" the "substance-versus procedure argument." Br. 67 (emphasis omitted). It simply applied this Court's precedents to a different statute, and reached a different outcome. This was not error — let alone justification for leave to appeal.

CONCLUSION

For the reasons set forth above, the motion for leave to appeal should be denied.

Dated: August 18, 2023
New York, New York

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EXHIBIT A

To Be Argued By:
WILLIAM SAVITT
Time Requested: 15 Minutes

New York County Clerk's Index No. 651500/20

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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

Plaintiffs-Appellants,

—against—

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZÜHLKE, SIMONE BAGEL-TRAH, NORBERT W. BISCHOFBERGER,

(*Caption continued on inside cover*)

CASE NOS. 2022-02491, 2022-04806

BRIEF FOR NOMINAL DEFENDANT-RESPONDENT BAYER AG AND THE BAYER DEFENDANTS-RESPONDENTS

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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.

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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. No defendant resides in New York; nearly all are German. No part of the lawsuit is governed by New York law; every part is governed by German law. None of the corporate governance policies the lawsuit seeks to challenge involve New York companies; all implicate German corporate law alone.

Recognizing all this, the Supreme Court dismissed the action on multiple grounds in a carefully reasoned decision. The motion court found that the defendants, all foreign to New York, were not amenable to personal jurisdiction here. 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 Plaintiffs have standing to sue in the name of a German corporation — a test that they 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 below, and without any support and ask 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. 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. Plaintiffs contend that Germany's law of derivative standing does not apply to them, because they filed their complaint in New York. If accepted, Plaintiffs' position would upend the internal affairs principle and decades of precedent. *See* Point I, *infra*.

Second, New York lacks personal jurisdiction over the Bayer Defendants — a foreign subsidiary and various members of Bayer's Board of Management or Supervisory Board. No defendant 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 were neither sustained nor substantial — and therefore do not constitute "transaction of business" by the Bayer Defendants — and that Plaintiffs' claims do not arise from the alleged New York contacts anyway. That decision was correct and should be sustained. *See* Point II, *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 — none lives in New York — and the business decisions at issue were centered there. *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 that is governed by both a corporate statute and a charter expressly requiring derivative claims just like this to be brought in Germany. *See* Point III, *infra*.

This lawsuit was the first salvo in a fusillade of derivative litigation filed by the same attorneys seeking to drag European directors of European companies into New York's courts, to answer for conduct undertaken in Europe in alleged breach of European-law fiduciary duties. These lawsuits are all not only improper and contrary to precedent — they are disrespectful of foreign sovereigns and an unnecessary burden on New Yorkers and their courts. Reflecting that legal reality, not one lawsuit among this opportunistic litigation campaign has survived a motion to dismiss. This was the first of these suits to be appealed, and it presents the Court the opportunity to reaffirm long-settled principles governing litigation of foreign cases in New York's courts.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. (i) Whether German law governs Plaintiffs' standing to assert derivative claims on behalf of Bayer; (ii) If New York law governs derivative standing, whether Plaintiffs have satisfied that standard.

Answer below: (i) The Supreme Court held that German law governs derivative standing and dismissed based on Plaintiffs' conceded failure to satisfy German law. (ii) Because the court held that German law governs derivative standing, it did not reach the question under New York law.

2. Whether personal jurisdiction over the Bayer Defendants is authorized by (i) New York statute and (ii) the federal Due Process Clause.

Answer below: (i) The Supreme Court held that personal jurisdiction is unavailable under New York law. (ii) Because the court held that New York law does not extend jurisdiction, it did not reach the federal constitutional question.

3. (i) 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; (ii) Whether the court abused its discretion in denying Plaintiffs leave to assert a waived statutory argument.

Answer below: (i) The Supreme Court held that New York is not an appropriate forum under the doctrine of *forum non conveniens*. (ii) The Supreme Court denied Plaintiffs leave to assert their waived argument.

COUNTERSTATEMENT OF THE CASE AND PROCEEDINGS[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).

Of the 31 current or former members of the Supervisory Board and Board of Management who have been named as defendants in this action, 26 live overseas, one has passed away, and only 4 reside in the United States, all outside New York. R746-48 (Semrau Aff. ¶¶ 6-7); R778 (Arnold Aff. ¶ 5). 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).

[1] Citations in the form of "¶ __" refer to paragraphs of the second amended complaint (the "Complaint," R158-356). "Branca Aff.," "Semrau Aff.," "Arnold Aff.," and "Koch Aff." refer, respectively, to the affidavit of Brian Branca (R781-82) and the affirmations of Dr. Stephan Semrau (R745-49), Dr. Markus Arnold (R777-79), and Prof. Dr. Jens Koch (R786-810). "Order" refers to the Supreme Court's Decision and Order on Plaintiffs' Motion to Dismiss (R13-27).

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 have not alleged 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 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.[2] On December 9, 2020, Ms. Haussmann, now 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 are eight Supervisory Board members who joined the Board after Bayer agreed to buy Monsanto. R746-47 (Semrau Aff. ¶ 6).

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). Boiled all the way down, the 360-paragraph, 195-page Complaint alleged that Bayer should not have entered the Monsanto merger and sought to hold the board members liable in damages for Monsanto's adverse post-merger litigation outcomes.

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[2] *See Rosenfeld* v. *Achleitner*, Index No. 651578/2020 (Deutsche Bank AG); *Lambinet* v. *Pötsch*, Index No. 653303/2020 (Volkswagen AG); *Cattan* v. *Ermotti*, Index No. 652270/2020 (UBS AG); *Cattan* v. *Rohner*, Index No. 652468/2020 (Credit Suisse Group AG); *Cattan* v. *Vasella*, Index No. 650463/2021 (Novartis AG); *Ezrasons, Inc.* v. *Rudd*, Index No. 656400/2020 (Barclays PLC).

Plaintiffs allegedly own 2,317 shares of Bayer. R211 (¶ 66). While both Plaintiffs submitted verifications, neither indicates when they purchased Bayer shares. R358, R359. The Complaint contains contradictory claims on the topic, alleging variously that Plaintiffs owned Bayer securities throughout the period of alleged wrongdoing, or were shareholders "at the time of one or more of the breaches of duties complained of." R211, R310 (¶¶ 66, 252). Neither the Complaint nor the verifications state that either Plaintiff continuously owned Bayer securities from the time of the alleged breaches through the present. The Complaint is likewise obfuscatory as to whether Plaintiffs alleged ownership of Bayer common stock or of American Depository Receipts — domestic securities that are issued in the United States pursuant to a deposit agreement entered into between Bayer and a domestic depositary bank (the "ADR Deposit Agreement"). R602-05 (Ex. 1 to Chang Aff.). In an unverified filing, Plaintiffs claim that, at present, they "own ordinary common shares," not ADRs. R2508 (Pls.' Reply ISO Mot. for Leave to Renew and Reargue at 12).

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 the litigation of

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); R2290-2313 (Bayer's Mem. ISO Mot. to Dismiss); R2364-2382 (Bayer's Reply 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 Supreme Court held that Plaintiffs lack standing to pursue derivative claims on Bayer's behalf. R26-27 (Order at 14-15). Applying the internal affairs doctrine, the court held that 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 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 New York forum." R26, R15 (Order at 14, 3). As the court explained, none of the Bayer Defendants "live here, conduct business here regularly, or have 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 concerning decisions made in Germany by foreign fiduciaries of a German corporation. R21 (Order at 9). In support of this conclusion, the court noted that nearly all of the Bayer Defendants reside in Europe, none resides in New York, 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. R21-22 (Order at 9-10). 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 filed a motion 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); R2393-2412 (Mem. ISO Mot. for Leave to Reargue and Renew). In support of that motion, Plaintiffs argued — for the first time — that CPLR 327(b) precluded Defendants from seeking dismissal under the doctrine of *forum non conveniens* on their previously resolved motion, because their claims purportedly "arise[] from and relate[] to" certain debt and other agreements referenced in the Complaint, each of which includes New York choice-of-law and choice-of-forum provisions. *Id.* Plaintiffs had never raised that argument in opposition to dismissal.

On October 20, 2022, the Supreme Court heard argument on Plaintiffs' motion for leave to reargue and renew. *See* R91-122 (Tr. Hr'g on Pls.' Mot. for Leave to Reargue and Renew). At the hearing, Plaintiffs 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 . . . ."). While the court expressed skepticism about the merits of Plaintiffs' argument, it made clear that it was "not inclined" to "reach that issue" given Plaintiffs' admitted failure to preserve the argument. R120. 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 that dismissal. *Id.*

D. Plaintiffs appeal the Supreme Court's orders.

On February 2, 2022, Plaintiffs filed a notice of appeal from the Supreme Court's order dismissing the Complaint. R3-7; R28-32; R53-57. On October 26, 2022, Plaintiffs filed a notice of appeal from the Supreme Court's written order denying leave to reargue and renew. R78-81. Following consolidation of the appeals, Plaintiffs filed their opening appellate brief on January 30, 2023. Bayer and the Bayer Defendants now seek affirmance on multiple independent grounds.

Much of the parallel litigation filed by Plaintiffs' counsel against European corporations is likewise before this Court following dismissal. *See Cattan* v. *Ermotti*, 2021 WL 6200975, at *1-2 (N.Y. Cty. Sup. Ct. Dec. 30, 2021) (dismissing based on presence of forum-selection provision in corporate charter), *appeal pending*, Case No. 2022-02492; *Cattan* v. *Vasella*, 2022 WL 3574155, at *4-5 (N.Y. Cty. Sup. Ct. Aug. 18, 2022) (same), *appeal pending*, Case No. 2022-04655; *Ezrasons, Inc.* v. *Rudd*, Index No. 656400/2020 (N.Y. Cty. Sup. Ct. May 4, 2022), NYSCEF No. 65 (dismissing for lack of derivative standing under English law), *appeal pending*, Case No. 2022-04657.

STANDARD OF REVIEW

This Court reviews dismissal for lack of derivative standing and personal jurisdiction *de novo*. *511 W. 232nd Owners Corp.* v. *Jennifer Realty Co.*, 98 N.Y.2d 144, 151-52 (2002). Dismissal under the doctrine of *forum non conveniens* is reviewed for abuse of discretion, as is denial of leave to renew under CPLR 2221. *Islamic Republic of Iran* v. *Pahlavi*, 62 N.Y.2d 474, 478 (1984); *Wade* v. *Giacobbe*, 176 A.D.3d 641, 641 (1st Dep't 2019). No appeal lies from an order denying leave to reargue, unless the lower court has effectively granted reargument by addressing the merits of the motion, which the motion court expressly declined to do. *Lewis* v. *Rutkovsky*, 153 A.D.3d 450, 453 (1st Dep't 2017).

ARGUMENT

POINT I

THE SUPREME COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS FOR LACK OF DERIVATIVE STANDING.

The Complaint seeks to assert claims on behalf of a German corporation. Following decades of New York precedent applying the internal affairs doctrine to matters of internal corporate governance, the Supreme Court held that Plaintiffs' standing to pursue these derivative claims is governed by German corporate law. Because Plaintiffs did not show that they had satisfied Germany's substantive conditions for derivative standing, the Supreme Court dismissed the Complaint.

On appeal, Plaintiffs do not dispute their failure to comply with German law. Instead, they argue — as below — that New York courts should ignore the German law that governs the internal affairs of Bayer in favor of New York law. Plaintiffs claim that this result is compelled either by an obscure provision of the Business Corporation Law, N.Y. Bus. Corp. Law ("BCL") § 1319(a), or the purportedly procedural nature of the limitations on derivative litigation imposed by German corporate law.

Neither argument has any merit; both are contrary to long-settled New York precedent. Moreover, the decision below would necessarily be affirmed even if New York's derivative standing rules governed, because the Complaint does not meet the New York law test, either. While the motion court had no occasion to

reach this issue, it was argued by Bayer below and presents an alternate ground for affirmance. *See* R732-34 (Bayer Defs.' Mem. ISO Mot. to Dismiss at 12-14); *Fenton* v. *Consolidated Edison Co.*, 165 A.D.2d 121, 125 (1st Dep't 1991) (respondent "is entitled to have the determination affirmed on any ground he properly raised before the IAS court"). Plaintiffs thus lack standing regardless of the governing law.

A. The Supreme Court correctly held that German law governs whether Plaintiffs are entitled to sue on Bayer's behalf and makes clear that they are not.

1. Section 1319 of the Business Corporation Law does not displace the internal affairs doctrine.

"[I]ssues 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). As this Court observed in *Hart* v. *General Motors*, "[t]he corporation and its shareholders rightfully expect that the laws under which they have chosen to do business will be applied." 129 A.D.2d 179, 185 (1st Dep't 1987). This bedrock principle follows the U.S. Supreme Court's wisdom 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).

Consistent with that guidance, this Court has for many decades relied upon the internal affairs doctrine to hold that derivative standing is fixed by the law of the state of incorporation. *See, e.g.*, *Wilson* v. *Tully*, 243 A.D.2d 229, 232 (1st Dep't 1998) (applying law of the state of incorporation to determine standing in shareholder derivative action); *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); *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); *Deckter* v. *Andreotti*, 170 A.D.3d 486, 486 (1st Dep't 2019) (same). The other appellate departments are in accord.[3]

Faithfully applying this precedent, the Supreme Court held that German corporate law 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. Section 1319 provides that BCL § 626 (among other provisions of the Business Corporation

[3] *See, e.g.*, *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); *Mason-Mahon* v. *Flint*, 166 A.D.3d 754, 756 (2d Dep't 2018) ("[T]he substantive law of the United Kingdom governs.").

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. Plaintiffs' position lacks statutory grounding; is unsupported in the legislative history; is contrary to well-settled controlling case law; and, if accepted, would place this Department's corporate governance choice-of-law principles far outside the mainstream.

As to the statutory text: Neither § 1319 nor § 626 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 legislative history

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 129).

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 112). 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.[4] As this Court found in a related context, likewise reviewing

[4] *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 114) ("The section lists the articles and sections of other articles which, to the extent provided therein, apply to foreign corporations doing business

the legislative history of the BCL, "there is no suggestion, as elsewhere in the revisor's notes, that any change in law is propounded." *Indus. Psychology, Inc.* v. *Simon*, 16 A.D.2d 114, 119 (1st Dep't 1962). The same analysis should govern 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 38. But, fact-checking the sources, one sees that neither of Plaintiffs' academics said anything like that.[5] More fundamentally, academic articles can't override legislative

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in this state and to the directors, officers and shareholders of such corporations, except as set forth in § 1320.").

[5] Br. 38 (quoting Robert S. Stevens, *New York Business Corporation Law of 1961*, 47 Cornell L.Q. 141, 174 (Winter 1962) (Addendum at 134) ("Applicable to all foreign corporations are to the extent stated therein . . . the provisions relating to . . . derivative actions . . . ."")); Br. 38 (quoting Robert A. Kessler, *The New York Business Corporation Law*, 36 St. John's L. Rev. 1, 107 n.418 (Dec. 1961) (Addendum at 121) ("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 [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 121, 122) (acknowledging

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.[6]

As to caselaw: New York precedent overwhelmingly confirms that Plaintiffs are wrong about § 1319. Under these decisions, the statute is 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 America*, 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); *Ezrasons, Inc.* v. *Rudd*, Index No. 656400/2020 (N.Y. Cty. Sup. Ct. May 4, 2022), NYSCEF No. 65 at 38:14-20 (same); *City of Aventura Police Officers' Retirement Fund* v. *Arison*, 134 N.Y.S.3d 662, 673 n.3 (N.Y. Cty. Sup. Ct. 2020) (same); *Stephen Blau MD Money Purchase Pension*

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that "not all foreign corporations doing business in New York will be held to the New York standard of conduct").

[6] 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. 32-33; 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).

Plan Trust v. *Dimon*, 2015 WL 2127119, at *4 n.1 (N.Y. Cty. Sup. Ct. May 6, 2015) (same); *Potter* v. *Arrington*, 810 N.Y.S.2d 312, 316 (Monroe Cty. Sup. Ct. 2006) (Section 1319 is "not a conflict of laws rule and does not compel the application of New York law"); *Lewis* v. *Dicker*, 459 N.Y.S.2d 215, 216 (Kings 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). These cases all require New York courts to apply the law of the state of incorporation to determine derivative standing, consistent with the internal affairs doctrine.

In response to this mountain of precedent, Plaintiffs cite only *Culligan Soft Water Co.* v. *Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014). That decision referenced § 1319 when it applied New York's law of derivative standing in a case involving a Bermuda corporation. *Id.* at 422-23. According to Plaintiffs, *Culligan* abrogated application of the internal affairs doctrine to the issue of derivative standing, thereby overruling decades of New York law.

No court has adopted Plaintiffs' interpretation of *Culligan*. As Justice Singh has observed, had this Court "wanted to change the clear precedents from *Hart* to *Lerner*" — all of which point indelibly to an application of the internal affairs doctrine here — "it most assuredly would have said just that, and why." *Blau*, 2015 WL 2127119, at *4 n.1.

More recently, and after broadly surveying the controlling jurisprudence, the Supreme Court reached the same conclusion in *City of Aventura Police Officers' Retirement Fund* v. *Arison*, 134 N.Y.S.3d 662 (N.Y. Cty. Sup. Ct. 2020). There, Justice Cohen reviewed cases from 1982 through 2015, none of which are cited in *Culligan*, all reaffirming that § 1319 is not a choice-of-law provision. *Id*. at 672. *Aventura* thus concluded that *Culligan "*did not purport to alter settled New York law on the application of the internal affairs doctrine" and that the reading of § 1319 Plaintiffs advance here is "contrary to decades of controlling appellate precedent." *Id.* at 673 & n.3. More recently still, *Ezrasons, Inc.* v. *Rudd* reached the identical result. Index No. 656400/2020 (N.Y. Cty. Sup. Ct. May 4, 2022), NYSCEF No. 65 at 39:14-39:4 ("[T]he Court doesn't accept that the *Culligan* case dictates a different outcome" than application of the internal affairs doctrine, because the case "concerned regulation of conduct within New York and did not purport to alter settled New York law").

Nor is the Supreme Court alone in its refusal to interpret *Culligan* as a jurisprudential revolution. The Second Department has likewise declined to read that case as ousting New York's traditional deference to the internal affairs doctrine. In *Mason-Mahon* v. *Flint*, 166 A.D.3d 754, 755 (2d Dep't 2018) ("*HSBC*"), a derivative plaintiff urged exactly the position advanced by Plaintiffs here: "[P]ursuant to BCL section 1319, shareholder derivative actions brought in

New York on behalf of foreign corporations doing business in New York are governed by section 626." Brief for Plaintiff-Appellant at 21, *HSBC*, Case No. 2015-12400 (2d Dep't Aug. 15, 2016) (Addendum at 79) (citing *Culligan*, 118 A.D.3d at 422). The Second Department rejected this argument, instead holding — consistent with the decades of precedent cited above — that "[b]ased upon the internal affairs doctrine, the substantive law of [the foreign jurisdiction of incorporation] governs the merits of this action." *HSBC*, 166 A.D.3d at 756.

Consistent with these decisions from other courts, this Court has not once read *Culligan* as holding that New York law governs derivative standing for foreign corporations. To the contrary, the Court has continued to apply the internal affairs doctrine, consistent with long-established precedent. *See Asbestos Workers Philadelphia Pension Fund* v. *Bell*, 137 A.D.3d 680, 681 (1st Dep't 2016) (Delaware law governs derivative standing for Delaware corporation); *Korsinsky* v. *Winkelreid*, 143 A.D.3d 427, 427 (1st Dep't 2016) (same); *Wandel* v. *Dimon*, 135 A.D.3d 515, 516 (1st Dep't 2016) (same); *Deckter* 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, applying Cayman Islands law). So too here.

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. This is precisely the outcome that the internal affairs doctrine was designed to avoid. The Court should not invite that chaos.

2. In the alternative, § 1319 is inapplicable here because Plaintiffs have not alleged that Bayer is "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 is not. To qualify as "doing business" under the provisions of Article 13, a foreign corporation must have established a presence in the State that would satisfy "the common-law concept of general personal jurisdiction" that prevailed when the Business Corporation Law was codified in 1961. *Airtran New York, LLC* v. *Midwest Air Grp., Inc.*, 46 A.D.3d 208, 216 (1st Dep't 2007). Under that precedent, a corporate defendant must operate in the State "not occasionally or casually, but with a fair measure of permanence and continuity." *Id.* (quoting *Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917)); *Frummer* v. *Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 536 (1967) (requiring "such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction").

Plaintiffs have not even attempted to satisfy this standard. They instead misread *Airtran* to require an application of the "'purposeful-availment' standard developed in the 'specific jurisdiction' cases under CPLR §302." Br. 40 (purporting to quote *Airtran*, 46 A.D.3d at 217). This has no foundation in the *Airtran* opinion, where this Court repeatedly explained that it was applying "[t]he usual standard of 'doing business' derive[d] from the interpretation of *CPLR 301*, which codified the common-law concept of *general* personal jurisdiction." 46 A.D.3d at 216 (emphasis added).

Having misread *Airtran*, Plaintiffs argue that § 1319 applies based on the same dog's breakfast of miscellaneous contacts that the Supreme Court rejected as a basis for extending specific personal jurisdiction. Because Plaintiffs have not established that Bayer transacted business in New York for jurisdictional purposes, *see infra* Point II.A, they cannot satisfy the higher standard under Article 13. Cases applying the *Airtran* standard establish that much more is required. *See, e.g.*, *Transasia Commodities* v. *Newlead JMEG, LLC*, 7 N.Y.S.3d 245, at *5 (N.Y. Cty. Sup. Ct. 2014) (hiring New York lawyers and consultants and past jurisdictional consent are not doing business); *Tremont Cap. Mgmt. Corp.* v. *Parnell*, 2005 WL 1561470, at *2 (S.D.N.Y. July 1, 2005) (corporation that made 10 to 20 visits to New York and communicated with vendors and investment managers here was not doing business).

3. The German Stock Corporation Act sets substantive requirements for derivative standing that Plaintiffs do not even claim to have met.

Because Bayer is a stock corporation, the claims that Plaintiffs seek to assert on its behalf are governed by the German Stock Corporation Act (abbreviated in Germany as "AktG"). The Stock Corporation 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 of management or supervisory board acted improperly in rejecting the shareholder's demand to sue, R804-05 (Koch Aff. ¶¶ 59-63 (discussing AktG § 148(1)(3))).

Plaintiffs do not argue that they satisfy these requirements — waiving appeal as to those specific requirements that the Supreme Court found were not met. *See* R26-27 (Order at 14-15) ("Plaintiffs have not alleged that they own a sufficient number of shares to assert their claims, that they made a demand upon the company to take legal action, or that they have sought permission from a German court to assert their claims."). Instead, Plaintiffs claim the requirements are inapplicable because they are procedural, rather than substantive. Br. 43-45.

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 44. 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, e.g.*, *Lewis*, 459 N.Y.S.2d at 217; R1953-56 (Koch Reply Aff. ¶¶ 2-10).

New York law governs whether a foreign legal provision is substantive for choice-of-law purposes. *See, e.g.*, *Tanges* v. *Heidelberg North America*, 93 N.Y.2d 48, 54 (1999). 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, this Court and others have held for decades that foreign rules of derivative standing are substantive and applicable in New York under the internal affairs doctrine. *See supra* p. 17.

This is true with regard to derivative standing generally, *e.g.*, *In re NASD Disp. Resol.*, 46 A.D.3d at 295, as well as 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*, 129 A.D.2d at 182, and the requisite nature of the alleged misconduct, *In re Renren, Inc. Deriv. Litig.*, 127 N.Y.S.3d 702, at *24 (N.Y. Cty. Sup. Ct. 2020).[7]

Notably, Plaintiffs cite nothing to support their contention that any of these particular standing requirements can be ignored as procedural. They cite only two cases on substance and procedure, both of which addressed leave-of-court

[7] A foreign state's classification of its law as either substantive or procedural is not binding on New York courts but can inform the determination under New York law. *Tanges*, 93 N.Y.2d at 54. Professor Koch affirmed that the derivative standing requirements of the German Stock Corporation Act are likewise substantive under German law. R1953-56 (Koch Reply Aff. ¶¶ 2-10).

requirements — leaving Plaintiffs with no authority on any of Germany's other substantive requirements for derivative standing. Moreover, neither case supports Plaintiffs' position.

In *Davis* v. *Scottish Re Group*, the Court of Appeals 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 of Appeals 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.

Following *Scottish Re*, the Second Department held in *HSBC* that a comparable provision in the UK Companies Act was procedural and did not bar a derivative action brought in New York on behalf of a UK corporation. Here again, the reason for the result was that the UK rule applied only to derivative actions filed in England, Wales, or Northern Ireland regardless of where the subject company was incorporated. 166 A.D.3d at 756-57. The Cayman and UK rules were rules of court, applicable to any would-be derivative litigant appearing in the local courts without regard to choice-of-law — not rules of conduct that defined

the obligations of would-be derivative litigants under the prevailing law of corporate governance.

Confirming this dispositive distinction, both *Scottish Re* and *HSBC* distinguished cases applying 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), *aff'd*, 62 A.3d 1224 (Del. 2013); *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)); *HSBC*, 166 A.D.3d at 757 (discussing *Scottish Re*).[8] The Court of Appeals 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 reflect the law of the place of incorporation, the rule is substantive. *Scottish Re*, 30 N.Y.3d at 254.

[8] Consistent with *Scottish Re* and *HSBC*, courts have held these and similar provisions of Canadian and BVI law to be substantive and have dismissed actions by derivative plaintiffs who failed to comply with them. *See Gutstadt* v. *Nat'l Fin. Partners Corp.*, 2013 WL 5859550 (N.Y. Cty. Sup. Ct. Oct. 22, 2013) (Ontario law, which has an "identical requirement" to Canadian law); *Dragon Invs. Co.*, 2007 WL 4144251 (former BVI law); *Blanchard*, 2005 WL 2063852, at *6 (Canadian law).

Section 148(2) of the German Stock Corporation Act falls unequivocally into the second category. 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. ¶ 69); R844 (AktG § 148(2)). Accordingly, under *Scottish Re*, *HSBC*, and the many cases enforcing the comparable Canadian and BVI rules, § 148(2) is another substantive requirement that Plaintiffs have not met.

B. New York law would also require dismissal for lack of derivative standing.

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 § 626(b). The Supreme Court did not reach either ground, but each is sufficient for affirmance.

1. 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

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 with regard to 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. Accordingly, there is no basis under New York law to excuse demand with regard to 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, 200-01 (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). This substantial-likelihood-of-liability theory is not recognized in New York. *See, e.g.*, *Wandel* v. *Eisenberg*, 60 A.D.3d 77, 80 (1st Dep't 2009). The "[r]isk of personal liability by the majority of a board of directors does not render a demand futile." *City of Tallahassee Ret. Sys.* v. *Akerson*, 2009 WL 6019489 (N.Y. Cty. Sup. Ct. Oct. 16, 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 Board of Management member Werner Baumann, Plaintiffs claimed that Bayer Supervisory Board members would face a conflict in considering litigation against him because he is favored by former Supervisory Board member Werner Wenning, to whom all Supervisory Board members are supposedly beholden. R330-35 (¶¶ 295-98). Plaintiffs conclusorily alleged, for example, that "[t]o sue Baumann is to sue Wenning, and the Supervisors will never do that." R332 (¶ 297). This suggestion that all Supervisory Board members are indirectly under Mr. Baumann's "control" is unsupported by any particularized facts. *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").[9]

Prong two — no particularized pleading of inadequate information. Plaintiffs likewise failed to plead with particularity that Supervisory Board

[9] Plaintiffs further alleged that three Supervisory Board members have a "vested personal interest" in blocking shareholder derivative suits "because of their own past misconduct in their corporate positions," and that worker representatives are conflicted because they are "dependent on the goodwill" of other directors. R332-35 (¶¶ 298-99). Both claims are unsupported by particularized allegations and unrelated to the "transaction at issue." *Marx*, 88 N.Y.2d at 200.

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), and were advised by counsel on the risks of the transaction. R237-38, R281-83 (¶¶ 133-35, 210-13). 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) (futility not established where complaint alleges defendants were kept informed of the matters at issue).

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 S'holder Deriv. 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). And there is no support for the notion that the acquisition reflected poor business judgment by Bayer's directors. To the contrary, the deal was widely commended at the time of its announcement. *See,*

e.g., Jacob Bunge & Christopher Alessi, *Bayer-Monsanto Deal Would Forge New Agricultural Force*, *Wall Street Journal* (Sept. 14, 2016), https://www.wsj.com/articles/bayer-and-monsanto-expected-to-announce-takeover-1473839357.

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

In addition, § 626 of the Business Corporation Law 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). Plaintiffs therefore fail to satisfy § 626(b).[10]

[10] *See Myers* v. *Jeffe*, 111 N.Y.S.2d 384, 389 (Kings Cty. Sup. Ct. 1952) ("To comply properly with [the predecessor to § 626,] it is incumbent on plaintiff to set forth in the complaint the date when it is claimed he became a stockholder."); *see also* West's McKinney's Forms, Business Corporation Law § 8.23 ("Plaintiff must allege the dates, exact or approximate, when it is claimed that plaintiff became a shareholder. Absence of such allegation will make it appear on the face of the complaint that the plaintiff lacks legal capacity to sue.").

Defendants highlighted this failure of proof below. R2312 (Bayer's Mem. ISO Mot. to Dismiss at 17). Plaintiffs had no response, save for a conclusory (and legally insufficient) reference to their "ownership . . . at the time of the 'transaction.'" R2325 (Pls.' Mem. Opp. Bayer's Mot. to Dismiss at 4). Without anything more, this threshold failure requires affirmance of dismissal.

POINT II

THE SUPREME COURT CORRECTLY DISMISSED 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. R23-26 (Order at 11-14). The court did not reach 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. 67-72.

To satisfy that standard, Plaintiffs had the burden to plead facts showing that the Bayer Defendants purposefully "avail[ed] [themselves] of the privilege of conducting activities" in New York and "establish[ed] a continuing relationship" for "sustained and substantial" business. *Paterno* v. *Laser Spine Inst.*, 24 N.Y.3d 370, 376-77 (2014). And to establish jurisdiction vicariously through Bayer's New York conduct rather than the Bayer Defendants' individual contacts, Plaintiffs needed to present detailed allegations describing how *each* of the Bayer Defendants controlled Bayer's New York activities. *Coast to Coast Energy, Inc.* v. *Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017). Regardless, 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).

The Supreme Court correctly held that Plaintiffs' scattershot pleading fell far short under this standard:

> 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). The court thus concluded that Plaintiffs had failed to satisfy either of the CPLR's prerequisites: They showed neither that the Bayer

Defendants "purposefully availed themselves of the benefit of the New York forum" nor that the Complaint's claims of fiduciary breach arise out of the Bayer Defendants' alleged New York contacts. *See* R14-15 (Order at 2-3). In so holding, the Supreme Court followed a consistent line of authority establishing that the incidental contacts alleged by Plaintiffs are insufficient for long-arm jurisdiction. *See Paterno*, 24 N.Y.3d at 378 (defendant's "responsive" contacts did not constitute purposeful availment); *Presidential Realty Corp.* v. *Michael Square West, Ltd.*, 44 N.Y.2d 672, 673 (1978) (allegations of a meeting in New York during which "conciliatory modifications" to a deal were negotiated and signed insufficient under CPLR 302(a)(1)).

The Supreme Court got it right. 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 in authorizing the deal.").

On appeal, Plaintiffs attempt to overcome their deficient pleading by pulling new, unpleaded New York contacts out of thin air. For example, Plaintiffs now

assert that "[b]eginning in 2016, Baumann, Condon, and other Bayer executives travelled to New York to negotiate with Monsanto." Br. 67 (citing ¶¶ 223-25). The Complaint paragraphs to which Plaintiffs cite allege only that in 2016 and 2017, Messrs. Baumann, Condon, and "the Supervisors and Managers" joined "investor conference calls, meetings, and presentations" in unspecified locations to "extoll the virtues and economic benefits" of the transaction. *See* R288-91 (¶¶ 223-25). New York is nowhere mentioned.

Another example: Plaintiffs assert that the merger agreement was "signed by Baumann and Condon in New York." Br. 67. 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 even if the merger agreement had been signed in New York, that fact alone would not establish long-arm jurisdiction. *See Presidential Realty*, 44 N.Y.2d at 673 (allegation of contract signing in New York insufficient under CPLR 302(a)(1)).

Yet another example: Plaintiffs now deem it "highly improbable that the largest acquisition in Bayer's history closed in New York without top Bayer officials being present" and assert that "for sure [Bayer's] lawyers and investment bankers were at the closing." Br. 70 n.24. Plaintiffs' assertion that the transaction physically "closed" in New York 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) ("Parties to business transactions and their counsel seldom gather in the same location to exchange manually signed agreements and other documents; virtual closings have been and are the norm.").

Still more: Plaintiffs repeatedly 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. 10 (Monsanto was "integrated . . . into the New York-incorporated BCS"); Br. 11, 41, 60 (to same effect). Plaintiffs claim that this "fact" was alleged in Paragraphs 232 through 234 of the Complaint. Br. 10, 41, 60. That is false: the Complaint did not allege that Monsanto merged into Bayer CropScience there or anywhere else. The allegation is unpleaded, unsupported, inaccurate, and entitled to no weight.

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: 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); 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" in seeking to finance the Monsanto transaction).

Precedents applying New York's long-arm statute show that these coincidental, 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 ("responsive" New York contacts did not demonstrate purposeful availment); *Aquiline Capital Partners* 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. *Paterno*, 24 N.Y.3d at 376-77. *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, 383 (2007) ("continuing relationship" involving "frequent" and "regular[] communicat[ions]" with New York lawyer); *D&R Glob. Selections, S.L.* v. *Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297-98 (2017) (multiple New York meetings between plaintiff and defendant to further their agreement and promote defendant's product); *Paterno*, 24 N.Y.3d at 377-79 (frequent calls, emails, and texts with New York resident plaintiff did not constitute transaction of business because contacts were "responsive in nature").

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 motion 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 * 8 (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 Group, 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").[11]

Plaintiffs also fail to leverage Bayer's New York contacts into jurisdiction over all 31 individual Bayer Defendants. In order to do so, Plaintiffs needed to establish that each individual defendant controlled Bayer's activities in New York. As this Court explained in *Coast to Coast Energy, Inc.* v. *Gasarch*:

> To make a prima facie showing of 'control,' a plaintiff's allegations must sufficiently detail the defendant's conduct so as to persuade a court that the defendant was a 'primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation.

149 A.D.3d at 487 (internal quotation omitted); *see also Kreutter* v. *McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988).

In an effort to meet this demanding standard, Plaintiffs point to the sorts of conclusory allegations New York courts consistently reject. *See* Br. 70-71 (citing

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[11] Plaintiffs also take liberties with the record concerning where Bayer's advisors operated. According to Plaintiffs, "the Bank Defendants admitted in their affidavits that some of their 'deal team' members were 'based in New York[,]' where some of the 'key [deal] documents were negotiated.'" Br. 12 (citing R147-48). This is a creative interpretation of what the Bank Defendants actually wrote:

> CSSU, headquartered in New York, was the entity that actually worked on the deal, yet most of the deal team — and relevant witnesses — were based in Germany and the United Kingdom; the remainder of the team was based in New York and travelled extensively to Germany, where many of the key documents were negotiated.

R147-48. There is no mention of any documents being negotiated in New York.

¶¶ 146-57, 292). Plaintiffs' complaint generically alleged that the individual Bayer Defendants "review[ed]" and "approv[ed]" the Monsanto acquisition and ancillary transactions. *See* R244-50, R329 (¶¶ 146-57, 292). This is a far cry from the detailed showing required for agency-based jurisdiction. *See Coast to Coast Energy*, 149 A.D.3d at 487. Notably absent from these allegations is any mention of New York, let alone a detailed description of how each individual Defendant controlled Bayer's activities here.[12]

[12] The cases on which Plaintiffs rely all involved much greater New York engagement than plaintiffs can manage here, thus highlighting the poverty of their pleading. *See Coast to Coast Energy*, 149 A.D.3d at 487 (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); *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); *In re Renren, Inc. Deriv. Litig.*, 127 N.Y.S.3d 702, *17, 21 (N.Y. Cty. Sup. Ct. 2020) (detailed allegations of actions taken by each defendant to "siphon-off Renren's most valuable assets for the benefit of themselves" through transactions in New York); *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). Also going nowhere is Plaintiffs' brand-new-for-appeal argument that Bayer Corporation — from whom Plaintiffs seek no damages — "could not . . . seriously challenge personal jurisdiction because it was registered to do business in New York and played a substantial role in the Acquisition." Br. 65 n.23. The claim is unpleaded, unsupported and legally insufficient to establish long-arm jurisdiction. *See Fekah* v. *Baker Hughes Inc.*, 176 A.D.3d 527, 528 (1st Dep't 2019).

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

Plaintiffs also fail to show the required "substantial relationship" between their claims and Bayer's New York contacts. *See* R14-15, 25-26 (Order at 2-3, 13-14); *Johnson*, 4 N.Y.3d at 519. The alleged New York contacts reduce to (1) a dinner during which Bayer's and Monsanto's CEOs "hammered out" unspecified "final aspects of the deal"; (2) a meeting between Mr. Baumann and then-president-elect Trump to discuss antitrust approval for the transaction; and (3) investor presentations by unidentified Bayer personnel "in New York City and elsewhere" to seek deal financing. *See* R1891; R319-23 (¶¶ 271-78).

These allegations bear no connection to the claims underlying Plaintiffs' lawsuit — which stems from Bayer's decision to acquire Monsanto on the basis of 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 is not based on any harm suffered by shareholders 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).

Caselaw confirms that the link between Plaintiffs' claims and Bayer's activities in New York is too attenuated to support long-arm jurisdiction. New York 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 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*, 2020 WL 1852641, at *4 (N.Y. Cty. Sup. Ct. Apr. 9, 2020) (investment fund's 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).

Plaintiffs' authorities are not to the contrary, as each involved circumstances — unlike here — where the defendants' New York contacts were essential to the claimed misconduct. *See Wilson*, 128 A.D.3d at 185 (finding nexus between shareholders' agreement formed in New York and claim for compensation owed under the agreement); *Al Rushaid*, 28 N.Y.3d at 319-20, 327, 329-30 (use of New York correspondent account was "essential" step in money-laundering scheme); *Licci* v. *Lebanese Canadian Bank*, 20 N.Y.3d 327, 340 (2012) (use of New York correspondent account was "necessary" to terrorism funding).

C. 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 Supreme Court did not reach this issue, it provides an alternate ground for affirmance. *Fenton*, 165 A.D.2d at 125.

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). Five "reasonableness" factors are relevant to this analysis:

1. the burden on defendants;
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. v. *Superior Court of California*, 480 U.S. 102, 113 (1987). Each factor favors dismissal.

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." *Asahi*, 480 U.S. at 114. Similarly, as for the 31 Bayer officers and directors named as defendants, 26 live overseas and none live in New York. This Court and others continue to recognize the hardship incurred when foreign defendants are compelled to litigate in American courts. Br. 75 n.25; *see AlbaniaBEG Ambient Sh.p.k* v. *Enel S.p.A.*, 160 A.D.3d 93, 110 (1st Dep't 2018); *Tymoshenko* v. *Firtash*, 2013 WL 1234943, at *6 (S.D.N.Y. Mar. 27, 2013).

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. *See id*. Plaintiff Ms. Haussmann, who initiated this lawsuit, 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*, 21 Misc. 3d 1143(A), at *2 (N.Y. Cty. Sup. Ct. 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' claims of fiduciary duty breach under German law. 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 located in the state). And "[t]o the extent that Plaintiffs' claims involve violations of [German] law, [domestic] courts are ill-equipped to assess such a claim." *Tymoshenko*, 2013 WL 1234943, at *6 (finding third *Asahi* factor weighed against jurisdiction for claims arising under Ukrainian law). Plaintiffs' desire for a jury trial and punitive damages are not relevant to the propriety of long-arm jurisdiction, as a matter of law. *See, e.g.*, *Metro. Life Ins. Co.*, 84 F.3d at 574 (factors such as difference in limitations period "are not permissible considerations in the context of a jurisdictional inquiry").

Fourth, Plaintiffs' dispute would be more efficiently resolved in a German court. German law and Bayer's charter require shareholder disputes to be litigated in Germany. Germany's jurisdiction over all the Bayer Defendants is undisputed.

And a German court would be better positioned to resolve issues of German law and enforce any judgment resulting from this dispute.[13]

Fifth, 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 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.* at 115.[14]

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[13] As explained before the motion court, any judgment entered in New York would be unenforceable in Germany. R807-810 (Koch Aff. ¶¶ 73-85); R1961-64 (Koch Reply Aff. ¶¶ 22-28).

[14] 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. *Peterson* v. *Spartan Industries, Inc.*, 33 N.Y.2d 463, 467 (1974). Before the Supreme Court, Plaintiffs advanced a perfunctory discovery request in a footnote of their brief opposing dismissal, without any explanation of what essential facts may exist or how any discovered information would support jurisdiction. *See* R1898 (Pls.' Opp. to Bayer's Mot. to Dismiss at 12 n.9). This is waiver, not a "sufficient start." *See, e.g.*, *McBride* v. *KPMG Int'l*, 135 A.D.3d 576, 577 (1st Dep't 2016) (affirming denial of jurisdictional discovery where "plaintiffs failed to submit affidavits specifying facts that might exist but could not then be stated that would support the exercise

POINT III

THE SUPREME COURT CORRECTLY DISMISSED 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 held, the answer is a resounding "yes," and the "elsewhere" is Germany. *See* R21-22 (Order at 9-10).

Plaintiffs seek reversal on two grounds. *First*, Plaintiffs claim that the Supreme Court abused its discretion when it found that Germany is the more appropriate forum for litigating corporate decisions made in Germany by fiduciaries of a German corporation. *Second*, Plaintiffs assert that the Supreme Court abused its discretion again by refusing to allow them to assert a waived argument under CPLR 327(b) — a statutory provision that blocks defendants who have entered contracts with New York choice-of-law and forum-selection provisions from asserting that New York is an inconvenient forum for litigation about those agreements. The Supreme Court did not abuse its discretion on either

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of personal jurisdiction"). The Supreme Court did not abuse its discretion in denying Plaintiffs' vague request for a fishing expedition.

point. The court's application of CPLR 327(a) should be affirmed, constituting yet another independent ground for dismissal.

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

Consistent with the guidance of this Court and the Court of Appeals, 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 *Pahlavi*, 62 N.Y.2d at 479). The Supreme Court's faithful application of these factors — standing alone — supplies sufficient basis to affirm. As the Court of Appeals has instructed, "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).[15]

[15] Plaintiffs cite federal law to argue that "two additional rules apply" to shareholder litigation against foreign corporations: (1) "deference owed to the forum choice of domestic plaintiffs cannot be reduced solely because they chose to invest in a foreign entity," *Otto Candies, LLC* v. *Citigroup, Inc.*, 963 F.3d 1331, 1339–40 (11th Cir. 2020); and (2) local choice of forum "must be accorded extra weight where . . . the proposed alternative forum is in a foreign country," Br. 58

But even if the Supreme Court's analysis of the discretionary CPLR 327(a) factors were before this Court, 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). Resolving those claims would require application of German law. As the Supreme Court held, this 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 Dept 2019)). *See also Shin-Etsu Chem. Co.* v. *ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep't 2004) (applicability of foreign law is an "important consideration" favoring *forum non conveniens* dismissal). Moreover, discovery in the case 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

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(citing *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950)). The first of these "rules" is irrelevant here, because the Supreme Court did not premise dismissal on Plaintiffs' decision to invest overseas. The second has no foundation in New York law and misstates federal precedent. *See Swift & Co. Packers*, 339 U.S. at 697 (reversing order vacating foreign court's attachment of shipping vessel under the doctrine of *forum non conveniens*).

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

Although the Supreme Court is certainly capable of applying German law and navigating the intricacies of overseas discovery, 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*, 9 A.D.3d at 176. As the Supreme Court found, the nexus here is almost nonexistent. No Bayer Defendant lives in New York. R746-48 (Semrau Aff. ¶¶ 6-7); R778 (Arnold Aff. ¶ 5); *see* Compl., Dkt. No. 1, ¶¶ 50-74. Only one Plaintiff does, but the action was on file for almost eight months before he appeared (R211 (¶ 66)), he asserts a claim on behalf of a German corporation that is the true party in interest,[16] and CPLR 327(a) expressly states that a party's residence in New York "shall not preclude" dismissal. *See Wyser-Pratte Mgmt.* v. *Babcock Borsig AG*, 23 A.D.3d 269, 270 (1st Dep't 2005) (affirming *forum non conveniens* dismissal where plaintiff was a New York resident and five of nine defendants lived in Germany).

[16] This Court has repeatedly cautioned that derivative plaintiffs are entitled to less deference in their choice of forum under CPLR 327(a), because "the corporation is the real party in interest." *Hart*, 129 A.D.2d at 185 n.3 (citing *Bader & Bader* v. *Ford*, 66 A.D.2d 642, 645 (1st Dep't 1979)); *see also Koster* v. *(Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 525 (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") (cited in *Ford*, 66 A.D.2d at 645).

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 (*e.g.*, *Heaps* v. *Simon & Schuster*, 150 A.D.2d 164, 164 (1st Dep't 1989)) — for the Bayer Defendants as well as other witnesses who may be willing to testify (*New Media Holding Co. LLC* v. *E.W. United Bank SA*, 126 N.Y.S.3d 314, at *6 (N.Y. Cty. Sup. Ct. 2020)) — 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 submitted "[n]o [e]vidence of [i]nconvenience or [h]ardship of [l]itigating in New York." Br. 59. This is false. As the Supreme Court noted below, Defendants submitted detailed affirmations confirming that none of the Bayer Defendants reside in New York and virtually all reside in Europe. R21 (Order at 9) (citing Arnold Aff. ¶¶ 5-8; Semrau Aff. ¶¶ 6-7). That is the evidence relevant to establish the burden of litigating an overseas dispute in Manhattan.

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

Plaintiffs' causes of action bear only the most tenuous connection to New York, further favoring *forum non conveniens* dismissal. *Pahlavi*, 62 N.Y.2d at 479. The claims against the Bayer Board of Management and Supervisory Board members stem from allegedly faulty oversight of the Monsanto acquisition. *See* R270-72 (¶¶ 190-92); *see also* R263-74, R298-305 (¶¶ 176-96, 228-44). But this conduct, if it occurred at all, occurred outside New York. Putting aside the foreign residence of the defendant board members, none of the relevant meetings of either board was convened here. *See* R748 (Semrau Aff. ¶ 8); R779 (Arnold Aff. ¶ 7); *Platt Corp.* v. *Platt*, 17 N.Y.2d 234, 237 (1966) (failure to act occurs where defendant is located).

Moreover, even if any non-Bayer defendant or nonparty firm performed transaction-related work in New York, that would *not* mean that the "underlying transaction" primarily occurred here. That critical distinction is illustrated by this Court's decision in *Viking Global Equities* v. *Porsche Automobil Holding*, a case closely analogous to this one. *See* 101 A.D.3d 640 (1st Dep't 2012). Plaintiffs there were New York-headquartered hedge funds who claimed Porsche defrauded them with calls and emails they received in New York about Porsche's plans to buy a controlling stake in Volkswagen. The Court held that Porsche's calls and emails "failed to create a substantial nexus with New York, given that the events of

the underlying transaction" — Porsche's investment in Volkswagen — "otherwise occurred entirely in a foreign jurisdiction." *Id.* at 641; *see also Imaging Holdings I, LP* v. *Israel Aerospace Indus.*, 907 N.Y.S.2d 437, at *4 (N.Y. Cty. Sup. Ct. 2009) (performance of due diligence in New York "overshadowed" by the fact that the alleged misconduct was "carried out in Israel by Israeli residents").

This authority forecloses any argument that Plaintiffs' grab-bag of tangential New York contacts qualify as transactions from which this lawsuit arose. Thus, Plaintiffs emphasized that the financing of the acquisition was carried out through "U.S./New York capital markets," R320 (¶ 273); *see* R277, R320-22 (¶¶ 202, 273-74), but as in *Imaging Holdings*, "the gravamen of this action does not focus on the raising of capital here," 907 N.Y.S.2d 437, at *5 — and Plaintiffs conceded as much at oral argument before the Supreme Court. *See supra* p. 47. Plaintiffs have alleged in conclusory fashion that Monsanto-related litigation was "centered" in New York, *see* R171-73, R192, R240-41, R308-09, R319 (¶¶ 17, 37, 141, 249, 271-72), yet the claims they assert are not about the personal-injury litigation itself, but rather the risk it presented to Bayer at the time of the Monsanto deal. Plaintiffs further alleged that Bayer ADRs are issued by The Bank of New York Mellon, R310-12, R318 (¶¶ 255-58, 269); that Monsanto's shares traded on the New York Stock Exchange, R319 (¶ 271); that Wachtell Lipton represents Bayer in a Roundup-related securities case in California, R319 (¶ 272); and that Bayer's CEO

held two meetings in New York, R322-23 (¶¶ 275-78). But these allegations likewise have no relation to the breaches of duty that Plaintiffs allege, and their peripheral mention in the Complaint makes *forum non conveniens* dismissal no less appropriate. *See 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").

Plaintiffs' authority only demonstrates how far afield their pleadings are from CPLR 327's "substantial nexus" standard. Plaintiffs 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. 58. They ignore that Dow was headquartered in Manhattan and a majority of directors and officers who lived or worked here, and the "only nexus" with the proposed alternative forum, Delaware, was that Dow was incorporated there. 103 A.D.2d at 93. No part of that reasoning supports Plaintiffs here. Similarly, Plaintiffs cite *HSBC* as an authority for rejecting dismissal, Br. 62 (citing 166 A.D.3d 754, 759 (2d Dep't 2018)) — overlooking the fact that *HSBC*, 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 nearly entirely located in Germany. With respect to witnesses, again, 26 of the 31 defendant Supervisory Board and Board of Management members live overseas and only four reside in the United States, all outside New York. R746-48 (Semrau Aff. ¶¶ 6-7); R778 (Arnold Aff. ¶ 5). As for documents, the key records relevant to Plaintiffs' claims that Supervisory Board or Board of Management members breached duties to Bayer are the company's books and records, including minutes of meetings and materials provided to the boards. *See* R244-48 (¶¶ 146-53). These records are maintained in Germany, R748 (Semrau Aff. ¶ 9); R779 (Arnold Aff. ¶ 8), further weighing in favor of *forum non conveniens* dismissal. *See 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*, 225 A.D.2d 419, 419 (1st Dep't 1996) (affirming dismissal where majority of relevant witnesses and documents are in London). Nor have Plaintiffs identified any 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 suggest 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).

The short answer to this suggestion is that this Court reviewed and rejected it not long ago in *Viking Global*, where it expressly held that Germany "provides an adequate alternative forum" for CPLR 327 purposes. 101 A.D.3d at 641. That carefully-reasoned decision was correct.

Plaintiffs' attempt to escape it are unavailing. Under the internal affairs doctrine, the restrictions that the German legislature has imposed on derivative litigation will apply wherever this case proceeds, so *forum non conveniens* dismissal would make no difference as to the substantive law that applies here. Plaintiffs seem to understand this, as they retained a German law firm to represent them and have affirmatively invoked provisions of the German Stock Corporation Act. R242-44 (¶ 143).

As for tactical advantages that Plaintiffs hope to secure in New York, including the availability of a jury trial and pretrial discovery, New York courts have consistently held these differences are not grounds to deny *forum non conveniens* dismissal. *See Emslie* v. *Recreative Indus.*, 105 A.D.3d 1335, 1336-37 (4th Dep't 2013) (contingency fees, jury trials); *In re New York Bextra and*

Celebrex Product Liability Litigation, 2009 WL 423745 (N.Y. Cty. Sup. Ct. Feb. 3, 2009) (jury trials, contingency fees, discovery devices).

Plaintiffs' position also ignores that 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).

Plaintiffs thus offer this Court no basis to depart from its prior finding on the adequacy of the German court system. *See Viking Glob.*, 101 A.D.3d at 641; *Wyser-Pratte Mgmt. Co.*, 801 N.Y.S.2d 244, at *5 (N.Y. Cty. Sup. Ct. 2004) (courts in New York and elsewhere have "routinely" granted *forum non conveniens* dismissal on the ground that "Germany was an adequate and more appropriate forum" (citing cases)).

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. Over and over again, courts have invoked CPLR 327(a) to vindicate this interest. Thus, in *Fernie* v. *Wincrest Capital*, 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). This uniform wall of authority is high and wide: New York courts have repeatedly granted *forum non conveniens* dismissal of shareholder derivative actions brought on behalf of foreign corporations. *See Gutstadt* v. *Nat'l Fin. Partners*, 2013 WL 5859550 (N.Y. Cty. Sup. Ct. Oct. 22, 2013); *Alden Global Distressed Opportunities Master Fund* v. *Smulyan*, 2011 WL 11076590 (N.Y. Cty. Sup. Ct. July 15, 2011); *Sumers* v. *AmBase Corp.*, 1991 WL 11764876 (N.Y. Cty. Sup. Ct. Nov. 22, 1991).

As in all these cases, Germany has a significant interest in disputes concerning 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.[17]

[17] Bayer's articles of association also require that this derivative case proceed in Germany. Article 3(3) of the articles 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

B. The Supreme Court correctly denied Plaintiffs 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. 52. Plaintiffs 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 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."

European Court of Justice has held that charter provisions like this one operate as a matter of contractual agreement to assign exclusive jurisdiction to the court identified in the charter. 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). This provision is enforceable and a further basis for affirming dismissal under New York law. *See HEMG Inc.* v. *Aspen Univ.*, 2013 WL 5958388, at *2-3 (N.Y. Cty. Sup. Ct. Nov. 4, 2013) (enforcing forum selection clause in company's charter and by-laws requiring shareholder derivative suit to be filed in company's jurisdiction of incorporation); *Cattan* v. *Ermotti*, 2021 WL 6200975, at *1 (N.Y. Cty. Sup. Ct. Dec. 30, 2021) (same); *Cattan* v. *Vasella*, 2022 WL 3574155, at *4 (N.Y. Cty. Sup. Ct. Aug. 18, 2022) (same).

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). This provision "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." *William P. Pahl Equip.*, 182 A.D.2d at 27. A renewal motion "shall contain reasonable justification for the failure to present such facts on the prior motion." *Henry* v. *Peguero*, 72 A.D.3d 600, 602 (1st Dep't 2010) (quoting CPLR 2221(e)(3)). Accordingly, "[r]enewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." *Foley* v. *Roche*, 68 A.D.2d 558, 568 (1st Dep't 1979).

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 ("[W]e bear the blame for not raising the argument earlier . . . .") (Tr. at 12:12-13). Nor could they have claimed otherwise. Despite receiving a full and fair opportunity to oppose Defendants' motions to

dismiss — including extensive briefing and a lengthy hearing before the Court — Plaintiffs waited until a month after dismissal to even cite CPLR 327(b). The Supreme Court could not have "overlooked" or "misapprehended" an argument that was never advanced.

And with respect to renewal, Plaintiffs have expressly conceded that the Complaint "set[] forth the choice-of-law and submission-to-jurisdiction provisions" they belatedly invoked. R2410 (Mem. ISO Pls.' Mot. for Leave to Reargue and Renew at 14). 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); *Henry*, 72 A.D.3d at 602 (renewal is appropriate "*only* where the movant presents a reasonable excuse" (emphasis added)).

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. 52. This, Plaintiffs say, is because the provision is equivalent to a "deprivation of subject-matter jurisdiction." Br. 52-53.

This Court rejected this *exact* argument just last May, in *Nurlybayev* v. *SmileDirectClub, Inc.*, 205 A.D.3d 455 (1st Dep't 2022). Like Plaintiffs,

Nurlybayev argued that the statute "cannot be waived" because it is "analogous to the absence or deprivation of subject-matter jurisdiction." *Id.*, NYSCEF No. 12 at 15 n.5 (Reply Brief for Plaintiff-Appellant); *see id.*, NYSCEF No. 4 at 32-34 (Brief for Plaintiff-Appellant). This Court affirmed dismissal under CPLR 327(a), holding that Nurlybayev had "failed to preserve his argument that dismissal on *forum non conveniens* grounds was improper under CPLR 327(b)." 205 A.D.3d at 457.

In the alternative, Plaintiffs suggest that it would be "unfair to find a 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. 54. Even were that representation credited, it would make no difference. An unauthorized, post-argument sur-reply would not have cured Plaintiffs' waiver either. *Williams* v. *City of New York*, 114 A.D.3d 852, 854 (2d Dep't 2014).

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, that provision governs this dispute because their derivative claims "'relate to' and 'arise out of'" the ADR Deposit Agreement and several loan agreements through which Bayer refinanced its debt from the Monsanto acquisition. Br. 48-51. 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*, 907 N.Y.S.2d 437, at *3. 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 ADR Deposit Agreement. And even if Plaintiffs did hold ADRs, fiduciary breach claims by ADR holders are independent of any underlying ADR agreement, as a matter of settled law. *See, e.g.*, *Tomran, Inc.* v. *Passano*, 391 Md. 1 (2006) ("neither the Deposit Agreement nor the Receipts by their terms provide[d the plaintiff] with the right to sue derivatively"); *Batchelder* v. *Kawamoto*, 147 F.3d 915, 918 (9th Cir. 1998) (rejecting claim that the right of an ADR holder to bring derivative suit did not arise from the pertinent deposit agreement). *Id.* at 918.

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 directly funded the acquisition. R25-26 (Order at 13-14). If the claims advanced in the Complaint did not arise out of or relate to the debt that actually financed the Monsanto acquisition, *see supra* Point II.B, then they clearly bear no relationship to the agreements cited by Plaintiffs in support of their CPLR 327(b) argument — which concerned the post-close restructuring of that debt.

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. 50. The claim is absurd. The agreements Plaintiffs cite came more than 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.

CONCLUSION

For the reasons stated above, the Court should affirm the Supreme Court's orders dismissing the Complaint and denying leave to reargue and renew.

Dated: New York, New York
March 15, 2023

Respectfully submitted,

WACHTELL, LIPTON, ROSEN & KATZ

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EXHIBIT B

To Be Argued By:
LARA SAMET BUCHWALD
Time Requested: 15 Minutes

New York County Clerk's Index No. 651500/20

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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

Plaintiffs-Appellants,

—against—

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

(*Caption continued on inside cover*)

CASE NOS. 2022-02491, 2022-04806

JOINT BRIEF FOR DEFENDANTS-RESPONDENTS BOFA SECURITIES, INC., BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, AND CREDIT SUISSE AG

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Defendants,

BAYER AG,

Nominal Defendant-Respondent.

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STATUTES & RULES

Defendants-Respondents Bank of America Corporation and BofA Securities, Inc. (the "BofA Defendants") and Credit Suisse Group AG and Credit Suisse AG (the "Credit Suisse Defendants," and together with the BofA Defendants, the "Bank Defendants") respectfully submit this brief in opposition to the consolidated appeal of Plaintiffs-Appellants Rebecca R. Haussmann, trustee of Konstantin S. Haussmann Trust, and Jack E. Cattan (together, "Plaintiffs") from the Supreme Court's December 27, 2021 Order dismissing Plaintiffs' Second Amended Complaint (the "Dismissal Order") and the Supreme Court's October 20, 2022 Order denying Plaintiffs' motion for leave to renew and reargue the Dismissal Order's holding on *forum non conveniens* grounds.

PRELIMINARY STATEMENT

After failing twice to defeat dismissal of their claims—and despite having already twice amended the complaint—Plaintiffs bring this consolidated appeal in an effort to resurrect claims that the motion court correctly recognized should have been brought in Germany, if at all. Plaintiffs' claims against nominal defendant Bayer AG, current and former members of Bayer AG's Board of Management and Supervisory Board and Bayer Corporation (collectively, the "Bayer Defendants"), and the Bank Defendants (together with Bayer AG and the Bayer Defendants, the "Defendants") arise under German law, relate to an acquisition centered in Germany, and are purportedly brought on behalf of a German company. The

claims are asserted against German entities and individuals, are based on conduct outside of New York (the assessment of litigation risks relating to Bayer's acquisition of Monsanto), and are subject to agreements that require any dispute to be litigated in Germany.

As the court recognized below, Plaintiffs' decision to name as defendants certain U.S.-based entities—namely, the two BofA Defendants, who notably did not provide any services to the Bayer Defendants but apparently were named only because they are the U.S.-based affiliates of the European advisors that provided services in the underlying transaction—does not cure the tenuous connection to New York or change the fact that the gravamen of Plaintiffs' claims relates to the events and transactions that occurred in Germany.

Plaintiffs' mischaracterizations of the record in their opening brief similarly do not change the fact that this case has the most insignificant of connections to New York. There is an enormous gap between how Plaintiffs describe the supposed connection of their claims to New York and what the allegations and facts in the record unequivocally demonstrate. As the court below correctly recognized, the events and transactions at issue in this case occurred in Germany, regardless of how Plaintiffs characterize them in their briefing.

After briefing and oral argument on Defendants' motions to dismiss, the motion court properly dismissed Plaintiffs' Second Amended Verified Shareholder

Derivative Complaint (the "Second Amended Complaint") (R158-359) on three independent bases: (i) pursuant to CPLR 327(a), on *forum non conveniens* grounds; (ii) lack of personal jurisdiction over the Bayer Defendants, whose alleged breaches of fiduciary duty the Bank Defendants are alleged to have aided and abetted; and (iii) Plaintiffs' lack of standing to sue under applicable German law. (R39-41.) In dismissing under CPLR 327(a), which the motion court was permitted to do in exercising its sound discretion, the court considered the relevant *forum non conveniens* factors and found that the burden on the New York courts, the availability of an alternative forum, and the alternative forum's interest in the litigation all supported dismissal "in the interest of substantial justice." (R20.)

Dissatisfied with the motion court's well-reasoned decision to dismiss on several independent grounds, Plaintiffs sought to appeal the Dismissal Order and simultaneously moved for leave to renew and reargue the dismissal on the *forum non conveniens* grounds only. But rather than identify any matter of law or fact that the motion court overlooked or misapprehended, as required by CPLR 2221(d) and (e), Plaintiffs instead advanced an entirely new theory as to why their German shareholder derivative claims should be heard in New York. On their motion for leave to renew and reargue, Plaintiffs argued, for the very first time, that the motion court was deprived of its discretion to dismiss the claims on *forum non conveniens* grounds based on the purported applicability of CPLR 327(b) and

New York General Obligations Law ("GOL") § 5-1402 to Plaintiffs' claims. And rather than take responsibility for their failure to make this (flawed) argument earlier, Plaintiffs blamed both the court and Defendants, claiming that the court overlooked facts and misapprehended the law (R2409) and that Defendants had an ethical obligation to have raised this issue even if Plaintiffs did not do so (R2504). The motion court denied Plaintiffs' request for renewal and reargument, holding that Plaintiffs had waived the argument by failing to raise it on the prior motion. The motion court's decision stated the obvious—that the court could not have "overlooked or misapprehended" earlier what Plaintiffs had failed to argue in the first place.

Now, Plaintiffs seek to reverse the motion court's sound decisions by advancing the same arguments that were carefully considered and rejected below. But Plaintiffs fail to acknowledge that those decisions are each reviewed for abuse of discretion. And in applying that standard of review, it is clear that the motion court properly exercised its discretion to dismiss all claims against the Bank Defendants on *forum non conveniens* grounds. The Bank Defendants respectfully ask that, in the alternative, this Court find dismissal appropriate on other, independent grounds, including Plaintiffs' failure to state a claim against the Bank Defendants, that documentary evidence shows that the Plaintiffs named the wrong

entities as defendants, and that the Credit Suisse Defendants, each of whom is Swiss-based, are not subject to personal jurisdiction in New York.

QUESTIONS PRESENTED

1. Did the motion court properly exercise its discretion to dismiss Plaintiffs' claims against the Bank Defendants under the doctrine of *forum non conveniens*, CPLR 327(a), where German law applies to this derivative action involving a German company and where the decisions at issue and the alleged breach of fiduciary duty took place in Germany?

Respondents respectfully submit that the answer to this question is yes.

2. Did the motion court properly deny Plaintiffs' motion for leave to renew and reargue, where Plaintiffs did not raise in their opposition to the Bank Defendants' motion to dismiss, and therefore waived, the argument that dismissal of Plaintiffs' claims on the grounds of *forum non conveniens* was improper under CPLR 327(b) and New York General Obligations Law § 5-1402?

Respondents respectfully submit that the answer to this question is yes.

3. Should the motion court's decision to deny Plaintiffs' motion for leave to renew and reargue be affirmed, where there are alternative, independent bases upon which the Second Amended Complaint should be dismissed?

Respondents respectfully submit that the answer to this question is yes.

STATEMENT OF THE CASE

A. Bayer's Acquisition of Monsanto

In or around May 2016, Bayer, a German corporation, made a $60 billion opening offer to acquire Monsanto Company ("Monsanto"). (R133.) Following negotiations with Bayer, Monsanto accepted a $66 billion cash offer for its acquisition (the "Acquisition"). (R133.) The Acquisition closed in or around June 2018. (R134.)

B. Plaintiffs' Derivative Lawsuit

On March 6, 2020, almost two years after the Acquisition closed, Plaintiff Rebecca R. Haussmann, a California citizen, filed a shareholder derivative suit in New York state court on behalf of Bayer, asserting claims under German law against Bayer's directors and officers at the time of the Acquisition, several banks, and two law firms. On August 27, 2020, Plaintiff amended the complaint; on December 9, 2020, Plaintiff again amended the complaint, adding another Bayer shareholder, Jack E. Cattan, a New York citizen, as an additional named plaintiff. (*See* R134.) In the Second Amended Complaint, Plaintiffs assert claims under German law against Bayer's directors and officers—none of whom resides in New York and the majority of whom are located outside of the United States—for purported breaches of duty, aiding and abetting in those alleged breaches, and for civil conspiracy, all in connection with the Acquisition. (*See id.*) Despite the "much greater connection to Germany where the case should have been brought,"

Plaintiffs chose to file their German law claims on behalf of a German company in New York—even though the relevant books and "records [including meetings and materials provided to the boards] are maintained in Germany" (R739); neither of Bayer AG's two boards held any relevant meeting in New York (*see* R748 ¶ 8; R779 ¶ 7); and "most of the parties [and] likely witnesses … are located abroad" (R146).

Plaintiffs attempted to shoehorn the Bank Defendants into the case through allegations that the Bank Defendants breached purported fiduciary duties to Bayer shareholders and/or aided and abetted the Bayer Defendants' breaches of fiduciary duties in connection with the Acquisition—claims that, according to Plaintiffs, arise under German law. (R134.) The Second Amended Complaint names Bank of America Corporation; BofA Securities, Inc.; Credit Suisse Group AG; and Credit Suisse AG as defendants—but none of these entities was even engaged to provide advisory or financial services to the Bayer Defendants in connection with the Acquisition. (*Id.*) The record here makes clear that the Bank of America entities that were in fact engaged to provide services in connection with the Acquisition were Bank of America Merrill Lynch International Limited, Frankfurt/Main Branch ("BAMLI Frankfurt") and DSP Merrill Lynch Limited ("ML India") (R135)—two foreign entities based in Europe and India, respectively. (R155-157 (Buchwald Aff.) ¶¶ 8-10.) The Credit Suisse entity that

was engaged by Bayer was Credit Suisse Securities (USA) LLC ("CSSU"), a U.S.-based affiliate of the Credit Suisse Defendants. (R136.) CSSU's team members provided the majority of the relevant services in Germany and the United Kingdom. (R147-148.) Bayer's engagement letters with these entities—none of which was named as a defendant in this action—contain unambiguous forum selection clauses providing that any disputes must proceed or can proceed in either Germany or Singapore. (R135-137.)

C. The Motion Court's Dismissal of the Second Amended Complaint

On February 9, 2021, the Bank Defendants, Bayer, and the Bayer Defendants filed motions to dismiss the Second Amended Complaint. (R126-152; R716-744; R2290-2314.) The Bank Defendants jointly moved to dismiss the Second Amended Complaint on three grounds: (i) Plaintiffs had sued the wrong entities; (ii) dismissal on *forum on conveniens* grounds under CPLR 327(a) was appropriate, given the substantial nexus to Germany and the absence of a connection to New York; and (iii) Plaintiffs' allegations against the Bank Defendants did not fit within any cognizable legal theory. (R2481.) In addition, the Credit Suisse Defendants moved to dismiss the Second Amended Complaint for lack of personal jurisdiction pursuant to CPLR 302(a)(1). (*Id.*)

Following extensive briefing, the motion court held oral argument on December 13, 2021 on Defendants' motions to dismiss. (R90.1-90.84.) On

December 27, 2021, the motion court dismissed the Second Amended Complaint in its entirety on several independent bases. (R13-27.) The motion court dismissed claims against all Defendants on the grounds of f*orum non conveniens* and dismissed claims against the Bayer Defendants for lack of personal jurisdiction. (R14-16.) The motion court also held that Plaintiffs lacked standing to sue any of the Defendants under applicable German law. (R15-16.)

In exercising its sound discretion to dismiss the Second Amended Complaint on *forum non conveniens* grounds, the motion court cited key governing authority, including the Court of Appeals decisions in *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984), and *Estate of Kainer v. UBS AG*, 37 N.Y.3d 460 (2021), and this Court's decision in *Shin-Etsu Chemical Co. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171 (1st Dep't 2004). Applying those governing decisions, the motion court considered several factors, including that German law applies to this derivative action; none of the individual Bayer Defendants is located in New York; the Bayer Defendants received the advice of their bank advisers in Germany; the burden of applying German law here is significant; and Germany presents an adequate alternative forum. (R21-22.)

D. The Motion Court's Denial of Plaintiffs' Motion for Leave to Renew and Reargue

Unsatisfied with that outcome, Plaintiffs subsequently moved for leave to renew and reargue and simultaneously filed a notice of appeal from the motion

court's Dismissal Order. (R2393-2413.) In their motion, Plaintiffs took issue with the court's dismissal of the Second Amended Complaint on the grounds of *forum non conveniens* only, and raised for the first time the argument that CPLR 327(b) deprived the motion court of its discretion to dismiss the Second Amended Complaint on *forum non conveniens* grounds (R2397)—a fact that Plaintiffs conceded at oral argument and admitted they were "at fault" for (R97; *see also* R102).

Following briefing and oral argument on October 20, 2022, the motion court denied Plaintiffs' motion on the grounds that Plaintiffs had not identified any matters of fact or law that the court allegedly overlooked and misapprehended, and also on the basis of waiver. (R88-89.) The motion court made clear that it was "not inclined" to reach Plaintiffs' new argument, given Plaintiffs' failure to raise it earlier (R120), but further stated that, even if there had been no waiver, the action still would have been dismissed for several independent reasons—namely, lack of personal jurisdiction, lack of standing, and pursuant to CPLR 327(a) *forum non conveniens* (R89).

ARGUMENT

POINT I.
THE MOTION COURT CORRECTLY DISMISSED THE SECOND AMENDED COMPLAINT UNDER CPLR 327(a) BECAUSE NEW YORK IS NOT AN APPROPRIATE FORUM FOR PLAINTIFFS' CLAIMS

The motion court's decision to dismiss Plaintiffs' Second Amended Complaint on *forum non conveniens* grounds pursuant to CPLR 327(a) was proper and should be affirmed.[1]

A. There Is No Abuse of Discretion Reviewable Here, Where the Motion Court Properly Weighed the Relevant Factors in Dismissing on *Forum Non Conveniens* Grounds

The motion court's decision to dismiss the Second Amended Complaint on *forum non conveniens* grounds was a proper exercise of its sound discretion, and is reviewable only for abuse of discretion. *See World Point Trading PTE, Ltd. v. Credito Italiano*, 225 A.D.2d 153, 159 (1st Dep't 1996). But there is no abuse of discretion reviewable here, where the motion court carefully considered the relevant *forum non conveniens* factors and was guided by longstanding precedent.

Plaintiffs do not (and cannot) dispute that the motion court considered all the appropriate factors in dismissing on *forum non conveniens* grounds. (*See* R20-23.) The motion court weighed the burden on New York courts of translating and

[1] The motion court dismissed the Second Amended Complaint in its entirety on two additional grounds: (i) Plaintiffs' lack of standing under German law and (ii) lack of personal jurisdiction over the Bayer Defendants. The Bank Defendants join in the Bayer Defendants' arguments that the motion court also correctly dismissed the Second Amended Complaint on these two other grounds.

applying foreign law, the potential hardship to the Defendants of producing witnesses and evidence located abroad, the availability of Germany as an alternative forum, the residence of the relevant parties, and Plaintiffs' failure to show a connection between their claims and New York, and found that dismissal under CPLR 327(a) was appropriate. (*Id.*) In reaching that decision, the motion court cited the key governing authority from New York courts on *forum non conveniens*. (*See id.* (citing *Pahlavi*, 62 N.Y.2d at 479; *Kainer*, 37 N.Y.3d at 467; and *Shin-Etsu*, 9 A.D.3d at 178).)

Under these circumstances, where "the court[] below considered the relevant factors in making . . . a determination" to dismiss on *forum non conveniens* grounds, the Court of Appeals has held that "'there has been no abuse of discretion reviewable by this [C]ourt,' *even if we would have weighed those factors differently*." *Kainer*, 37 N.Y.3d at 467 (emphasis added) (citation omitted). Because there is no abuse of discretion reviewable here, the motion court's decision to dismiss the Second Amended Complaint should be affirmed.

B. Plaintiffs' Claims Arise Out of Alleged Conduct that Took Place in Germany, Not New York

Even if it were appropriate to revisit the motion court's weighing of applicable factors (and it is not), it is clear that the motion court did not abuse its discretion in dismissing the Second Amended Complaint pursuant to CPLR 327(a)

where Plaintiffs pleaded no more than a *de minimis* connection to New York and pleaded extensive connections to Germany.

The motion court correctly held that dismissal on *forum non conveniens* grounds was appropriate because Plaintiffs' case "has only a tenuous connection to New York and has a much greater connection to Germany where the case should have been brought." (R14.) Here, the "gravamen of the dispute in this shareholder derivative action is that [Bayer's] directors—none of whom live in New York, personally transacted business in New York, or met with anyone in New York—breached their fiduciary duties in approving the $66 billion acquisition of Monsanto." (*Id.*) Bayer is a German company, and the directors of its Management Board who considered the Acquisition all resided in Europe during the relevant time period; none lived in New York. (R21 (citing R778-779).) Similarly, the majority of the members who served on Bayer's Supervisory Board during the relevant period leading up to the approval of the Acquisition resided in Europe; none lived in New York. (R21 (citing R746-748).) All of the meetings of both the Management Board and the Supervisory Board relating to the consideration of the Monsanto transaction took place in Germany, where the books and records of both boards are also maintained. (R21 (citing R779); *id.* (citing R748).) Germany is also where the Bayer Defendants received the advice of the banks concerning the Acquisition. (R47.) In sum, as the motion court correctly

found, the decision to approve the challenged Acquisition, and the alleged breach of fiduciary duties in connection thereof, took place in Germany. (R21-22.)

Plaintiffs misrepresent the extent of any connection between the underlying transaction and New York by repeatedly asserting that the Acquisition was "negotiated, financed, and closed in New York." (*See, e.g.*, Br. at 1, 8, 11, 25, 61, 67.) But neither the allegations in the Second Amended Complaint nor the evidence in the record supports those assertions. To the extent that Plaintiffs allege any connection between the Acquisition and the United States, those connections are not to New York. (*See, e.g.*, R166 ¶ 7 (alleging that a Bayer Defendant traveled to Monsanto's headquarters in St. Louis, Missouri to make a cash acquisition offer); R181 ¶ 26 (same); R173 ¶ 18 (alleging that the product liability litigation that made Monsanto an unattractive acquisition target was centered in California); R210 ¶ 64 (same).) As the motion court correctly held, "[t]he hiring of New York based lawyers (and closing out of a firm's New York office) and funding through New York banks is simply not sufficient to ground jurisdiction in New York based on the German Board's alleged breach of fiduciary duty," which "undeniably occurred elsewhere." (R14.) The motion court correctly found that the "cause of action . . . relate[d] to due diligence" for the Acquisition, and the due diligence decisions were made in Germany. (R25.) The Bank Defendants have submitted uncontested declarations that the relevant entities and personnel that

provided advice to the Bayer Defendants in connection with the Acquisition did so primarily outside of New York, including in Germany.[2] (*See* R154 ¶¶ 4-6; R393 ¶ 4.) On this clear record, the motion court correctly held that "this dispute does not arise out of the defendants' contacts with New York and the defendants cannot be said to have purposefully availed themselves of the benefit of the New York forum," and dismissed the Second Amended Complaint on *forum non conveniens* grounds as an exercise of its sound discretion.[3] (R14-15.)

C. Plaintiffs' Claims Are Better Heard in Germany, Which Is an Adequate Alternative Forum

The motion court need not have found Germany to be an adequate alternative forum to have dismissed Plaintiffs' claims against the Bank Defendants on *forum non conveniens* grounds—but, in any event, it correctly identified the availability of Germany as an adequate alternative forum for Plaintiffs' claims to

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[2] In an apparent attempt to distort the record and create a nexus between New York and the Acquisition, Plaintiffs have also misquoted the Credit Suisse Defendants as having "admitted in their affidavits that some of their 'deal team' members were 'based in New York' where some of the 'key deal documents were negotiated.'" (Br. at 12, 60.) But in fact, the Credit Suisse Defendants stated that some employees of a *nondefendant entity*, CSSU, were located in New York, and that they "travelled extensively to *Germany*, where many of the key documents were negotiated." (R147-148 (emphasis added).)

[3] The motion court's holding is consistent with New York case law. *See, e.g.*, *Imaging Holdings I, LP v. Israel Aerospace Indus. Ltd.*, 2009 WL 5895337, at *4 (Sup. Ct. N.Y. Cnty. Dec. 11, 2009) (granting *forum non conveniens* dismissal, despite plaintiffs' allegations that "due diligence . . . was conducted in New York," because that purported connection to New York was "overshadowed" by the fact that "the alleged misconduct . . . was carried out in Israel by Israeli residents").

be heard as a factor favoring dismissal under CPLR 327(a). Contrary to the Plaintiffs' assertions now, the First Department has unequivocally held that defendants need not demonstrate the existence of an adequate alternative forum to successfully move to dismiss for *forum non conveniens*. *Primus Pac. Partners I, LP v. Goldman Sachs Grp.*, 175 A.D.3d 401, 402 (1st Dep't 2019) ("Contrary to plaintiff's contention, New York law does not require an alternative forum to be available."). Plaintiffs' assertion otherwise (Br. at 63) relies on federal law requirements that "New York courts do not [apply] where the New York connection to the litigation is minimal," as it is here. *Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG*, 23 A.D.3d 269, 270 (2005).

In any event, the motion court appropriately considered the existence of an alternative forum as one factor counseling in favor of dismissal. (R22.) Unsurprisingly, New York courts have not hesitated to hold that Germany is an adequate alternative forum when dismissing actions on *forum non conveniens* grounds. *See, e.g.*, *Bluewaters Commc'ns Holdings, LLC v. Ecclestone*, 122 A.D.3d 426, 428 (1st Dep't 2014) (holding that Germany is an adequate alternative forum, especially where issues related to the action had already been litigated in Germany, which consequently "ha[d] an interest" in the litigation); *Wyser-Pratte Mgmt. Co.*, 23 A.D.3d at 270 (affirming dismissal on the grounds that Germany is an adequate forum despite differences in procedural safeguards between German

and American courts). As the motion court here aptly observed, "[t]he Porsche Litigation is proof positive that Germany presents a suitable alternative forum." (R22 (citing *Viking Glob. Equities, LP v. Porsche Automobil Holding SE*, 101 A.D.3d 640 (1st Dep't 2012).) In fact, substantially the same claims as those asserted by Plaintiffs here have been brought by different shareholders in Germany (R748 ¶ 11), belying Plaintiffs' contention that the German Stock Corporation Act ("GSCA") "§ 148's procedural hurdles are nearly insurmountable for any shareholder to commence a derivative action in Germany" (Br. at 63).

D. The Burden on the New York Court and on the Bank Defendants in Litigating Plaintiffs' Claims in New York Is Significant

In light of the availability of Germany as an alternative forum, the motion court's decision to dismiss for *forum non conveniens* is particularly appropriate here, where the burden of litigating Plaintiffs' German law claims in New York would be substantial, both on the New York court and on Defendants.

Courts in New York are clear that where, as here, the burden on New York courts of applying foreign law is "significant," a court may exercise its sound discretion to dismiss on *forum non conveniens* grounds. *Est. of Kainer v. UBS AG*, 175 A.D.3d 403, 405 (1st Dep't 2019) (affirming motion to dismiss for *forum non conveniens* because, among other things, the parties "discuss the substance of the [foreign] law," which "weighs in favor of dismissal"); *cf. Federbush v. Shah*, 2020 WL 1018443, at *11 (Sup. Ct. N.Y. Cnty. Mar. 2, 2020) (declining to adjudicate

certain claims in a dispute between a New York resident and a Thai citizen because determining the validity of an agreement under Thai law would require "at a minimum, for both sides to hire Thai legal experts . . . and to present certified relevant translations of either Thai statutes or caselaw"). In *Kainer*, for example, the First Department affirmed dismissal for *forum non conveniens* because, among other things, the plaintiffs' rights as heirs to a painting arose in Germany and France, and, notwithstanding a subsequent sale in New York, the case would require the New York court to apply Swiss and French law to resolve a critical issue in the case. 175 A.D.3d at 405. Similarly, in *Shin-Etsu*, the First Department held that the burden on the court of requiring foreign law experts supported dismissal on *forum non conveniens* grounds. 9 A.D.3d at 178.

The concern about the burden of interpreting, construing, and applying foreign law—which animated this Court's and the Court of Appeals' decisions in *Shin-Etsu* and *Kainer*—applies with equal force here. Plaintiffs assert that at least eight "substantive provisions of the German Stock Corporation Act control this litigation and provide the legal basis for Defendants' liability." (R242-244 ¶ 143.) But that contention—while appropriately acknowledging the central role of German law to this dispute—sidesteps meaningful problems with their pleading that a New York court need not be forced to address. Notably, Plaintiffs' claims against the Bank Defendants turn on the theory—which is never pleaded—that

outside advisors can acquire fiduciary-like duties under Section 117 of the GSCA.[4] Underscoring the burden that Plaintiffs seek to impose here, Plaintiffs filed a lengthy report from a purported German law expert (R452-477)—but not a single word of the report interprets GSCA Section 117 or supports the extension of fiduciary duties to outside advisors (or affiliates of outside advisors) under German law.[5] If Plaintiffs' claims were heard in New York, a New York court would have to translate, interpret, and apply German substantive law—at a "greater burden . . .

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[4] Plaintiffs waited until their opposition to the Bank Defendants' motion to dismiss to raise this theory, despite already having amended the complaint twice. (*Compare* R343-345, R350 (¶¶ 320, 333 (identifying no source of law for Plaintiffs' claim against the Bank Defendants)), *with* R413-419, R430-431 (asserting, for the first time, in opposition to the Bank Defendants' motion to dismiss, that the Bank Defendants violated GSCA section 117).)

[5] Underscoring the burden on New York courts, Plaintiffs appear to have mistranslated Section 117 in the Second Amended Complaint by omitting the word "intentionally" from their pleading. (*See* R243 (¶ 143).) Based on the English translation of Section 117, the statute creates liability as follows:

> Anyone who ***intentionally*** compels, by exploiting his influence on the company, a member of the management board or of the supervisory board an officer of the company vested with full commercial power of attorney (*Prokurist*), or an authorised agent to act to the detriment of the company or its stockholders shall be under obligation to provide compensation to the company for the damage it has suffered as a result. Such party shall also be under obligation to compensate the stockholders for the damage they have suffered as a result, insofar as they have suffered damage above and beyond the damage that has been caused them by the damage caused to the company.

(R705-706 (emphasis added).)

than it would be on a German court." (R15.) The motion court's decision here to dismiss Plaintiffs' claims pursuant to CPLR 327, where "the burden on the New York court would be substantial in comparison to that on the German court" (R15), thus entirely follows precedent and should be affirmed on appeal.

Concerns about burden are especially acute here because litigating Plaintiffs' derivative claims in New York would present undue burdens on the Bank Defendants. The documentary evidence demonstrates that the named Bank Defendants were not engaged to provide advisory or financial services in connection with the Acquisition and the entities that did provide such services—BAMLI Frankfurt, ML India, and CSSU—did so predominantly from abroad. (R135-136.) The relevant witnesses from those nonparty entities are, therefore, located outside of the United States and/or traveled extensively to Germany, where many of the key documents were negotiated. (*See* R154 (Buchwald Aff.) ¶ 6; R157-368 (Buchwald Aff. Exhs. 1, 2); R393 (CSSU Affid.) ¶ 4.)

To the extent that Plaintiffs are now arguing that Defendants must submit evidence to overcome Plaintiffs' "presumptive entitlement" to their choice of a New York forum (*see* Br. at 57), that argument holds no water. As an initial matter, the Bank Defendants did submit evidence attesting to the hardship of litigating Plaintiffs' breach of fiduciary duty and aiding and abetting claims, borne from an Acquisition in Germany by a German company, in New York, where the

corpus of relevant witnesses and documents reside abroad. (R153-156 (BofA Defendants); R.403-404 (CSGAG); R405-406 (CSAG); *see* R392-393 (CSSU).)

Moreover, to the extent that Plaintiffs attempt to impose a requirement of "actual evidence of inconvenience or hardship" (Br. at 46), Plaintiffs cite no authority supporting such a standard. New York courts have exercised their sound discretion to grant *forum non conveniens* dismissals on factual records similar to the one here. In *Kainer*, for example, the defendants submitted affidavits attesting to the foreign locations of the defendants and their employees—just as the Bank Defendants did here in support of their motion to dismiss. (*Compare* Reply Aff. of Anne M. Wildhaber at 1-2, *Est. of Kainer v. UBS AG*, No. 650026/2013 (Sup. Ct. N.Y. Cnty. Jan. 3, 2013), NYSCEF Doc. No. 36, *and* Aff. of John Connors at 1-2, *id.*, NYSCEF Doc. No. 102, *with* R155-156 (Buchwald Aff.) ¶¶ 8-10 (attesting to foreign locations of BofA Defendants), *and* R393 (CSSU Affid.) ¶ 4 (attesting that "[t]he personnel who worked on Bayer's acquisition of Monsanto were primarily based in Frankfurt, London and New York, with the majority of personnel based in Europe").) On these facts, the First Department found that "the potential hardships to the defendants of litigating in New York [were] clear" where "many relevant nonparty witnesses and documents [were] located in Switzerland and Germany, and [the defendant] would be powerless to compel their attendance in New York," and affirmed dismissal for *forum non conveniens*—even where defendants "ha[d] a

New York office and resources to litigate the case here." *Kainer*, 175 A.D.3d at 405, *aff'd*, 37 N.Y.3d at 467–68.

Moreover, in *Porsche Automobil Holding SE*, the First Department reversed denial of a motion to dismiss on *forum non conveniens* grounds where—just as here—there existed "inadequate connection between the events of the transaction and New York, as well as the facts that defendant and most plaintiffs are not New York residents, [and] many of the witnesses and documents are located in Germany"). 101 A.D.3d at 641. (*Compare id.*, *with* R14 (dismissing pursuant to CPLR 327(a) where there existed "only a tenuous connection to New York" and where none of the individual defendants, or the relevant witnesses and documents, are located in New York).)

Accordingly, the motion court exercised its sound discretion to dismiss the Second Amended Complaint on *forum non conveniens* grounds under CPLR 327(a), and its decision to do so should not be disturbed on appeal.

POINT II.
THE MOTION COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR LEAVE TO RENEW AND REARGUE

In their October 20, 2022 Order, the motion court denied Plaintiffs' motion for leave to renew and reargue based on Plaintiffs' failure to identify matters of fact or law that the court overlooked or misapprehended. On appeal, Plaintiffs contend that the motion court erred in denying their motion, including because

CPLR 327(b) stripped the court of its discretion to dismiss on *forum non conveniens* grounds. The motion court's ruling was based on a sound exercise of discretion that should not be disturbed.

A. Plaintiffs' Appeal of the Motion Court's Denial of Their Motion for Leave to Reargue Is Procedurally Improper

As Plaintiffs themselves recognize, no appeal generally lies from an order denying leave to reargue. (Br. at 27.) Plaintiffs' argument that the motion court's denial of reargument is appealable here because "the court has effectively granted reargument and adhered to its original decision" (Br. at 27) is baseless. The motion court expressly declined to reach the merits of Plaintiffs' new CPLR 327(b) argument (R120), and its denial of the motion was unambiguous (R88-89). As the motion court plainly reasoned, "denial of the motion [was] required" because Plaintiffs failed to raise the argument that dismissal was improper under CPLR 327(b) on the prior motion, and thus, the argument "is waived." (R89.)

B. Plaintiffs Failed to Advance Any Argument that Satisfies the Standard for Renewal or Reargument Under CPLR 2221

Even if Plaintiffs could appeal the motion court's denial of their motion for leave to reargue, that denial, and the denial of Plaintiffs' motion for leave to renew, should be affirmed because Plaintiffs failed to identify anything the motion court allegedly overlooked or misapprehended. Plaintiffs' motion for leave to renew and reargue was based on the erroneous claim that the motion court had "overlooked"

Bayer's Depository Agreement and Offering Memorandum and "misapprehended" the impact of CPLR 327(b) and GOL § 5-1402. But the motion court did not overlook or misapprehend anything, let alone an argument that Plaintiffs failed to raise earlier.

In their motion for leave to renew and reargue, Plaintiffs raised for the first time the argument that CPLR 327(b) and GOL § 5-1402 deprived the motion court of its discretion to grant dismissal on *forum non conveniens* grounds because the Depository Agreement and the Offering Memorandum contained "choice-of-law and submission-to-jurisdiction provisions." (R2404.) Despite having had ample opportunity to do so, Plaintiffs failed to make this argument earlier—not in any of their three complaints, in any of their multiple oppositions to Defendants' motions to dismiss, or even during oral argument on the motions to dismiss. Accordingly, the motion court properly denied Plaintiffs' motion because "this argument was not raised on the prior motions and is waived." (R89.)

Plaintiffs' assertion that their new CPLR 327(b) argument is "neither waivable as a matter of law, nor waived under the facts of the case" (Br. at 52) both misunderstands the law and mischaracterizes the record. Plaintiffs assert that their CPLR 327(b) argument is not waivable because it is "a purely legal question," and "legal questions are not waivable." (Br. at 52.) But Plaintiffs offer nothing to support this assertion besides an analogy to subject matter jurisdiction

that is both unavailing and unsupportable.[6] (*See* Br. at 52-53.) Indeed, Plaintiffs' argument is contrary to controlling authority. Just last year, while Plaintiffs' motion for leave to renew and reargue was pending before the motion court, this Court rejected the precise argument that Plaintiffs make here. *See Nurlybayev* v. *SmileDirectClub, Inc.*, 205 A.D.3d 455, 457 (1st Dep't 2022). In *SmileDirectClub*, this Court held that the CPLR 327(b) argument could be waived where the plaintiffs failed to properly preserve it, *id.*—just as Plaintiffs failed to do here.

Plaintiffs claim that they had intended to make the CPLR 327(b) argument later, in anticipation of a purported January 10, 2022 hearing "for further arguments," but were deprived of the opportunity to do so when the motion court took that "hearing" off the calendar and delivered a written decision dismissing Plaintiffs' claims. (Br. at 54.) As an initial matter, Plaintiffs grossly mischaracterize the purported January 10, 2022 hearing. That date was not, as Plaintiffs contend, a hearing "for further arguments" on Defendants' motions to dismiss. The date was instead tentatively set at the close of oral argument on the

[6] Plaintiffs' argument that a Court of Appeals decision from 1941 concerning a statutory time-period requirement in substantive ERISA law counsels in favor of overturning the motion court's sound exercise of discretion under CPLR 327(a) is similarly misguided. (Br. at 53 (citing *Title Guarantee & Tr. Co. v. Foxvale Realty Corp.*, 287 N.Y. 147, 149 (1941)).) As the one-page opinion in *Title Guarantee* makes clear, the court's decision there was narrowly cabined to "statutory proceedings[] under section 1077-c of the Civil Practice Act." *Id.* It says nothing about New York courts' statutory power and limitations under CPLR 327.

pending motions to dismiss as a tentative time for an oral decision. Plaintiffs cite to nothing to suggest that the motion court had ordered further arguments. And if Plaintiffs intended to file a "pre-hearing brief to raise the CPLR 327(b) issue," *after* the December 13, 2021 oral argument, as they contend (Br. at 54), that too would not have resuscitated the waived argument because Plaintiffs may not avoid waiver by raising new arguments in post-hearing briefing. *Williams v. City of New York*, 114 A.D.3d 852, 854 (2d Dep't 2014) (rejecting plaintiff's contentions "based on arguments and evidence provided for the first time in the plaintiff's surreply papers submitted to the Supreme Court").

C. Even if Plaintiffs' Motion to Renew and Reargue Were Granted, Plaintiffs' Second Amended Complaint Should Still Have Been Dismissed Because Plaintiffs Cannot Enforce Any Forum Selection Clauses Against the Bank Defendants

Even if the motion court had granted Plaintiffs' motion for leave to reargue, it would have been within the court's sound discretion to dismiss Plaintiffs' claims against the Bank Defendants on the grounds of *forum non conveniens*. The motion court's exercise of that discretion was proper because, contrary to Plaintiffs' arguments, CPLR 327(b) plainly does not apply here. CPLR 327(b) presents a conjunctive standard, as set forth below:

> Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law

> applies, *and* the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.

See CPLR 327(b) (emphasis added). In plain terms, this statute requires that Plaintiffs' claims "arise out of" or "relate to" to the Depository Agreement and Offering Memorandum, *and* that the "parties to the contract have agreed" that New York state law governs. *Id.* Neither requirement of CPLR 327(b) is satisfied here.

First, the motion court correctly rejected Plaintiffs' contentions that their claims "arise out of" or "relate to" the Depository Agreement or Offering Memorandum during the December 13, 2021 oral argument on Defendants' motions to dismiss, reasoning that the "debt to do the transaction [is] not what gives rise to [Plaintiffs'] claim" and that it is "the transaction itself and the alleged lack of diligence in connection with the transaction" that does. (R90.37 (Tr. at 37:7-14); *see also* R90.38 (Tr. at 38:3-5) (reasoning that "the gravamen of [the Second Amended Complaint], is … that this company should never have been bought").) Plaintiffs themselves even conceded then that the "gravamen of the [Second Amended Complaint] isn't about those agreements." (R100 (Tr. at 10:5-8).)[7] Now, however, Plaintiffs appear to argue that they can establish that

[7] Plaintiffs now complain that CPLR 327(b) "says nothing about 'the gravamen' of the complaint." (Br. at 51.) This line of reasoning ignores well-established case law analyzing the *forum non conveniens* doctrine through the lens properly applied by the motion court. *See, e.g.*, *Islamic Republic of Iran v. Pahlavi*, 99 A.D.2d 1009, 1010 (1st Dep't 1984) (exercising court's discretion to

their claims "arise[] out of" or "relate[] to" the Depository Agreement and Offering Memorandum because, according to Plaintiffs, "but for" the issuance of bonds and raising of debt in connection with the Acquisition—events unconnected to the heart of Plaintiffs' claims—the Acquisition would not have been consummated. (Br. at 50.) But Plaintiffs point to no case law to support such a "but for" standard with respect to CPLR 327(b), and in any event, plead no factual allegations to support such a theory here.

Second, even if Plaintiffs' claims did "arise out of" or "relate to" the Depository Agreement or Offering Memorandum (which, as the motion court correctly found, they do not), they are irrelevant to the *forum non conveniens* argument advanced by the Bank Defendants, who were not signatories to those agreements. *See Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 184 A.D.3d 116, 121 (1st Dep't 2020) ("It is a general principle that only the parties to a contract are bound by its terms." (citation omitted)). Plaintiffs ignore the clear and distinct statutory language that CPLR 327(b) 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).

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dismiss on *forum non conveniens* grounds after weighing various factors, including the "gravamen of the lawsuit," and concluding that "New York's connection with all of this is, at best, tenuous and the better approach is to exercise our discretion and reject this action").

Plaintiffs fail to address this fatal deficiency in their argument, just as they failed to do so below.

Indeed, Plaintiffs appear to concede that they cannot enforce the choice of law provisions in either the Depository Agreement and the Offering Memorandum against the Bank Defendants, insofar as they argue only that the Depository Agreement states that "*Bayer* 'consents and submits to the non-exclusive jurisdiction of any state or federal court in the County of New York'" (Br. at 2 n.2 (emphasis added)), and that the Offering Memorandum similarly states that "*Bayer* 'irrevocably submit[s] to the non-exclusive jurisdiction of … any federal or state court in … Manhattan'" (Br. at 3 n.3 (emphasis added)). Plaintiffs do not contend that any of the Bank Defendants are bound by the choice of law provisions, as is required for CPLR 327(b) to apply, in either the Depository Agreement or the Offering Memorandum. Nor could they, because the Bank Defendants are plainly not party to either.[8] (*See* R2429-2433 (Chang Aff., Exh. 11 (Bayer Deposit Agreement)) (signatories Bayer AG and The Bank of New York Mellon); R2434-2457 (Chang Aff., Exh. 12 (Offering Memorandum)) (signatories Bayer US Finance II LLC and Bayer AG, as "Issuer" and "Guarantor," respectively).)

[8] Indeed, the Credit Suisse Defendants are not even mentioned in the Depository Agreement or Offering Memorandum. The only Credit Suisse entity mentioned in either agreement is CSSU, which is not a named defendant. (*See* R2434-2457 (Chang Aff., Exh. 12 (Offering Memorandum)) (CSSU included as joint bookrunner).)

Plaintiffs do not, and cannot, argue that the choice of law provisions in either the Depository Agreement or the Offering Memorandum can be enforced against the non-signatory Bank Defendants. Courts in New York have recognized two exceptional circumstances under which a forum selection clause may be enforced against non-signatories: (i) where the non-signatory "is . . . an employee, successor or alter ego of the signatory" to the forum selection clause or (ii) where the non-signatory "has a sufficiently close relationship with the signatory *and* the dispute to which the forum selection clause applies." *See Tate & Lyle Ingredients Ams., Inc. v. Whitefox Techs. USA, Inc.*, 98 A.D.3d 401, 401-02 (1st Dep't 2012).

Neither of those circumstances is satisfied here. Plaintiffs have not pleaded—and did not argue below—that any of the Bank Defendants "is . . . an employee, successor or alter ego of the signatory" to either Agreement. *Id.* Plaintiffs likewise have not pleaded—and did not argue below—that any of the Bank Defendants falls into this exception such that it would be foreseeable that the forum selection clause would be enforced against the bank. *See id.*; *cf. Sutton v. Houllou*, 141 N.Y.S.3d 501, 504 (2d Dep't 2021) (requiring foreseeability to enforce forum selection clause against non-signatory). Accordingly, because there is no basis for enforcing the choice of law provisions in the Depository Agreement and Offering Memorandum against the Bank Defendants, the motion court

exercised its sound discretion to deny Plaintiffs' motion for leave to renew and reargue.[9]

POINT III.
THE MOTION COURT'S DECISION TO DENY RENEWAL AND REARGUMENT SHOULD BE AFFIRMED BECAUSE DISMISSAL OF THE SECOND AMENDED COMPLAINT IS APPROPRIATE ON ALTERNATIVE, INDEPENDENT GROUNDS

e Th motion court's denial of Plaintiffs' motion for leave to renew and reargue should be affirmed because there are alternative and independent grounds on which the Second Amended Complaint should be dismissed. Indeed, it is well established that this Court has the authority to affirm the decisions below on any alternative ground that may be decided clearly by the record. *See J. Remora Maint. LLC v. Efromovich*, 103 A.D.3d 501, 501 (1st Dep't 2013) ("We affirm for reasons other than those stated by the motion court." (internal citation omitted)); *Nieves v. Martinez*, 285 A.D.2d 410, 411 (1st Dep't 2001) (respondent "could . . . advance an alternate ground for affirmance").

First, the Second Amended Complaint should be dismissed under CPLR 3211(a)(7) as to the Bank Defendants for failure to state a claim. As the

[9] While the analysis of application of forum selection clauses to non-signatories is distinct from the analysis here—which concerns whether a non-signatory can be bound by a choice of law provision—the guardrails established and applied by this Court in the forum selection context are nonetheless instructive and underscore Plaintiffs' wholesale inability to bind the Bank Defendants to a source of law selected in an agreement to which they are not signatories.

Bank Defendants demonstrated in their motion to dismiss, the Second Amended Complaint failed to plead "any specific factual allegations as to what precisely the Bank Defendants allegedly failed to do or how and in what ways the alleged financial incentives prevented the Bank Defendants from adequately advising Bayer on the risks of acquiring Monsanto"—let alone with the particularity required under CPLR 3016(b) for claims that sound in breach of fiduciary duty. (R148-150.) Indeed, the Second Amended Complaint fails to plead *any* factual allegations of wrongdoing against the Bank Defendants or any basis whatsoever for primary or secondary liability under German law.[10] (*See* R149.) The motion court recognized as much during oral argument on Defendants' motions to dismiss, finding that Plaintiffs failed to allege facts against the Bank Defendants that fit within any cognizable legal theory. (R90.74 (Tr. at 74:9-14) ("I talked about that with [plaintiffs' counsel], the fact that he cites the statute and says that liability arises under the statute without specifically telling me which bank did what. I

[10] That Plaintiffs later assert GSCA section 117 against the Bank Defendants in their opposition to the Bank Defendants' motion to dismiss does not cure this fatal defect in the Second Amended Complaint, for "allegations, made for the first time in opposition to a motion to dismiss, cannot form a basis for the survival of the complaint in its current form." *Sodhi v. IAC/Interactivecorp.*, 2021 WL 1331386, at *8 (Sup. Ct. N.Y. Cnty. Apr. 8, 2021); *see also Cambridge Invs. LLC v. Prophecy Asset Mgmt., LP*, 188 A.D.3d 521, 521 (1st Dep't 2020) ("[Plaintiff] may not amend [its] complaint . . . via statements made in a memorandum of law." (internal quotation marks and citation omitted)).

think that's a problem. Even under notice pleading standard, I think that that's a problem.").)

Second, the Second Amended Complaint should also be dismissed because none of the named Bank Defendants was engaged to provide services to the Bayer Defendants in connection with the Acquisition. The documentary evidence here conclusively demonstrates that it was instead nonparty affiliates of the Bank Defendants that were actually engaged to advise on the Acquisition. (*See* R139.) The relevant engagement letters, which are all part of the record on appeal, demonstrate that it was nonparty entities BAMLI Frankfurt and ML India—two foreign entities based in Europe and India, respectively (R155-157)—and CSSU—a U.S.-based affiliate of the Credit Suisse Defendants, whose team members provided the majority of the relevant services in Germany and the United Kingdom (R136; R147-148)—that were actually engaged by Bayer in connection with the Acquisition. (R360-379; R394-402.) It is undisputed that none of the Bank Defendants signed these engagement letters, and Plaintiffs allege no facts on which it would be appropriate to pierce the corporate veil such that any of the Bank Defendants could be held liable for the actions of the entirely separate corporate entities that were in fact engaged to advise on the Acquisition. (R139.)

The record additionally conclusively demonstrates that, even if Plaintiff had named as defendants the entities that were engaged by Bayer in connection with

the Acquisition, their claims still could not proceed against these affiliates in New York. (*Id.*) The engagement letters between these entities and Bayer each contains an unambiguous forum selection clause that provides that any disputes must or can proceed in another jurisdiction—in Germany (CSSU and BAMLI Frankfurt) or in Singapore (ML India). (R360-379; R394-402.) Thus, even if Plaintiffs had sued these entities instead, their claims against them in New York must still be dismissed.

Third, the Second Amended Complaint should be dismissed as to the Credit Suisse Defendants for lack of personal jurisdiction. In briefing below, the Credit Suisse Defendants demonstrated that they were not subject to jurisdiction under New York's long-arm statute or under the due process clause, because they are Swiss companies that are incorporated in and have their principal place of business in Switzerland and did not engage in any suit-related conduct in or directed at New York. (*See* R136-138; R140 n.9; R147-148; R403-406.) Plaintiffs never contested this and point to nothing in the record demonstrating that the specific Credit Suisse entities that they sued engaged in any alleged wrongdoing in New York.

The motion court did not rule on this argument but did grant a personal jurisdiction motion brought by the Bayer Defendants that raised nearly identical arguments. There, the court found that Plaintiffs failed to sufficiently allege that the Bayer Defendants transacted business related to the alleged harms in New York

either themselves or through an agent. (R24-26.) It found that the few actions which the Bayer Defendants had taken in New York—hiring lawyers and arranging funds—were not truly suit-related and could not be used to establish jurisdiction because there was "simply too tenuous of a connection" between the cause of action and the State. (R25-26.) The motion court's reasoning in dismissing the Bayer Defendants applies equally to the Credit Suisse Defendants.

Plaintiffs allege that there is jurisdiction over the Credit Suisse Defendants pursuant to New York's long-arm statute (R240-241), which provides that to "exercise personal jurisdiction over any non-domiciliary," the non-domiciliary must "transact[] any business within the state or contract[] anywhere to supply goods or services in the state." CPLR 302(a)(1). "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 prong set out in *Licci* 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).[11] The second *Licci* prong requires that these same contacts have "an articulable nexus or substantial relationship" with the plaintiff's cause of action. *Id.* at 299.

Plaintiffs here have failed to meet this standard as to the Credit Suisse Defendants, each of whom, as reflected in the record below, either has no suit-related ties to New York or "any ties to New York" at all. (R404 ¶ 8; R406 ¶ 7; R140-141 & n.9.) Plaintiffs have failed to demonstrate with any specific allegations that the Credit Suisse Defendants transacted business in New York, nor have they shown that their claims arose from any such business. 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. (R404 ¶ 8; R406 ¶ 7; R140-141 & n.9; R25-26.) Plaintiffs have repeatedly failed to name the only Credit Suisse entity "that actually worked on the deal," CSSU, in this suit. (R147.) Instead, they asserted claims against two Credit Suisse entities completely unrelated to the Acquisition and generally alleged that these Credit Suisse Defendants somehow "influence[d]" the Bayer Defendants in connection to the

[11] The recent decision from the Court of Appeals in *State v. Vayu, Inc.* confirms that jurisdiction requires a "purposeful transaction," 2023 WL 1973001, at *3 (N.Y. Feb. 14, 2023), a standard Plaintiffs have not come close to satisfying.

Acquisition. (*See* R281 ¶ 209.) It is uncontested, however, 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).

Plaintiffs have also not established personal jurisdiction because they cannot satisfy the requirements of due process. Due process demands a "substantial connection" between a plaintiff's claims and the defendants' forum contacts, such that "traditional notions of fair play and substantial justice" are not offended. *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014); *Waggaman v. Arauzo*, 985 N.Y.S.2d 281, 283 (2014). Jurisdiction must also be reasonable. *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113, 115 (1987).

Plaintiffs do not come close to meeting those exacting standards. Not only can they not show a substantial connection between their claims and the Credit Suisse Defendants' forum contacts, for the reasons discussed above, they cannot show any connection at all. Moreover, it would be unreasonable to exercise jurisdiction over two Swiss companies with no-suit related conduct in New York in a case where "Germany has a significant interest in adjudicating a dispute involving an old and major German company" and more generally in having its law apply in cases involving German corporations. (R22; R1943.)

CONCLUSION

For the foregoing reasons, and the reasons stated in the Bayer Defendants' opposition brief, the motion court's orders dismissing the Second Amended Complaint and denying Plaintiffs' motion for leave to renew and reargue should be affirmed.

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