New York County Clerk's Index No. 651500/2020
Appellate Division, First Department Case Nos. 2022-02491 and 2022-04806

Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Appellants,

against

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

(Caption Continued on the Reverse)

CORRECTED MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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Date Completed: August 1, 2023

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Defendants-Respondents,

and

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

Defendants.

BAYER AG,

Nominal Defendant-Respondent.

COURT OF APPEALS
STATE OF NEW YORK

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REBECCA R. HAUSSMANN, Trustee of Konstantin S. Haussmann Trust, and JACK E. CATTAN, derivatively on behalf of Bayer AG,

Plaintiffs-Appellants,

vs.

WERNER BAUMANN, *et al*.,

Defendants-Respondents,

- and -

BAYER AG,

Nominal Defendant.

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New York County Clerk's
Index No. 651500/2020
(Andrew Borrok, J.)

Appellate Division, First Department
Case Nos. 2022-02491; 2022-04806
(Dianne T. Renwick, P.J., Tanya R. Kennedy, Saliann Scarpulla, Martin Shulman, John R. Higgitt, JJ.)

PLAINTIFFS-APPELLANTS' NOTICE OF MOTION AND MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that upon the annexed Memorandum of Law, dated July 21, 2023, with Addenda 1–7 and Exhibits A–D,[1] Plaintiffs-Appellants Rebecca R. Haussmann and Jack E. Cattan ("Plaintiffs") will and hereby do move this Court at a Motion Term thereof to be held at the Courthouse, 20 Eagle Street, Albany, New

[1] Addenda 1 through 7 include the texts of CPLR §302, 327, New York Business Corporation Law §§626, 720, 1317, 1319, and German Stock Corporation Act §148 (R448; R450; R445–446). Exhibits A through D include the First Department's June 22, 2023 decision, the Commercial Division's decisions of December 27, 2021 and October 19, 2022 (R8–27; R82–90), and appellants' January 30, 2023 opening brief in the First Department.

York, on August 7, 2023, for an order under CPLR §5602(a)(1)(i) and 22 NYCRR §500.22 granting leave to appeal to this Court from the decision and order of the Appellate Division, First Department (Renwick, P.J., Kennedy, Scarpulla, Shulman, Higgitt, JJ.), dated June 22, 2023, affirming the decisions and orders of the Supreme Court (Borrok, J.), dated December 27, 2021 and October 19, 2022.

At bottom, this appeal presents a critical question:

> Should a New York court exercise jurisdiction over this shareholder derivative action brought by a New York-resident shareholder against the directors and officers of Bayer AG, a German corporation doing business in New York, for defendants' breaches of fiduciary duties in connection with Bayer's 2018 failed $66 billion acquisition of Monsanto Inc.—the "*worst acquisition in history*"—which, under defendants' direction and through their participation, was negotiated, signed, closed, financed and implemented in New York?

Both the First Department and the trial court answered "no." But their answer conflicts with this Court's decisions in *Davis*,[2] *German-American Coffee*,[3] and *Bagdon*,[4] the Appellate Divisions' decisions in *Culligan* and *HSBC*,[5] and the Legislature's mandates in CPLR §302, CPLR 327, and Business Corporation Law ("BCL") §1319.

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[2] *Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247 (2017).

[3] *German-American Coffee Co. v. Diehl*, 216 N.Y. 57 (1915) (Cardozo, J.).

[4] *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916) (Cardozo, J.), cited with approval in *Mallory v. Norfolk S. Ry.*, 600 U.S. ___, 2023 U.S. LEXIS 2786, at **15–16 (June 27, 2023), and *Aybar v. Aybar*, 37 N.Y.3d 274, 292 (2021) (Wilson, J., dissenting).

[5] *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014) (following *German-American Coffee*); *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*") (following *Davis*).

Leave to appeal should be granted to bring the lower courts in line with this Court's precedents exercising jurisdiction over, and applying New York law to, foreign corporations, as well as their directors and officers, that "do" or "transact" business in New York, or otherwise consent to jurisdiction here by entering into contractual forum-selection clauses or by registering with the Department of State and appointing an agent for service of process in New York. The First Department's decision raises the recurring important issue of statutory construction of CPLR §302 and 327, as well as BCL §1319, which, *both* independently *and* together, require that New York courts exercise jurisdiction over foreign corporations doing or transacting business in New York, as well as their directors and officers.

Specifically, this Court's review is necessary to clarify CPLR 327(a)'s reach by enforcing CPLR 327(b)'s limitation on the lower courts' power to dismiss actions under the *forum-non-conveniens* doctrine. Review is also necessary to assure the lower courts' compliance with the well-settled rule that, in a *forum-non-conveniens* analysis, New York-resident plaintiffs are "presumptively entitled" to sue in a New York court, and their choice of forum must be accorded "substantial deference." Finally, review is necessary to assure compliance with both this Court's decision in *Davis* and BCL §1319's command to apply New York's procedural "gatekeeper" rules, *i.e.* BCL §626, to shareholder derivative actions brought on behalf of foreign corporations doing business in New York.

This Court should review the following four questions:

Question 1: In this action arising from Bayer AG's $66 billion acquisition of Monsanto Inc., does CPLR §302's long-arm jurisdiction reach the directors and officers of Bayer, a German corporation doing business in New York, where Plaintiffs' verified complaint alleges that the directors and officers—through themselves and their New York-based bankers and lawyers—negotiated, signed, closed, and financed the acquisition in New York, that Bayer consented to New York jurisdiction in an offering memorandum raising billions of dollars to pay for the acquisition, and that Bayer's main U.S. operating subsidiary was registered to do business in New York and had appointed an agent for service of process in New York?

Question 2: First, does CPLR 327(b) limit the lower courts' power to dismiss actions based on *forum non conveniens*, where the underlying claims relate to, or arise from, an agreement or undertaking (involving $1 million or more) in which the parties consent to the jurisdiction of New York courts and the application of New York law? Second, in a *forum-non-conveniens* analysis, are New York-resident plaintiffs "presumptively entitled" to sue in New York courts, and must their choice of a New York forum be accorded "substantial deference"?

Question 3: As a matter of statutory interpretation, supported by the extensive legislative history, does BCL §1319's plain text mandate that §626's "gatekeeper" provisions governing shareholder derivative actions be applied to this action—as a statutory choice-of-law rule that displaces the common-law internal-affairs doctrine?

Question 4: As a matter of *stare decisis*, does this Court's decision in *Davis* require that the "gatekeeper" rules of BCL §626 be applied to determine shareholder standing to file this action involving a German corporation doing business in New York because §148 of the German Stock Corporation Act is procedural and applies only in Germany?

In addition to leave to appeal, Plaintiffs request that the Court grant such other and further relief as it may deem just and proper.

Dated: New York, New York
July 21, 2023

Respectfully submitted,

BOTTINI & BOTTINI, INC.
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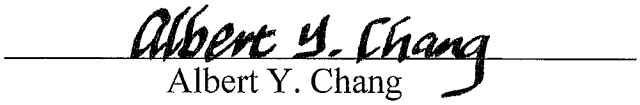

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STATE OF NEW YORK

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REBECCA R. HAUSSMANN, Trustee of Konstantin S. Haussmann Trust, and JACK E. CATTAN, derivatively on behalf of Bayer AG,

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New York County Clerk's Index No. 651500/2020 (Andrew Borrok, J.)

Appellate Division, First Department Case Nos. 2022-02491; 2022-04806 (Dianne T. Renwick, P.J., Tanya R. Kennedy, Saliann Scarpulla, Martin Shulman, John R. Higgitt, JJ.)

CORRECTED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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Table of Contents

Table of Authorities

Cases

Statutes

Foreign Statutes

Rules

Treatises

Law Review Articles

Other Authorities

PRELIMINARY STATEMENT

Leave to appeal should be granted to ensure compliance with this Court's consent-to-jurisdiction jurisprudence[6] and the Legislature's comprehensive statutory scheme.[7] For both this Court and the Legislature have mandated that New York courts exercise jurisdiction over and apply New York law to foreign corporations doing business in New York, as well as their directors and officers. Leave to appeal is necessary to effectuate the Legislature's intent—reflected in BCL §1319's plain text and legislative history[8]—to apply New York's gatekeeping rules governing shareholder derivative actions to foreign corporations doing business here and to preserve New York courts' centuries-old jurisdiction over those actions.[9] Finally, leave to appeal is necessary to ensure compliance with this Court's decision in *Davis* and to avoid a conflict with the Second Department's decision in *HSBC*.[10]

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[6] *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 64 (1915) (Cardozo, J.) (foreign corporations have consented to the application of New York law by doing business here); *Bagdon v. Phila. & Reading Coal & Iron Co*., 217 N.Y. 432, 437 (1916) (Cardozo, J.) (foreign corporations have consented to the jurisdiction of New York courts by registering to do business here), *cited with approval in Mallory v. Norfolk S. Ry.*, 600 U.S. ___, 2023 U.S. LEXIS 2786, at **15–16 (June 27, 2023), and *Aybar v. Aybar*, 37 N.Y.3d 274, 292 (2021) (Wilson, J., dissenting).

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

[8] Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the New York State and New York City Bar Association*, at 32–35 (Jan. 25, 1961) ("*Joint Report*"). A copy of the Joint Report is annexed as Addendum A to Plaintiffs' January 30, 2023 brief (Exhibit D).

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

[10] *Davis v. Scottish Re Grp. Ltd*., 30 N.Y.3d 247 (2017) (holding that foreign gatekeeper rules governing derivative actions are procedural, not substantive, and are thus inapplicable in New York); *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*") (following *Davis*).

This motion seeks leave to appeal the decision of the First Department (the "Panel") affirming the trial court's dismissal of this shareholder derivative action based on lack of personal jurisdiction, *forum non conveniens*, and failure to comply with the procedural requirements under the German Stock Corporation Act ("GSCA"). *See Haussmann v. Baumann*, 2023 N.Y. App. Div. LEXIS 3390 (1st Dep't June 22, 2023) (Ex. A).

Plaintiffs-Appellants Rebecca R. Haussmann and Jack E. Cattan ("Plaintiffs"), shareholders of Bayer AG residing in New York and California, respectively, brought this action on Bayer's behalf asserting breach-of-fiduciary-duty claims against Bayer's Directors[11] and two New York investment banks that assisted them.[12] Plaintiffs sued in New York because their derivative claims arose from Bayer's $66 billion purchase of Monsanto Inc. (the "Acquisition"), which was negotiated, financed, closed, and implemented in New York, the "epicenter" of this saga—dubbed by industry experts as the "*worst acquisition in history*." R185–189 (¶32); R240–241 (¶141); R320–322 (¶¶273–274).

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

[12] The Bank Defendants include BofA Securities, Inc./Bank of America/Merrill Lynch and Credit Suisse Group AG/Credit Suisse AG (R225–237 (¶¶100–132)).

I. Leave to Appeal Is Merited Because This Case Involves Recurring Issues of Public Importance Relating to New York's Sovereign Power over Foreign Corporations Doing Business in New York, as Well as Their Directors and Officers

The choice-of-law, personal jurisdiction and forum questions presented raise this core issue:

> Where can a New York resident sue foreign corporations and their directors and officers, if they are registered to do business, have an agent for service of process in New York, are actually doing business in New York, and have consented to New York jurisdiction and the application of New York law in agreements "related to" the New York resident's claims?

For over a century, the jurisdictional question of state power over foreign corporations and their directors and officers has been debated in this Court and the U.S. Supreme Court in varying contexts. Writing for a unanimous Court in 1915, Judge Cardozo applied New York law to a case involving corporate dividends issued by a foreign corporation because "directors of a foreign corporation transacting business in this state and subjecting itself to the conditions established by our laws[] may be charged with liability" if they engage in conduct regulated by New York law. *German-American Coffee*, 216 N.Y. at 65. In the following year, Judge Cardozo, again writing for a unanimous Court, upheld the validity and constitutionality of a foreign corporation's designation of an agent for service of process in New York as consent to New York courts' jurisdiction. *Bagdon*, 217 N. at 439.

The reach of the long-arm jurisdictional statutes, subject to due process, has been under constant assault by foreign actors—corporate and otherwise. Recently, in *Aybar*, a majority of this Court yielded, and declined to follow *Bagdon*'s construction of a foreign corporation's registration to do business in New York as a consent to general jurisdiction in New York courts—over a spirited dissent of Judge Wilson and Judge Rivera stressing the importance of jurisdiction over foreign actors and remaining vitality of a "consent" based analysis of long-arm personal jurisdiction in the corporate context. *See Aybar*, 37 N.Y.3d at 291–313 (Wilson, J., dissenting). The ongoing issue of sovereign state jurisdiction over foreign corporations and their officers and directors grows ever more important as free market capitalism spreads, using the corporate form worldwide—frequently with major impact on New York as the center of global commerce and finance. *Deutsche Bank Nat'l Trust Co. v. Flagstar Capital Mkts.*, 32 N.Y.3d 139, 162 (2018) (New York is "a global center of finance and commercial transactions").[13]

The enormity of the damages to Bayer and the egregiousness of the underlying misconduct require that the Bayer Directors and their assistors be called to account. Controlled by defendants, however, Bayer is powerless to bring suit against them.

[13] New York City is home to more than 5,000 foreign companies, which employ nearly 300,000 New Yorkers and contribute 11% of the City's $761 billion annual economic output. *See* Partnership for New York City, *Global Business, Local Benefit, Foreign Contributions to the New York Economy*, at 2 (Nov. 2017).

These circumstances present a classic case for a shareholder derivative action—a form of action that has been endorsed by New York courts since the 1800s. *See*, *e.g.*, *Attorney-General*, 2 Johns. Ch. at 389.

The Court is not alone in confronting these recurring questions of jurisdiction over foreign corporations and their directors and officers. Just weeks ago, the U.S. Supreme Court decided *Mallory*, endorsing Judge Cardozo's view, stated in *Bagdon*, on the state courts' exercise of jurisdiction over foreign corporations. 2023 U.S. LEXIS 2786, at **15–16 (citing *Bagdon* as an example of "[o]ther leading judges, including Learned Hand and Benjamin Cardozo, [who] had reached similar conclusions in similar cases"). The Supreme Court in *Mallory* stressed the expansiveness of state jurisdiction over foreign corporations that, like Bayer, not only register to do business in a foreign state, and appoint an agent for service, but in fact do substantial business there. *See id.* at *16 (citing Pennsylvania statute "permit[ting] state courts to 'exercise general personal jurisdiction' over a registered foreign corporation, just as they can over domestic corporations").

This appeal presents a similar question of state sovereign power—subject matter over the claims—and personal jurisdiction of the corporation and its directors and officers in the context of a shareholder derivative action brought by a New York-resident plaintiff utilizing CPLR §302 and BCL §§626, 1319 on behalf of a foreign corporation. In addition to this appeal, pending before the Court is another motion

for leave to appeal the First Department's June 1, 2023 decision in another shareholder derivative action involving a foreign corporation, Barclays PLC, *Ezrasons, Inc. v. Rudd*, Mo. No. 2023-502 (Pin No. 84231) (N.Y.). *See also Ezrasons, Inc. v. Rudd*, 2023 N.Y. App. Div. LEXIS 2945 (1st Dep't June 1, 2023) ("*Barclays*"). The *Barclays* appeal raises similar issues relating to the construction of BCL §1319 and the conflict with *Davis* and *HSBC*.

But both this appeal and the *Barclays* appeal have more far-reaching public-policy implications. Beyond the specific context of shareholder litigation, the reasoning of the Panel decision imperils the established framework for exercising jurisdiction over foreign corporations and their directors and officers more widely. The Panel ignored the jurisdictional reach and implications of New York's long arm statute, and then exceeded limits on its own power/jurisdiction to dismiss a case it lacked the judicial power to dismiss.

A refusal to properly—expansively—apply "doing business" or "transact[ing] business" long-arm jurisdiction granted by the legislature in BCL §§1319/626 and CPLR §302, and enforce consents to jurisdiction by conduct lessens accountability of foreign corporations and their directors and officers. It also limits access to justice for New Yorkers *of all stripes*—not just shareholders—who want to access their home courts to resolve their claims involving foreign corporations, and for that matter, their directors and officers—"doing" or "transacting" business in New York.

The U.S. Supreme Court's June 27, 2023 decision in *Mallory* finds that a foreign corporation's registration to do business in Pennsylvania and appointment of an agent for service of process constitutes consent to Pennsylvania's "general jurisdiction" and allows Pennsylvania courts to hear a claim by an out-of-state resident over out-of-state misconduct. *See* 2023 U.S. LEXIS 2786, at **15–23. To support part of that analysis, the court cited Judge Cardozo's *Bagdon* decision.

The same rationale applies to New York's jurisdictional outreach statutes involved here. BCL §626 and §1319 together create jurisdiction over foreign corporations "doing business" in New York and their directors and officers specifically for derivative actions, and under CPLR 302 for actions generally. In addition, Bayer and its directors and officers consented to New York jurisdiction (and the application of BCL §626 and §1319 and CPLR 302) by registering to do business here, with an agent for service, while actually "doing business" in New York on an ongoing basis and by arranging and overseeing the Monsanto Acquisition in New York via Bayer's top officers who were physically present in New York, as were their New York agents (attorneys and bankers)—where the $66 billion transaction was negotiated, signed, closed, financed and implemented, and where the main Bayer U.S.-based subsidiary has appointed an agent for service of process. There was subject-matter jurisdiction over the derivative claims; and there was personal jurisdiction over the Bayer Directors.

II. The Facts of This Case Provide a Perfect Vehicle for This Court to Decide the Important Questions Presented

This case involves a derivative action for a foreign corporation under BCL §§626 and 1319, which create jurisdiction over the claims, the corporation and its directors and officers. Bayer's main operating U.S. subsidiary was registered to do business in New York with an agent for service of process. R213 (¶71). Bayer was "doing" billions in yearly business here as well. That triggers BCL §§1319/626 jurisdiction and requires the application of §626's gatekeeper rules governing "standing" to sue. CPLR 302 provides a separate jurisdictional reach over these out-of-state actors who were "transacting business" in New York. CPLR 327(b) absolutely protected Plaintiffs' action against *forum-non-conveniens* dismissal under CPLR 327(a) because the action "related to" and "arose out of" agreements that were pleaded in the Complaint, in which Bayer AG *consented* to New York jurisdiction and application of New York law. R312 (¶258); R318 (¶269); R214–215 (¶73).

As New York and California residents, Plaintiffs were "*presumptively entitled*" to sue in a New York court by invoking its jurisdiction over the derivative claims asserted and the defendants sued, conferred by §§626/1319 and CPLR 302. *Broida v. Bancroft*, 103 A.D.2d 88, 89 (2d Dep't 1984) (shareholder plaintiffs are "presumptively entitled to use their judicial system" as "New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation … having a foreign charter has substantial contacts with this state").

Plaintiffs' invocation of their "presumed access" to New York's courts was particularly appropriate because their derivative claims arose from Bayer's $66 billion purchase of NYSE-listed Monsanto Inc. (the "Acquisition"), which was negotiated, financed, signed, closed and then implemented in New York, the "epicenter" of the "*worst acquisition in history*." R185–189 (¶32); R240–241 (¶141); R320–322 (¶¶273–274).

Bayer started operating in Albany in the mid-19th century. R213 (¶70). Today, Bayer Corporation—Bayer's main U.S. subsidiary—is registered to do business in New York and has appointed an agent for service of process here. R213 (¶71). Because of Monsanto's terrible reputation, Bayer discarded Monsanto's name after the Acquisition and integrated the Monsanto business into Bayer's New York-incorporated subsidiary—Bayer Crop Science, registered to do business here. R298–299 (¶¶232–234).

Ultimately subjecting Bayer to ruinous liabilities from 125,000 Roundup-cancer suits, the Monsanto Acquisition was born of an improper motive, *i.e*., to entrench the Bayer Directors, who feared a takeover by Pfizer, Inc. R180 (¶¶25–27). The Defendants caused Bayer to pay $66 billion in cash for Monsanto and financed the Acquisition with debt [R320–322 (¶¶273–274)] that operated as a "poison pill," making Bayer "unacquirable," avoiding the takeover and cementing the Directors in their positions, but damaging the corporation. R182 (¶27), R223–

225 (¶¶100–101), R286 (¶219).

Bayer's American Depositary Receipts ("ADRs"), *i.e.* American common shares, are traded in New York where Bank of New York Mellon ("BNY Mellon") acts as depositary. Thousands of Bayer's shareholders reside in New York. In the Depositary Agreement (R602–605), Bayer "*consents* and submits to the non-exclusive jurisdiction of any state or federal court in the County of New York." R605; *see also* R312 (¶258). *See* R311–312 (¶256); R318 (¶¶269–270).

Bayer obtains billions from New York, selling a wide range of products. *See* R318 (¶270). Bayer's stockholders and businesses are more concentrated here than Germany. *Id.* Close to 30% of Bayer shares are held by United States residents, as compared to 20% in Germany. *Id.* Bayer has 15 operations in the United States; 14 in Germany. *Id.* In 2019, Bayer's United States sales exceeded $14.5 billion, compared to German sales of approximately $2.7 billion.[14] *Id.* Bayer's United States assets are 350% greater than those in Germany. *Id.* Bayer AG and Bayer Corporation have commenced at least 60 lawsuits in New York state and federal courts—invoking and consenting to New York courts' jurisdiction at least 50 times. R591.

[14] Bayer's public disclosures do not separate its New York revenues from its United States numbers. New York has about 8% of the United States' gross domestic product and 6% of the United States population. Bayer's United States' sales are nearly $14 billion. A fair extrapolation reveals that Bayer generates at least $1 billion in revenues from New York.

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

Beginning in 2016, Bayer's executive team, including Baumann (Bayer's CEO (R216 (¶75))), travelled to New York to negotiate with Monsanto. R611. Both Bayer and Monsanto were represented by New York law firms: Sullivan & Cromwell LLP ("S&C") for Bayer and Wachtell Lipton Rosen & Katz ("Wachtell") for Monsanto. R319 (¶271). The New York law firms and banks—as Bayer's agents—worked on all aspects of the transaction, including conducting due diligence on Monsanto's Roundup products and U.S. lawsuits out of their New York offices. R320–322 (¶¶273–274).[15]

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

> Final talks took place in New York, culminating in a tete-a-tete dinner Tuesday evening between Baumann and Grant at Aretsky's Patroon … in midtown Manhattan—while advisers dined … at the

[15] In fact, 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." R147–148; R393.

office as they hammered out the final aspects of the deal.

R611. The September 2016 Merger Agreement, which required closing to take place in S&C's New York office, was signed by Baumann and Liam Condon (BCS's President (R217 (¶78))) in New York. R2514, 2520, 2523.

Bayer's executive team continued to engage in substantial activities in New York to complete and implement the Acquisition. To secure regulatory approval they met President-Elect Trump in January 2017 in New York. R322–323 (¶¶275–278). They also arranged financing for the Acquisition through Bayer's New York bankers. Initially, the Acquisition was funded by a $50-plus billion "bridge loan" by the New York banks. R320 (¶273); R277–279 (¶¶202–204). To pay off this bridge loan and provide financing for the Acquisition, Baumann and Condon participated in "sales job" investor conferences in New York to help sell billions in Bayer securities (R288–294 (¶¶223–225)), including on June 18, 2018.

Bayer's June 18, 2018 bond offering raised $15 billion to pay down the bridge loan. R321 (¶274). With Bayer AG as guarantor (R320 (¶273)), the bond offering was led by the New York banks (*see* R214–215 (¶73); R277 (¶202)), listing their Manhattan offices. R688–689; R691–693; *see also* R277 (¶202).

The bond Offering Memorandum also contained a consent to New York jurisdiction and law, providing that "[t]he Notes and Fiscal Agency Agreement will be governed by … the laws of the State of New York," as well as a consent-to-

jurisdiction clause providing that "[t]he Guarantor [(Bayer AG)] has irrevocably submitted to the non-exclusive jurisdiction of … any federal or state court in … Manhattan" in any action "arising out of or relating to the Notes or the Fiscal Agency Agreement." R2440–2441.

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

Immediately after the Acquisition was completed, Bayer suffered billions in verdicts in the first Roundup trials (R169–170 (¶¶11–13)), which exposed Monsanto's decades of deceit. R170 (¶13). Bayer was quickly buried in 125,000 Roundup-cancer suits. *See* R170 (¶14). The Roundup litigation morass is being overseen by the New York office of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). R192 (¶37); R238 (¶136).

Using Skadden via mediations in New York, the Bayer Defendants (R308 (¶249)) negotiated a $10 billion "global settlement, of all present and future Roundup claims (R192–200 (¶¶37–49)). But a federal judge rejected Bayer's "global settlement" gambit as a "dubious" attempt to manipulate the judicial process.

R171 (¶16); R195–198 (¶¶43–46).

At the same time it was ignoring these "New York" facts as pleaded in the verified complaint and misapplying New York's jurisdictional statutes and this Court's precedents, the *Haussmann* Panel repeated another First Department panel's recent erroneous decision in *Barclays*—a derivative action involving a British bank—again refusing to apply the text of BCL §1319, to effectuate legislative intent, and to follow *Davis*. *Haussmann*, 2023 N.Y. App. Div. LEXIS 3390, at **3–4. The Panel held that the Plaintiffs—despite undisputed ownership of over 2,300 shares of Bayer stock (at one time worth hundreds of thousands of dollars)—lacked "standing" under German law (*i.e.*, GSCA §148) to bring derivative claims in a New York court, because they failed to go to Leverkusen, Germany and file a petition seeking leave for permission to file the suit.

The Panel committed several legal errors that satisfy §500.22(b)(4)'s standard—meriting this Court's review.

First, the Panel dismissed all the Bayer Directors and Officers for lack of personal jurisdiction without saying why. But BCL §§1319/626 create jurisdiction over the foreign corporation and its "directors and officers" so long as they are "*doing business in this state*," as does CPLR §302 using "transacts business" language. Any out-of-state actor that transacts or does business in New York directly or through agents is subject to personal jurisdiction.

Second, ignoring that CPLR 327(b) deprived New York courts of *the power—the jurisdiction*—to grant Defendants' CPLR 327(a) inconvenient-forum motions, because the complaint pleaded agreements "related to" the Monsanto Acquisition that contained *consents* to New York jurisdiction and to the application of New York law, the Panel considered and then granted a CPLR 327(a) motion. But in improperly considering the CPLR 327(a) motion it could not grant, the Panel gave no deference—*none at all*—to Plaintiffs' choice of a New York forum to which they had "*presumed access*," with "*substantial deference*" to their selection of this forum. In so doing, the Panel compounded one legal mistake with yet another analytical error.

The Panel endorsed the trial court's misreading—and misapplication—of the "trigger" for the CPLR 327(b) prohibition. The Panel exceeded its statutory power to dismiss actions based on *forum non conveniens* because CPLR 327(b) prohibits any New York court from dismissing an action that "arises out of or relates to [an] … agreement or undertaking to which [General Obligations Law ("GOL") §5-1402] applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part." N.Y. CPLR 327(b). When the trial court decided the trigger issue, *i.e.*, "relating to" under CPLR 327(b) it did so incorrectly, by creating an elevated "*gravamen of the complaint*" test to trigger CPLR 327(b), instead of the much broader actual statutory language "*related to*."

Third, the *Haussmann* Panel like the *Barclays* panel again defied this Court's decision in *Davis* and created a further conflict with the Second Department's decision in *HSBC*. In *Davis*, this Court reversed a First Department decision relying on the internal-affairs doctrine, and refused to apply Cayman Islands procedural rules, similar to GSCA §148, to a derivative action involving a Cayman Islands corporation, while upholding derivative standing to sue under New York's procedural rules. *See* 30 N.Y.3d at 253–54. In *HSBC*, the Second Department refused to apply English legal requirements to a shareholder derivative action involving an English corporation because they were procedural. *HSBC*, 166 A.D.3d at 757. Instead, the Second Department applied BCL §626, sustained the pleading sufficiency of the complaint based on New York's own gatekeeping rules governing derivative actions *and* refused to grant a *forum-non-conveniens* dismissal because, like here, the "*wrongdoing occurred in New York*." *Id*. at 759.

Plaintiffs urged the Panel to follow *Davis* and avoid a conflict with *HSBC* by applying BCL §626—instead of German law—on the issue of standing. But the Panel completely disregarded Plaintiffs' *Davis-HSBC* argument and, instead, cited the First Department's *reversed decision* in *Davis* (138 A.D.3d 230 (1st Dep't 2016)) and the *Barclays* decision to support its continuing erroneous application of the internal-affairs doctrine to block the exercise of New York's jurisdiction created via BCL §§1319/626. *Haussmann*, 2023 N.Y. App. Div. LEXIS 3390, at **3–4.

The Panel—again like the *Barclays* panel—also refused to follow BCL §1319's text, which mandates the application of §626's "gatekeeper" provisions to derivative actions brought on behalf of foreign corporations doing business in New York. N.Y. BUS. CORP. LAW §1319(a). As reflected in legislative history (*Joint Report*, at 32–35), the Legislature, by enacting §1319, made a reasoned judgment in balancing the interests of New York investors and the management of foreign corporations, as well as the overriding public interest of New York as the center of world commerce and finance.[16] To protect New York investors and to preserve New York courts' centuries-old jurisdiction over shareholder derivative actions,[17] the Legislature decided to confer standing to bring derivative actions to all holders of beneficial interests in shares of all corporations, domestic and foreign, regardless of whether such holders have standing under foreign law.[18]

To prevent the loss of the New York forum and to preserve the "presumed

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

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

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

access" of domestic plaintiffs to that forum, CPLR 327(b) forbids any court from granting a CPLR §327(a) *forum-non-conveniens* motion where there are contracts consenting to New York's jurisdiction, and the application of New York law – which the Depositary Agreement and Offering Memorandum did. CPLR 302, BCL §1319 and §626 combine to create subject matter and personal jurisdiction over these Defendants, while CPLR 327(b) prohibits any court from dismissing on *forum non conveniens*, if, as here, there are consents to New York jurisdiction and law in agreements related to the suit. These related jurisdictional and forum statutes were intended to assure that foreign actors were subject to personal jurisdiction in New York (subject to due process), and also that plaintiffs' "presumed access" to New York courts was protected, when subject-matter and personal jurisdiction otherwise exists. The Panel committed legal error in denying Plaintiffs that access by affirming the *forum-non-conveniens* dismissal.

Under the Legislature's jurisdiction-forum statutory scheme, this shareholder derivative suit is a perfect example of the type of suit a domestic resident should be able to bring in New York courts. For this suit involves a foreign corporation doing billions of dollars of business in New York, where the foreign corporation, whose securities are traded in New York, had consented to jurisdiction and application of New York law in agreements "related to" this litigation, and where the Acquisition was negotiated, signed, closed and financed. But these U.S. citizen owners of Bayer

stock were denied access to New York courts.

The Panel's decision has left Bayer's shareholders, including New York residents, without a remedy against wayward fiduciaries for grave violations of their duties of due care that caused Bayer billions in losses—destroying billions more in shareholder value—from which Bayer and its stock have never recovered. *See* R898–899 (¶311). Review by this Court is necessary to secure New York citizens' (and other U.S. citizens'/investors') access to New York courts and to assure jurisdiction over and the accountability of directors and officers of international corporations. Review is necessary to preserve New York as a sophisticated, fair forum for litigating disputes involving foreign actors—including corporations and their officers and directors who have consented to New York jurisdiction and are subject to the full permissible reach of New York's jurisdictional statutes that are part of creating and maintaining New York's "undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980).

Leave to appeal should be granted to ensure:

- compliance with New York's foreign corporation jurisdictional statutes CPLR 302 and BCL §1319 and their proper expansive application to their due process limits to foreign corporations and their directors and officers, that appoint agents for service, register to, and "do business" in New York;

- compliance with CPLR 327(b)'s denial of New York courts' power to grant a *forum-non-conveniens* motion, where, as here, the Complaint pleads agreements that fall within the purview of GOL §5-1402; and, if and when any *forum-non-conveniens* motion is analyzed, to give substantial deference to a New York plaintiff's "presumed access" to a New York forum; and
- compliance with this Court's decision in *Davis*, to avoid a conflict with the Second Department's decision in *HSBC*, and to effectuate the Legislature's intent, reflected in the plain text and legislative history of BCL §§1319/626, to apply New York's "gatekeeping" rules governing shareholder derivative actions on behalf of foreign corporations doing business in New York, not the common-law internal-affairs doctrine.

In sum, the Panel decision violates basic rules of *stare decisis* and statutory interpretation as to important jurisdictional statutes over foreign corporations and their directors and officers, as well as explicit restrictions on New York's courts own jurisdiction to dismiss a case involving a foreign corporation on *forum-non-conveniens* grounds. Leave to review is necessary on these grounds alone.

This Court should grant leave to appeal.

PROCEDURAL HISTORY

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

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

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

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

Plaintiffs appealed both the December 27, 2021 order (Ex. B) and the October 19, 2022 order (Ex. C).

On June 22, 2023, the First Department Panel affirmed both orders. In

affirming dismissal, the *Haussmann* Panel adopted the recent erroneous panel decision in *Barclays*, where a motion by the Plaintiff-Appellant to appeal that decision to this Court was fully briefed on July 17, 2023, and is currently pending. *See Ezrasons, Inc. v. Rudd*, Mo. No. 2023-502 (Pin No. 84231) (N.Y.). The Panel's decision in this *Bayer* case presents the same "standing—substance *versus* procedure" issue in *Barclays*—under the English Companies Act 2006 §260—here under GSCA §148—a German procedural statute applicable only to derivative suits filed in the regional court where the corporation is registered in Germany and employing terms and procedures foreign to New York. In refusing to apply BCL §1319, the Panel cited and relied upon *Barclays,* and endorsed an elevated "in state presence" jurisdiction test for §1319, instead of the straightforward—and here easily satisfied—"doing business" test.

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

on these two issues, presumably finding the reasoning of the trial court sufficient. *See Haussmann*, 2023 N.Y. App. Div. LEXIS 3390, at *4.

Despite the facts pleaded in the verified Complaint,[19] the Panel affirmed the trial court's finding that the Acquisition's "connection to New York" was "too tenuous," and that the Directors did not "do or transact business" in New York, and even though Plaintiffs had requested jurisdictional discovery, the trial court dismissed, without leave to conduct any, and without any explanation as to why. R90.66; R1898 n.9; R26.

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

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

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

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

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

As demonstrated in the Record before the Panel, the trial court repeatedly referred to the Monsanto Acquisition as a "moonshot" transaction, a term never used by any party or the media. R23–24. At its final hearing, the trial court expressed "agree[ment] with almost everything that the defendants put in their papers," and wished Plaintiffs "[g]ood luck with the First Department." R120–122.

TIMELINESS OF THIS MOTION FOR LEAVE TO APPEAL

Notice of Entry of the First Department's decision and order at issue in this motion was served on June 22, 2023, by electronic means through the NYSCEF system (*see* N.Y. CPLR 2103(b)(7)). This motion for leave to appeal is timely made within 30 days of that service. *See* N.Y. CPLR §5513(b).

STATEMENT OF JURISDICTION

The Court has jurisdiction over this motion and the proposed appeal because the First Department's decision and order constitutes a final order within the meaning of CPLR §5602(a)(1)(i). Plaintiffs have made a showing that this Court has jurisdiction of the motion and of the proposed appeal, including that the order or judgment sought to be appealed from is a final determination (*see* N.Y. CPLR §5602(a)(2)).

QUESTIONS PRESENTED FOR REVIEW

Question 1: In this action arising from Bayer AG's $66 billion acquisition of Monsanto Inc., does CPLR §302's long-arm jurisdiction reach the directors and officers of Bayer, a German corporation doing business in New York, where Plaintiffs' verified complaint alleges that the directors and officers—through themselves and their New York-based bankers and lawyers—negotiated, signed, closed, and financed the acquisition in New York, that Bayer consented to New York jurisdiction in an offering memorandum raising billions of dollars to pay for the acquisition, and that Bayer's main U.S. operating subsidiary was registered to do

business in New York and had appointed an agent for service of process in New York?

Question 2: First, does CPLR 327(b) limit the lower courts' power to dismiss actions based on *forum non conveniens*, where the underlying claims relate to or arise from an agreement or undertaking (involving $1 million or more) in which the parties consent to the jurisdiction of New York courts and the application of New York law? Second, in a *forum-non-conveniens* analysis, are New York-resident plaintiffs "presumptively entitled" to sue in New York courts, and must their choice of a New York forum be accorded "substantial deference"?

Question 3: As a matter of statutory interpretation, supported by the extensive legislative history, does BCL §1319's plain text mandate that §626's "gatekeeper" provisions governing shareholder derivative actions be applied to this action—as a statutory choice-of-law rule that displaces the common-law internal-affairs doctrine?

Question 4: As a matter of *stare decisis*, does this Court's decision in *Davis* require that the "gatekeeper" rules of BCL §626 be applied to determine shareholder standing to file this action involving a German corporation doing business in New York because §148 of the German Stock Corporation Act is procedural and applies only in Germany?

REASONS TO GRANT REVIEW

These questions merit review because they raise issues of public importance, present a conflict with this Court's prior decisions, involve a conflict among the Appellate Divisions, and potentially negate the Legislature's statutory scheme to exercise jurisdiction over foreign corporations doing business in New York.

In affirming the trial court's dismissal of this action, the Panel violated the statutory mandates of CPLR §302, CPLR 327, and BCL §§1319/626. On the one hand, the Panel failed to exercise jurisdiction, mandated by CPLR §302 and BCL §1319, over foreign corporations doing business in New York, as well as their directors and officers, even though they consented to New York jurisdiction by doing business here, by negotiating, signing, closing, and financing the Monsanto Acquisition here, and by registering Bayer's main subsidiary to do business here and appointing an agent for service of process here. The Panel's affirmance of the trial court's finding of lack of personal jurisdiction impermissibly limits CPLR §302's reach, which applies to all defendants who transacted business in New York through a single act and even without physical presence in New York or consent to jurisdiction in New York. Such a limitation conflicts with this Court's precedents.

On the other hand, the Panel and the trial court exceeded their statutory power, restricted by CPLR 327(b), by granting a *forum-non-conveniens* motion. The Panel and the trial court also disregarded Plaintiffs' "*presumptive entitlement*" to sue in

New York courts and applied the wrong legal standard by failing to give substantial deference to Plaintiffs' forum choice and by overlooking Defendants' failure to make an evidentiary showing of hardship or oppression in defending in New York.

In applying German procedural law, rather than New York's gatekeeper rules governing derivative actions, the Panel disregarded BCL §1319's text and legislative history. By invoking the internal-affairs doctrine, the Panel violated the maxim that a statutory choice-of-law rule displaces any inconsistent common-law rule.

Finally, the Panel decision departs from this Court's binding decision in *Davis* and creates another, further conflict with the Second Department's decision in *HSBC*. This Court should grant leave to appeal.

I. The Panel Decision Negates the Comprehensive Statutory Scheme Requiring Courts to Exercise Jurisdiction over Foreign Corporations Doing Business in New York and Their Directors and Officers

A. Together with BCL §§1317 and 1319, CPLR §302 Serves as a Statutory Basis for New York Courts to Exercise Jurisdiction over Foreign Corporations Consistent with This Court's Consent-to-Jurisdiction Jurisprudence

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

New York's long-arm jurisdiction is a "single act statute"—"one transaction is sufficient to invoke jurisdiction." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). Even if a foreign corporation "never enters [New York]," §302 provides for jurisdiction where (1) the corporation engages in sufficient activities in New York to have "transacted business in [New York]," and (2) "the claims … arise from the transactions." *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 323 (2016).

To satisfy §302(a)(1)'s first prong, the non-domicile's New York activities must be "purposeful." *Id.* "Purposeful activities are those with which [an entity], through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007).

To satisfy the second prong, "there must be an articulable nexus or substantial relationship between the business transaction and the claim asserted." *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 339 (2012). "This inquiry is relatively permissive and does not require causation." *Rushaid*, 28 N.Y.3d at 329. It requires "merely a relatedness between the transaction and the legal claim such that the latter is *not completely unmoored* from the former"—that is, "[t]he claims *need only be in some way arguably connected to the transaction*." *Id.*

Both are satisfied—pleaded—here. CPLR §302 works in harmony with BCL §1319, which mandates that certain BCL provisions, including the gatekeeper rules

governing shareholder derivative actions, "shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders." N.Y. BUS. CORP. LAW §1319(a). Likewise, CPLR §302 provides a basis for New York courts to exercise jurisdiction over foreign corporations doing business in New York for liability under BCL's substantive provisions. For example, BCL §720 authorizes actions against "directors or officers of a corporation" for, among other things, "neglect of, or failure to perform, or other violation of [their] duties in the management and disposition of corporate assets." N.Y. BUS. CORP. LAW §720(a)(1)(A). BCL §1317 imposes liability under §720 upon "the directors and officers of a foreign corporation doing business in this state … to the same extent as directors and officers of a domestic corporation." N.Y. BUS. CORP. LAW §1317(a).

So long as a foreign corporation "do[es] business" in New York—satisfying CPLR §302's single-act requirement—it is subject to the jurisdiction of New York courts for liability under certain BCL provisions as directed by BCL §1317 and §1319. This jurisdictional "outreach" to foreign corporations is consistent with New York courts' centuries-long exercise of jurisdiction over shareholder derivative actions "to regulate and restrain foreign corporations in doing business [within their borders] under charters from other [state] governments." *Merrick v. Van Santvoord*, 34 N.Y. 208, 212 (1866). It is also consistent with the "consent regime" articulated by Judge Cardozo in *German-American Coffee* and *Bagdon*.

B. In Affirming the Trial Court's Dismissal for Lack of Personal Jurisdiction, the Panel Decision Presents a Conflict with This Court's Precedents Because CPLR §302 Requires a Finding of Personal Jurisdiction, Where the Verified Complaint Alleged That the Bayer Directors Negotiated, Signed, Closed, Financed, and Implemented the Monsanto Acquisition in New York

In dismissing the Bayer Defendants for lack of personal jurisdiction,[20] the Panel endorsed the trial court's erroneous findings—inconsistent with Plaintiffs' verified allegations—that the Monsanto Acquisition had only a "*tenuous connection*" with New York, and that a New York Court "does not have personal jurisdiction against any of the [Bayer Directors] because none of them live[s] here, conduct[s] business here regularly or had contacts with New York that give rise to this dispute," because "this dispute does not arise out of [the Bayer Directors'] contacts with New York," and because they had not "purposefully availed themselves of the benefit of the New York forum." R14–15.

But the trial court's findings are erroneous in light of the New York-centric nature of the Monsanto Acquisition and this Court's CPLR §302 jurisprudence.

[20] The "Bayer Defendants" include Bayer Corporation and 31 Bayer Directors. R713–714. Although the trial court dismissed the Bayer Defendants *en masse*, *Bayer Corporation did not—and could not—seriously challenge personal jurisdiction because it was registered to do business in New York and played a substantial role* in the Acquisition. R213–214 (¶¶71–73). Accordingly, the personal-jurisdiction analysis here focuses on the Directors. But the same analysis applies to Bayer Corporation to the extent the trial court actually did dismiss it on personal jurisdiction grounds.

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

Beginning in 2016, Baumann, Condon, and other Bayer executives travelled to New York to negotiate with Monsanto. *See* R288–294 (¶¶223–225). Negotiations included a September 2016 "final talk" between Baumann and Grant in a Manhattan restaurant. R611. The Merger Agreement, which required closing to take place in S&C's New York office, was signed by Baumann and Condon in New York. *See* R2514, 2520, 2523. To secure regulatory approval, Bayer executives, including Baumann, also met President-Elect Trump in January 2017 in New York. R322–323 (¶¶275–278).

To finance the Acquisition, Bayer arranged, through its New York bankers, a $50-plus billion "bridge loan." R320 (¶273); R277–279 (¶¶202–204). To pay off this loan, Baumann and Condon participated in investor conferences in New York. R288–294 (¶¶223–225). Bayer's June 2018 bond offering—raising $15 billion to pay down the bridge loan for the Acquisition—relied on New York banking services. R214–215 (¶73); R277 (¶202); R320–322 (¶¶273–274). The offering materials contained a clause choosing New York law as governing law and a clause submitting Bayer to the jurisdiction of New York courts in actions relating to the bonds. R2440–2441. And, when the Acquisition closed in New York in June 2018 (R2514), Bayer's "Paying Agent," the New York-based JP Morgan, transferred $57 billion to

a bank account in New York to complete the Acquisition. R2515; R2528–2532.

These many New York contacts establish that Bayer and its Directors purposefully availed themselves of "'the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.'" *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297–98 (2017).

On this point, *Wilson* is instructive. There, plaintiff asserted claims against non-domiciles arising from the creation and management of certain investment funds operating in Brazil. *Wilson v. Dantas*, 128 A.D.3d 176, 181, 179–81 (1st Dep't 2015). Even though plaintiff alleged that some of the underlying contracts "were negotiated and executed" in New York, the trial court dismissed the action for lack of personal jurisdiction. *Id*. at 179. Reversing the dismissal, the court found that "defendants purposefully availed themselves of New York law by engaging in [contract] negotiations, being physically present in New York at the time [one of the underlying contracts] was made, and thereby establishing a continuing relationship between the parties." *Id*. at 183–84. To a much greater extent than the non-domicile defendants in *Wilson*, the Bayer Directors were either physically present, or directed their agents to conduct business, in New York in connection with the Acquisition. *See*, *e.g*., R214–215 (¶73); R277 (¶202); R319–323 (¶¶271–278); R611; R2515; R2528–2532. Bayer and its Directors' New York contacts were not mere happenstance, they were "purposeful," "volitional," actions essential to carrying out

the wrongdoing complained of. *D&R Global*, 29 N.Y.3d at 297–98; *Rushaid*, 28 N.Y.3d at 327–28 ("It is precisely the fact that defendants chose New York … that makes the New York connection 'volitional' and not 'coincidental.'"). This satisfies prong one of CPLR §302(a). *See Wilson*, 128 A.D.3d at 183–84; *see also*, *e.g.*, *Rushaid*, 28 N.Y.3d at 329 (finding correspondent activity alone "sufficient to establish a purposeful course of dealing"); *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 377 (2014) ("where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)").

A plaintiff asserting jurisdiction over a defendant based on the actions of his or her corporate agent need not establish a formal agency relationship. *See Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 19 (1970). The plaintiff need only convince the court that the company engaged in purposeful activities in New York in relation to the transaction for the benefit of and with the "knowledge and consent" of defendants, and that they exercised some control over the company in the matter. *See Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017) (citing *Kreutter*, 71 N.Y.2d at 467).

The allegations of the Bayer Directors' involvement with the Acquisition are sufficient to show "control" over Bayer. Plaintiffs also allege in detail that the

Directors made key decisions and were involved in all aspects of the Acquisition. R244–250 (¶¶146–157); R329 (¶292).[21] For example, Plaintiffs alleged that during 2016, Bayer's Directors "were regularly informed of" and dealt in detail with the planned Acquisition, including the financing the strategic aspects of the Acquisition, "the question of Monsanto's valuation" and "resolved on the final offer conditions for the acquisition." R245–246 (¶148). Plaintiffs also alleged that during several meetings in 2017–18, the Bayer Directors' "particular focus was the acquisition, including the progress of the merger control proceedings, which were reported on extensively at several meetings" the "performance of the Monsanto business and the related risks of the business"; "looking in detail at the required divestment of parts of Bayer's [BCS] business in connection with the Acquisition and the status of the [Roundup] litigations." R246–248 (¶¶150–152).

That Bayer's Directors were not physically present in New York is of no moment. "It is well settled that 'one need not be physically present'" in New York to be subject to jurisdiction under §302. *Fischbarg*, 9 N.Y.3d at 382. The Bayer Directors authorized the New York activities of Bayer's officers and the use of New

[21] Without any factual support, the trial court said that no one from Bayer was present at the closing in New York in June 2018, and that the Banks' advice was given to the Directors in Germany. R25–26. But those are factual matters. It is highly improbable that the largest acquisition in Bayer's history closed in New York without top Bayer officials being present, and the investment banks never gave advice to the Bayer executive team in New York. But for sure its lawyers and investment bankers were at the closing. The closing was not conducted by robots. The same is true of the Roundup settlement mediations in New York. Jurisdictional discovery would have helped resolve these factual issues.

York agents. *See Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 457 (1965) (even where a contract is not executed in New York (here the Acquisition was), "the statutory test may be satisfied by a showing of other purposeful acts performed"). Here, the Acquisition contract was signed in New York. R2514, 2520, 2523.

Plaintiffs specifically alleged that the Directors personally benefited from the Acquisition. In fact, the Acquisition was designed from the start to entrench the Bayer Directors, who sought to avoid a feared takeover by Pfizer, Inc. R180 (¶¶25–27). That was successful. The debt from the Acquisition operated as a "poison pill" to making Bayer "unacquirable," allowing the Directors to remain in their positions of power, prestige, and profit. R182 (¶27), R223–225 (¶¶100–101), R286 (¶219).

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

Plaintiffs' allegations satisfy the minimal "articulable nexus" requirement of CPLR §302(a)(1)'s second prong. *Licci*, 20 N.Y.3d at 339. Indeed, Plaintiffs' breach-of-fiduciary duty claims are inextricably linked with the New York transactions described above. *See Rushaid*, 28 N.Y.3d at 329 ("The claim need only be in some way arguably connected to the transaction.").

The Acquisition and the entrenchment scheme were dependent on Bayer's New York transactions. *Rushaid*, 28 N.Y.3d at 329, 330 (finding sufficient nexus

where the scheme "could not proceed" without and "necessarily include[d] the use of" New York contacts). Without the New York negotiations, the New York financing, and New York's legal/banking services, the Acquisition would never have materialized. In all, these New York transactions were critical to the Acquisition.

In the face of these extensive case-specific contacts, the Bayer Directors failed to carry their "burden to present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *D&R Global*, 29 N.Y.3d at 300. New York's strong policy interests are implicated here: if not for New York's legal and capital markets, Bayer could not have completed the Acquisition. New York has a strong policy "interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980). That policy interest "embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here." *Id.*[22]

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

Plaintiffs sufficiently alleged that Bayer and its Directors were doing or transacting business in New York, and that Plaintiffs' claims have an articulable nexus to those transactions. These detailed verified allegations satisfied CPLR §302, BCL §§1319/626/720 and due process. The Panel's decision to the contrary is error and should be reviewed.

II. The Panel Exceeded Its Statutory Authority, Limited by CPLR 327(b), to Grant a *Forum-Non-Conveniens* Dismissal and Departed from This Court's Precedent Providing Presumptive Access to New York Residents to New York Courts

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

A. Under CPLR 327(b) and New York Public Policy, the Panel and the Trial Court Were Precluded from Dismissing This Action Based on *Forum Non Conveniens*

The common-law doctrine of *forum non conveniens* was first codified into the CPLR in early 1970s when the Legislature enacted CPLR 327(a). *See* N.Y. CPLR 327. Ten years later, subdivision (b) was added "to enhance the status of New York as a leading commercial and financial center." Michael J. Virgadamo, *CPLR 327(b): Forum Non Conveniens Relief May No Longer Be Granted by a Court If, Pursuant to Certain Contracts, the Parties Have Agreed on New York as Their Choice of Forum in Accordance with Section 5-1402 of the GOL*, ST. JOHN'S L. REV., Vol. 59 No. 2, Art. 10, at 415 (Winter 1985). While CPLR 327(a) gives the courts the power to grant a *forum-non-conveniens* motion, CPLR 327(b) takes away that power under certain circumstances—circumstances that happen to be present in this case. *See id.* at 414–15. "Subdivision (b) was enacted to foreclose use of [CPLR] 327 as an 'escape hatch' from enforcement of newly enacted GOL § 5-1402." *Id.* at 415 n.6.

Today, the court's power to dismiss actions based on *forum non conveniens* is granted by CPLR 327(a) and limited by 327(b). CPLR 327(a) requires that any CPLR 327(a) power be exercised "in the interest of substantial justice." Because "*forum non conveniens* is equitable in nature[,]" the exercise of CPLR 327(a)'s power "rests on considerations of public policy." *Strand v. Strand*, 57 A.D.2d 1033, 1034 (3d Dep't 1977).

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

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

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

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

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

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

> The parties to any contract, agreement or undertaking … may

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

N.Y. GEN. OBLIG. LAW §5-1401(1).

This Court has never reviewed or interpreted CPLR 327(b). But every lower department that has, has ruled contrary to the Panel, including other First Department decisions. CPLR 327(b) and GOL §5-1402 operate as a "statutory mandate" that "preclude[s] a New York court from declining jurisdiction even where the only nexus is the contractual agreement." *Nat'l Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228, 230 (1st Dep't 1999). Put another way, as a matter of "public policy," New York courts must assert jurisdiction over cases involving foreign persons and entities that have consented to their jurisdiction. *Lumbermens Mut. Cas. Co. v. Commonwealth of Pa.*, 52 A.D.3d 212, 212 (1st Dep't 2008).

This shareholder derivative action falls within CPLR 327(b)'s prohibition because the Depositary Agreement and the Offering Memorandum satisfy GOL §5-1402's requirements. In those agreements, Bayer AG consented to the jurisdiction of New York courts, their venue and the application of New York law. R605; R312 (¶258); R2440–2441. And the agreements—both pleaded in the Complaint—involved obligations exceeding $1 million. R605; R2440–2441.

Nothing in CPLR 327(b) or GOL §5-1402 requires any Defendant to be party to the underlying agreements, although here Bayer AG is a party to both of them.

So long as Plaintiffs' derivative claims "arise out of" or are "related to" these agreements, CPLR 327(b) bars a dismissal based on "inconvenient forum." *See* N.Y. CPLR 327(b). CPLR 327(b)'s bar is as broad as it is absolute. As recognized in *Lumbermens*, CPLR 327(b) is the Legislature's declaration of New York's "public policy" that New York courts must assert jurisdiction over cases involving foreign persons and entities that have consented to their jurisdiction. 52 A.D.3d at 212. Application of CPLR 327(b) is mandatory, so long as this action "relates to" or "arises out of" agreements that meet GOL §5-1402's requirements—regardless of whether the parties to the agreements overlap with the parties to the action.

This Court has never interpreted CPLR 327(b). In light of these recurring disputes over jurisdiction and forum in suits involving foreign corporations and their directors and officers, the Court should do so now to assure the terms "arises from" and "relates to" receive the proper expansive reading going forward to assure a plaintiff's selection of a New York forum to which he has presumed access and is protected from dismissal by the improper exercise of discretion. Under CPLR 327(b), Plaintiffs' derivative claims "relate to" and "arise out of" the Depositary Agreement for Bayer's ADRs and the Offering Memorandum for the $15 billion bond offering to finance the acquisition.

A review of dictionaries and thesauruses will show how expansive the meanings of "relates to" and "arises from" are. "Relates to" is an exceedingly broad

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

Under this broad interpretation, the Depositary Agreement and the Offering Memorandum satisfy both the "arising from" and "relating to" standards under CPLR 327(b). *Both the Depositary Agreement and the Offering Memorandum are pleaded in the Complaint.* R312 (¶258); R318 (¶269); R214–215 (¶73). They were pleaded as part of the alleged wrongdoing and as facts supporting personal jurisdiction and a New York forum for the case. *See* R312 (¶258); R320–322 (¶¶273–274). The Depositary Agreement *relates to* this case because the derivative claims here are brought on behalf of Bayer and its shareholders, including ADR holders. *See Batchelder v. Kawamoto*, 147 F.3d 915, 917–19 (9th Cir. 1998) (finding that a shareholder derivative action brought by ADR holders relates to the depositary agreement for the issuance of the ADRs). Likewise, the Offering Memorandum *relates to* this case because it is "associated with" the financing of the Acquisition. *Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128–29 (2d Cir. 2001); *see also Planned Consumer Mktg., Inc. v. Coats & Clark, Inc.*, 71 N.Y.2d

442, 448 (1988) ("'relate to[]' is to be interpreted broadly").

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

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

Rejecting all this, the Panel said that "*the gravamen of* [*Plaintiffs' Complaint*] *isn't about those agreements*." R100; *see also* R89. *But this was the wrong legal standard*. CPLR 327(b)'s text says nothing about "*the gravamen of the complaint*."

So long as "the action arises out of or relates to [an] … agreement" that falls within GOL §5-1402, the rule takes away the lower court's power to grant a CPLR 327(a) motion. Under New York's broad interpretation of "arising out of" and "relating to," the Depositary Agreement and the Offering Memorandum fit well within the purview of CPLR 327(b) and GOL §5-1402. The Panel and the trial court's refusal to follow CPLR 327(b) is an error,[23] and their dismissal of this action must be reversed.

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

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

At the outset, CPLR 327(b) addresses the court's power to act—taking away the power granted by subsection (a) where GOL §5-1402 is applicable is a purely legal question. Legal questions are not waivable. *Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.*, 65 A.D.3d 405, 408 (1st Dep't 2009). Indeed,

[23] CPLR 327(b) functions as a "statutory mandate," "preclud[ing] a New York court from declining jurisdiction." *Nat'l Union*, 257 A.D.2d at 230. CPLR 327(b)'s prohibition is as broad as it is absolute. The parties to the "action" do not have to be the parties to the Agreements. The requirement to trigger the prohibition is that the "action arises out of or is related to a contract, agreement, or undertaking" covered by CPLR 327(b). In any event, Bayer is a party to both the Depositary Agreement and the Offering Memorandum. And the Bank Defendants are parties to the $15 billion bond offering. R691; R320–321 (¶273).

CPLR 327(b)'s prohibition against dismissing an action is analogous to the deprivation of subject-matter jurisdiction. *See Ballard v. HSBC Bank USA*, 6 N.Y.3d 658, 663 (2006) ("'subject[-]matter jurisdiction is a question of judicial power'"). The lack of subject-matter jurisdiction cannot be waived, even if a party never raised it or pleaded it. *Murray v. State Liquor Auth*., 139 A.D.2d 461, 462 (1st Dep't 1988). So it should be with CPLR 327(b).

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

argument is raised.[24]

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

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

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

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

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

Broida made clear that the defense bears the burden of proof on *forum-non-*

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

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

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

Litigation involving U.S. shareholders in foreign companies often ends up in federal court, where "[t]he deference owed to the forum choice of [such] plaintiffs cannot be reduced solely because they chose to invest in a foreign entity." *Otto Candies, LLC v. Citigroup, Inc*., 963 F.3d 1331, 1339–40 (11th Cir. 2020). Also, a New York-resident plaintiff's choice of New York forum must be accorded *extra*

weight where, as here, the proposed alternative forum is in a foreign country. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950). Defendants must overcome the presumption for a New York forum by "establish[ing] *such oppression and vexation* … as to be *out of all proportion* to plaintiff's convenience." *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 102 (2d Cir. 2000). All the same considerations apply to suits in New York given its status as the center of world commerce and finance.

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

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

It is undeniable that New York is the "epicenter" of the Acquisition. R241

(¶141). Because the Acquisition was negotiated, financed, closed and implemented in New York, and because Bayer's lawyers and bankers are based in New York much of the evidence of, and key witnesses to, Defendants' liability are in New York or the United States. Plaintiffs' showing of a substantial nexus, combined with Defendants' failure to show *any* hardship of litigating in New York, requires a denial of the *forum-non-conveniens* motions. *See Cadet*, 173 A.D.2d at 271.

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

The reasoning in *Elmaliach* and *HSBC* applies here—with greater force—because Plaintiffs, unlike the foreign-national plaintiffs in those cases, are based in New York and in California (R211 (¶66)). *See Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc*., 131 A.D.3d 431, 432 (1st Dep't 2015) (plaintiff's

residence held generally to be the most significant factor). Applying this rule, New York courts have consistently denied *forum-non-conveniens* motions in shareholder derivative actions that have a nexus to New York. *See*, *e.g.*, *Rocha Toussier y Asociados, S.C. v. Rivero*, 91 A.D.2d 137, 141 (1st Dep't 1983); *Laurenzano v. Goldman*, 96 A.D.2d 852, 853 (2d Dep't 1983) (upholding a New York-resident plaintiff's choice of forum). Plaintiffs' choice of the New York forum to which they had presumed access was thus entitled to substantial deference in the *forum-non-conveniens* analysis given the allegations of the verified Complaint. Yet, the Panel and the trial court gave it none.

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

III. The Panel Refused to Follow BCL §1319's Plain Language and Effectuate the Legislature's Intent, as Reflected in Legislative History, to Preserve New York Courts' Jurisdiction over Derivative Actions Involving Foreign Corporations Doing Business in New York

Review by this Court is necessary to correct the Panel's erroneous interpretation of BCL §1319—in contravention of the First Department's own precedent in *Culligan*—and the Panel's improper elevation of the existing "doing business" jurisdictional standard in BCL §1319. This motion presents some of the same legal issues in the *Barclays* motion to for leave to appeal.

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

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

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

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

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

Article 13 of the BCL, which includes §1319, was the product of years of study and work by the New York Legislature in the early 1960s to revise and modernize the BCL. *See* Kessler, *The New York Business Corporation Law*, at 1–2.[25] The research and drafting process—spanning over four years—was known to be "elaborate" and "well organized." *Id.* at 4. Research reports "were widely

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

distributed for comments" to various constituents, including "the State and New York City Bar Associations," which voiced opposition on behalf of business interests to the regulation of foreign corporations. *See id.* at 3–4.

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

To that end, the New York Legislature considered the objection of the corporate establishment, represented by the State and New York City Bar Associations. The corporate establishment criticized the new Article 13—specifically §1319—as an attempt "to regulate the internal affairs of foreign corporations" and to "impose additional obligations and liabilities upon foreign corporations, their directors and stockholders, which go well beyond what other

states see fit to do." *Joint Report*, at 32–35. As Dean Stevens observed,[26] "[i]t was strongly urged before the [Joint] Committee that the policy of other states should be respected and that foreign corporations should be subject to and regulated by the law of the jurisdiction of incorporation, not by the law of New York." Stevens, *New York Business Corporation Law of 1961*, at 172.

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

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

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

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

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

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

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

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

BCL §1319 reflects a legislative policy choice to regulate certain discreet aspects of the affairs of foreign corporations doing business in New York, including derivative standing to sue, which has been traditionally characterized as involving corporate "internal affairs." *See Joint Report*, at 32–35. And that was exactly how the New York Legislature, as well as the corporate establishment, understood §1319 to be: §1319 "regulate[s] the internal affairs of foreign corporations[.]" *Id*. at 34–

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

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

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

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

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

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

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

doctrine called for jurisdictional exclusivity for derivative actions only in the place of incorporation. *Koster v. (Am.) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 527 (1947); *see also* Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, STAN. J. OF COMPLEX LITIG., at 51 (2012) ("[t]he modern doctrine does not dictate where a dispute is heard"). New York courts have long rejected any "automatic application" of the internal-affairs doctrine in shareholder derivative litigation. *See Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975). Derivative suits are today embedded as part of American law—with good reason.[27] Today in an ever increasingly internationalized corporate world, New York's power to regulate

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

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

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

C. The Panel Failed to Follow the First Department's Own Precedent, *Culligan*, Which Correctly Held That §1319 Displaced the Internal-Affairs Doctrine and Mandated the Application of §626, Including Its Standing Requirement, to Shareholder Derivative Actions Brought in New York Courts

The Panel's erroneous interpretation of §1319 also conflicts with the First Department's own precedent. Following Judge Cardozo's opinion in *German-American Coffee*, the First Department in *Culligan* applied New York law to a shareholder derivative action involving a Bermuda corporation. *See* 118 A.D.3d at 423. There, the trial court dismissed the shareholder's derivative complaint "upon finding that Bermuda law applied to the case pursuant to the 'internal affairs' doctrine." *Id*. at 422. Reversing the dismissal, the First Department squarely held that "the issue of plaintiffs' standing to bring a derivative action is governed by [New York] law":

> [T]he internal affairs doctrine [does not] apply to claims based on … [BCL §1319]. [BCL] §1319(a)(1) expressly provides that §626 (shareholders' derivative action) shall apply to a foreign corporation doing business in New York. Thus, the issue of plaintiffs' standing to

bring a shareholder derivative action is governed by New York law, not Bermuda law.

Id. at 422–23.

Culligan is both on-point and binding. Review by this Court is necessary to ensure that the First Department follows the rule of *stare decisis*.

D. In Contravention of the Existing "Doing Business" Jurisdictional Standard in §1319, the Panel Impermissibly Adopted an Elevated "in-State Business Presence" Jurisdictional Test to Block Application of §626

To evade *Culligan*, the *Hausmann* Panel cited and relied upon *Barclays*—where another First Department panel created—*out of thin air*—an elevated jurisdictional requirement for applying BCL §1319 / §626 to the standing issue. Without any legal or factual support, the *Barclays* panel (and thus the *Hausmann* Panel) relegated *Culligan*—and BCL §1319—to be applicable "only … [to] rare situation[s]" where the foreign corporation has "*such presence … in our State as would*, *irrespective of other considerations*, *call for the application of New York law*." *Barclays*, 2023 N.Y. App. Div. LEXIS 2945, at **3–4. The Panel's enhanced jurisdictional standard is akin to what is necessary to impose general jurisdiction over foreign corporations or to apply New York's substantive law to foreign corporations. But §1319 does not contain any elevated "such presence in our state" language. Nor is §1319's reach limited to only "rare situation[s]." By its own terms, §1319 reaches *any* foreign corporation "doing business in this state" and requires the

application of §626's gatekeeper provision to *all* derivative actions brought on behalf of such corporations in New York courts.

The Panel's enhanced "in state presence" jurisdictional test is not only wrong, but dangerous. Apart from the jurisdiction over foreign corporations and their officers and directors who are "doing business" in New York, New York also uses a "doing business," "minimum contacts" jurisdictional test for out-of-state actors, generally—including foreign corporations and officers and directors, in many contexts. *See* N.Y. CPLR §302; *see also Williams v. Beemiller, Inc*., 33 N.Y.3d 523, 528 (2019) ("the action is permissible under the long-arm statute [(CPLR §302)]" so long as "the exercise of jurisdiction comports with due process"). In *Aybar*, this Court (over a dissent by then-Judge Wilson and Judge Rivera) limited the jurisdictional consequences of *mere* registration to do business in New York. 37 N.Y.3d at 280; *but see Mallory*, 2023 U.S. LEXIS 2786, at **16–19. As *Aybar* made clear, however, New York's long-arm jurisdiction over foreign corporations "doing business" here remains intact.[28] *New York courts' jurisdiction reaches as far as the federal "due process" permits especially where, as here, a clear consent to jurisdiction has been made*. *See* 37 N.Y.3d at 310–13 (Wilson, J., dissenting)

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

(stressing the importance of a state's regulation of foreign corporations that consent to jurisdiction by registration and the in-state conduct flowing from that registration).

IV. The Panel Disregarded Precedent Requiring the Application of New York's Gatekeeping Rules—Not Those of Foreign Jurisdictions—to Actions Brought in New York Courts, Again Defying This Court's Decision in *Davis*, and Creating Additional Conflicts with the Second Department's Decision in *HSBC*

Review by this Court is warranted because the Panel decision "present[s] a conflict with prior decisions of this Court" and "involve[s] a conflict among the departments of the Appellate Division." *See* 22 NYCRR §500.22(b)(4).

As one of the three independent grounds asserted for reversing the dismissal of this action, Plaintiff urged the *Haussmann* Panel to follow *Davis* and avoid a conflict with *HSBC*. Ex. D at 43–45. Disregarding Plaintiff's arguments, however, the Panel refused to apply BCL §626, as required by *Davis* and endorsed by *HSBC*, and instead relied on German law to find that Plaintiff lacked standing to bring derivative claims in New York and had to go to Germany to seek permission from a court in Leverkusen to sue. Review by this Court is necessary to enforce the rule of *stare decisis* and to prevent conflicting rulings among the lower courts regarding the applicability of the foreign procedural statutes like the GSCA in shareholder derivative actions brought on behalf of German or other foreign companies.

A. The Panel Defied This Court's Decision in *Davis* by Disregarding Plaintiff's Procedure-*Versus*-Substance Arguments and by Citing to the First Department's Reversed Decision in *Davis*

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

This Court instructed that, before deciding whether a foreign statute, which serves a "gatekeeping" function in derivative actions, applies to an action brought in a New York court, the lower courts must first decide whether the foreign statute is substantive or procedural based on statutory text. *Davis*, 30 N.Y.3d at 253 ("[w]e first look at the plain language of [the foreign statute]"). Because the Cayman Islands statute at issue, by its "plain language," applies only to actions brought in the Cayman Islands and "has no provision that would suggest that it applies … in derivative actions brought … outside the Cayman Islands," this Court held that the

foreign statute "is a procedural rule that does not apply in New York courts." *Id*. at 254. In *Davis*, this Court upheld the right of a holder of "ordinary shares" of a foreign corporation to bring a derivative action in New York under "our own 'gatekeeping' statutes." *Id*. at 257.

Here, the *Haussmann* Panel again *defied* this Court's instruction in *Davis*—just as the *Barclays* panel did. *Barclays*, 2023 N.Y. App. Div. LEXIS 2945, at *1. Even though Plaintiff raised the substance-*versus*-procedure argument based on *Davis* (Ex. D at 43–45), the Panel disregarded that argument. Instead, the Panel cited the First Department's *Davis* decision (138 A.D.3d 230)—reversed by this Court—to support its invocation of the internal-affairs doctrine, without first deciding whether GSCA §148 is substantive or procedural. *See Hausmann*, 2023 N.Y. App. Div. LEXIS 3390, at *4.

To justify its repeated reliance on the reversed *Davis* decision, the Panel mischaracterized this Court's reversal as being "on other grounds." *See id*. But this Court in *Davis* reversed the First Department *not* "on other grounds," but on its reliance on the internal-affairs doctrine to apply foreign law. *Compare* 30 N.Y.3d at 253, *with Davis*, 138 A.D.3d at 238. This Court rejected the First Department's reliance on the internal-affairs doctrine as a rationale to bar derivative claims brought by a holder of "ordinary shares" and upheld the shareholder's access to New York's courts.

Like the Cayman Islands statute in *Davis*, GSCA §148's title and text is explicit: *it is a procedural rule that does not apply in New York*. *Davis*'s reasoning applies here and compels the finding that GSCA §148 is a procedural rule and is thus inapplicable to shareholder derivative actions brought in courts outside Germany. The title of GSCA §148 is "*Court Procedures* for Petitions Seeking Leave to File an Action for Damages." Procedures means procedures. The plain language of GSCA §148 dictates the outcome.

All told, German law designates GSCA §148 as procedural and limits its application to actions brought in a designated court in Germany. This is exactly how the Second Department interpreted a similar provision in the English Companies Act 2006. In *HSBC*, a shareholder derivative action brought on behalf of an English corporation, the trial court dismissed the action, finding that plaintiff failed to comply with English statutory requirement to seek permission to sue. *See* 166 A.D.3d at 757. Reversing the dismissal, the Second Department refused to apply the English provisions because they were procedural. *Id.* Instead, the Second Department applied BCL §626 and sustained the pleading sufficiency of the complaint based on New York's gatekeeping rules governing derivative actions. *Id.* at 758–59.

Under *Davis*, GSCA §148 is procedural because, just like the Cayman Islands rules, this section—employs terms specific to the practices of Germany such as

"petition" to sue and furnishing "evidence" of improprieties before suing and sharing "no overriding company interests" to prevent the assertion of the claims all steps to be proven as part of seeking "leave to file" a derivative action. All of this is non-existent in New York courts. And, just like the lack of extraterritorial reach of the Cayman Islands rules in *Davis*, nothing in the GSCA indicates that §148 requirement to seek permission to sue in German courts can be applied to derivative actions brought outside Germany on behalf of German companies. *See Davis*, 30 N.Y.3d at 254. To the contrary it refers to a specific court in Leverkusen, Germany in which to file a petition seeking leave to file a complaint.

The Panel's contrary conclusion—its repeated defiance of *Davis*—requires review by this Court. *See* 22 NYCRR §500.22(b)(4) ("review by this Court" is warranted where "the issues … present a conflict with prior decisions of this Court").

B. The Panel Created a Conflict with the Second Department's *HSBC* Decision, Which Followed *Davis* to Uphold a Shareholder's Derivative Standing to Sue on Behalf of an English Corporation, Like Bayer, in New York Under New York's Gatekeeping Rules

In *HSBC*, the Second Department followed this Court's decision in *Davis* and rejected the application of the internal-affairs doctrine. *See* 166 A.D.3d at 755–56. There, the trial court dismissed a derivative action brought by an England-resident owner of shares in HSBC Holdings, PLC, an English corporation, holding that "the internal affairs doctrine required the application of foreign law to questions of standing, and that the plaintiff lacked standing because he failed to seek permission

from the English High Court" under the English Companies Act 2006 ("ECA"). *Id.* at 755. Relying on *Davis*, the Second Department reversed the dismissal because the English requirement for seeking permission to sue, provided in ECA §261, "by its own terms, … applies only to derivative claims brought in England and Wales, or Northern Ireland, and does not suggest that it applies in any other jurisdiction such as New York." *Id*. at 756–57 (citing *Davis*, 30 N.Y.3d at 253). To reach this conclusion, the Second Department—consistent with *Davis*—found that the ECA "has no provision suggesting that it applies to derivative actions on behalf of [English companies] commenced … outside of England, Wales, or Northern Island." *Id*. at 757. *HSBC* also affirmed denial of a *forum-non-conveniens* dismissal because same as here the "wrongdoing took place in New York" and even though there the plaintiff resident was from England not New York or elsewhere in the United States.

HSBC held that the same type of procedural provisions at issue in this case are inapplicable in a New York court. Thus, *HSBC* permitted an England-resident shareholder to sue in New York without demanding compliance with English procedures required by the ECA refusing to dismiss the suit on *forum-non-conveniens* grounds. Likewise, this Court in *Davis* upheld a Mexico-resident shareholder's access to a New York court without demanding compliance with Cayman Island's procedural rules. Under the *Davis-HSBC* line of precedents, technical requirements imposed by foreign law cannot form a basis to deny

shareholders (particularly those based in New York) access to New York courts to bring derivative claims on behalf of foreign corporations. Yet these US-NY – California resident plaintiffs have been denied their "presumed" access to those same courts.

By following *Barclays* and applying GSCA §148's Procedures to this action—the same type of provision that the Second Department held to be inapplicable—the Panel has created a split with *HSBC*.

All told, the Panel's decision to apply the GSCA to this action—in conflict with *HSBC*—requires review by this Court. *See* 22 NYCRR §500.22(b)(4) ("review by this Court" is warranted where "the issues … involve a conflict among the departments of the Appellate Division").

STATEMENT OF PRESERVATION OF THE ISSUES PRESENTED

Plaintiffs have raised and preserved Question 1 for review in the trial court in R1889 through R1898, and in the First Department in pages 65 through 76 of Plaintiffs' January 30, 2023 opening brief (Ex. D).

Plaintiffs have raised and preserved Question 2 for review in the trial court in R1898 through R1906 and in R2393 through R2413, and in the First Department in pages 46 through 64 of Plaintiffs' opening brief (Ex. D).

Plaintiffs have raised and preserved Question 3 for review in the trial court in R2335 through R2340, and in the First Department in pages 29 through 42 of

Plaintiffs' opening brief (Ex. D).

Plaintiffs have raised and preserved Question 4 for review in the trial court in R2341 through R2343, and in the First Department in pages 43 through 45 of Plaintiffs' opening brief (Ex. D).

CONCLUSION

For the reasons set forth above, the Court should grant leave to appeal.

Dated: New York, New York
August 1, 2023

Respectfully submitted,

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Addendum 1

[Text of Section 302 of the New York CPLR.]

NY CLS CPLR § 302, Part 1 of 2

Current through 2023 released Chapters 1-191

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 3 Jurisdiction and Service, Appearance and Choice of Court (§§ 301 — 328)

§ 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state. The family court may exercise personal jurisdiction over a non-resident respondent to the extent provided in sections one hundred fifty-four and one thousand thirty-six and article five-B of the family court act and article five-A of the domestic relations law.

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

(d) Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to *section fifty-three hundred four* of this chapter, to the fullest extent permitted by the United States constitution, provided:

1. the publication at issue was published in New York, and

2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign

defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 1966, ch 590, § 1, eff Sept 1, 1966; L 1974, ch 859, § 1, eff June 7, 1974; L 1979, ch 252, §§ 1, 2, eff Sept 1, 1979; L 1980, ch 281, § 22; L 1982, ch 505, § 1; *L 1991, ch 69, § 7*; *L 1995, ch 441, § 2*, eff Oct 31, 1995; *L 2006, ch 184, § 5*, eff July 26, 2006; *L 2008, ch 66, § 3*, eff April 28, 2008.

Annotations

Notes

1995 Recommendations of Family Court Advisory and Rules Committee:

In 1990, the New York State Legislature amended *Family Court Act § 1036* to establish long-arm jurisdiction in child abuse and neglect cases, where the child in deed of protection resides within the state [Laws of 1990, ch. 268]. This recognition that family violence knows no boundaries in an increasingly mobile society applies as well in all cases in which an order of protection in sought to protect family members from the threat of abuse. The Family Court in New York State has an interest in protecting individuals who are residents or are present on a regular basis in the state from violence committed in the state by family members, regardless of whether the offender is a state resident.

The Family Court Advisory and Rules Committee is submitting a proposal to amend *Family Court Act § 154* to authorize service of process outside the state in child support, paternity, custody and guardianship, family offense and child abuse and neglect proceedings in which an order of protection is sought. Specifically, the Family Court would be permitted to exercise personal jurisdiction over a person who is not a resident or domiciliary of New York State in cases where (1) the acts giving rise to the application for an order of protection or the claimed violation of an existing temporary or final order of protection occurred within the State, and (2) the applicant for the order resides or is domiciled in the State, or has substantial contacts in the State, including presence on a regular basis.

The proposed measure would establish special procedures to be observed when long-arm jurisdiction is exercised. First, it would provide that when service is effected upon a non-resident or non-domiciliary solely under this new long-arm provision, the papers to be served must include a conspicuous notice that the scope of the court's jurisdiction is limited to the order of protection. Also, service of a petition and summons associated with the exercise of such jurisdiction must be made at least 20 days prior to the return date of the case in court.

Additionally, this measure would provide that in instances when a non-resident or non-domiciliary has been served, and later defaults by failing to appear, a court may, on its own motion or on the application of any party, proceed to a hearing with respect to the issuance of the order of protection.

Lastly, this measure would revise *section 302(b) of the CPLR*, to include within the scope of actions that may constitute the basis for a court to exercise personal jurisdiction over non-residents or non-domiciliaries *section 154 of the Family Court Act*, which, as it would be amended by this measure, will prescribe procedures for the disposition of orders of protection or violations of orders of protection arising under Articles 4, 5, 6, 8 or 10 of the Family Court Act.

Advisory Committee Notes:

(See also Advisory Committee notes preceding § 301, under subheading "Jurisdiction").

Addendum 2

[Text of Section 327 of the New York CPLR.]

NY CLS CPLR R 327

Current through 2023 released Chapters 1-191

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 3 Jurisdiction and Service, Appearance and Choice of Court (§§ 301 — 328)

R 327. Inconvenient forum

(a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

(b) 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.

History

Added by Judicial Conference, eff Sept 1, 1972; amd, L 1984, ch 421, § 2, eff July 19, 1984.

Annotations

Commentary

PRACTICE INSIGHTS:

COMPARING VENUE AND FORUM NON CONVENIENS MOTIONS

By David L. Ferstendig, Law Offices of David L. Ferstendig, LLC

General Editor, David L. Ferstendig, Esq.

INSIGHT

Practitioners, novice and seasoned alike, recognize that the place of trial can have a significant impact on the outcome of a case. Although moving for a change of venue and moving for a stay or dismissal based upon forum non conveniens grounds achieve different results, the ultimate goal of these motions is frequently the same: to try the case before a more favorable court. Unfortunately, many defendants overlook forum non conveniens, sometimes confusing it with venue or jurisdictional principles. If the action involves long-arm jurisdiction over the defendant and the cause of action arises outside of New York, a forum non conveniens motion should be considered. Such an analysis must occur at the outset of the litigation.

ANALYSIS

Unlike motion for change of venue, *forum non conveniens* motions do not result in transfer.

Although a court may have subject matter jurisdiction and personal jurisdiction over the defendant, it may nevertheless stay or dismiss an action on *forum non conveniens* grounds. *CPLR 327* codifies the common law doctrine of *forum non conveniens*. Many

Addendum 3

[Text of Section 626 of the New York Business Corporation Law.]

FILED: NEW YORK COUNTY CLERK 04/13/2021 09:43 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 153 RECEIVED NYSCEF: 04/13/2021

NY CLS Bus Corp § 626

Current through 2021 released Chapters 1-49, 61-101

***New York** Consolidated Laws Service > Business Corporation Law (Arts. 1 — 20) > Article 6 Shareholders (§§ 601 — 630)*

§ 626. Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor

(a) An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates.

(b) In any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law.

(c) In any such action, the complaint 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.

(d) Such action shall not be discontinued, compromised or settled, without the approval of the court having jurisdiction of the action. If the court shall determine that the interests of the shareholders or any class or classes thereof will be substantially affected by such discontinuance, compromise, or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to the shareholders or class or classes thereof whose interests it determines will be so affected; if notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as special costs of the action and recoverable in the same manner as statutory taxable costs.

(e) If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them.

History

Add, L 1961, ch 855, eff Sept 1, 1963; amd, L 1962, ch 834, § 42; L 1963, ch 746, eff Sept 1, 1963.

End of Document

Addendum 4

[Text of Section 720 of the New York Business Corporation Law.]

NY CLS Bus Corp § 720

Current through 2023 released Chapters 1-191

New York Consolidated Laws Service > Business Corporation Law (Arts. 1 — 20) > Article 7 Directors and Officers (§§ 701 — 727)

§ 720. Action against directors and officers for misconduct

(a) An action may be brought against one or more directors or officers of a corporation to procure a judgment for the following relief:

(1) Subject to any provision of the certificate of incorporation authorized pursuant to paragraph (b) of section 402, to compel the defendant to account for his official conduct in the following cases:

(A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

(C) In the case of directors or officers of a benefit corporation organized under article seventeen of this chapter: (i) the failure to pursue the general public benefit purpose of a benefit corporation or any specific public benefit set forth in its certificate of incorporation; (ii) the failure by a benefit corporation to deliver or post an annual report as required by section seventeen hundred eight of article seventeen of this chapter; or (iii) the neglect of, or failure to perform, or other violation of his or her duties or standard of conduct under article seventeen of this chapter.

(2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

(3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there is sufficient evidence that it will be made.

(b) An action may be brought for the relief provided in this section, and in paragraph (a) of section 719 (Liability of directors in certain cases) by a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof, or, under section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor), by a shareholder, voting trust certificate holder, or the owner of a beneficial interest in shares thereof.

(c) This section shall not affect any liability otherwise imposed by law upon any director or officer.

History

Add, L 1961, ch 855, eff Sept 1, 1963; amd, L 1965, ch 803, § 30, eff Sept 1, 1965; L 1987, ch 367, § 4, eff July 23, 1987; *L 2011, ch 599, § 4*, eff Feb 10, 2012.

Annotations

Notes

Addendum 5

[Text of Section 1317 of the New York Business Corporation Law.]

NY CLS Bus Corp § 1317

Current through 2023 released Chapters 1-191

New York Consolidated Laws Service > Business Corporation Law (Arts. 1 — 20) > Article 13 Foreign Corporations (§§ 1301 — 1320)

§ 1317. Liabilities of directors and officers of foreign corporations

(a) Except as otherwise provided in this chapter, the directors and officers of a foreign corporation doing business in this state are subject, to the same extent as directors and officers of a domestic corporation, to the provisions of:

(1) Section 719 (Liability of directors in certain cases) except subparagraph (a)(3) thereof, and

(2) Section 720 (Action against directors and officers for misconduct.)

(b) Any liability imposed by paragraph (a) may be enforced in, and such relief granted by, the courts in this state, in the same manner as in the case of a domestic corporation.

History

Formerly § 1318, renumbered and amd, L 1962, ch 834, §§ 97, 98, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Former § 1317, add, L 1961, ch 855, repealed, L 1962, ch 834, § 96, eff Sept 1, 1963.

Revision Notes:

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

Commentary

PRACTICE INSIGHTS:

NEW YORK RESIDENT SHAREHOLDERS SEEKING TO SHOW THAT A FOREIGN CORPORATION IS DOING BUSINESS IN NEW YORK IN ORDER TO OBTAIN SHAREHOLDER RECORDS ARE NOT SUBJECT TO HEIGHTENED STANDARD OF "DOING BUSINESS" UNDER *BCL § 1312(A)*.

By Karla L. Braun-Kolbe, Esq., Phillips Lytle LLP *www.phillipslytle.com*.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP *www.phillipslytle.com*

Addendum 6

[Text of Section 1319 of the New York Business Corporation Law.]

FILED: NEW YORK COUNTY CLERK 04/13/2021 09:43 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 153 RECEIVED NYSCEF: 04/13/2021

NY CLS Bus Corp § 1319

Current through 2021 released Chapters 1-49, 61-101

New York Consolidated Laws Service > Business Corporation Law (Arts. 1 — 20) > Article 13 Foreign Corporations (§§ 1301 — 1320)

§ 1319. Applicability of other provisions

(a) In addition to articles 1 (Short title; definitions; application; certificates; miscellaneous) and 3 (Corporate name and service of process) and the other sections of article 13 (foreign corporations), the following provisions, to the extent provided therein, shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders:

(1) Section 623 (Procedure to enforce shareholder's right to receive payment for shares).

(2) Section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor).

(3) Section 627 (Security for expenses in shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor).

(4) Section 630 (Liability of shareholders for wages due to laborers, servants or employees).

(5) Sections 721 (Nonexclusivity of statutory provisions for indemnification of directors and officers) through 726 (Insurance for indemnification of directors and officers), inclusive.

(6) Section 808 (Reorganization under act of congress).

(7) Section 907 (Merger or consolidation of domestic and foreign corporations).

History

Formerly § 1320, renumbered and amd, L 1962, ch 819; amd, L 1961, ch 834, § 101; L 1962, ch 317, § 15, eff Sept 1, 1963; L 1963, ch 684, § 8, eff Sept 1, 1963; L 1969, ch 1007, eff Sept 1, 1969; *L 2016, ch 5, § 2*, effective January 19, 2016.

End of Document

Addendum 7

[Text of Section 148 of the German Stock Corporation Act (*Aktiengesetz*), English translation as of May 10, 2016 by Norton Rose Fulbright.]

§ 148 Court Procedure for Petitions Seeking Leave to File an Action for Damages

(1) [1]Shareholders whose aggregate holdings at the time of filing the petition equal or exceed one per cent of the share capital or amount to at least 100,000 euros, may file a petition for the right to assert the claims of the company for damages mentioned in § 147(1) sentence 1 in their own name. [2]The court shall give them leave to file such action for damages if

1. the shareholders furnish evidence that they or, in the case of universal succession, their predecessors in title have acquired the shares before learning about the alleged breaches of duty or alleged damage from a publication;

2. the shareholders demonstrate that they in vain filed a petition to the company requesting to institute the necessary legal proceedings itself within an appropriate period of time;

3. facts exist which give reason to suspect that the company has suffered a loss as a result of improprieties or gross breaches of the law or articles; and

4. no overriding interests of the company exist which would prevent the assertion of such damage claim.

(2) [1]The regional court of the company's registered seat shall decide on the petition seeking leave to file such action. [2]If the regional court maintains a chamber for commercial matters, such chamber shall have jurisdiction in lieu of the chamber for civil matters. [3]The state government may by regulation transfer jurisdiction for several regional courts to one regional court if such transfer is required to ensure uniformity of decisions. [4]The state government may transfer such power to the state ministry of justice. [5]The statute of limitation for the claim at issue is stayed by the filing of such petition until the petition has been dismissed by a final and binding decision or the period allowed for bringing an action has expired. [6]Before rendering its decision, the court shall provide the other party with an opportunity to comment on the matter. [7]Such decision may be appealed immediately. [8]Appeals on points of law are not permitted. [9]The company shall be made a party in the judicial proceedings deciding on the petition pursuant to paragraph (1) as well as in such action for damages.

(3) [1]The company may assert its claims for damages itself at any time; as soon as the company files such action, all pending proceedings instituted by the shareholders concerning that particular damage claim become inadmissible. [2]The company may decide to take over a pending action in which its own damage claims are being asserted by another party in its current state at the time when the action is taken over. [3]In the event of sentences 1 and 2, all former petitioners or claimants shall be joined as parties.

(4) [1]If the petition is granted, the action may only be brought before the court with jurisdiction pursuant to paragraph (2) within three months from the date on which the decision has become final and binding, provided that the shareholders have one more time to no avail requested the company to institute the necessary legal proceedings itself within an appropriate period of time. [2]The action shall be brought against the persons specified in § 147(1) sentence 1 with the aim of obtaining compensation for the company. [3]Interventions by shareholders are not permitted after the petition has been granted. [4]If more than one such action is brought, they shall be consolidated in order to be heard and decided together.

(5) [1]Such judgement shall be binding on the company and all other shareholders even if the action is dismissed in the judgement. [2]The same shall apply to a settlement to be made pursuant § 149; however, such settlement shall only be effective in favour of or against the company after the permission to file an action has been granted.

(6) [1]The person filing the petition shall bear the costs of the judicial proceedings if and to the extent that the petition is dismissed. [2]If the petition is dismissed for reasons of opposing interests of the company, of which the company could have informed the petitioner prior to filing the petition but failed to do so, then the company shall reimburse the petitioner for the costs. [3]In all other respects, a decision on the allocation on costs will be rendered in the final judgement. [4]If the company files an action itself or takes over a pending action brought by shareholders, it shall bear all costs incurred by the petitioner until such time and may, except for the three-year waiting period, withdraw its action on the conditions set forth in § 93 (4) sentences 3 and 4 only. [5]If the action is dismissed in whole or in part, the company shall reimburse the claimant for the costs to be borne by them unless the claimant obtained the court's permission to file an action by making false statements intentionally or by gross negligence. [6]Shareholders acting jointly as petitioners or party shall only be reimbursed for the costs of one attorney unless the engagement of another attorney was necessary to prosecute the action.

EXHIBIT A

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

REBECCA R. HAUSSMANN, trustee of Konstantin S. Haussmann Trust, and JACK E. CATTAN, derivatively on behalf of BAYER AG, Plaintiffs, v. WERNER BAUMANN, *et al.*, Defendants, - and - BAYER AG, Nominal Defendant.	Index No. 651500/2020 Justice Andrew Borrok, Part 53 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 22, 2023, and duly entered in the office of the Clerk of the Appellate Division, First Department, on June 22, 2023.

Dated: June 22, 2023
New York, New York

WACHTELL, LIPTON, ROSEN & KATZ

By: */s/ Noah B. Yavitz*

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Attorneys for Bank of America Corporation and BofA Securities, Inc.

Dated: June 22, 2023
New York, New York

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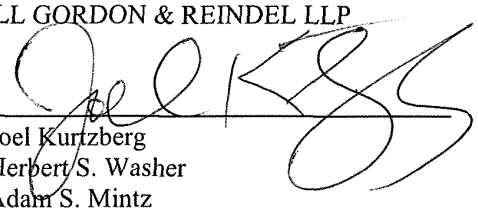
By: 

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Attorneys for Credit Suisse Group AG and Credit Suisse AG

CC: All Counsel of Record via NYSCEF

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, P.J., Kennedy, Scarpulla, Shulman, Higgitt, JJ.

513-
514

REBECCA R. HAUSSMANN, as Trustee of the KONSTANTIN S. HAUSMANN, TRUST, et al.,
Plaintiffs-Appellants,

-against-

WERNER BAUMANN, et al.,
Defendants-Respondents,

CHRISTIAN STRENGER, et al.,
Defendants.

BAYER AG,
Nominal Defendant-Respondent.

Index No. 651500/20
Case Nos. 2022-02491
2022-04806

Bottini & Bottini, Inc., New York (Albert Y. Chang of counsel), for appellants.

Wachtell, Lipton, Rosen & Katz, New York (William Savitt of counsel), for 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, Horst Baier, Robert Gundlach, and Bayer AG, respondents.

Davis Polk & Wardwell LLP, New York (Lara Samet Buchwald of counsel), for Bank of America Corporation and BofA Securities, Inc., respondents.

Cahill Gordon & Reindel LLP, New York (Joel Kurtzberg of counsel), for Credit Suisse Group AG and Credit Suisse AG, respondents.

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about February 3, 2022, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs. Order, same court and Justice, entered on or about October 25, 2022, which, to the extent appealable, denied plaintiffs' motion for leave to renew, unanimously affirmed, with costs.

Plaintiffs, who are shareholders of nominal defendant Bayer AG, commenced this derivative action in the New York Supreme Court in connection with Bayer AG's June 2018 $66 billion purchase of Monsanto Inc., the Delaware-incorporated, Missouri-based agricultural products corporation. Plaintiffs assert causes of action for breach of fiduciary duty under German law against defendants Bayer Corporation and certain current and former members of Bayer AG's Board of Management and Supervisory Board (collectively, the Bayer defendants), as aided and abetted by defendants Bank of America Corporation, BofA Securities Inc., Credit Suisse Group AG, Credit Suisse AG (collectively, the Bank defendants).

The complaint asserts subject matter jurisdiction based on New York Business Corporation Law §§ 626(a) and 1319(a)(2) and personal jurisdiction over each defendant under CPLR 302. The complaint alleges that Bayer AG, a German corporation, operates and conducts business in New York through six subsidiaries registered in the state and trades its American Depositary Receipts in the United States over-the-counter market, with thousands of shareholders living in New York. The complaint further alleges that the Monsanto acquisition was negotiated, financed, and closed in New York, with $57 billion in cash transferred to a New York bank account for distribution to Monsanto shareholders. With respect to plaintiffs' standing to assert these derivative claims, the complaint alleges that plaintiffs own Bayer AG common

stock. The complaint further alleges that the procedural provisions of the German Stock Corporation Act § 148 are inapplicable because compliance with Business Corporation Law § 626 pre-suit demand/demand futility procedures establishes jurisdiction in New York with respect to shareholder derivative suits.

The court correctly dismissed the complaint, finding that the internal affairs doctrine mandated dismissal for lack of standing. The internal affairs doctrine is a conflict of laws principle providing that "claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation" — in this case, Germany (*Ezrasons, Inc. v Rudd,* __ AD3d ___, 2023 NY Slip Op 02938 [1st Dept 2023]; *Davis v Scottish Re Group Ltd.*, 138 AD3d 230, 233 [1st Dept 2016], *revd on other grounds* 30 NY3d 247 [2017]). This Court has consistently invoked the internal affairs doctrine in derivative actions to apply foreign law on substantive issues, including those affecting a party's right to sue (*see e.g. Lerner v Prince*, 119 AD3d 122, 127-128 [1st Dept 2014]; *Hart v General Motors Corp.*, 129 AD2d 179, 183 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]).

Accordingly, we agree with Supreme Court that the internal affairs doctrine applies to this shareholder derivative action on behalf of a foreign corporation to make applicable relevant substantive German laws. Furthermore, we agree with Supreme Court's implicit finding that the German Stock Corporation Act § 148 is a substantive law rather than a procedural one and requires plaintiffs to seek leave from the German court to bring a derivative action. As plaintiffs concede, they failed to satisfy § 148; thus, they lack standing to maintain this action.

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 22, 2023

Susanna Molina Rojas
Clerk of the Court

EXHIBIT B

EXHIBIT B

Decision and Order of the Honorable Andrew S. Borrok on Motion 3, dated December 27, 2021, Appealed From, with Notice of Entry [pp. 8 - 27]

FILED: NEW YORK COUNTY CLERK 01/03/2022 09:30 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 01/03/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

REBECCA R. HAUSSMANN, trustee of Konstantin S. Haussmann Trust, and JACK E. CATTAN, derivatively on behalf of BAYER AG,

Plaintiffs,

- 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, CHRISTIAN STRENGER, BAYER CORPORATION, BOFA SECURITIES, INC., BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, SULLIVAN & CROMWELL LLP, LINKLATERS LLP, HORST BAIER, ROBERT GUNDLACH and CREDIT SUISSE AG,

Defendants,

- and -

BAYER AG,

Nominal Defendant.

Index No. 651500/2020
Mot. Seq. Nos. 003, 004, 005

Commercial Division Part 53
Justice Andrew Borrok

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that annexed hereto is a true and accurate copy of a Decision and Order, dated December 27, 2021, which was duly entered in this action on January 3, 2022, in the Office of the Clerk of the Supreme Court, New York County.

Dated: New York, New York
January 3, 2022

DAVIS POLK & WARDWELL LLP

By: */s/ Lara Samet Buchwald*

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FILED: NEW YORK COUNTY CLERK 02/03/2022 09:30 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

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FILED: NEW YORK COUNTY CLERK 02/03/2022 09:30 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

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FILED: NEW YORK COUNTY CLERK 02/03/2022 09:10 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **53**

Justice

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INDEX NO. 651500/2020

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 003 004 005

REBECCA R. HAUSSMANN, TRUSTEE OF KONSTANTIN S. HAUSSMANN TRUST, AND JACK E. CATTAN, DERIVATIVELY ON BEHALF OF BAYER AG,

Plaintiff,

- v -

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZUHLKE, SIMONE BAGEL-TRAH, NORBERT BISCHOFBERGER, ANDRE VAN BROICH, ERTHARIN COUSIN, THOMAS ELSNER, JOHANNA HANNEKE FABER, COLLEEN GOGGINS, HEIKE HAUSFELD, REINER HOFFMANN, FRANK LOLLGEN, WOLFGANG PLISCHKE, PETRA REINBOLD-KNAPE, DETLEF RENNINGS, SABINE SCHAAB, MICHAEL SCHMIDT-KIEBLING, OTMAR WIESTLER, NORBERT WINKELJOHANN, CLEMENS BORSIG, THOMAS FISCHER, PETRA KRONEN, SUE HODEL RATAJ, THOMAS EBELING, KLAUS STURANY, HEINZ GEORG WEBERS, CHRISTIAN STRENGER, BAYER CORPORATION, BOFA SECURITIES, INC.,BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, SULLIVAN & CROMWELL LLP, LINKLATERS LLP, BAYER AG, HORST BAIER, ROBERT GUNDLACH, CREDIT SUISSE AG

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 206, 209

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 207, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149,

FILED: NEW YORK COUNTY CLERK 02/03/2022 09:18 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

150, 151, 152, 199, 200, 201, 202, 203, 204, 205, 208, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252

were read on this motion to/for DISMISSAL.

Bank of America Corporation (**BAC**), BofA Securities, Inc. (**BofA Securities**, and, together with BAC, the **BofA Entities**), Credit Suisse Group AG (**CSGAG**), and Credit Suisse AG (**CSAG**, and, together with CSGAG, the **Credit Suisse Entities**, and the Credit Suisse Entities together with the BofA Entities, the **Banks**)'s motion to dismiss must be granted and the Second Amended Complaint (the **SAC**, NYSCEF Doc. No. 35) must be dismissed because this court lacks jurisdiction under CPLR 302(a)(1) and pursuant to CPLR 327 because this case has only a tenuous connection to New York and has a much greater connection to Germany where the case should have been brought.

The gravamen of the dispute in this shareholder derivative action is that the 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 (the **Moonshot Transaction**). The 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 (i) in structuring the Moonshot Transaction with cash and debt (i.e., as opposed to stock) to make Bayer unattractive to a potential purchaser of Bayer; (ii) by ultimately approving the Moonshot Transaction at the allegedly highly inappropriate $66 billion price; and (iii) by failing to properly assess the substantial exposures that Monsanto faced, all of which undeniably occurred elsewhere. Stated differently, 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. (*Cf. In re Renren, Inc. Deriv. Litig.*, 2020 WL 2564684 [Sup Ct, NY County 2020]). For the avoidance of doubt, the court does not have personal jurisdiction as against any of the individual director-defendants because none of them live here, conduct business here regularly or had contacts with New York that give rise to this dispute.

In addition, Bayer (hereinafter defined) is a German Company and German law governs this dispute. While the Commercial Division, New York County regularly hears disputes involving the application of foreign law and could certainly do so here, it is a greater burden on the New York court than it would be on a German court. All of the directors of Bayer are located outside of the United States. None live in New York. It is beyond cavil that defending this action in New York would hoist a substantial and unnecessary burden on the defendants, and Germany presents an alternative forum.[1] Thus, the burden on the New York court would be substantial in comparison to that on the German court and dismissal pursuant to CPLR 327 is therefore also appropriate. (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 [1988]; *see also Holzman v Guoqiang Xin*, 2015 WL 5544357 [SD NY 2015]).

Finally, Bayer AG's (**Bayer)** motion must also be granted because, pursuant to the internal affairs doctrine, the Plaintiffs (hereinafter defined) lack standing under German law to bring this

[1] *See Viking Glob. Equities, LP v Porsche Automobil Holding SE*, 101 AD3d 640 (1st Dept 2012) (the **Porsche Litigation**).

FILED: NEW YORK COUNTY CLERK 02/03/2022 09:18 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

action because the Plaintiffs made no attempt whatsoever to satisfy the prerequisite condition that they seek leave from the German court to bring this action and do not appear to have, in any event, sufficient holdings under German law.

The Relevant Facts and Circumstances

This case involves Bayer's 2018 alleged rushed $66 billion acquisition of Monsanto Inc. (**Monsanto**) consummated without proper due diligence at a grossly inflated price structured with substantial debt to prevent Bayer from being taken over, and in an attempt to entrench management. Bayer is a German corporation incorporated under the German Stock Corporation Act (**GSCA**) and headquartered in Germany. Pursuant to the GSCA, Bayer is run by a Board of Management and a Supervisory Board. Monsanto is a Missouri corporation.

According to Plaintiffs, the pharmaceutical industry was going through significant consolidation with companies using mergers and acquisitions to grow and gain products (NYSCEF Doc. No. 35, ¶23) rather than grow organically from within. Bayer was an attractive takeover candidate because of its broad shareholder base, profitability, cash flow, and minimal debt (*id.*, ¶25). Indeed, according to the Plaintiffs, rumors circulated as early as 2008 that Pfizer was considering a takeover of Bayer (*id.*). Bayer had also been involved in its own acquisitions and on multiple occasions had contemplated an acquisition of Monsanto. The Plaintiffs allege, however, that Bayer's long standing CEO, Marijn Dekkers, had opposed and prevented prior attempts to acquire Monsanto because of Monsanto's track record and controversial reputation including

FILED: NEW YORK COUNTY CLERK 02/03/2022 09:10 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

PCB, DDT and Agent Orange fiascos and the growing cancer controversy concerning Roundup (*id.*, ¶6).

In January 2016, Mr. Dekkers retired. He was succeeded by Werner Baumann, who worked alongside the Supervisory Board Chair Werner Wenning (NYSCEF Doc. No. 35, ¶ 3). Mr. Baumann and Mr. Wenning assured shareholders that they did not plan any radical changes (*id.*, ¶6). However, subsequently, in May 2016, in a complete about face, Bayer made an unsolicited offer to acquire Monsanto for $60 billion (*id.*). This $60 billion offer to acquire Monsanto was unsolicited and at a 44% premium over market value (*id.*, ¶7). This, according to the Plaintiffs, was done without proper due diligence and constituted a breach of fiduciary duty. According to Plaintiffs, Mr. Dekkers reluctance to consider a Monsanto acquisition was not without basis. Monsanto had been implicated in several controversies prior to Bayer's offer. The $60 billion offer was not accepted. Undeterred, and allegedly out of fear based on the news that, in April 2016, Pfizer's pending $160 billion acquisition of Allergan was terminated (*id.*, ¶26), as a result of which Bayer might now be a Pfizer target, Bayer increased its offer by $6 billion and consummated the Moonshot Transaction for $66 billion.

Plaintiffs allege that the Moonshot Transaction was "the worst merger in history – certainly in German history" and that it was motivated by "an attempt to entrench the Bayer Board and CEO and protect them from a possible takeover of Bayer, which they had learned might be in the air and were determined to avoid as it would cost them their lucrative and prestigious positions" (NYSCEF Doc. No. 35, ¶9). The $60 billion offer was denounced by Bayer's owners and

shareholders (*id.*, ¶8). They further allege that Mr. Baumann and Mr. Wenning "wanted to use the Monsanto acquisition as a 'poison pill' to ward off a feared takeover of Bayer that would cost them – and all their supervisors – their positions of power, prestige and profit atop Bayer" (*id.*, ¶ 22). More specifically, Plaintiffs allege that Moonshot Transaction was structured to be paid in all cash (*id.*, ¶27), and financed with substantial debt which a potential acquirer would have to assume, thus acting as a poison pill so that Bayer could not be acquired (*id.*) and so that a shareholder vote could be avoided because no new Bayer shares were issued (*id.*, ¶28).

Bayer hired New York based Wachtell Lipton Rosen & Katz to do the deal and the deal was closed at Sullivan & Cromwell also in New York (NYSCEF Doc. No 35, ¶ 272; NYSCEF Doc. No. 175, at 5). None of the defendants were present at the closing and no board meetings took place in New York in connection with the due diligence or otherwise in authorizing the deal. The debt was raised from the defendant banks, denominated in US dollars and governed by NY law. (NYSCEF Doc. No. 175, at 6). Bayer is a German company with ADRs offered in the US. The Plaintiffs allege that they are "in the process of having their shares registered pursuant to their written request under Section 67(1)" of the GSCA. Monsanto was a Missouri based company.

As a result of the Moonshot Transaction, Bayer has been "crushed by a tsunami of Monsanto legacy tort suits and legacy liabilities" which has cost Bayer over $12 billion and allegedly collapsed Bayer's stock price (NYSCEF Doc. No. 35, ¶¶9, 11). In April 2019, Bayer's shareholders voted 55% to show no confidence in Bayer's Board of Management and Supervisory Board, "the first time in history such a vote occurred in a German public company"

(*id.*, ¶31). Bayer's stock hit an all-time low in in 2020 and Mr. Wenning quit his position as the Supervisory Board Chair (*id.*, ¶15).

Bayer's wholly owned subsidiary Bayer Corporation operates in the United States. Plaintiffs in this case are the alleged owners of 2,317 shares of Bayer's German common stock – based on US ADR holdings. The individual defendants are/were members of Bayer's Board of Management or Supervisory Board or directors/officers of a subsidiary or controlled entity of Bayer (the individual defendants, together with Bayer Corporation, hereinafter, collectively, the **Bayer Defendants**).

Plaintiffs brought this derivative action alleging that the individual defendants failed to obtain adequate information on the Moonshot Transaction, breached their duties to Bayer and violated GSCA §117, and abused their control of Bayer to advance their personal interests. Plaintiffs also allege that the Banks influenced the individual defendants to act to Bayer's disadvantage and were negligent in their duties to Bayer in violation of GSCA §117, and that the Board of Management and Supervisory Board also breached their fiduciary duties to Bayer by violating GSCA §117. Plaintiffs assert that jurisdiction is proper here under New York's long arm statute. As discussed more fully below they are not correct.

Discussion

On a motion to dismiss, "the pleading is to be afforded a liberal construction" and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 233-234 [1st Dept 1994]). CPLR 3211(a)(1) provides for dismissal on the ground that "a defense is founding upon documentary evidence." "The documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law" (*Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]). CPLR 3211(a)(7) provides for dismissal on the ground that "the pleading party fails to state a cause of action."

The SAC Must Be Dismissed Against the Bank Defendants (Mtn. Seq. No. 003)

The Banks argue that the SAC must be dismissed as against them because (i) this matter should be heard in Germany, (ii) the Plaintiffs named the wrong entities in the SAC, and (iii) the SAC fails to state a cause of action as against the Banks.

CPLR 327 codifies the common law doctrine of forum non conveniens. Under CPLR 327, a court may dismiss an action if it "finds that in the interest of substantial justice the action should be heard in another forum." The resolution of a motion to dismiss on forum non conveniens grounds is left to the sound discretion of the trial court *(Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479).

FILED: NEW YORK COUNTY CLERK 02/03/2022 09:18 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

Courts consider the burden on New York courts, potential hardship to the defendant, the unavailability of an alternative forum in which the plaintiff may bring suit, the residence of the parties, and whether the transaction at issue arose primarily in a foreign jurisdiction (*id.*). Significantly, the plaintiff's choice of forum should rarely be disturbed unless the balance is strongly in favor of the defendant, and a substantial nexus between New York and the action is lacking (*Waterways, Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]).

Dismissal of the SAC under CPLR 327(a) is appropriate. German law applies to this derivative action involving a German company where the decisions at issue and where the alleged breach of fiduciary took place in Germany. None of the individual defendants are located in New York. The current members of Bayer's Board of Management all live in Europe, and no member has lived in New York during their service on the board (Aff. of Dr. Markus Arnold, Head of Corporate Office at Bayer, NYSCEF Doc. No. 59, ¶5). Additionally, every member of the Board of Management who served during from January 1, 2016 until the Moonshot Transaction closed on June 7, 2018 resided in Europe and no member resided in New York during the time they served on the board (*id.*, ¶6). All of the meetings of the Board of Management from January 1, 2016 through February 9, 2021 took place in Germany and Bayer's Board of Management's books and records are maintained in Germany (*id.*, ¶¶7-8). Of the members of Bayer's Supervisory Board, both the current members and the members who served between January 1, 2016 and June 7, 2018, the majority reside in Europe and none reside in New York (Aff. of Dr. Stephan Semrau, Head of Law Corporate of Bayer, NYSCEF Doc. No. 57, ¶¶6-7). The meetings

of the Supervisory Board between January 1, 2016 and February 7, 2021 all took place in Germany, and the board's books and records are maintained in Germany (*id.*, ¶¶8-9).

With regard to the investment bankers involved with the Moonshot Transaction, BAC is a Delaware-incorporated entity with its principal executive offices in North Carolina (Aff. of Lara Buckwald, Counsel for the BofA Entities, NYSCEF Doc. No. 43, ¶7). CSGAG is a Switzerland-incorporated entity with its headquarters in Switzerland (Aff. of Daniel Kläy, Director of CSGAG, NYSCEF Doc. No. 53, ¶2). But the Bayer Defendants received the advice of the banks in Germany, where the Bayer Defendants were located and where all meetings of the Supervisory and Management Board occurred.

Additionally, although, the Commercial Division in New York County is well equipped to apply foreign law, the burden here is significant (*see Estate of Kainer v UBS AG*, 175 AD3d 403, 405 [1st Dept 2019]) and Germany presents an adequate alternative forum (*see Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 428 [1st Dept 2014]). As noted above, the Plaintiffs' argument that because of the costs involved, no suit could be brought there fails. The Porsche Litigation is proof positive that Germany presents a suitable alternative forum and in fact, Germany 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 (*Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 178 [1st Dept 2004]). Therefore, dismissal pursuant to CPLR 327 is appropriate.

For completeness, the Banks' argument that the SAC must be dismissed against them because they are not the entities which Bayer engaged to provide advisory and financial services (i.e., that the Plaintiffs sued the wrong entities) fails at this stage of the proceedings. The basis for the Plaintiffs' SAC does not rest on whether the Banks violated the terms of the retention agreements. The Plaintiffs allege that, under the GSCA, the Banks unduly exerted influence on the Bayer Defendants to act to the disadvantage of the company and its shareholders (*see* GSCA §117). Given that the Banks ***themselves*** indicated in their own public disclosure statements that they had represented Bayer in the Moonshot Transaction, they cannot now merely disavow those representations based on engagement letters (NYSCEF Doc. Nos. 45, 46 and 52) with their affiliates to provide advisory services. Were this case to go forward in this Court, should discovery prove that they did not in fact provide advisory services, they might well be entitled to dismissal on this ground as well.

The SAC Must Be Dismissed against the Bayer Defendants (Mtn. Seq. No. 004)

The Bayer Defendants also argue that this action must be dismissed pursuant to CPLR 327. For the reasons set forth above, they are correct and the SAC must be dismissed against the Bayer Defendants.

Additionally, the Bayer Defendants allege that this court lacks personal jurisdiction over them as well. This is also correct.

FILED: NEW YORK COUNTY CLERK 02/03/2022 09:38 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

CPLR 302(a)(1) provides for jurisdiction over any non-domiciliary who, either in person or through an agent, transacts business within the state or contracts to supply goods or services within the state. The parties do not dispute that the individual defendants did not come to New York to transact business with respect to the Moonshot Transaction, and the Plaintiffs have not sufficiently alleged that the Bayer Defendants transacted business in New York through an agent related to the harms alleged as to the Moonshot Transaction.

The seminal case discussing long arm jurisdiction established through an agent is *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 (1988). In *Kreutter*, Albert Kreutter, a resident of New York, invested $70,000 in Brian McFadden and Company, Inc. (**McFadden Company**), a Texas corporation headquartered in New York City. After various transfers involving McFadden Oil Corporation (**McFadden Oil**) and Harmony Drilling Company, Inc. (**Harmony**), both Texas corporations, and Eugene Downman, a Texas resident who owned Harmony and exercised management control over McFadden Oil, McFadden Company paid the balance of the funds to Harmony to buy certain oil rights to be leased back to Harmony. Mr. Kreutter, however, received nothing for his money, so he sued in New York state court.

Mr. Downman argued the court lacked jurisdiction over him personally because he did not transact business in New York nor as the corporate agent of McFadden Oil or Harmony. He further argued that because Mr. Kreutter's claims did not arise out of the McFadden Oil's business, but out of the leaseback investment with Harmony and Harmony did not transact business within New York, jurisdiction was not proper in New York.

FILED: NEW YORK COUNTY CLERK 02/03/2022 09:18 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

The Court disagreed, holding that NY jurisdiction was proper. The McFadden Company, in which Mr. Kreutter invested, had its headquarters in New York and engaged in purposeful activities in New York, including in relation to Mr. Kreutter's transaction, which was for the benefit of, and with the knowledge and consent of, the Texas defendants, which defendants exercised control over the New York-headquartered McFadden Company. The Court reasoned that jurisdiction over McFadden Oil was proper because the sale-leaseback of the oil rig was presented to Mr. Kreutter as a transaction with McFadden Oil and that jurisdiction over Harmony was proper because Harmony transacted business in the state. The Court further explained that Harmony used the McFadden Company to secure Mr. Kreutter's investment, paid the McFadden Company for its service, and received the balance of Mr. Kreutter's invested funds directly from the McFadden Company. Lastly, the Court rejected Harmony and Mr. Downman's argument that the conduct of McFadden Company could not be attributed to them because there was no agency relationship between them because the sole reason that Mr. Kreutter did not know about the relationship with the McFadden Company is because Harmony and Downman used McFadden Oil to conceal their involvement. Thus, the Court of Appeals found an agency relationship and held that jurisdiction was proper over all defendants.

This is not *Kreutter*. 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. Investors in Bayer—a German company, based in Germany, and listed on German stock exchanges—are from all over the world, and the decision to keep the investment in Bayer and not sell based on the understanding that Bayer would not make changes in its corporate direction was not tied to any particular New York-related contact or activity. Thus, dismissal as to the Bayer Defendants based on lack of personal jurisdiction is also appropriate.

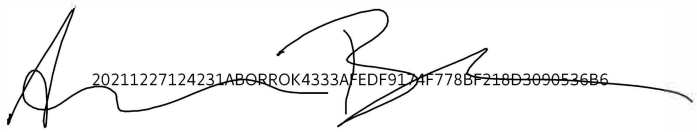
The SAC Must be Dismissed Against Bayer (*Mtn. Seq. No. 005)*

This lawsuit also must be dismissed against Bayer because the Plaintiffs lack standing under German law. As Bayer rightfully asserts, the internal affairs doctrine requires application of German law to determine whether the Plaintiffs have standing to bring this derivative suit (*see Renren, Inc. v XXX*, 67 Misc.3d 1219(A), at *24 [Sup Ct, NY County 2020]). Under GSCA §148, shareholders whose aggregate shareholdings equal or exceed one percent of the registered share capital may request the court's permission to assert claims, and leave shall be granted if (i) the shareholders provide evidence that they purchased the shares prior to the point in time they became aware of the alleged breaches or alleged damages, (ii) the shareholders provide evidence that they called upon the company to take legal action, (iii) there are facts justifying the suspicion that the damages were incurred due to dishonest conduct or gross violation of the law or the articles of association, and (iv) there are no overriding reasons that the company's interests would preclude the assertion of the claim for compensatory damages (*see* NYSCEF Doc. No. 112). The 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

FILED: NEW YORK COUNTY CLERK 02/03/2022 09:18 AM INDEX NO. 651500/2020
NYSCEF DOC. NO. 258 RECEIVED NYSCEF: 02/03/2022

permission from a German court to assert their claims. The Plaintiffs thus, under applicable German law, lack standing to bring this action, and the action must be dismissed.

It is accordingly hereby ORDERED that the SAC is dismissed in its entirety.



12/27/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

EXHIBIT C

EXHIBIT C

Decision and Order of the Honorable Andrew S. Borrok, dated October 19, 2022, Appealed From, with Notice of Entry [pp. 82 - 90]

FILED: NEW YORK COUNTY CLERK 10/21/2022 05:18 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 290 RECEIVED NYSCEF: 10/21/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

REBECCA R. HAUSSMANN, trustee of Konstantin S. Haussmann Trust, and JACK E. CATTAN, derivatively on behalf of BAYER AG,

Plaintiffs,

- 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, CHRISTIAN STRENGER, BAYER CORPORATION, BOFA SECURITIES, INC., BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, SULLIVAN & CROMWELL LLP, LINKLATERS LLP, HORST BAIER, ROBERT GUNDLACH and CREDIT SUISSE AG,

Defendants,

- and -

BAYER AG,

Nominal Defendant.

Index No. 651500/2020
Mot. Seq. No. 006

Commercial Division Part 53
Justice Andrew Borrok

FILED: NEW YORK COUNTY CLERK 10/26/2022 05:18 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 290 RECEIVED NYSCEF: 10/27/2022

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that annexed hereto is a true and accurate copy of a Decision and Order of the Supreme Court, New York County, dated October 20, 2022, and entered in the Office of the Clerk of that Court on October 20, 2022.

FILED: NEW YORK COUNTY CLERK 10/26/2022 05:18 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 290 RECEIVED NYSCEF: 10/27/2022

Dated: New York, New York
October 21, 2022

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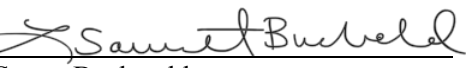
By: 

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FILED: NEW YORK COUNTY CLERK 10/26/2022 05:18 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 290 RECEIVED NYSCEF: 10/27/2022

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FILED: NEW YORK COUNTY CLERK 10/20/2022 05:18 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 290 RECEIVED NYSCEF: 10/20/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

----------X

REBECCA R. HAUSSMANN, TRUSTEE OF KONSTANTIN S. HAUSSMANN TRUST, AND JACK E. CATTAN, DERIVATIVELY ON BEHALF OF BAYER AG,

Plaintiff,

- v -

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZUHLKE, SIMONE BAGEL-TRAH, NORBERT W. BISCHOFBERGER, ANDRE VAN BROICH, ERTHARIN COUSIN, THOMAS ELSNER, JOHANNA HANNEKE FABER, COLLEEN A. GOGGINS, HEIKE HAUSFELD, REINER HOFFMANN, FRANK LOLLGEN, WOLFGANG PLISCHKE, PETRA REINBOLD-KNAPE, DETLEF RENNINGS, SABINE SCHAAB, MICHAEL SCHMIDT-KIEBLING, OTMAR D. WIESTLER, NORBERT WINKELJOHANN, CLEMENS A.H. BORSIG, THOMAS FISCHER, PETRA KRONEN, SUE HODEL RATAJ, THOMAS EBELING, KLAUS STURANY, HEINZ GEORG WEBERS, CHRISTIAN STRENGER, BAYER CORPORATION, BOFA SECURITIES, INC.,BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, SULLIVAN & CROMWELL LLP, LINKLATERS LLP, BAYER AG, HORST BAIER, ROBERT GUNDLACH, CREDIT SUISSE AG

Defendant.

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INDEX NO. 651500/2020

MOTION DATE N/A

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

HON. ANDREW S. BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 277, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 294, 295

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The Plaintiffs' motion for leave to reargue and renew this Court's decision and order dated December 27, 2021 (the **Prior Decision;** NYSCEF Doc. No. 255) must be denied because (i) the Plaintiffs do not identify any matters of fact or law that the Court allegedly overlooked or miscomprehended (CPLR 2221[d]) and (ii) the Plaintiffs do not identify new facts that were not

offered on the prior motion with reasonable justification for their failure to present such facts on the prior motion (CPLR 2221[e]).

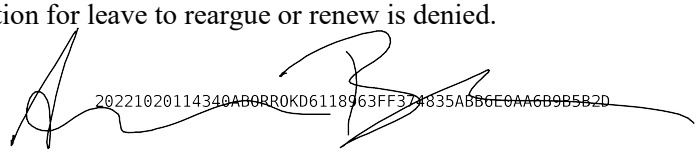
Simply put, the Plaintiffs seek to reargue and renew the Prior Decision solely to the extent that it dismissed this action on the grounds of *forum non conveniens* pursuant to CPLR 327(a), arguing that such dismissal was improper under CPLR 327(b) and New York General Obligations Law § 5-1402. In sum and substance, they argue that dismissal was improper because the action arises from or relates to the Depository Agreement and the Offering Memorandum. Significantly, this argument was not raised on the prior motion and is waived. Thus, denial of the motion is required.

In any event, were the court to consider these new agreements, the action still would have been dismissed. The gravamen of the alleged conduct sounds in breach of fiduciary duty and aiding and abetting breach of fiduciary duty by the defendants in causing Bayer, a venerable German company, to approve the acquisition of Monsanto (NYSCEF Doc. No. 255, at 2). These claims would be governed by German law and this case was dismissed on multiple grounds – *i.e.,* lack of personal jurisdiction (*id.,* at 3*,* citing *cf. In re Renren, Inc. Deriv. Litig.*, 2020 WL 2564684 [Sup Ct, NY County 2020]), lack of standing (under the internal affairs doctrine pursuant to German law), **and** pursuant to CPLR 327 (a) *forum non conveniens*. Thus, the motion must be denied.

The court has considered the parties remaining arguments and finds them unavailing.

FILED: NEW YORK COUNTY CLERK 10/20/2022 05:18 PM INDEX NO. 651500/2020
NYSCEF DOC. NO. 290 RECEIVED NYSCEF: 10/20/2022

It is hereby ORDERED that the Plaintiffs' motion for leave to reargue or renew is denied.



10/19/2022
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
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APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

EXHIBIT D

EXHIBIT D

To Be Argued by:
Albert Y. Chang
Time Requested: 15 Minutes

New York County Clerk's Index No. 651500/2020

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case Nos.
2022-02491
2022-04806

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

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFFS-APPELLANTS REBECCA R. HAUSSMANN, TRUSTEE OF KONSTANTIN S. HAUSSMANN TRUST, AND JACK E. CATTAN

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Defendants-Respondents,

and

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

Defendants.

BAYER AG,

Nominal Defendant-Respondent.

Table of Contents

Table of Authorities

Cases

New York Statutes

German Statutes

Treatises

Law Review Articles

Other Authorities

PRELIMINARY STATEMENT

These consolidated appeals seek reversal of two orders of the Commercial Division (1) dismissing a shareholder derivative action brought on behalf of Bayer AG ("Bayer"); and (2) denying leave to renew and reargue. Plaintiffs-Appellants Rebecca R. Haussmann and Jack E. Cattan ("Plaintiffs"), who reside in California and New York, respectively, asserted breach-of-fiduciary-duty claims against Bayer's Supervisors and its two top Managers (together, the "Directors" and, with Bayer Corporation, the "Bayer Defendants"). As residents of New York and the United States, Plaintiffs are "presumptively entitled" to sue in a New York court and to invoke its jurisdiction, conferred by §626 of the Business Corporation Law ("BCL"). *Broida v. Bancroft*, 103 A.D.2d 88, 89 (2d Dep't 1984). Plaintiffs' invocation of New York's jurisdiction and venue is particularly appropriate because their derivative claims arose from Bayer's $66 billion purchase of Monsanto Inc. (the "Acquisition"), which was negotiated, financed, and closed in New York, the "epicenter" of this saga—what industry experts dubbed as the "*worst acquisition in history*." R185–189 (¶32); R240–241 (¶141); R320–322 (¶¶273–274).[1]

Subjecting Bayer to tens of billions of dollars in liability from Monsanto's Roundup-cancer litigations, the Acquisition was born of an improper motive to

[1] Citations to "R___" are to pages of the Record. The allegations in Plaintiffs' Second Amended Verified Shareholder Derivative Complaint ("SAC") (R158–359), are cited as "¶¶___" in parentheticals following the Record citations. All emphases in quoted texts are added, and all internal punctuations are omitted.

entrench the Bayer Directors, who sought to avoid a takeover by Pfizer, Inc. R180 (¶¶25–27). The Directors caused Bayer to pay cash for Monsanto and financed the Acquisition with debt, including a $50-plus billion loan brokered by Bayer's New York-based bankers. R320–322 (¶¶273–274). That huge debt operated as a "poison pill," making Bayer "unacquirable," in the words of Defendant Werner Wenning (Chairman of the Supervisory Board), and allowing the Directors to remain in their positions of power and profit. R182 (¶27), R223–225 (¶¶100–101), R286 (¶219).

While Bayer is incorporated in Germany, it started operating in Albany, New York in the mid-19th century (R213 (¶70)), and conducts business in New York today through six subsidiaries—all registered to do business here—including Bayer Crop Science, Inc. ("BCS"), which is incorporated in New York. R213–214 (¶72). Widely known as the maker of aspirin, Bayer generates tens of billions of dollars in annual revenues in the United States, and its American Depositary Receipts ("ADRs") are traded here—with thousands of shareholders residing in New York.[2] *See* R311–312 (¶256); R318 (¶¶269–270).

The Acquisition was centered in New York. The Bayer Directors hired New York-based law firms and banks (the "Bank Defendants" (R225–237 (¶¶100–132)))

[2] With Bank of New York Mellon ("BNY Mellon") acting as depositary, Bayer's ADRs are traded in the over-the-counter market in the United States and are owned by thousands of New York-based investors. *See* R311–312 (¶256); R318 (¶269). In a Depositary Agreement (R602–605) with BNY Mellon, Bayer "consents and submits to the non-exclusive jurisdiction of any state or federal court in the County of New York." R605; *see also* R312 (¶258).

to work on all aspects of the Acquisition between 2016 and 2018. The Bayer Directors and their agents conducted negotiations in New York, signed the Merger Agreement in New York, and financed the Acquisition in New York, including making a $15 billion bond offering in June 2018 to New York investors.[3] R320–322 (¶¶273–274). The Acquisition was closed in New York, with $57 billion in cash being transferred to a bank account in New York for distribution to Monsanto shareholders. R2528–2532; R321–322 (¶274).

Despite the New York-centric nature of the Acquisition, the lower court dismissed this action—effectively depriving Plaintiffs of their day in court—based on the so-called "internal-affairs doctrine," *forum non conveniens*, and lack of personal jurisdiction. The lower court erred on all three counts.

The Internal-Affairs Doctrine. Invoking this doctrine, the lower court chose to apply German law, specifically, §148 of the German Stock Corporation Act ("GSCA"), whose title reads "*Court Procedure* for Petitions Seeking Leave to File an Action for Damages." R313–314 (¶260). The lower court held that Plaintiffs lacked standing to sue under German law because they failed to follow GSCA §148 and seek permission from a German court. R26–27. In so holding, the lower court failed to apply BCL §1319, which imposes New York's gatekeeping rules governing

[3] In the Offering Memorandum, Bayer "irrevocably submit[s] to the non-exclusive jurisdiction of … any federal or state court in … Manhattan" in any action "arising out of or relating to the Notes or the Fiscal Agency Agreement." R2440–2441.

shareholder derivative actions, including §626, on all derivative actions—whether they involve domestic or foreign corporations. And the lower court took away the protection for investors provided by the New York Legislature through BCL §626: conferring standing to bring derivative actions to all "holder[s] of shares … or of a beneficial interest in such shares"—without regard to whether they comply with the procedures provided by GSCA §148 or any other law.

The lower court's disregard of §1319 is error. Indeed, §1319, together with other provisions in the BCL, constitute a statutory scheme (collectively, the "Foreign Corporation Statutes") to apply select provisions of New York substantive law to foreign corporations—as if they are incorporated in New York. This statutory scheme regulates certain discreet aspects of the "*internal affairs*" *of foreign corporations that choose to do business in New York by mandating the application of certain BCL provisions* to those "foreign corporation[s] …, [their] directors, officers and shareholders." BUS. CORP. LAW §1319(a). And one such provision is BCL §626—New York's procedure for shareholder "derivative action[s] brought in the right of the corporation to procure a judgment in its favor." *Id.* §1319(a)(2).

This legislative intent—to regulate foreign corporations doing business in New York—is clearly manifested in §1319's text and its "bill jacket" materials.[4]

[4] Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the New York State and New York City Bar Association*, at 32–35 (Jan. 25, 1961) (cited as "*Joint Report*"). An excerpt of this Bill Jacket, including this Joint Report, is submitted as Addendum A.

The Foreign Corporation Statutes reflect the New York Legislature's judgment in balancing "the interests of shareholders, management, employees, and the overriding public interest."[5] This statutory scheme operates as a window to the legal world—providing a convenient and sophisticated legal system for the adjudication of disputes involving actors in modern world commerce, including foreign corporations, large and small, as plaintiffs or defendants. The courts are duty-bound to enforce these statutory provisions and to effectuate the intent of the Legislature. *See Irvine v. N.Y. Edison Co*., 207 N.Y. 425, 434 (1913). Here, the Legislature's imposition of New York's laws on foreign corporations doing business here is particularly important in light of New York's status—recognized by the courts—as the legal, commercial, and financial center of the world.[6]

In fact, for over a century, our appellate courts have faithfully implemented the Legislature's scheme to regulate foreign corporations. As the Court of Appeals recognized in the 1915 case of *German-American Coffee Co. v. Diehl*, 216 N.Y. 57 (1915) (Cardozo, J.), and reaffirmed in the 2021 case of *Aybar v. Aybar*, 37 N.Y.3d 274 (2021), BCL's Article 13 effectively requires foreign corporations to consent to the application of New York law as a pre-condition to doing business here. Under *German-American Coffee*'s consent regime, this Court in *Culligan Soft Water Co.*

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

[6] *See Carlyle CIM Agent, L.L.C. v. Trey Res. I, LLC*, 148 A.D.3d 562, 564 (1st Dep't 2017).

v. Clayton Dubilier & Rice LLC issued on-point holdings that control the outcome of this appeal:

(1) New York's Foreign Corporation Statutes trump the common-law internal-affairs doctrine; and

(2) as mandated by BCL §1319, §626 governs shareholder derivative actions brought on behalf of foreign corporations in New York courts.

See 118 A.D.3d 422, 422–23 (1st Dep't 2014). *Culligan* requires that "the issue of plaintiffs' standing to bring a shareholder derivative action [be] governed by *New York law*"—*not the law of any foreign corporation's place of incorporation*. *Id.*

Independent of Article 13's consent regime, New York's appellate courts have invoked other doctrines, such as the settled rule applying forum law to procedural issues, to prevent wayward fiduciaries of foreign corporations from escaping New York's jurisdiction over derivative actions. *See Davis v. Scottish Re Grp. Ltd*., 30 N.Y.3d 247 (2017); *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*"). The Court of Appeals in *Davis* and the Second Department in *HSBC* have held that BCL §626's rules and procedures apply to derivative actions brought in New York on behalf of foreign corporations, displacing any procedural rules provided by the laws of such corporations' places of incorporation. Under *Davis* and *HSBC*, GSCA §148's requirements governing standing are procedural in nature and are thus applicable only to shareholder derivative actions brought in German courts. GSCA §148 is inapplicable in New York courts.

Contrary to these binding precedents and the statutory directives requiring the application of BCL §626 to this action, the lower court applied GSCA §148. This erroneous application of foreign law frustrates the New York Legislature's intent to insist that foreign corporations doing business in New York, as well as their directors and officers, be subject to New York's jurisdiction and its rules for shareholder derivative actions. As a result of the lower court's dismissal, Bayer's New York-based shareholders are left without remedy against its wayward fiduciaries for grave violations of their duties that have caused Bayer to lose tens of billions of dollars and suffer a horrific decline in shareholder value. This Court should reverse.

Forum Non Conveniens. In granting the CPLR 327(a) motions, the lower court exceeded its statutory power to dismiss actions based on *forum non conveniens* because Subsection (b) of CPLR 327 prohibits the lower court from dismissing an action that "arises out of or relates to [an] … agreement or undertaking to which [General Obligations Law ("GOL") §5-1402] applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part." CPLR 327(b). The lower court refused to correct this error by denying Plaintiffs leave to renew or reargue the motions to dismiss based on the two underlying agreements—Bayer's Depositary Agreement and Offering Memorandum, both of which contained the consents to New York jurisdiction and to the application of New York law, as required by GOL §5-1402.

In any event, even if CPLR 327(b) is inapplicable, the lower court erred in disregarding the "presumptive entitlement" of Plaintiffs—one of whom resides in New York—to invoke a New York court's jurisdiction over derivative actions conferred by the Legislature. The lower court also failed to hold Defendants to their heavy burden of overcoming the presumption favoring a New York forum by submitting actual evidence of inconvenience or hardship.

These errors require reversal.

Personal Jurisdiction. Plaintiffs alleged in their verified SAC that Bayer conducts extensive business in New York, that its executive team was present in New York in connection with its $66 billion Acquisition and its aftermath, and that the Bayer Directors managed every aspect of the Acquisition through the executive team and Bayer's agents in New York. *E.g.*, R319–323 (¶¶271–278); R611. The lower court, however, disregarded these detailed allegations, as well as the New York-centric nature of the Acquisition: it was in New York where the Acquisition was negotiated, financed, and closed. *Id*. Without access to New York's capital markets, law firms, and bankers, the Acquisition would not have taken place.

Instead, the lower court dismissed the Directors *en masse* without any analysis of their individual New York contacts, and without giving Plaintiffs leave to conduct jurisdictional discovery. This Court should reverse and remand.

QUESTIONS PRESENTED

Question 1: Do New York's Foreign Corporation Statutes (*i.e.*, BCL §§1319 and 626) govern the issue of shareholders' standing to bring derivative actions, as confirmed by *German-American Coffee*, *Davis*, *Culligan*, and *HSBC*, thus overriding any contrary provisions in GSCA §148, as well as the internal-affairs doctrine? The lower court answered "no," but the correct answer is "yes."

Question 2: Part (i), does CPLR 327(b) prohibit the lower court from granting a *forum non conveniens* motion because Plaintiffs' derivative claims arise from and relate to Bayer's Depositary Agreement and Offering Memorandum, both of which were pleaded in the SAC? Part (ii), should the lower court have granted leave to Plaintiffs to raise the CPLR 327(b) argument under CPLR 2221 and in the interest of justice, because that argument—pertaining to the court's statutory power—was neither waived nor waivable? Part (iii), must the lower court deny the CPLR 327(a) motions because the Acquisition has a substantial nexus to New York, because Plaintiffs are presumptively entitled to bring this action in a New York court, and because Defendants submitted no actual evidence of inconvenience or hardship of litigating in New York? The lower court answered "no" to all three parts, but the correct answer is "yes" to all three parts.

Question 3: Does the lower court have jurisdiction over the Bayer Defendants under CPLR 302? The lower court answered "no," but the correct answer is "yes."

STATEMENT OF THE CASE

I. The Relevant Facts

A. Bayer's Background and Operations in New York

Bayer started operating in New York in the mid-19th century. R213 (¶70). Today, Bayer conducts business in New York through six subsidiaries—all registered to do business in New York. R213–214 (¶72). Because of Monsanto's terrible reputation, Bayer discarded Monsanto's name and integrated the acquired business into the New York-incorporated BCS. R298–299 (¶¶232–234).

Bayer obtains billions in revenue from New York selling a wide range of products, including aspirin. *See* R318 (¶270). Bayer's stockholders and businesses are more concentrated in the United States than Germany. *Id.* Close to 30% of Bayer shares are held by United States residents, as compared to 20% in Germany. *Id*. Bayer has 15 operations in the United States, and only 14 in Germany. *Id*. In 2019, for example, Bayer's United States sales exceeded $14.5 billion, compared to German sales of approximately $2.7 billion.[7] *See id*. Bayer's United States assets are valued at 350% greater than those in Germany. *Id*.

Bayer's ADRs are traded in the over-the-counter market in the United States and are owned by thousands of New York-based investors. R311–312 (¶256); R318

[7] Bayer's public disclosures do not separate its New York revenues from its United States numbers. New York has about 8% of the United States gross domestic product and 6% of the United States population. Bayer's United States sales are nearly $14 billion. A fair extrapolation reveals that Bayer generates at least $1 billion in revenues from New York.

(¶269). BNY Mellon acts as depositary. R318 (¶269). The Depositary Agreement (R602–605) provides that it "shall be governed by the laws of the State of New York," and that Bayer "consents and submits to the non-exclusive jurisdiction of any state or federal court in the County of New York." R605; R312 (¶258).

For years, Bayer executives exploited New York's capital markets. For example, during the five-year period between 2015 and 2019 alone, Bayer executives participated in at least 28 investor events in New York. R595.

Bayer and its subsidiaries are also frequent users of courts in New York. Bayer AG commenced at least five cases in federal court in Manhattan between 1988 and 2011. R591. In addition, Bayer Corporation has commenced at least 55 cases in courts in New York (15 in federal courts and 40 in state courts). R591–595.

B. The Acquisition's Substantial Nexus to New York

New York has been the "epicenter" of the Acquisition from the start. R241 (¶141). Monsanto was listed on the New York Stock Exchange ("NYSE"). R319 (¶271). The Acquisition was negotiated, signed, financed, and closed in New York during 2016–18—two years of constant work by Bayer's executive team and its New York-based law firms and banks, all acting as the agents of Bayer's Directors. *See* R319–322 (¶¶271–274). Upon closing, Monsanto's business was folded into BCS—Bayer's New York-incorporated subsidiary. *See* R2514–2515; R2521; R2534.

Beginning in 2016, Bayer's executive team, including Werner Baumann

(Bayer's CEO (R216 (¶75))), travelled to New York to negotiate with Monsanto. R611. Both Bayer and Monsanto were represented by New York law firms: Sullivan & Cromwell LLP ("S&C") for Bayer and Wachtell Lipton Rosen & Katz ("Wachtell") for Monsanto. R319 (¶271). Under the direction of Baumann and other Bayer Defendants, the New York-based law firms and investment banks—as Bayer's agents—worked on all aspects of the transaction, including conducting due diligence on Monsanto's operations and securing financing, in their New York offices. R320–322 (¶¶273–274). In fact, 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." R147–148; R393.[8]

Key deal negotiations took place in New York. For example, as reported by Bloomberg, Baumann and his assistants conducted a final round of negotiations with Monsanto's executives in New York in September 2016:

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

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

[8] The Bank Defendants also admitted that Credit Suisse Securities (USA) LLC's "headquarters is and has been located at Eleven Madison Avenue, New York, New York 10010," and that its "principal place of business is and has been in New York." R393.

Condon (BCS's President (R217 (¶78))) in New York. R2514, 2520, 2523.

After signing the Merger Agreement, Bayer's executive team engaged in substantial activities in New York to complete the Acquisition. To secure regulatory approval of the Acquisition, for example, Baumann and his team met President-Elect Donald J. Trump in January 2017 in New York. R322–323 (¶¶275–278).

Bayer arranged financing for the Acquisition in New York through Bayer's New York-based bankers.[9] The Acquisition was funded by a $50-plus billion "bridge loan" from two New York banks. R320 (¶273); R277–279 (¶¶202–204). To pay off this loan and provide financing for the Acquisition, Baumann and Condon participated in investor conferences in New York as part of the "sales job" Bayer pursued to sell billions in Bayer securities. R288–294 (¶¶223–225).

Bayer's June 18, 2018 bond offering—raising $15 billion to pay down the bridge loan for the Acquisition—targeted New York investors. R321 (¶274). With a Bayer subsidiary acting as issuer and Bayer as guarantor (R320 (¶273)), the bond offering was brokered by New York-based banks. *See* R214–215 (¶73); R277 (¶202). The Acquisition financing prospectuses, which the Banks used to raise billions to help pay down their own huge bridge loan, identify "BofA Merrill Lynch" and "Credit Suisse" as "joint bookrunner," listing their offices as located in

[9] The Acquisition price was $66 billion—$57 billion in cash, the rest in assumed Monsanto debt. *See* R292 (¶225).

Manhattan. R688–689; R691–693; *see also* R277 (¶202). Deutsche Bank's New York operations at 60 Wall Street acted as paying agent for the $15 billion in Bayer bonds sold in New York to New York investors just days after the closing to help pay down the Bank's bridge loan and provide long term financing for the Acquisition. R320–322 (¶¶273–274). Notably, the bond Offering Memorandum contained a choice-of-law clause providing that "[t]he Notes and Fiscal Agency Agreement will be governed by … the laws of the State of New York," as well as a consent-to-jurisdiction clause providing that "[t]he Guarantor [(Bayer AG)] has irrevocably submitted to the non-exclusive jurisdiction of … any federal or state court in … Manhattan" in any action "arising out of or relating to the Notes or the Fiscal Agency Agreement." R2440–2441.

The cash for the Acquisition changed hands in New York. R2515. When the Acquisition closed in New York in June 2018 (R2514), the New York-based JP Morgan, acting as Bayer's "Paying Agent," transferred $57 billion to a bank account in New York to complete the Acquisition. R2528–2532; *see also* R321–322 (¶274).

C. Post-Closing Revelation—the "Worst Acquisition in History"

By June 2018, 11,000 Roundup-cancer lawsuits had already been filed—a 10,000% increase since signing the Merger Agreement. *See* R208–209 (¶62). Soon after the Acquisition closed, Bayer suffered billions in Roundup verdicts. R169–170 (¶¶11–13). The trials made public what Bayer could have obtained through

competent due diligence—evidence that exposed Roundup's carcinogenic properties and Monsanto's decades of deceit about Roundup. R170 (¶13). Bayer was soon buried in 125,000 Roundup-cancer suits in courts throughout the United States, including New York. *See* R170 (¶14). The Roundup litigation morass is being overseen by the New York office of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). R192 (¶37); R238 (¶136).

To put a cap on the exploding Roundup liabilities, the Bayer Defendants used Skadden's New York office to broker a "global settlement"—with a price tag north of $10 billion—of all existing Roundup suits, plus future claims. R192–200 (¶¶37–49). These efforts involved extensive mediations in New York. R308 (¶249). But a federal judge rejected Bayer's "global settlement" gambit as a "dubious" attempt to manipulate the judicial process. R171 (¶16); R195–198 (¶¶43–46).[10]

Bayer, Wenning, Baumann and Condon were also sued in a class action by purchasers of Bayer's ADRs, alleging violations of federal securities laws in connection with the Acquisition. R319 (¶272). Wachtell's New York office has been representing them in defending this securities-fraud class action. *Id.*

All told, the "Worst Acquisition in History" has devolved into a quagmire of

[10] Apart from the Roundup lawsuits that Bayer is defending out of New York, Bayer has been involved in a multitude of mass-tort lawsuits in New York and other states over the years. As Baumann admitted, Bayer has "quite a bit of experience in United States products litigation." R260–262 (¶¶172–174).

endless litigation. R171–173 (¶17). The center of gravity of the litigation fallout from the Acquisition is New York. R319 (¶271).

Bayer's shareholders voted no confidence in its management, and this was a first in German history. R175–177 (¶19); *see also* R184–189 (¶¶31–32). Industry experts and commentators agreed that Bayer's acquisition of Monsanto violated nearly every rule of mergers-and-acquisitions practice. R185–189(¶32).

II. The Lower Court's Orders

A. The December 27, 2021 Decision and Order

The lower court held a hearing on Defendants' motions to dismiss on December 13, 2021. R90.1–90.84.[11] At the conclusion of that hearing, the lower court scheduled a second hearing for January 10, 2022. R90.82–90.84.

On December 27, 2021—before the January 10, 2022 hearing could take place—the lower court issued three identical Decisions and Orders granting Defendants' motions to dismiss the SAC. R13–27; R38–52; R63–77.

Bayer's Motion: The lower court endorsed Bayer's argument that "the internal affairs doctrine requires application of German law to determine whether the Plaintiffs have standing to bring this derivative suit." R26. To support this endorsement, the lower court cited a single decision, *In re Renren, Inc. Derivative Litigation*, 2020 N.Y. Misc. LEXIS 2132 (Sup. Ct. N.Y. Cnty. May 20, 2020). R26.

[11] Perhaps impressed by the speculative, risky nature of the Acquisition, the lower court repeatedly referred to it as the "Moonshot" transaction—a term never before used by any party.

Notably, the lower court appeared to find *Renren* analogous despite two key distinctions: (1) BCL §1319 was not at issue in *Renren*; and (2) nor was the applicability of the internal-affairs doctrine in dispute there. R2326 n.6. Disregarding Plaintiffs' choice-of-law argument (R2316–2346), the lower court gave no explanation as to why BCL §1319 and *Culligan* were not controlling, and why *Davis* and *HSBC* did not require the application of New York's own gatekeeper provisions. Instead, the lower court considered the law was "settled." R.90.67.

The lower court faulted Plaintiffs for failing to comply with GSCA §148—"Court Procedure" (R445)—to seek permission from a German court to assert derivative claims. R26. Specifically, the lower court found that Plaintiffs failed to follow GSCA §148's requirements of providing "evidence" establishing a variety of qualifications, including "shareholdings equal [to] or exceed[ing] one percent of the registered share capital" and "facts justifying the suspicion" giving rise to the claims. *See id*. In the lower court's view, these failures—under German law—rendered Plaintiffs without standing to bring derivative claims in New York. *See* R27.

The Bank Defendants' Motion: The lower court granted the motion based on *forum non conveniens* under CPLR 327(a).[12] R20–22. The lower court

[12] The lower court rejected the Bank Defendants' argument that their subsidiaries—not the Bank Defendants themselves—were the parties to the service contracts with Bayer in connection with the Acquisition. R23. This "corporate shell game" argument lacked merit, the lower court found, because the Bank Defendants "themselves indicated in their own public disclosure statements that they had represented Bayer in the Moonshot Transaction." *Id*.; *see also* R415–418.

emphasized the fact that "[n]one of the individual defendants are located in New York," that Bayer's records were maintained in Germany, and that the meetings of Bayer's Boards took place in Germany. R21. And the lower court deduced that "the Bayer Defendants received the advice of the [Bank Defendants] in Germany." R22.

The lower court also found Germany to be an adequate alternative forum, even though Plaintiffs and their German-law expert identified multiple, nearly insurmountable hurdles for Plaintiffs to commence action in Germany (*see* R326–327 (¶¶282–285); R465 (¶¶40–41)). R22. To support this finding, the lower court pointed to *Viking Global Equities, LP v. Porsche Automobil Holding SE*, 101 A.D.3d 640 (1st Dep't 2012), where the court found Germany to be an adequate alternative forum for a fraud action brought by a hedge fund. R22. Citing Germany's interest in a litigation "involving an old and major German company," as well as the burden to the court, the lower court held that New York was an inconvenient forum. *Id*.

The Bayer Defendants' Motion: The lower court also granted the Bayer Defendants' motion to dismiss the SAC on two grounds. First, the lower court held that its *forum non conveniens* analysis regarding the Bank Defendants applied equally to the Bayer Defendants. R23. In so holding, the lower court did not address the Bayer Defendants' argument (*see* R740) based on a purported forum-selection clause in Article 3 of Bayer's Articles of Incorporation. *See* R23.

Second, the lower court endorsed the Bayer Defendants' denial of personal

jurisdiction. The lower court found—incorrectly—that "[t]he parties do not dispute that the individual defendants did not come to New York to transact business with respect to the Moonshot Transaction."[13] R24. The lower court relied on *Kreutter v. McFadden Oil Corp*., 71 N.Y.2d 460 (1988), where the court found that personal jurisdiction over a Texas resident was proper because he transacted business in New York through his agents. R24–25. The lower court found *Kreutter* to be distinguishable because Bayer's use of New York-based attorneys and its funding activities in New York "[did] not constitute purposeful availment as [they] relate[] to the causes of action." R25. This was so, the lower court reasoned, because Plaintiffs' claims "relate[] to due diligence activities as to a Missouri-based company and the decisions made in Germany to proceed with the [A]quisition." *Id*. The lower court further reasoned that the decisions of Bayer shareholders—spread all over the world—to invest in Bayer were "not tied to any particular New York-related contact or activity." R26. In sum, the lower court found the Acquisition's "connection to New York" to be "too tenuous." *Id*. Both in their opposition to motions to dismiss and at the December 13, 2021 hearing, Plaintiffs requested discovery as necessary

[13] Contrary to this finding, Plaintiffs alleged multiple direct contacts with New York by the Bayer Defendants. For example, Plaintiffs alleged, consistent with media reports, that Baumann and his New York advisors were present in New York in September 2016 in connection with the negotiations of the Acquisition. R611. Plaintiffs also alleged that Baumann, Wenning, and Condon actively participated in arranging and soliciting financing for the Acquisition, which took place in New York. *See* R279 (¶205), R320–322 (¶¶270–274). And Plaintiffs alleged that top Bayer executives, including Baumann, met with President-Elect Donald J. Trump in New York in January 2017 to pitch the benefits of the Acquisition. R322–323 (¶¶275–278).

to resolve the personal-jurisdiction questions. R90.66; R1898 n.9. But the lower court dismissed the SAC as to the Bayer Defendants for lack of personal jurisdiction without leave to conduct jurisdictional discovery. R26.

B. The October 19, 2022 Decision and Order

On October 20, 2022, the lower court held a hearing on Plaintiffs' motion for leave to renew and reargue the narrow issue of whether CPLR 327(b) precluded the lower court from dismissing the SAC under CPLR 327(a). R91–122. On the same day, the lower court entered a Decision and Order, signed on the day before, denying the motion on both procedural and substantive grounds. R88–90.

With respect to procedure, the lower court found that Plaintiffs failed to meet the stricture of CPLR 2221(d) and (e) for renewal and reargument because they "[did] not identify any matters of fact or law that the Court allegedly overlooked[,]" or "identify new facts that were not offered on the prior motion with reasonable justification for their failure to present such facts[.]" R88–89. The lower court held that Plaintiffs waived any arguments under CPLR 327(b) because they failed to raise them in opposition to Defendants' motions. R89. The lower court rejected Plaintiffs' argument that an issue pertaining to the court's statutory power—*i.e.*, whether the court has the authority to dismiss an action under CPLR 327(a)—is akin to subject-matter jurisdiction and thus cannot be waived (*see* R2405–2406).

With respect to substance, the lower court found that Plaintiffs' breach-of-

fiduciary-duty claims did not "arise from or relate to" the two agreements at issue—Depositary Agreement for Bayer's ADRs and the Offering Memorandum to finance the Acquisition. *See* R89; *see also* R100 ("THE COURT: The gravamen of your complaint isn't about those agreements."). In so finding, the lower court rejected Plaintiffs' argument that their claims, at a minimum, *relate to* the two agreements because "New York courts have given a very broad interpretation to provisions that refer to both 'arises out of' and 'relates to'" (*see* R2407–24).

In denying Plaintiffs leave to renew and reargue, the lower court expressed "agree[ment] with almost everything that the defendants put in their papers." R120. The lower court wished Plaintiffs "[g]ood luck with the First Department." R122.

This consolidated appeal followed.

III. The Importance of These Consolidated Appeals

A. The Important Jurisdiction of New York Courts over Shareholder Derivative Actions

For two centuries, the power to hear derivative claims brought by shareholders on behalf of corporations has been firmly established in the courts in New York and beyond. In the 1832 case of *Robinson v. Smith*, for example, the New York Court of Chancery exercised "jurisdiction" in aid of "the individual rights of the [in]corporators" to "call the directors to account" for any "breach[es] of trust." 3 Paige Ch. 222, 231–32 (N.Y. Ch. 1832). Likewise, in the 1855 case of *Dodge v. Woolsey*, the U.S. Supreme Court affirmed the federal courts' jurisdiction over

shareholder derivative actions. 59 U.S. 331, 341 (1856).

The courts' assertion of jurisdiction over shareholder derivative actions was timely because, before the turn of the last century, American capitalism produced a proliferation of corporations chartered by states. As corporations spread, so did abuse by officers and directors. This in turn gave rise to the shareholder derivative lawsuits to call corporate fiduciaries to account. In 1949, one derivative action, *Cohen v. Beneficial Industrial Loan Corp*., reached the U.S. Supreme Court. *See* 337 U.S. 541 (1949). There, one of 16,000 shareholders of a corporation—holding 100 of its two million shares—sued the corporation's officers and directors, alleging breaches of duties that caused the loss of over $100 million in corporate assets. *Id*. at 544. In discussing the purposes of derivative actions, the Supreme Court emphasized that permitting "holders of small interests" to bring derivative actions was the *only* "practical check on [fiduciary] abuses." *Id*. at 547–48.

B. The Applicability of New York's Foreign Corporation Statutes to This Action

As jurisdiction over shareholder derivative lawsuits took hold in the courts, the power to regulate foreign corporations became cemented in the legislatures of both the states where they are incorporated and the states where they conduct business. As courts recognized at the turn of the 19th century, it became increasingly common for corporations chartered by one state to conduct business in other states. *See generally Merrick v. Van Santvoord*, 34 N.Y. 208 (1866). The need also rose

for the non-incorporation states "to regulate and restrain foreign corporations in doing business [within their borders] under charters from other [state] governments." *See id.* at 212. Judicial response to this need was resolute. The U.S. Supreme Court affirmed the non-incorporation states' "plenary power to exclude a foreign corporation from doing business within [their] borders" and to regulate a foreign corporation "in their discretion"—"as in their judgment will best promote the public interest." *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 343 (1909); *see also Paul v. Virginia*, 75 U.S. 168, 181 (1869).

Consistent with this "plenary" and "discretionary" power, the New York Legislature enacted the Foreign Corporation Statutes in 1963 imposing certain BCL provisions upon "foreign corporation[s] doing business in this state, [their] directors, officers and shareholders." BUS. CORP. LAW §1319(a). Among these enumerated provisions is §626, which codifies New York courts' long-standing jurisdiction over shareholder derivative actions and confers standing to sue to all "holder[s] of shares … of the corporation or of a beneficial interest in such shares[.]" *Id.* §626(a).

The Legislature enacted these provisions as part of its policy of advancing New York's centrality in world financial and legal affairs. New York's Foreign Corporation Statutes provide an efficient and sophisticated legal system for the adjudication of the disputes involving actors in modern world commerce, including large publicly owned international corporations. New York is unique in having the

combination of legislative enactments creating subject-matter jurisdiction in New York courts, plus many foreign corporations with substantial presences in New York. New York courts must be faithful to the public policy declared by the Legislature through the Foreign Corporation Statutes and must further the legislative intent of asserting jurisdiction over, and applying New York law to, derivative actions involving foreign corporations doing business in New York.

Imposing New York's gatekeeping provision for derivative actions on foreign corporations doing business in New York is exactly the kind of legislative judgment contemplated by the U.S. Supreme Court in *Paul*. As the Court of Appeals and this Court have recognized, New York enjoys its "unique status as a global center of finance and commercial transactions."[14] *Deutsche Bank Nat'l Trust Co. v. Flagstar Capital Mkts.*, 32 N.Y.3d 139, 162 (2018). Consistent with this recognition, New York courts have repeatedly exercised jurisdiction over derivative lawsuits involving foreign corporations brought by investors residing in New York and beyond. *See, e.g.*, *Rocha Toussier y Asociados, S.C. v. Rivero*, 91 A.D.2d 137, 138 (1st Dep't 1983) (Mexican corporation; Mexican-resident plaintiff); *HSBC*, 166 A.D.3d at 759 (English corporation, English-resident plaintiff).

[14] New York City is home to more than 5,000 foreign companies, which employ nearly 300,000 New Yorkers and contribute 11% of the City's $761 billion annual economic output. *See* Partnership for New York City, *Global Business, Local Benefit, Foreign Contributions to the New York Economy*, at 2 (Nov. 2017).

These consolidated appeals seek reversal of the lower court's refusal to apply New York's Foreign Corporation Statutes to this action, which arises from a $66 billion Acquisition that was negotiated, financed, and closed in New York. The fundamental question is whether the Legislature meant what it said when it enacted two BCL provisions: §626, creating subject-matter jurisdiction for shareholder derivative actions and extending standing to beneficial owners of shares; and §1319, requiring foreign corporations "doing business" in New York to consent to the litigation of derivative suits filed in New York.

The lower court, as well as this Court, have a duty to follow the Legislature's statutory directives. *Irvine*, 207 N.Y. at 434. This question of statutory interpretation here is presented in a policy-laden context, *i.e.*, the reach and impact of the Legislature's scheme to regulate foreign corporations and the judiciary's ability to implement that statutory scheme. New York's appellate courts, including this Court in *Culligan*, have uniformly upheld the statutory grant of subject-matter jurisdiction over shareholder derivative actions, and have faithfully applied New York's gatekeeping rules governing those actions.

But the lower court has proven hostile to exercising the jurisdiction conferred by the Legislature, and have instead dismissed this action brought by a New York-resident plaintiff on behalf of Bayer. These consolidated appeals present an opportunity for this Court to bring the lower court back in line.

STANDARD OF REVIEW

I. Rulings Under CPLR 3211

This Court reviews the grant of a motion to dismiss *de novo*. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151–52 (2002). The lower court's determinations regarding foreign law are reviewed *de novo*. CPLR 4511(c); *see also DeJesus v. DeJesus*, 90 N.Y.2d 643, 647 (1997). Likewise, questions of statutory construction are reviewed *de novo*. *N.Y.C. Transit Auth. v. N.Y. State Pub. Emp't Relations Bd*., 8 N.Y.3d 226, 231 (2007). When analyzing whether plaintiffs have sufficiently alleged derivative standing on a CPLR 3211 motion, their well-pleaded allegations "are presumed to be true and accorded every favorable inference." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

II. Rulings Under CPLR 327

Generally, a decision to grant a motion to dismiss based on *forum non conveniens* is reviewed for abuse of discretion. *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014). However, where the decision is premised on errors of law, it is reviewed *de novo*. *Id*.

Additionally, "this Court is 'not limited to deciding that the *nisi prius* court abused its discretion, but may exercise such discretion independently.'" *Shin-Etsu Chem. Co. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 175 (1st Dep't 2004).

A decision to deny a motion to renew is reviewed for abuse of discretion. *S.V.L. v. PBM, LLC*, 191 A.D.3d 564, 565 (1st Dep't 2021). Although in general, no appeal lies from an order denying leave to reargue, where the court purports to deny the motion, but considers the merits of the arguments, the court has effectively granted reargument and adhered to its original decision. *Lewis v. Rutkovsky*, 153 A.D.3d 450, 453 (1st Dep't 2017). In that circumstance, as is the case here, the order "denying" reargument is appealable. *See id*.

III. Rulings Under CPLR 302

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

The Court reviews a denial of jurisdictional discovery for abuse of discretion. *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 353 (1st Dep't 2004). A lower court necessarily abuses that discretion when it grants a motion to dismiss for lack of personal jurisdiction without first allowing jurisdictional discovery where a plaintiff alleges "that an agency relationship exists between [defendants] and, from the pleadings and affidavits, it is obvious that [plaintiff's] position is not frivolous."[15] *Amigo Foods Corp. v. Marine Midland Bank-N.Y.*, 39 N.Y.2d 391, 395 (1976).

[15] Plaintiffs' verified allegations in the SAC carry the weight of evidence. CPLR §105(u); *see also Fortino v. Hersch*, 307 A.D.2d 899, 899 (1st Dep't 2003) ("verified pleadings … 'may be utilized as an affidavit'").

ARGUMENT

I. This Court Should Reverse Because New York Law—Rather Than German Law—Governs the Issue of Plaintiffs' Standing to Bring a Derivative Action on Bayer's Behalf in a New York Court

With respect to Bayer's motion to dismiss, the lower court committed legal errors on two fronts. First, it failed to comply with the directive of New York's Foreign Corporation Statutes and disregarded §1319's mandate to apply New York's gatekeeping rules for shareholder derivative actions to determine Plaintiffs' standing to bring derivative claims. Instead, the lower court applied the internal-affairs doctrine in contravention of *Culligan*'s holding, effectively relinquishing its jurisdiction—vested by §626—over this shareholder derivative action. The lower court abdicated its duty to enforce §626 and §1319 as they are written. *See Irvine*, 207 N.Y. at 434. This error requires reversal.

Second, the lower court failed to follow precedents mandating the application of New York's gatekeeping rules governing shareholder derivative actions filed in New York courts. Under *Davis* and *HSBC*, foreign law governing procedures for shareholder derivative actions in foreign courts must give way to §626 in shareholder derivative actions brought in New York courts. The lower court's dismissal order conflicts with *Davis* and *HSBC*, and must therefore be reversed.

A. New York's Foreign Corporation Statutes Confer Jurisdiction to New York Courts over Shareholder Derivative Actions Brought on Behalf of Foreign Corporations Doing Business in New York, and Mandates the Application of New York's Gatekeeping Rules Governing Such Actions, Including Standing to Sue, in the Same Manner as If Domestic Corporations Are Involved

Clear and explicit in their texts, New York's Foreign Corporation Statutes codify the courts' centuries-old jurisdiction over shareholder derivative actions and confer standing to all shareholders—including holders of a "beneficial interest" in shares—of foreign corporations to bring derivative actions, so long as those foreign corporations do business in New York. BUS. CORP. LAW §626(a), §1319(a)(2). The Legislature's intent to regulate foreign corporations with respect to the procedure to bring shareholder derivative actions is reflected not only in the statutory text, but also in legislative history. *See* Bill Jacket, L 1961, ch. 855, *Joint Report*, at 32–35.

For over a century, the Court of Appeals has implemented this statutory scheme and applied New York law to cases involving foreign corporations, reasoning that they have consented to the application of New York law by doing business here. *German-American Coffee*, 216 N.Y. at 64. Following the *German-American Coffee* line of cases, this Court applied BCL §1319(a) in *Culligan* to a shareholder derivative action involving a foreign corporation and found as governing law §626's requirements for derivative standing. *See Culligan*, 118 A.D.3d at 423. In so finding, this Court squarely held that the common-law internal-affairs doctrine must yield to §1319's statutory directive.

As discussed below, by invoking the internal-affairs doctrine and applying German law to derivative standing, the lower court erred in departing from *Culligan* and disregarding §1319. This error amounts to a refusal to exercise jurisdiction over this shareholder derivative action despite §626's grant of such jurisdiction, which New York courts have consistently asserted for two centuries.

Accordingly, with respect to Question 1, this Court should find that the Foreign Corporation Statutes require the application of New York law, and should reverse the lower court's decision to apply German law.

1. The Texts and Legislative History of the Foreign Corporation Statutes Command That New York Law—Specifically, BCL §626—Governs the Issue of a Shareholder's Standing to Bring Derivative Actions

On an issue of statutory interpretation, the Court's task is "to effectuate the intent of the Legislature." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). The Court's inquiry must start with statutory text because "the clearest indicator of legislative intent is the statutory text." *Id*.

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

corporation[s] doing business in this state, [their] directors, officers and shareholders." BUS. CORP. LAW §1319(a)(2)–(3).

The texts of §1319 and §626 provide a clear directive of the New York Legislature: foreign corporations doing business in New York are subject to §626, which authorizes "holder[s] of shares … of … corporation[s] or of a beneficial interest in such shares"—regardless of the value of such shares—to bring shareholder derivative actions in New York courts. *See* BUS. CORP. LAW §§626(a), 1319(a)(2). Where, as here, legislative intent is clear from statutory text, the court's task of statutory interpretation ends, and the court must apply the statute according to its plain text. *See Deutsche Bank Nat'l Trust Co. v. Lubonty*, 208 A.D.3d 142, 147 (2d Dep't 2022). A review of legislative history, however, further crystalizes this legislative intent, expressed through §1319's text, to apply §626 to foreign corporations doing business in New York.

Article 13 of the BCL, which includes §§1317 and 1319, was the product of years of study and work by the New York Legislature in the early 1960s to revise and modernize the BCL. *See* Robert A. Kessler, *The New York Business Corporation Law*, ST. JOHN'S L. REV., Vol. 36, No. 1, Art. 1 at 1–2 (Dec. 1961).[16] The research and drafting process—spanning over four years—was known to be

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

"elaborate" and "well organized." *Id*. at 4. "The initial research reports alone total[ed] over 1750 pages." *Id*. Research reports "were widely distributed for comments" to various constituents, including "the State and New York City Bar Associations," which voiced opposition on behalf of business interests to the regulation of foreign corporations. *See id.* at 3–4. Before the draft statute was finalized, "public hearings [were] held in various places in the state." *Id*. at 4.

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

To that end, the New York Legislature considered the objection of the corporate establishment, represented by the State and New York City Bar Associations. The corporate establishment criticized the new Article 13—

specifically §1317[17] and §1319—as an uncommon attempt "to regulate the internal affairs of foreign corporations" and to "impose additional obligations and liabilities upon foreign corporations, their directors and stockholders, which go well beyond what other states see fit to do." Bill Jacket, L 1961, ch. 855, *Joint Report*, at 32–35. Objecting to the enactment of the Foreign Corporation Statutes, the corporate establishment urged adherence to "the approach of the Model Act … to eschew any attempt to regulate the internal affairs of foreign corporations." *Id*. at 33.

As Dean Robert S. Stevens observed,[18] "[i]t was strongly urged before the [Joint] Committee that the policy of other states should be respected and that foreign corporations should be subject to and regulated by the law of the jurisdiction of incorporation, not by the law of New York." Stevens, *New York Business Corporation Law of 1961*, at 172. Casting aside these objections by the corporate establishment and others, however, the New York Legislature passed the new BCL based on its judgment that it "represent the proper balance of the interests of shareholders, management, employees, and the overriding public interest." *Id*. The

[17] Just like §1319, BCL §1317 subjects foreign corporations doing business in New York to New York law, such as §720, imposing liabilities on officers and directors. BUS. CORP. LAW §1317. That provision expressly confers subject-matter jurisdiction to the New York courts to enforce such liabilities upon directors and officers of foreign corporations "in the same manner as in the case of a domestic corporation." And §720 authorizes shareholder derivative actions "against directors and officers for misconduct." BUS. CORP. LAW §720(a)–(b).

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

modernized BCL, including the Foreign Corporation Statutes, became law, codifying the New York courts' long-standing jurisdiction over shareholder derivative actions and subjecting foreign corporations doing business in New York to New York's "conditions precedent for bringing a shareholder's derivative action." Kessler, *The New York Business Corporation Law*, at 85.

2. The Legislature's Scheme to Regulate Foreign Corporations Finds Support in Precedents

For over a century, the Court of Appeals has faithfully implemented the Legislature's scheme to regulate foreign corporations. Writing for a unanimous Court of Appeals in the 1915 case of *German-American Coffee*, Judge Benjamin N. Cardozo applied New York law to the directors of a foreign corporation as a "condition" of its conducting business in New York. 216 N.Y. at 64. He reasoned that the directors and the foreign corporation had consented to the application of New York law by transacting the corporation's business here. *Id*. at 63–65.

Notably, the consent by foreign corporations to the application of New York laws, as prescribed by the New York Legislature, is "exacted"—involuntarily—so long as they choose to conduct business in New York. *See Pohlers v. Exeter Mfg. Co*., 293 N.Y. 274, 280 (1944). And this consent scheme falls within the ambit of the broad power of the Legislature, affirmed by the U.S. Supreme Court in *Paul* and the New York Court of Appeals in *German-American Coffee*, to regulate foreign corporations doing business here. *See German-American Coffee*, 216 N.Y. at 67.

3. As This Court Held in *Culligan*, §1319 Displaces the Internal-Affairs Doctrine and Mandates the Application of §626, Including Its Standing Requirement, to This Case

Following *German-American Coffee*, this Court in *Culligan* applied New York law to a shareholder derivative action involving a Bermuda corporation. *Culligan*, 118 A.D.3d at 423. There, the lower court dismissed the shareholder's derivative complaint "upon finding that Bermuda law applied to the case pursuant to the 'internal affairs' doctrine." *Id*. at 422. Reversing the dismissal, this Court held that "the issue of plaintiffs' standing to bring a derivative action is governed by [New York] law":

> [T]he internal affairs doctrine [does not] apply to claims based on … [BCL] §§1317 and 1319. [BCL] §1319(a)(1) expressly provides that §626 (shareholders' derivative action) shall apply to a foreign corporation doing business in New York. Thus, the issue of plaintiffs' standing to bring a shareholder derivative action is governed by New York law, not Bermuda law.

Id. at 422–23.[19]

Culligan is on-point and binding. Instead of following *Culligan* and §1319's mandate, the lower court erroneously concluded that the applicability of the internal-affair's doctrine is "settled." R90.67. The lower court's disregard of *Culligan* is an error and must be reversed.

[19] Likewise, in *Norlin Corp. v. Rooney, Pace, Inc*., the Second Circuit recognized the New York Legislature's decision to apply New York law to the issue of derivative standing, rather than deferring to foreign law under the internal-affairs doctrine. 744 F.2d 255, 261 (2d Cir. 1984) (citing *Barr v. Wackman*, 36 N.Y.2d 371 (1975)).

4. Applying the Internal-Affairs Doctrine in Contravention of *Culligan*, the Lower Court Committed a Legal Error Because the New York Legislature Has Overridden the Internal-Affairs Doctrine with Respect to the Provisions Enumerated in §1319

In opposing Bayer's motion to dismiss the verified SAC, Plaintiffs urged the lower court to adhere to the holdings of *Culligan* and *Norlin* (*see* R2325, 2337–2338). Arguing the contrary, however, Bayer cited *City of Aventura Police Officers' Retirement Fund v. Arison*, 70 Misc. 3d 234 (Sup. Ct. N.Y. Cnty. 2020). R2301 n.3. But *City of Aventura* cannot justify a departure from *Culligan*.

In deciding that §1319 did not "override the internal affairs doctrine on the issue of standing to bring a derivative claim," the trial court in *City of Aventura* did not even bother to cite §1319's text, which employs the phrase "shall apply"—mandating the application of §626 to "foreign corporation[s] doing business in this state, [their] directors, officers and shareholders." BUS. CORP. LAW §1319(a). Instead, the trial court erroneously and without analysis concluded that §1319 was not a conflict-of-laws rule, but "a mere statutory predicate to jurisdiction." *See City of Aventura*, 70 Misc. 3d at 244. This erroneous view originated with *Lewis v. Dicker*, which held—as a "matter of first impression" and (again) without analysis—that §1319 "is not a conflict of laws rule, and [thus] does not compel the application of New York law." 118 Misc. 2d 28, 30 (Sup. Ct. Kings Cnty. 1982).

City of Aventura's rationale of denying that §1319 is "a conflict-of-laws rule"

fails under settled rules of statutory construction. "Where the terms of a statute are clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." *Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 204 (1995). "'[A]ll parts of a statute'" must "'be given effect'" and must be harmonized with each other, as well as with the general intent of the whole statute. *See Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018). And effect and meaning must be given to the entire statute and every part and word thereof. *Id.*; *see also* MCKINNEY'S CONSOL. LAWS OF N.Y., BOOK 1, STATUTES §§97–98 (1971).

Under these rules, §626 (entitled "Shareholders' [D]erivative [A]ction …") must be interpreted as conferring subject-matter jurisdiction over shareholder derivative actions because it expressly provides that "[a]n action may be brought in the right of a domestic or foreign corporation to procure judgment in its favor." *See* BUS. CORP. LAW §626(a). In contrast, BCL §1319 (entitled "[A]pplicability of [O]ther [P]rovisions") says nothing about subject-matter jurisdiction. *See* BUS. CORP. LAW §1319. Rather, as a part of "Article 13 Foreign Corporations," §1319 is all about choice of law—providing that "[§626] shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders." *Id.*

Indeed, §1319 has no other purpose, but choice of law. It reflects a legislative policy choice to regulate certain aspects of the affairs of foreign corporations doing business in New York, including derivative standing to sue, which has been

traditionally characterized as involving corporate "internal affairs." *See* Bill Jacket, L 1961, ch. 855, *Joint Report*, at 32–35. And that was exactly how the New York Legislature, as well as the corporate establishment, understood §§1317 and 1319 to be: §1319 "regulate[s] the internal affairs of foreign corporations[.]" *Id*. at 34–35.

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

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

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

Statutory directives aside, long gone is the era when the internal-affairs doctrine called for jurisdictional exclusivity for derivative actions only in the place of incorporation. *Koster v. (Am.) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 527

(1947); *see also* Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, STAN. J. OF COMPLEX LITIG., at 51 (2012) ("[t]he modern doctrine does not dictate where a dispute is heard"). And long rejected by New York courts is any "automatic application" of the internal-affairs doctrine in shareholder derivative litigation. *See Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975).

By invoking the internal-affairs doctrine, the lower court defied the mandate of the Foreign Corporation Statutes. But a court must "follow a statutory directive of its own state on choice-of-law." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §6(1) (1988). A court defaults to various common-law choice-of-law rules *only* "[w]hen there is no such directive." *Id*. §6(2). "[T]he court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles." *Id*., Cmt. b. on §6(1). BCL §1319 is exactly that kind of choice-of-law statute. The common-law internal-affairs doctrine is inferior to statutory law and must give way. The lower court's decision to the contrary is an error and must be reversed.

5. Under BCL §626, Plaintiffs Had Standing Because They Have Sufficiently Alleged That They Are Bayer Shareholders, and That Bayer Does Business in New York

Under settled law, Plaintiffs must be accorded the "benefit of every possible inference" on a motion to dismiss. *People v. Sprint Nextel Corp*., 26 N.Y.3d 98, 113 (2015). Therefore, Plaintiffs' verified SAC must be liberally construed, and all facts

alleged, along with any submissions in opposition to the dismissal motion, must be accepted as true. *511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152.

Here, Plaintiffs allege that they continuously owned Bayer shares during the entire time period of Defendants' continuous course of misconduct. R211 (¶66). This verified allegation is more than enough to meet the pleading requirement under §626. *See 511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152.

Plaintiffs' verified allegations of Bayer's operations in New York also satisfy §1319's "doing business" standard. Courts have employed two different standards to determine when a foreign corporation is doing business in New York, "depending on the particular section of article 13 under consideration." *Airtran N.Y., LLC v. Midwest Air Grp., Inc.*, 46 A.D.3d 208, 214 (1st Dep't 2007). For example, BCL §1312 "employs a heightened 'doing business' standard, fashioned specifically to avoid unconstitutional interference with interstate commerce under the Commerce Clause," a standard closely related to the standard for exercising general jurisdiction under CPLR §301. *Id*. But other provisions, such as §1319, which do not implicate Commerce Clause concerns, employ the less exacting "purposeful-availment" standard developed in "specific jurisdiction" cases under CPLR §302. *Id*. at 240.

The "doing business" standard under §1319 is minimal and straightforward: defendant "must take some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Ford Motor Co. v. Mont. Eighth*

Judicial Dist. Ct., 141 S. Ct. 1017, 1024 (2021). In *Ford Motor*, the underlying company "is a global auto company. It is incorporated in Delaware and headquartered in Michigan. But its business is everywhere." *Id.* at 1022.

Here, this "purposeful availment" test is easily met. Bayer and its subsidiaries have operated in New York for over a hundred years. R213 (¶70). One of Bayer's subsidiaries, BCS, is incorporated in New York. R213–214 (¶72). And BCS is the subsidiary that absorbed Monsanto's business after the Acquisition. R298–299 (¶¶232–234). Bayer has 15 operations in the United States, including New York, and employs tens of thousands of workers. R318 (¶270). And Bayer's annual revenues from New York are in the multi-billion-dollar range. *See id.* With the New York-based BNY Mellon acting as its depositary, Bayer's ADRs are traded in the United States and owned by thousands of New York-based investors. *See* R311–312 (¶256). Bayer's executives have participated in dozens of investor events in New York. R595. Bayer used New York-based banks to finance the Acquisition and accessed the New York capital markets to fund the Acquisition. R277–279 (¶¶202–204); R288–294 (¶¶223–225); R320 (¶273). These facts are more than enough to satisfy the "purposeful availment" test. *See Airtran*, 46 A.D.3d at 219.

* * *

In enacting the Foreign Corporation Statutes, the Legislature created subject-matter jurisdiction over derivative actions involving "foreign corporations doing business in this state." BUS. CORP. LAW §1319. This statutory scheme permits

shareholders of foreign corporations to pursue derivative actions in New York courts under New York's gatekeeping rules, including BCL §626, while applying the substantive law of the place of incorporation via the statutory causes of action under BCL §720 imposing liability on defaulting directors and officers "as in the case of a domestic corporation." *See Goldberg v. Meridor*, 567 F.2d 209, 209 (2d Cir. 1977) (Friendly, J.) (applying BCL §720 to a Panamanian corporation).

All told, Plaintiffs are shareholders of Bayer and are entitled under §626 to bring a derivative action on Bayer's behalf because it does business in New York within the meaning of §1319. The text and legislative history of New York's Foreign Corporation Statutes, as well as precedents such as *Culligan*, command that §626 be applied to determine Plaintiffs' derivative standing to sue. The lower court's decision to the contrary is an error because the Foreign Corporation Statutes have displaced the internal-affairs doctrine. And the lower court has effectively abdicated the jurisdiction over this action conferred by §626.[20] This Court should reverse.

[20] In the lower court, Bayer also argued that Plaintiffs must go to a German Court in Leverkusen to ask for permission to sue because Article 3(3) of Bayer AG's articles of association ("BA3") "require[s] disputes with shareholders to be litigated in Germany." R733–734. While the lower court did not reach this argument, it is meritless because, as Plaintiffs' German-law expert explained, BA3 "has no application in this case." R455; R465–467. BA3 speaks only to "jurisdiction," not venue or forum. R752. Such purported contractual provision cannot block New York courts' exercise of their subject-matter jurisdiction. *See, e.g.*, *Sliosberg v. N.Y. Life Ins. Co.*, 217 A.D. 685 (1st Dep't 1926) ("parties may not … oust the courts of this State of jurisdiction"); *Sudbury v. Ambi Verwaltung Kommanditgesselschaft*, 213 A.D. 98 (1st Dep't 1925) (same).

B. Under *Davis* and *HSBC*, German Procedural Requirements—GSCA §148's "Court Procedure for Petitions"—to Bring Derivative Claims in Germany Are Inapplicable to This Derivative Action Brought in a New York Court

In *Davis*, a shareholder derivative action brought on behalf of a Cayman Islands corporation, the Court of Appeals affirmed the principles that "procedural rules are governed by the law of the forum," and that New York law determines whether a question is one of substance or procedure. 30 N.Y.3d at 252, 257. There, the trial court dismissed the action on the basis that plaintiff failed to "establish[] standing because he did not seek leave of court to commence a derivative action under rule 12A of order 15 of the Cayman Islands Grand Court Rules." *Id*. at 250.

Affirming the trial court, this Court found that the Cayman Islands rule at issue (Rule 12A) was substantive and was thus applicable to the action under the internal-affairs doctrine. *Id.* But the Court of Appeals reversed this Court, holding that Rule 12A was "procedural, and therefore [did] not apply where, as here, a plaintiff [sought] to litigate his derivative claims in New York." *Id*. The Court of Appeals reasoned that Rule 12A's language, purpose, and operation demonstrated that it was procedural—"serv[ing] a gatekeeping function … as to derivative actions brought in the Cayman Islands." *Id*. at 253–54. In addition, the Court of Appeals pointed to the fact that Rule 12A imposed the permission-seeking procedure only as to actions brought in the Cayman Islands, but "*not* for derivative actions, wherever brought, concerning Cayman companies specifically." *Id*. at 254.

Davis's reasoning applies here and compels the finding that GSCA §148 is a procedural rule and is thus inapplicable to shareholder derivative actions brought in courts outside Germany. The title of GSCA §148 is "*Court Procedures* for Petitions Seeking Leave to File an Action for Damages." Procedures means procedures. The plain language of GSCA §148 dictates the outcome.

Moreover, as explained by Plaintiffs' German-law expert, the "admissions procedure" of GSCA §148 is procedural. R459–461. Derivative actions on behalf of German corporations are not restricted to German courts and may be brought elsewhere. R456–459; R461–467. Subsections (2) and (4) of §148, taken together, show that the German legislature did not intend for §148's "admission procedure" to have "extra-jurisdictional authority." R461–464. That is because, while it is possible to file derivative litigation outside Germany, it is not possible to first employ the admission procedure in a German court, then pursue the main action in a court outside of Germany, which is what Defendants want here. *Id*. German law does not—and cannot—prohibit the litigation of the Plaintiffs' claims in New York, or seek to dictate procedural rules to a New York court. R455.

All told, German law designates GSCA §148 as procedural and limits its application to actions brought in Germany. This is exactly how the Second Department interpreted a similar provision in the English Companies Act 2006. In *HSBC*, a shareholder derivative action brought on behalf of an English corporation,

the trial court dismissed the action, finding that plaintiff failed to comply with English statutory requirement to seek permission to sue. *See* 166 A.D.3d at 757. Reversing the dismissal, the Second Department refused to apply the English provisions because they were procedural. *Id.* Instead, the Second Department applied BCL §626 and sustained the pleading sufficiency of the complaint based on New York's gatekeeping rules governing derivative actions. *Id.* at 758–59.

Davis and *HSBC* are on point and controlling. They provide an alternative—but no less mandatory—basis to BCL §1319, to apply §626's gatekeeping rules to this action. Under *Davis* and *HSBC,* this Court must apply §626 and permit all holders of shares, regardless of the value of the shares, of a foreign corporation to bring derivative actions. As alleged in the verified SAC, Plaintiffs own over 2,000 shares of Bayer stock. R211 (¶66). Plaintiffs have standing to bring this action on behalf of Bayer. *See* BUS. CORP. LAW §626(a). The lower court's decision to the contrary—applying GSCA §148 instead of BCL §626—must be reversed.

* * *

As discussed above, New York's Foreign Corporation Statutes mandate that BCL §626 governs Plaintiffs' standing to bring this derivative action on Bayer's behalf. The lower court violated this statutory mandate by erroneously invoking the common-law internal-affairs doctrine and departing from *Culligan*. The lower court further erred by failing to follow *Davis* and *HSBC* and applying German procedural rules to this action. In light of these legal errors, this Court must reverse.

II. This Court Should Reverse Because CPLR 327(b) Prohibited the Lower Court from Exercising the Statutory Power Under Subsection (a) to Dismiss This Action Based on "Inconvenient Forum," and Because the Lower Court Failed to Give Presumptive Weight to the New York-Based Plaintiff's Choice of Forum and Disregarded the New York-Centric Nature of the Acquisition

In granting the CPLR 327(a) motions, the lower court committed two errors. First, the lower court exceeded its statutory power to dismiss actions based on *forum non conveniens* because Subsection (b) of CPLR 327 prohibits the lower court from dismissing an action that "arises out of or relates to [an] … agreement or undertaking to which [GOL §5-1402] applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part." CPLR 327(b). The lower court refused to correct this error by denying Plaintiffs leave to renew or reargue the motions to dismiss based on the two underlying agreements—Bayer's Depositary Agreement and Offering Memorandum.

Second, even if the lower court had the power to dismiss the action under CPLR 327(a) (it did not), it erred in disregarding the "*presumptive entitlement*" of Plaintiffs—one of whom is a New York resident—to invoke a New York court's jurisdiction, conferred by statute, over derivative actions. The lower court also failed to hold Defendants to their heavy burden of overcoming the presumption favoring a New York forum by submitting actual evidence of inconvenience or hardship, which they did not do here.

As discussed below, this Court should reverse based on these errors.

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

The court's power to dismiss actions based on *forum non conveniens* is derived from CPLR 327(a). The rule requires that the power be exercised "in the interest of substantial justice." CPLR 327(a). Because "*forum non conveniens* is equitable in nature[,]" the exercise of CPLR 327(a)'s power "rests on considerations of public policy." *Strand v. Strand*, 57 A.D.2d 1033, 1034 (3d Dep't 1977).

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

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

CPLR 327(b). And GOL §5-1402(1) provides in relevant part:

> … [A]ny person may maintain an action … against a foreign corporation, non-resident, or foreign state where the action … arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to

> section 5-1401 and which (a) is a contract, agreement or undertaking … in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

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

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

GEN. OBLIG. LAW §5-1401(1).

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

1. Under CPLR 327(b) and New York Public Policy, the Lower Court Was Precluded from Dismissing This Action Based on *Forum Non Conveniens*

This action falls within CPLR 327(b)'s purview because the Depositary Agreement and the Offering Memorandum satisfy GOL §5-1402's requirements. In both agreements, Bayer consented to the jurisdiction of New York courts and the application of New York law. R605; R312 (¶258); R2440–2441. And both

agreements involved obligations exceeding, $1 million. R605; R2440–2441.

Under CPLR 327(b), Plaintiffs' derivative claims "relate to" and "arise out of" the Depositary Agreement for Bayer's ADRs and the Offering Memorandum for the $15 billion bond offering. A review of dictionaries and thesauruses will show how expansive the meanings of "relates to" and "arises from" are. "Relates to" is an exceedingly broad term and covers the meaning of "pertain" to, "bear[s]" on, and "concern[s]." BLACK'S LAW DICTIONARY at 1288 (6th ed. 1990). "Arises out of" is synonymous with "spring up," "originate," "come into being," and "become operative." *Id*. at 108. When used in legal context, "relates to" and "arises out of" are construed to have "the broadest and most comprehensive" meaning. *In re Potoker*, 286 A.D. 733, 736 (1st Dep't 1955).

Under this broad interpretation, the Depositary Agreement and the Offering Memorandum satisfy both the "arising from" and "relating to" standards under CPLR 327(b). Both the Depositary Agreement and the Offering Memorandum are pleaded in the SAC. R312 (¶258); R318 (¶269); R214–215 (¶73). They were pleaded as part of the alleged wrongdoing by the Bayer Supervisors, and as facts supporting personal jurisdiction as to the Bayer Supervisors and Credit Suisse and a New York venue for the case. *See* R312 (¶258); R320–322 (¶¶273–274). The Depositary Agreement *relates to* this case because the derivative claims here are brought on behalf of Bayer and its shareholders, including ADR holders. *See*

Batchelder v. Kawamoto, 147 F.3d 915, 917–19 (9th Cir. 1998) (finding that a shareholder derivative action brought by ADR holders relates to the depositary agreement for the issuance of the ADRs). Likewise, the Offering Memorandum *relates to* this case because it is "associated with" the financing of the Acquisition. *Coregis Ins. Co. v. Am. Health Found*., 241 F.3d 123, 128–29 (2d Cir. 2001); *see also Planned Consumer Mktg., Inc. v. Coats & Clark, Inc*., 71 N.Y.2d 442, 448 (1988) ("'relate to[]' is to be interpreted broadly").

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

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

Finding the contrary, the lower court said that "the gravamen of [Plaintiffs' SAC] isn't about those agreements." R100; *see also* R89. But this is the wrong standard. CPLR 327(b)'s text says nothing about "the gravamen" of the complaint. So long as "the action arises out of or relates to [an] … agreement" that falls within GOL §5-1402, the rule takes away the lower court's power to grant a CPLR 327(a) motion. Under New York's broad interpretation of "arising out of" and "relating to," the Depositary Agreement and the Offering Memorandum fit well within the purview of CPLR 327(b) and GOL §5-1402. The lower court's refusal to follow CPLR 327(b) is an error.[21] And because the lower court was without power to dismiss this action under CPLR 327(a), its order of dismissal must be reversed.

[21] CPLR 327(b) functions as a "statutory mandate," "preclud[ing] a New York court from declining jurisdiction." *Nat'l Union*, 257 A.D.2d at 230. CPLR 327(b)'s prohibition is as broad as it is absolute. The parties to the "action" do not have to be the parties to the Agreements. The requirement to trigger the prohibition is that the "action arises out of or is related to a contract, agreement, or undertaking" covered by CPLR 327(b). In any event, Bayer is a party to both the Depositary Agreement and the Offering Memorandum. And the Bank Defendants are parties to the $15 billion bond offering. R691; R320–321 (¶273).

2. The Lower Court Erred in Denying Leave to Renew and Reargue Because the Issue of Its Statutory Power Is Not Waivable, Because Plaintiffs Have Satisfied CPLR 2221's Requirements, and Because the Interest of Justice Requires Renewal of the *Forum Non Conveniens* Motions

a. Plaintiffs' CPLR 327(b) Argument—Pertaining to the Lower Court's Statutory Power—Is Neither Waivable Nor Waived

The lower court refused to correct its error under CPLR 327(b) based upon two procedural grounds. The lower court was wrong on both.

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

At the outset, CPLR 327(b) addresses the court's power—taking away the power granted by subsection (a) where GOL §5-1402 is applicable. This is a purely legal question. And legal questions are not waivable. *Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.*, 65 A.D.3d 405, 408 (1st Dep't 2009). Indeed, CPLR 327(b)'s prohibition against dismissing an action is analogous to the deprivation of subject-matter jurisdiction. *See Ballard v. HSBC Bank USA*, 6 N.Y.3d 658, 663 (2006) ("'subject[-]matter jurisdiction is a question of judicial power'"). The lack of subject-matter jurisdiction cannot be waived, even if a party never raised it or pleaded it. *Murray v. State Liquor Auth.*, 139 A.D.2d 461, 462 (1st Dep't 1988).

So it should be with CPLR 327(b). In *Title Guarantee & Trust Co. v. Foxvale Realty Corp*., for example, the trial court issued an order under a statute that imposed a time-period requirement—authorizing the trial court to direct a mortgagor to pay the mortgagee certain income "produced 'during the six months prior to [a certain] application.'" 287 N.Y. 147, 149 (1941). Instead of the six-month period set forth in the statute, the trial court issued an order directing that the mortgagor pay the mortgagee income produced during a different six-month period. *Id*. To justify its departure from the statutorily defined time period, the trial court relied on the mortgagor's decision to waive his right to challenge the order based on the "statutory period." *Id*. Reversing the order, the Court of Appeals reasoned that by failing to comply with the statutory time-period requirement, the trial court exceeded its authority conferred by statute. *Id*. The Court of Appeals held that a party may not "waive[] limitations upon the statutory power of the court." *Id*. *Title Guarantee* requires that the lower court comply with CPLR 327(b)'s limitation on its power, regardless of whether or when the CPLR 327(b) argument is raised.[22]

Second, Plaintiffs did not waive, and could not have waived, the CPLR 327(b) argument. At the December 13, 2021 hearing on Defendants' motions to dismiss,

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

the lower court scheduled another hearing for further arguments for January 10, 2022. R90.82–90.84. In reliance on that schedule, Plaintiffs intended to file a pre-hearing brief to raise the CPLR 327(b) issue. R2497. On December 27, 2021, while Plaintiffs were preparing for the hearing, the lower court dismissed the action under CPLR 327(a). The scheduled hearing was never held. Under these facts, it is unfair to find a waiver. *Lambert v. Williams*, 218 A.D.2d 618, 621 (1st Dep't 1995).

b. Plaintiffs Have Satisfied CPLR 2221's Requirements for Renewal and Reargument

To obtain leave to renew, Plaintiffs need only to identify "new facts not offered on the prior motion that would change the prior determination," as well as a "reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e). Renewal is warranted where "the equities of [the] matter" would be "properly served by permitting renewal, especially [where] denial would defeat substantial fairness." *Leary v. Bendow*, 161 A.D.3d 420, 421 (1st Dep't 2018).

Before Plaintiffs made the CPLR 2221 motion, the lower court did not have the benefit of the complete submission-to-jurisdiction and choice-of-New-York-law clauses in the Depositary Agreement and the Offering Memorandum. Nor were these relevant facts presented to the lower court in the context of CPLR 327(b). And Plaintiffs were prevented from submitting these facts and presenting CPLR 327(b) argument because the January 10, 2022 hearing never took place. These circumstances justify leave to renew. The lower court's refusal to grant leave to

renew must be reversed. *See, e.g.*, *Whelan v. GTE Sylvania, Inc.*, 182 A.D.2d 446, 450 (1st Dep't 1992) (reversing order denying leave to renew where the new facts submitted by the movant "were uncontroverted"); *Preferred Mut. Ins. Co. v. DiLorenzo*, 183 A.D.3d 1091, 1095–96 (3d Dep't 2020) (reversing order denying leave to renew where the new facts were previously unavailable).

Plaintiffs also satisfy the requirements for leave to reargue. The lower court overlooked the submission-to-jurisdiction and choice-of-New-York-law clauses in the Depositary Agreement and the Offering Memorandum, both of which were pleaded in the SAC. R214–215 (¶73); R312 (¶258); R318 (¶269); R320–322 (¶¶273–274). The lower court also misapprehended the law when it exceeded its power under CPLR 327(b). This is especially so because the lower court was well aware of CPLR 327(b)'s prohibition—it had previously denied a motion under CPLR 327(b) in another case. *See HH Trinity Apex Invs., LLC v. Hendrickson Props., LLC*, 2019 N.Y. Misc. LEXIS 4866 (Sup. Ct. N.Y. Cnty. Sept. 5, 2019). As such, the lower court erred in denying leave to reargue. *Whelan*, 182 A.D.2d at 450.

c. The Interest of Justice Requires That the Lower Court Grant Leave to Renew

"[T]the interest of justice requires renewal when the newly submitted evidence changes the outcome of the prior motion." *Salman v. Rosario,* 87 A.D.3d 482, 485 (1st Dep't 2011). Here, the Depositary Agreement and the Offering Memorandum change the outcome of the case because, under CPLR 327(b), the

lower court lacks the power to dismiss this action. As such, the lower court should have corrected its error in the interest of justice. *See id*.

Instead, the lower court concluded that Plaintiffs failed to satisfy the stricture of CPLR 2221. But "courts have discretion to relax [CPLR 2221's] requirement and to grant … a motion [for leave to renew] in the interest of justice." *Mejia v. Nanni*, 307 A.D.2d 870, 871 (1st Dep't 2003); *see also Hines v. N.Y. City Transit Auth*., 112 A.D.3d 528, 528 (1st Dep't 2013) (court has discretion to grant renewal based on submission of document "correcting an error in the original papers"). In *Vega v. Restani Construction Corp*., for example, this Court affirmed an order granting leave to renew even though the movants "failed to comply with the requirements of CPLR 2221(e)(3)." 98 A.D.3d 425, 426 (1st Dep't 2012).

Accordingly, even if Plaintiffs' motion for leave to renew was "technically" deficient under CPLR 2221 (it was not), the lower court had the discretion to grant leave to renew in the interest of justice. *See Salman*, 87 A.D.3d at 485. Exercising this discretion was particularly appropriate here because there was no prejudice to Defendants by granting leave to renew and reargue the motions to dismiss. Getting something right prejudices no one. Key legal issues should not be decided on technicalities that avoid the merits. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Contrary to this rule, the lower court failed to grant leave to renew in the interest of justice. *See Salman*, 87 A.D.3d at 485. This is error and should be reversed.

B. The Lower Court Erred in Its *Forum Non Conveniens* Analysis Because Plaintiffs' Choice of Forum Is Entitled to Presumptive Weight, and Because Defendants Have Failed to Carry Their Heavy Burden of Overcoming That Presumption

CPLR 327(b)'s prohibition aside, Defendants' *forum non conveniens* motions were meritless, and no amount of discretion could justify granting them. Plaintiffs—one of whom resides in New York—are presumptively entitled to sue in a New York court. Defendants bear a heavy burden to overcome that presumptive entitlement. Yet, Defendants have submitted *no evidence* to satisfy that heavy burden. And Defendants cannot establish that Germany is an adequate alternative forum for derivative lawsuits due to the extraordinary hurdles imposed by GSCA §148. As discussed below, the lower court's *forum non conveniens* ruling is error.

1. Plaintiffs' Choice to Sue in New York Is Entitled to Presumptive Weight and Deference

Plaintiffs, as New York and California residents, are presumptively entitled to sue here in New York and to invoke the subject-matter jurisdiction conferred to New York courts by the Legislature. *See Cadet v. Short Line Terminal Agency, Inc*., 173 A.D.2d 270, 271 (1st Dep't 1991) (reversing a CPLR 327(a) dismissal because defendants "failed to overcome the presumption that New York residents are entitled to the use of their judicial system"). New York courts have accorded this "presumptive[] entitle[ment]" to New York-resident shareholders who brought derivative actions on behalf of foreign corporations. In *Broida*, for example,

minority shareholders of Dow Jones & Company ("DJ&C"), a Delaware corporation doing business in New York, brought a derivative action on DJ&C's behalf. 103 A.D.2d at 89. On review of an order declining jurisdiction based on the internal-affairs doctrine, the Second Department held that "New York residents[] are presumptively entitled to utilize their judicial system," because "New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation, though having a foreign charter, has substantial contacts with this State." *Id*. at 92. The Second Department reversed the dismissal order because "[d]efendants ha[d] not carried their burden of establishing that litigation in New York would be inconvenient," and because DJ&C had a substantial nexus to New York, including the fact that its stock was traded on the NYSE and that it was "a frequent litigant in New York courts." *Id*. at 92–93.

In the context of shareholder litigation involving U.S.-based shareholders who invest in companies incorporated abroad, two additional rules apply. First, "[t]he deference owed to the forum choice of [such] plaintiffs cannot be reduced solely because they chose to invest in a foreign entity." *Otto Candies, LLC v. Citigroup, Inc*., 963 F.3d 1331, 1339–40 (11th Cir. 2020). Second, a New York-resident plaintiff's choice of New York forum must be accorded *extra weight* where, as here, the proposed alternative forum is in a foreign country. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950). Here, Defendants

must overcome the presumption for a New York forum by "establish[ing] *such oppression and vexation* … as to be *out of all proportion* to plaintiff's convenience." *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 102 (2d Cir. 2000).

As discussed below, however, they cannot carry this heavy burden.

2. Defendants Have Failed to Carry Their Burden to Overcome the Deferential Presumption of a New York Forum Because They Submitted No Evidence of Inconvenience or Hardship of Litigating in New York

In seeking dismissal under CPLR 302 in the lower court, Defendants made no showing—much less any evidentiary showing—of any hardship from defending this action in New York. Nor did Defendants submit any evidence to refute the Acquisition's "nexus" to New York—they submitted not a single affidavit identifying any "inconvenience." Defendants' failures, standing alone, require a denial of their *forum non conveniens* motions. *Elmaliach v. Bank of China Ltd*., 110 A.D.3d 192, 208 (1st Dep't 2013) (denying motion because defendants failed to carry the "'heavy burden' of establishing that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking").

The lack of evidentiary support for Defendants' CPLR 327 motions is reflected in the lower court's ruling. The lower court concluded—without citing any evidence in the record—that "[i]t is beyond cavil that defending this action in New York would hoist a substantial and unnecessary burden" on Defendants. R15. Nor did the lower court cite any evidence to support its conclusion that "the Bayer

Defendants received the advice of the banks in Germany." R22.

Indeed, the lower court cannot attribute its erroneous conclusions to anything in the record because the record demonstrates exactly the opposite. For example, the Bank Defendants admitted—in their own affidavit—that some members of their "deal team" for the Acquisition were "based in New York," and that they negotiated some of the "key documents" in New York. R147–148; R393. It is undisputed that both Monsanto and Bayer were represented by New York-based law firms, and that the Bank Defendants' New York offices appeared in the Acquisition financing prospectuses. R688–689; R691–693; R277 (¶202). Nor is it disputed that the financing for the Acquisition, including the June 2018 bond offering, was arranged through Bayer's New York-based bankers. R320 (¶273); R277–279 (¶¶202–204); R688–689; R691–693. The evidence also shows that the cash for the Acquisition—$57 billion—changed hands in New York. R2528–2532; R321–322 (¶274).

Financing aside, the Merger Agreement was signed, and the Acquisition was closed, in New York. R319–322 (¶¶271–274). Key negotiations regarding the Acquisition, including the "final talks" between Baumann and Grant, also took place in New York. R611. So did the meeting between Baumann and President-Elect Trump for purposes of securing regulatory approval of the Acquisition. R322–323 (¶¶275–278). And, after the closing of the Acquisition, Monsanto's business was folded into BCS, which is incorporated in New York. R298–299 (¶¶232–234).

The source of Defendants' liability—the litigation relating to Roundup, both pre- and post-Acquisition—is also centered in New York. R192 (¶37); R238 (¶136). Many of the Roundup-cancer lawsuits were filed in New York, and all of them are overseen by Skadden's New York office. *Id.*; R170 (¶14). The now-botched "global settlement" of the Roundup litigation was mediated in New York. R309 (¶249). Wachtell's New York office is representing Bayer, Wenning, Baumann, and Condon in the securities-fraud class action arising from the Acquisition. R319 (¶272).

All told, because the Acquisition was negotiated, financed, and closed in New York, and because Bayer's lawyers and bankers are based in New York, the evidence of, and key witnesses to, Defendants' liability are in New York. Under these facts, it is undeniable that New York is the "epicenter" of the Acquisition. R241 (¶141).

The Acquisition's nexus to New York is overwhelming. Plaintiffs' showing of a substantial nexus, combined with Defendants' failure to show any hardship of litigating in New York, requires a denial of Defendants' *forum non conveniens* motions. *See Cadet*, 173 A.D.2d at 271. This conclusion finds ample support in case law. In *Elmaliach*, for example, Israeli victims of terrorist acts sued a Chinese bank in New York alleging that the bank facilitated the transfer of money for terrorist organizations. 110 A.D.3d at 195. Affirming a denial of the bank's *forum non conveniens* motion, this Court reasoned that even though the case's nexus to New York—the alleged use of "New York banking facilities"—was insufficient to justify

the application of New York law, it was sufficient to justify a New York forum. *Id.* at 208–09. And in *HSBC*, the Second Department affirmed a denial of an English bank's CPLR 327 motion because the alleged "wrongdoing occurred in New York," even though plaintiff resided in England (R1902). 166 A.D.3d at 759.

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

Given New York's centrality to international finance and commerce, New York courts frequently adjudicate lawsuits involving foreign laws and foreign corporations, including stockholder derivative lawsuits. *See, e.g., Duncan-Watt v. Rockefeller*, 2018 N.Y. Misc. LEXIS 1383, at **12–13 (Sup. Ct. N.Y. Cnty. Apr. 13, 2018). The application of "substantive" foreign laws to the disputes does not dictate dismissal. *See id*. Just as the Second Department held in *Broida*, a New York plaintiff's choice to sue derivatively on behalf of a foreign corporation in New

York must be given deference and must not be disturbed absent a substantial showing by defendants of hardship and injustice. 103 A.D.2d at 91–92. Just like the nominal defendant in *Broida,* Bayer and its subsidiaries are frequent litigants in New York courts. R591–595. "It ill behooves [the Bayer Defendants] to now urge the contrary" in a *forum non conveniens* motion. *Broida*, 103 A.D.2d at 92–93.

Accordingly, the lower court's grant of the CPLR 327 motions is error.

3. GSCA §148's Unique Burdens and Procedural Requirements Preclude the Court from Finding Germany to Be an Adequate Alternative Forum

Defendants bear the burden of establishing that Germany is an "available adequate alternative forum" for this action. *Norex Petroleum, Ltd. v. Access Indus*., 416 F.3d 146, 160 (2d Cir. 2005). In Germany, GSCA §148's pre-suit "*Court Procedures*" control. GSCA §148 provides a means test, and requires that a shareholder plaintiff make a demand on the company's board, then submit facts showing "gross breaches of law" without discovery, and ultimately persuade the court that "there are no overriding interests of the [c]ompany that prevent the assertion of" the claims, plus an advance deposit of court costs. GERMAN STOCK CORP. ACT §148(1) (R446); R313–315 (¶¶260–261). As discussed in the affirmation of Plaintiffs' German-law expert, GSCA §148's procedural hurdles are nearly insurmountable for any shareholder to commence a derivative action in Germany. R465. Moreover, a *forum non conveniens* dismissal would deprive Plaintiffs—

residents of the United States and New York—of their rights to access New York's legal systems with its procedural rules, as well as their rights to punitive damages and a trial by jury. As a result, Defendants cannot satisfy their burden under *Norex*.

Defendants' inability to demonstrate an "available adequate alternative forum" is fatal to their CPLR 327(a) motions. *See Norex*, 416 F.3d at 160. On this point, the lower court's reliance on *Viking Global Equities*, 101 A.D.3d at 640, is misplaced because that action—involving allegations of fraud made by a hedge fund—has nothing to do with the hurdles imposed by GSCA §148. R22.

* * *

In sum, Plaintiffs are presumptively entitled to bring this action in a New York court. And the nexus of this action—and the Acquisition—to New York is overwhelming. Defendants have failed to carry their "heavy burden" to overcome that presumptive entitlement by making an evidentiary showing of hardship of litigating in New York. Nor have Defendants demonstrated that Germany is an adequate alternative forum. Where, as here, defendants are seeking dismissal "not because of genuine concern with convenience but because of … forum-shopping reasons," the Court must "arm [itself] with an appropriate degree of skepticism." *See Iragorri v. United Techs., Corp.*, 274 F.3d 65, 75 (2d Cir. 2001). "[I]n the interest of substantial justice," this action should be heard in a New York court, and the lower court's dismissal should be reversed. *See Elmaliach*, 110 A.D.3d at 208.

III. This Court Should Reverse Because Plaintiffs Have Sufficiently Alleged Personal Jurisdiction over the Bayer Directors, and Because Plaintiffs Are, at a Minimum, Entitled to Leave to Conduct Discovery

In dismissing the Bayer Defendants for lack of personal jurisdiction,[23] the lower court erred on two fronts. First, the lower court erroneously held that it "does not have personal jurisdiction against any of the [Bayer Directors] because none of them live[s] here, conduct[s] business here regularly or had contacts with New York that give rise to this dispute." R15. In so holding, the lower court said that "this dispute does not arise out of [the Bayer Directors'] contacts with New York," and that they had not "purposefully availed themselves of the benefit of the New York forum." R14–15. Second, the lower court disregarded Plaintiffs' request for leave to conduct jurisdictional discovery. *See* R90.66; R1898 n.9.

A. The Bayer Directors' Extensive New York Contacts and Their Misconduct's New York Nexus Support a Finding of Personal Jurisdiction Consistent with Due Process

The lower court has jurisdiction over the Bayer Defendants so long as "the action is permissible under the long-arm statute [(CPLR §302)]," and "the exercise of jurisdiction comports with due process." *Williams v. Beemiller, Inc.*, 33 N.Y.3d

[23] The "Bayer Defendants" include Bayer Corporation and 31 Bayer Directors. R713–714. Bayer Corporation is not a "target defendant" because Plaintiffs seek no damages from it. R214 (¶73). Plaintiffs named Bayer Corporation as a defendant "because it was used as an instrument in the course of [the Directors'] breaches of dut[ies]." *Id.* Although the lower court dismissed the Bayer Defendants *en masse*, Bayer Corporation did not—and could not—seriously challenge personal jurisdiction because it was registered to do business in New York and played a substantial role in the Acquisition. R213–214 (¶¶71–73). Accordingly, the personal-jurisdiction analysis here focuses on the Directors. But the same analysis applies to Bayer Corporation.

523, 528 (2019). CPLR §302(a)(1) authorizes personal jurisdiction "over any non-domiciliary … who in person or through an agent … transacts any business within [New York]." Thus, even if a company "never enters [New York]," §302(a)(1) provides for personal jurisdiction where (1) that company engages in sufficient activities in New York to have "transacted business in [New York]," and (2) "the claims … arise from the transactions." *Rushaid*, 28 N.Y.3d at 323. Because §302(a)(1) is a "single[-]act statute," "one transaction is sufficient to invoke jurisdiction." *Wilson v. Dantas*, 128 A.D.3d 176, 181 (1st Dep't 2015).

To satisfy §302(a)(1)'s first prong, the non-domiciliary's New York activities must be "purposeful." *Rushaid,* 28 N.Y.3d at 323. "Purposeful activities are those with which [an entity], through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007).

To satisfy the second prong, "there must be an articulable nexus or substantial relationship between the business transaction and the claim asserted." *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 339 (2012). "This inquiry is relatively permissive and does not require causation." *Rushaid*, 28 N.Y.3d at 329. It requires "merely a relatedness between the transaction and the legal claim such that the latter is *not completely unmoored* from the former"—that is, "[t]he claims *need only be in some way arguably connected to the transaction*." *Id*.

1. Exercise of Personal Jurisdiction over the Bayer Directors Is Permissible Under CPLR §302

a. The Bayer Directors Purposefully Transacted Business in New York

Bayer and its Directors transacted business in New York in connection with the Acquisition. Centered around New York from the start, the Acquisition was negotiated, financed, and closed here—only accomplished through New York-based law firms and banks, all acting as the agents and, under the direction, of Bayer's Directors. *See*, *e.g.*, R319–323 (¶¶271–278); R611.

Beginning in 2016, Baumann, Condon, and other Bayer executives travelled to New York to negotiate with Monsanto. *See* R288–294 (¶¶223–225). Key negotiations took place in New York, including a September 2016 "final talk" between Baumann and Grant in a Manhattan restaurant. R611. The Merger Agreement, which required closing to take place in S&C's New York office, was signed by Baumann and Condon in New York. *See* R2514, 2520, 2523. To secure regulatory approval for the Acquisition, Bayer executives, including Baumann, also met President-Elect Trump in January 2017 in New York. R322–323 (¶¶275–278).

To finance the Acquisition, Bayer arranged, through its New York-based bankers, a $50-plus billion "bridge loan." R320 (¶273); R277–279 (¶¶202–204). To pay off this loan, Baumann and Condon participated in investor conferences in New York that targeted New York-based investors. *See* R288–294 (¶¶223–225). Bayer's

June 2018 bond offering—raising $15 billion to pay down the bridge loan for the Acquisition—relied on New York banking services. R214–215 (¶73); R277 (¶202); R320–322 (¶¶273–274)). In fact, the bond Offering Memorandum contained a clause choosing New York law as governing law and a clause submitting Bayer to the jurisdiction of New York courts in actions relating to the bonds. R2440–2441. And, when the Acquisition closed in New York in June 2018 (R2514), Bayer's "Paying Agent," the New York-based JP Morgan, transferred $57 billion to a bank account in New York to complete the Acquisition. R2515; R2528–2532.

These many New York contacts establish that Bayer and its Directors purposefully availed themselves of "'the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.'" *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297–98 (2017). On this point, *Wilson* is instructive. There, plaintiff asserted claims against non-domiciles arising from the creation and management of certain investment funds operating in Brazil. *Wilson*, 128 A.D.3d at 179–81. Even though plaintiff alleged that some of the underlying contracts "were negotiated and executed" in New York, the trial court dismissed the action for lack of personal jurisdiction. *Id*. at 179. Reversing the dismissal, this Court found that "defendants purposefully availed themselves of New York law by engaging in [contract] negotiations, being physically present in New York at the time [one of the underlying contracts] was

made, and thereby establishing a continuing relationship between the parties." *Id.* at 183–84. Just like the non-domicile defendants in *Wilson*, the Bayer Directors were either physically present, or directed their agents to conduct business, in New York in connection with the Acquisition. *See, e.g.*, R214–215 (¶73); R277 (¶202); R319–323 (¶¶271–278); R611; R2515; R2528–2532. Bayer and its Directors' New York contacts were not mere happenstance, they were "purposeful," "volitional," actions essential to carry out the wrongdoing complained of. *D&R Global*, 29 N.Y.3d at 297–98; *Rushaid*, 28 N.Y.3d at 327–28 ("It is precisely the fact that defendants chose New York … that makes the New York connection 'volitional' and not 'coincidental.'"). This satisfies prong one of CPLR §302(a). *See Wilson*, 128 A.D.3d at 183–84; *see also, e.g.*, *Rushaid*, 28 N.Y.3d at 329 (finding defendants' correspondent activity alone "sufficient to establish a purposeful course of dealing"); *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 377 (2014) ("where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)").

The Bayer Directors are subject to jurisdiction as "primary actors" with respect to the same New York business transactions that give rise to personal jurisdiction over Bayer. Where, as here, "a corporation engages in purposeful activities within New York with respect to the subject transaction with the

knowledge and consent of the defendant, the court has personal jurisdiction over the defendant by virtue of the corporation's activities where the defendant benefited from the transaction and exercised some degree of control over the corporation in relation to the transaction." *Renren*, 2020 N.Y. Misc. LEXIS 2132, at **56–57 (citing *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 21-22 (2d Cir. 1988)). A plaintiff asserting jurisdiction over a defendant based on the actions of his or her corporate agent need not establish a formal agency relationship. *Id.* (citing *Kreutter*, 71 N.Y.2d at 467). "The plaintiff 'need only convince the court that [the] [c]ompany engaged in purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of the . . . defendants and that they exercised some control over [the] [c]ompany in the matter.'" *Id.*

The allegations of the Bayer Directors' contacts with New York set forth above are sufficient to show "control." *See Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017). But Plaintiffs also allege in detail that the Directors made key decisions and were involved in all aspects of the Acquisition. R244–250 (¶¶146–157); R329 (¶292).[24] For example, Plaintiffs alleged that during

[24] Without any factual support, the lower court said that no one from Bayer was present at the closing in New York in June 2018. And that the Banks' advice was given to the Directors in Germany. R25–26. But those are factual matters. It is highly improbable that the largest acquisition in Bayer's history closed in New York without top Bayer officials being present, and the investment banks never gave advice to the Bayer executive team in New York. But for sure its lawyers and investment bankers were at the closing. The closing was not conducted by robots. The same is true of the Roundup settlement mediations in New York. Jurisdictional discovery would help resolve these factual issues.

2016, Bayer's Directors "were regularly informed of" and dealt in detail with the planned Acquisition, including the financing … the strategic aspects of the Acquisition, "the question of Monsanto's valuation" and "resolved on the final offer conditions for the acquisition." R245–246 (¶148). Plaintiffs also alleged that during several meetings in 2017–18, the Bayer Directors' "particular focus was the acquisition, including the progress of the merger control proceedings, which were reported on extensively at several meetings" the "performance of the Monsanto business and the related risks of the business"; "looking in detail at the required divestment of parts of Bayer's [BCS] business in connection with the Acquisition and the status of the [Roundup] litigations." R246–248 (¶¶150–152).

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

In addition, Plaintiffs sufficiently allege that the Directors personally benefited from the Acquisition. In fact, the Acquisition was designed from the start to entrench the Bayer Directors, who sought to avoid a feared takeover by Pfizer,

Inc. R180 (¶¶25–27). That debt from the Acquisition operated as a "poison pill" to making Bayer "unacquirable," allowing the Directors to remain in their positions of power, prestige, and profit. R182 (¶27), R223–225 (¶¶100–101), R286 (¶219).

In sum, the Directors benefited from and exercised control ("some control") over Bayer regarding the Acquisition, making each of them a "primary actor" for jurisdictional purposes. *Kreutter*, 71 N.Y.2d at 467; *see also, e.g.*, *Renren*, 2020 N.Y. Misc. LEXIS 2132, at **56–68 (exercising jurisdiction over a "primary actor"); *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221, 260–264 (S.D.N.Y. 2019) (individual defendant subject to §302(a)(1) for corporation's act).

b. Plaintiffs' Claims Arise Out of the Bayer Directors' Transactions of Business in New York

Plaintiffs' allegations satisfy the minimal "articulable nexus" requirement of CPLR §302(a)(1)'s second prong. *Licci*, 20 N.Y.3d at 339. Indeed, Plaintiffs' breach-of-fiduciary duty claims are inextricably linked with the New York transactions described above. *See Rushaid*, 28 N.Y.3d at 329 ("The claim need only be in some way arguably connected to the transaction.").

The Acquisition and the entrenchment scheme were dependent on Bayer's New York transactions. *Rushaid*, 28 N.Y.3d at 329, 330 (finding sufficient nexus where the scheme "could not proceed" without and "necessarily include[d] the use of" New York contacts). Without the New York negotiations, the New York financing, and New York's legal/banking services, the Acquisition would never have

materialized. In all, these New York transactions were critical to the Acquisition.

Virtually every aspect of the Acquisition is linked to Bayer's New York business transactions. Plaintiffs' claims are in no way "completely unmoored" from those transactions. *Rushaid*, 28 N.Y.3d at 329. Rather, they arise entirely from them—the Acquisition "could not proceed without" Bayer's New York contacts. *Id.* at 330. There is certainly, at the very least, an "articulable nexus" between Plaintiffs' claims and those New York business transactions. *Rushaid*, 28 N.Y.3d at 329 ("The claim need only be 'in some way arguably connected to the transaction.'").

Finding the contrary (R25–26), the lower court failed to consider Plaintiffs' claims as they relate to the "overall transaction." *Wilson*, 128 A.D.3d at 185. Instead, the lower court narrowly focused on whether Plaintiffs' claims specifically arose out of any one of Bayer's New York business transactions. But courts "should not view the 'arising from' prong so narrowly." *Id.* at 185–186 ("as *Licci* illustrates, it is appropriate to view a business transaction through a broader lens when determining whether a plaintiff's claim arises from that transaction so as to confer personal jurisdiction over a defendant"). Indeed, Bayer and its Directors' New York transactions are "part of an integrated whole," indispensable to the Acquisition, and thus, clearly relate to Plaintiffs' claims. *Id.* at 184–185. The lower court's narrow application of the "articulable nexus" test is error and must be reversed.

2. Exercising Jurisdiction over Bayer and the Individual Defendants Does Not Offend Due Process

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

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

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

In the face of these extensive case-specific contacts, the Bayer Directors failed

to carry their "burden to present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *D&R Global*, 29 N.Y.3d at 300. New York's strong policy interests are implicated here: if not for New York's legal and capital markets, Bayer could not have completed the Acquisition. New York has a strong policy "interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980). That policy interest "embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here." *Id*.

* * *

In sum, Plaintiffs have sufficiently alleged that Bayer and its Directors transacted business in New York, and that Plaintiffs' claims have an articulable nexus to those transactions. Plaintiffs' detailed allegations satisfy CPLR §302 and due process.[25] The lower court's decision to the contrary is error and must be reversed.

[25] Claiming the lack of personal jurisdiction, the Bayer Directors ignored the realities of modern life and their specific circumstances in complaining of burden. "'[T]he conveniences of modern communication and transportation ease' any burden the defense of this case in [New York] might impose on" Bayer. *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013). Bayer and all of its Directors are represented by New York-based counsel. *See Law Debenture v. Maverick Tube Corp.*, 2008 U.S. Dist. LEXIS 87438, at *16 (S.D.N.Y. Oct. 15, 2008). The Bayer Defendants are covered by a directors & officers liability insurance policy, which will pay their legal fees, and will indemnify them up to the large policy limits. R327–328 (¶288). The Bayer Directors will never have to appear here; their depositions will be taken where they reside or remotely. The exercise of jurisdiction by a New York court will not disturb their lives of privilege.

B. At a Minimum, Plaintiffs Are Entitled to Jurisdictional Discovery

Jurisdictional discovery should be given where a plaintiff makes "a sufficient start, and show[s] that their position [is] not [] frivolous." *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467 (1974). Where "the jurisdictional issue is likely to be complex[,] [d]iscovery is … desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits." *Id*.; *see also* CPLR 3211(d).

Here, Plaintiffs' verified SAC contains ample factual allegations of the Bayer Directors' contacts with New York and documents demonstrating the Acquisition's substantial New York nexus. R288–294 (¶¶223–225); R319–323 (¶¶271–278); R611; R2514, 2520, 2523. As discussed in Point III.A. above, these allegations are more than sufficient to withstand Defendants' CPLR 3211(a)(8) motion. In any event, these allegations are—without a doubt—non-frivolous. Because Plaintiffs "have demonstrated that facts 'may exist' in opposition to the motion to dismiss and are therefore entitled to" jurisdictional discovery, the lower court erred in dismissing this action without granting leave to conduct discovery—despite Plaintiffs' requests (R90.66; R1898 n.9). *Universal Inv. Advisory SA v. Bakrie Telecom Pte., Ltd.*, 154 A.D.3d 171, 178 (1st Dep't 2017); *see also Lemle v. Lemle*, 92 A.D.3d 494, 500 (1st Dep't 2012) (permitting discovery to plead a derivative claim).

This Court should reverse the order dismissing the action under CPLR §302.

CONCLUSION

For all the foregoing reasons, this Court should reverse and remand.

Dated: New York, New York
January 30, 2023

Respectfully submitted,

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ADDENDUM A

ADDENDUM A

NYLS

GOVERNOR'S BILL JACKET

1961
CHAPTER 855

108 PAGES

NYLS added 3 pages

BUSINESS CORPORATION LAW

Revision

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JOINT REPORT

OF

NEW YORK STATE BAR ASSOCIATION
Committee on Corporation Law

AND

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

ON

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

INTRODUCTION

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

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

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

ARTICLE 1

SHORT TITLE; DEFINITIONS; APPLICATION; CERTIFICATES; MISCELLANEOUS

General.

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

§ 1.02 *Definitions.*

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

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

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

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

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

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

ARTICLE 2

Corporate Purposes and Powers

§ 2.01 *Purposes.*

This basic substantive section of the Bill provides:

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

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

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

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

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

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

§ 2.02 *General Powers.*

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

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

§ 1.03 *Application.*

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

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

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

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

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

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

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

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

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

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

§ 2.03 *Defense of ultra vires.*

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

ARTICLE 3

Corporate Name and Service of Process

§ 3.01 *Corporate name; general.*

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

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

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

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

§ 3.02 *Corporate name; exceptions.*

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

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

§ 3.03 *Reservation of name.*

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

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

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

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

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

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

ARTICLE 4

Formation of Corporations

§ 4.01 *Incorporators.*

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

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

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

ARTICLE 5

Corporate Finance

General.

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

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

§ 5.01 *Authorized shares.*

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

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

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

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

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

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

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

§ 5.04 *Consideration and payment for shares.*

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

§ 5.05 *Rights and options to purchase shares.*

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

§ 5.06 *Determination of stated capital.*

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

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

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

§ 5.08 *Certificates representing shares.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 5.12 *Share distributions to shareholders.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 5.16 *Redeemable shares.*

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

§ 5.18 *Reacquired shares.*

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

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

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

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

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

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

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

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

§ 5.21 *Corporate bonds.*

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

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

§ 5.22 *Convertible shares and bonds.*

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

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

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

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

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

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

ARTICLE 6

SHAREHOLDERS

§ 6.01 *By-laws.*

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

§ 6.03 *Special meeting for election of directors.*

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

§ 6.09 *Proxies.*

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

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

§ 6.10 *Oath of shareholder.*

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

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

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

§ 6.12 *Qualification of voters.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 7

DIRECTORS AND OFFICERS

General.

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

§ 7.02 *Number of Directors.*

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

§ 7.06 *Removal of directors.*

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

§ 7.07 *Quorum of directors.*

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

§ 7.08 *Action by the board.*

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

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

§ 7.11 *Notice of meetings of the board.*

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

§ 7.12 *Executive committee and other committees.*

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

§ 7.13 *Interested directors.*

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

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

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

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

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

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

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

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

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

§§ 7.21 through 7.25 [*Indemnification*].

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 8

Amendments and Changes

§ 8.01 *Right to amend certificate of incorporation.*

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

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

§ 8.06 *Provisions as to certain proceedings.*

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

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

§ 8.07 *Restated certificate of incorporation.*

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

ARTICLE 9

Merger or Consolidation; Guarantee; Disposition of Assets

General.

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

§ 9.04 *Certificate of merger or consolidation.*

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

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

§ 9.08 *Guarantee authorized by shareholders.*

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

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

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

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

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

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

ARTICLE 10

Non-Judicial Dissolution

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

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

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

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

§ 10.04 *Procedure after dissolution.*

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

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

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

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

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

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

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

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

ARTICLE 11

Judicial Dissolution

General.

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

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

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

§ 11.03 *Shareholders' petition for judicial dissolution.*

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

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

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

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

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

ARTICLE 12

Receivership

General.

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

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

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

ARTICLE 13

Foreign Corporations

General.

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

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

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

§ 13.01 *Authorization of foreign corporations.*

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

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

§ 13.07 *Tenure of real property.*

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

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

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

§ 13.15 *Record of shareholders.*

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

§ 13.16 *Voting trusts.*

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

§ 13.17 *Liabilities of directors and officers.*

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

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

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

§ 13.19 *Applicability of other provisions.*

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

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

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

January 25, 1961

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